



# 2013 ILA-ASIL ASIA-PACIFIC RESEARCH FORUM

*International Law and Dispute Resolution:  
Challenges in the Asia Pacific*

Hosted by:



Chinese (Taiwan) Society  
of International Law  
中華民國國際法學會



Research Center for  
International Legal Studies  
國際事務學院國際法學研究中心



International  
Law Association



American Society  
of International Law

**Welcome !**

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Dear Colleagues:

We warmly welcome you to the 2013 International Law Association (ILA)-American Society of International (ASIL) Asia-Pacific Research Forum in Taipei, Taiwan, Republic of China. The theme of the Research Forum is “International Law and Dispute Resolution: Challenges in the Asia Pacific.”

This Research Forum provides an opportunity for international law stakeholders to explore the full range of international and transnational legal issues concerning the Asia-Pacific region. We hope you will enjoy the intellectual discussions with our distinguished guests and scholars from all over the world.

Best Regards,  
2013 ILA-ASIL Asia-Pacific Research Forum Organizing Committee

## Summary of the Program

### Wednesday, May 15

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- 18:00-19:00 **Registration (by invitation only)**  
/ Noble House, 1F
- 19:00-20:30 **Welcome Reception (by invitation only)**  
/ Noble House, 1F

### Thursday, May 16

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- 08:00-17:00 **Registration** / Grand Ballroom, 3F
- 09:00-09:40 **Opening Ceremony** / Grand Ballroom, 3F
- 09:40-10:00 **Coffee Break & Poster Session**
- 10:00-12:00 **Roundtable Discussion: Territorial Disputes and International Law**  
/Grand Ballroom, 3F
- 12:00-13:10 **Lunch (by invitation only)** / 3F
- 13:10-14:50 **Panel A1** / *Law of the Sea* / VIP Room 1, 4F  
**Panel B1** / *International Human Rights* / VIP Room 2, 4F  
**Panel C1** / *The Discipline of International Law* / VIP Room 5, 4F
- 14:50-15:10 **Coffee Break & Poster Session**
- 15:10-17:00 **Panel A2** / *Recognition and Non-Recognition in International Law*  
/ VIP Room 1, 4F  
**Panel B2** / *International Economic Law* / VIP Room 2, 4F  
**Panel C2** / *Dispute Resolution and International Law* / VIP Room 5, 4F
- 17:05-17:30 **Closing Ceremony** / VIP Room 1, 4F
- 18:30-21:00 **Dinner (by invitation only)** / Lan Ting, 21F



## Program

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May 15-16, 2013

The Regent Taipei (台北晶華酒店)  
Taipei, Taiwan, Republic of China

Hosted by:

Chinese (Taiwan) Society of International Law -  
Chinese (Taiwan) Branch of the International Law Association  
(中華民國國際法學會) &  
International Law Association &  
American Society of International Law -  
Law in the Pacific Rim Region Interest Group &  
Research Center for International Legal Studies, National Chengchi University  
(國立政治大學國際事務學院國際法學研究中心)

### Wednesday, May 15

**18:00-19:00 Registration**

**19:00-20:30 Welcome Reception (by invitation only)**

Noble House, 1F (晶華會)

Hosted by the Ministry of Foreign Affairs, Republic of China

- **His Excellency David Y. L. Lin** (林永樂部長)  
– Minister of Foreign Affairs, Republic of China
- **Professor Seung Hwan Choi**  
– President, ILA-Korean Branch & Korean Society of International Law
- **Professor Naoya Okuwaki**  
– Former President, Japanese Society of International Law
- **Professor Chun-i Chen** (陳純一理事長)  
– President, Chinese (Taiwan) Society of International Law

### Thursday, May 16

**08:00-17:00 Registration** (國內與會者報到及領取資料)  
Grand Ballroom, 3F (宴會廳)

**09:00-09:40 Opening Ceremony**  
Grand Ballroom, 3F (宴會廳)

#### Opening Remarks

- **Professor Torsten Stein**  
– Honorary Treasurer, ILA; President, ILA-German Branch
- **Professor Edmund Sim**  
– Chair, ASIL Law in the Pacific Rim Region Interest Group
- **Dr. Bih-jaw Lin** (林碧炤副校長)  
– Vice President, National Chengchi University
- **Professor Chun-i Chen** (陳純一理事長)  
– President, Chinese (Taiwan) Society of International Law

#### Keynote Address

- **President Ying-jeou Ma** (馬英九總統)  
– President of the Republic of China

**09:40-10:00 Coffee Break & Poster Session**

**10:00-12:00 Roundtable Discussion:  
Territorial Disputes and International Law**

- **Stefan Talmon**  
– Professor, University of Bonn  
– *Islands of Discontent: Why Being a Rock Makes Life Easier*

- **Jacques deLisle**
  - Professor, University of Pennsylvania
  - *The People's Republic of China's Multiple Legal Claims in South and East China Sea Disputes and Implications for the International Legal and Political Order*
- **Donald R. Rothwell**
  - Professor, Australian National University
  - *The South-Western Caribbean Sea Case and Its Consequences for South China Sea Dispute Dynamics*
- **Nguyen Dang Thang**
  - Lecturer, Diplomatic Academy of Vietnam
  - *The South China Sea Disputes: Procedures and Prospects for Third-Party Intervention under UNCLOS*
- **Yurika Ishii**
  - Assistant Professor, National Defense Academy of Japan
  - *The Legality of Law Enforcement against a Government Ship in a Territorial Sea*
- **Han-yi Shaw** (邵漢儀研究員)
  - Research Fellow, Research Center for International Legal Studies, National Chengchi University
  - *The Sino-Japanese War of 1894-1895 and Its Relevance to the Territorial Sovereignty of the Diaoyutai/Senkaku Islands*
- **Moderator: Professor C.V. Chen** (陳長文教授)
  - Member of the Executive Committee, Chinese (Taiwan) Society of International Law

**12:00-13:10 Lunch (by invitation only), 3F**

(3 Parallel Sessions: Panels A, B and C – VIP Rooms, 4F)

**13:10-14:50 Panel A1 Law of the Sea (VIP Room 1, 4F)**

- **Miyazaki Takashi**
  - Professor, Nagoya Keizai University
  - *How to Solve East Asia's Island Disputes*
- **Erik Franckx & Marco Benatar**
  - Professor; Ph.D. Fellow, Vrije Universiteit Brussel
  - *Straight Baselines in the South China Sea: An International Legal Perspective*
- **Chen-Ju Chen** (陳貞如教授)
  - Assistant Professor, National Chengchi University
  - *Multipolar Disorder in the East China Sea: Learning from the Experience in Building the Legal Systems in the Antarctic and the Arctic*
- **Raymond Chen-En Sung** (宋承恩研究員)
  - Research Fellow, Research Center for International Legal Studies, National Chengchi University
  - *Safeguarding the Interest of Taiwan in the Trilateral Dispute over Diaoyu/Senkaku Islands*
- **Moderator: Bing Ling**
  - Professor, Sydney Law School, University of Sydney

Concurrent with

**13:10-14:50 Panel B1 International Human Rights (VIP Room 2, 4F)**

- **Irena Ilieva**
  - Professor, Bulgarian Academy of Sciences
  - *Countering Terrorism and Protecting Human Rights: An Asian International Legal Dimension*
- **Joanna Harrington**
  - Professor, University of Alberta
  - *China, the Responsibility to Protect, and an Opportunity for Leadership?*
- **Pei-Lun Tsai (蔡沛倫小姐)**
  - Ph.D. Candidate, University of Nottingham
  - *Taiwan's "Ratification" and Domestication of International Human Rights Treaties: International Law Implications*
- **Shahla Ali**
  - Assistant Professor, University of Hong Kong
  - *International Law and Dispute Resolution: Challenges and Opportunities of Forging Collaborative Partnerships for Humanitarian Relief in Precarious Times*
- **Yamashita Tomoko**
  - Ph.D. Candidate, Kobe University, Japan
  - *Jus Cogens Norm Invalidates State Immunity?: International Restorative Justice and Japanese War Compensation Cases*
- **Moderator: Bernard Y. Kao (高玉泉教授)**
  - Dean, College of Law and Politics, National Chung Hsing University

Concurrent with

**13:10-14:50 Panel C1 The Discipline of International Law (VIP Room 5, 4F)**

- **Tomonori Mizushima**
  - Professor, Nagoya University, Japan
  - *The Settlement of a Private Person's Claim against a Foreign "State": The Case of Japan's Foreign State Immunity Act*
- **Pasha L. Hsieh (謝笠天教授)**
  - Assistant Professor, Singapore Management University
  - *The Discipline of International Law in Republican China and Contemporary Taiwan*
- **Mahdev Mohan**
  - Assistant Professor, Singapore Management University
  - *Global Administrative Lawyers & The Discipline of International Law – A Singapore Story*
- **Lysun Olga Valerevna**
  - Associate Professor, The Far Eastern State Transport University, Russia
  - *International Law in Russian-Asian Relationship: Perspectives, Challenges and Contributions*
- **Barak Kushner**
  - Senior Lecturer, University of Cambridge
  - *Pawns of Empire 'Revisited': Postwar Taiwan, Japan and the Dilemma of War Crimes*
- **Moderator: Huei-Yi Shyu (徐慧怡教授)**
  - Dean, College of Law, National Taipei University

**14:50-15:10 Coffee Break & Poster Session**

(3 Parallel Sessions: Panels A, B and C – VIP Rooms, 4F)

**15:10-17:00 Panel A2 Recognition in International Law (VIP Room 1, 4F)**

- **Władysław Czapliński**
  - Director, Institute of Law Studies, Polish Academy of Sciences
  - *The Role of Recognition with Regard of Non-State Actors*
- **Przemysław Saganek**
  - Associate Professor, Polish Academy of Sciences
  - *Is Recognition a Legal (Juridical) Act? Is It a Unilateral Legal Act?*
- **Brad R. Roth**
  - Professor, Wayne State University
  - *Parsing “Mutual Non-Recognition and Mutual Non-Denial”: An International Law Perspective on Taipei’s Current Framework for Cross-Strait Relations*
- **Hamamoto Shotaro**
  - Professor, Kyoto University
  - *The 2011 “Japan-Taiwan Bilateral Investment Agreement” or How to Establish International Law Relations with an Unrecognized Entity*
- **Alison Pert**
  - Lecturer, University of Sydney
  - *The “Duty” of Non-Recognition in Contemporary International Law: Issues and Uncertainties*
- **Jure Vidmar**
  - Leverhulme Early Career Fellow, University Oxford
  - *The Concept of Collective Recognition in Contemporary International Law*
- **Moderator: Władysław Czapliński**
  - Professor, Polish Academy of Sciences

Concurrent with

**15:10-17:00: Panel B2 International Economic Law (VIP Room 2, 4F)**

- **Seung Hwan Choi**
  - Professor, Kyung Hee University; President, ILA-Korean Branch & Korean Society of International Law
  - *The Principle of Human Dignity as an Indispensable Requirement for Sustainable Regional Economic Integration*
- **Phoenix Cai**
  - Associate Professor, University of Denver
  - *Trading with Foreigners: An Interdisciplinary Analysis of China’s Core Interests in Trade and Foreign Policy*
- **Yoshimichi Ishikawa**
  - Officer, WTO Dispute Settlement Division, Economic Bureau, Ministry of Foreign Affairs of Japan
  - *The WTO and Tobacco Control in Asia: Feasibility of Plain Packaging Requirements*
- **Yao-Ming Hsu (許耀明教授)**
  - Associate Professor, National Chengchi University
  - *Trade and Energy: Inspirations from the Case Canada-Feed-in Tariff Program to Taiwanese Renewable Energy Policies and Regulations*
- **James Fry**
  - Assistant Professor, University of Hong Kong
  - *The Intertemporal Rule and Investment Arbitration in Asia*
- **Timothy Webster**
  - Assistant Professor, Case Western Reserve University
  - *Compliance and Contention: China’s Participation in the WTO’s Dispute Settlement Body*
- **Moderator: Spenser Y. Hor (何曜琛教授)**
  - Dean, College of Law, Chinese Culture University

Concurrent with

**15:10-17:00 Panel C2 Dispute Resolution and International Law  
(VIP Room 5, 4F)**

- **Peter van Krieken**
  - Professor, Webster University Leiden
  - *Dispute Settlement and the Right to Peace*
- **Chien-huei Wu (吳建輝教授)**
  - Assistant Research Professor, Academia Sinica, Taiwan
  - *Beyond the ASEAN Way: the Legalization of Dispute Settlement Mechanisms in ASEAN, ASEAN plus Three and Even More*
- **Hsiu-An Hsiao (蕭琇安教授)**
  - Assistant Research Fellow, Institute of International Relations, National Chengchi University
  - *Governing Unilateral Acts in Maritime Disputes*
- **Kemal Başlar**
  - Professor, National Police Academy & Bilkent University
  - *The Maritime Disputes in the Aegean Sea and the Mediterranean: A Turkish Perspective*
- **Michael Gau (高聖惕教授)**
  - Professor, National Taiwan Ocean University
  - *Preliminary Comments on the Arbitration between the Philippines and China on South China Sea (9 Dash Line) Disputes*
  
- **Moderator: Sea-Wain Yau (姚思遠教授)**
  - Professor, Soochow University

**17:05-17:30 Closing Ceremony (VIP Room 1, 4F)**

- **Professor Edmund Sim**
  - Chair, ASIL Law in the Pacific Rim Region Interest Group
- **Professor Torsten Stein**
  - Honorary Treasurer, ILA; President, ILA-German Branch
- **Władysław Czapliński**
  - Chair, ILA Recognition/Non-recognition in International Law Committee
- **Professor Chun-i Chen (陳純一理事長)**
  - President, Chinese (Taiwan) Society of International Law; Director, Research Center for International Legal Studies, National Chengchi University

**18:30-21:00 Dinner (by invitation only)**

Lan Ting, 21F (蘭亭餐廳)

Hosted by the Chinese (Taiwan) Society of International Law  
– Chinese (Taiwan) Branch of the International Law Association



## Poster Presenters

### Morning, May 16, 2013 (3F)

- **Edyta Roszko**
  - Rechtskulturen Postdoctoral Fellow, Humboldt University
  - *Performing Sovereignty in the South China Sea/East Sea: The Politics of Cartography, International Law and Customary Fishing Practices in Vietnam and China*
- **Szymon Zaręba**
  - Assistant, Polish Academy of Sciences
  - *Recent Practice of Recognition as “Representatives of the People” – Rupture or Continuity?*
- **Tsai-fang Chen (陳在方教授) & Yi-Ting Chen (陳怡婷小姐)**
  - Assistant Professor; L.L.M. Student, National Chiao Tung University, Taiwan
  - *The Strait between China’s Accession Protocol and General Exceptions under the GATT*
- **Hsu-Hua Chou (周旭華教授)**
  - Professor, National Taipei College of Business
  - *Emergence of Plurilateral Services Agreement and the Implications*
- **Martin Björklund**
  - Senior Lecturer, Swedish School of Social Science, University of Helsinki
  - *Communicating through Conditional Deference – Taking Solange Global?*

### Afternoon, May 16, 2013 (4F)

- **Rachminawati**
  - Lecturer, Universitas Padjadjaran, Bandung, Indonesia
  - *The European Doctrine of Margin of Appreciation: What Can ASEAN Learn from Its Concept and Application in Universalizing “Controversial” ASEAN Declaration of Human Rights?*
- **Ting Chang (張婷教授) & David Tzaan (詹大偉博士)**
  - Assistant Professor; Ph.D., Ling Tung University
  - *Another Chance of Approving International Investment Law: Is TPP Another Option?*
- **Mark D. Kielsgard**
  - Assistant Professor, City University of Hong Kong
  - *Exclusion in PRC Criminal Justice: Compliance with International Norm and General Principles of Criminal Law*
- **Emika Tokunaga**
  - Ph.D. Candidate, Osaka University, Japan
  - *The Rights of Disaster Victims: Japan’s Triple Disaster Two Years On*
- **Edy Santoso & Martin Roestamy**
  - Visiting Senior Lecturer; Rector, University of Djuanda
  - *International Law on Trademark Related to the China-ASEAN Free Trade Agreement (CAFTA) as a Challenge for ASEAN Countries*



## Panel Abstracts

### Plenary Session: Roundtable Discussion

**10:00-12:00**

Moderator: *C.V. Chen*

#### **Islands of Discontent: Why Being a Rock Makes Life Easier**

– *Stefan Talmon*

In its recent notification and statement of claim addressed to the People's Republic of China, the Republic of the Philippines *inter alia* raised the question of the legal status of certain natural land features in the South China Sea. Whether these features are islands, rocks, low tide elevations or submerged banks or reefs is determinative of the question of whether they can generate certain maritime zones or not. Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS) provides that only 'islands' possess an exclusive economic zone and continental shelf while rocks only have a territorial sea. Low tide elevations and submerged banks or reefs do not generate any maritime zones of their own. It is suggested that many of the maritime disputes in the South China Sea would simply disappear or, at least, lose their economic and concomitant political significance if some of the disputed 'islands' would turn out to be mere 'rocks' or lesser land features. The presentation will examine the requirements for a natural land feature to qualify as an 'island' in international law. What does it mean for an area of land to be 'naturally formed'? Could a naturally formed area of land be preserved by artificial means without losing its status as an island? Could a rock or other land feature be extended by natural or artificial means to make it an area of land that can sustain human habitation or economic life of its own? Do submerged former islands keep their maritime zones or does a change in status automatically lead to a loss of maritime zones? The question of islands being entitled to all maritime zones must be distinguished from the question of delimitation of overlapping maritime zones generated by islands. The presentation will examine the effect given to islands in delimitation disputes. It will be shown that the effect of islands depends on both their geographic position and the maritime zones to be delimited. Perhaps of even greater practical significance than the question of whether a feature qualifies as an island is the question of who can decide on the status of insular features. The Commission of the Limits of the Continental Shelf has effectively ruled itself out as an arbiter of disputes over the status of insular features. It will thus be asked whether and, if so, under what circumstances the question of the legal status of a natural land feature can be brought before the compulsory dispute settlement mechanisms under UNCLOS.

### **The People's Republic of China's Multiple Legal Claims in South and East China Sea Disputes and Implications for the International Legal and Political Order – Jacques deLisle**

China's long-standing territorial and jurisdictional disputes in the South China Sea and the East China Sea have become foci of significant international tension and potential conflict. Although the interests and stakes are geopolitical and strategic, the disputes have been cast strikingly in legal terms. China's legal arguments have included three conceptually distinct strands, one based on historical claims to disputed maritime regions (including claims to "historic waters"), another based on claims of sovereignty over landforms (including claims of discovery and minimal exercises of sovereignty or jurisdiction) and highly expansive claims about maritime rights that follow therefrom (especially concerning the bases for drawing and the powers over EEZs), and a third, less frequently discussed assertion of security rights of coastal states (which are incompletely and complexly linked to law of the sea issues). Each of these lines of legal argument is, in distinctive ways, revisionist of existing legal principles and a point of disagreement of legal principle—and a focus of conflicting interest—with the principal extraregional power (the United States) and many regional actors as well. Some of Beijing's arguments are closely bound to the law of the sea while others are less so. The plurality of Beijing's legal arguments, its reluctance or unwillingness to clarify some aspects, its preference for separating disputes by party and type of legal issue, and its aversion to multilateralism and binding dispute resolution processes all are striking and potentially disconcerting features. Understanding the structure, content and possible motivations and trajectory of China's legal claims in the East and South China Sea may teach broader lessons about a rising great power's approach to the international legal order and the international system more generally.

### **The South-Western Caribbean Sea Case and Its Consequences for South China Sea Dispute Dynamics – Donald R. Rothwell**

The South-Western Caribbean Sea case is the most recent judgment of the International Court of Justice in a land and maritime boundary matter which has consequences for how land and maritime disputes in the South China Sea may eventually be settled. In the Territorial and Maritime Dispute (Nicaragua v Colombia) case the court was called upon to determine sovereignty over a number of islands and maritime features in the South-Western Caribbean Sea claimed by Nicaragua and Colombia, the maritime entitlements of those features, and the consequent exclusive economic zone/continental shelf boundary. The 19 November 2012 judgment of the court explored a range of issues which not only bear similarities to aspects of the land and maritime disputes in the South China Sea, but which set a precedent for the interpretation of the relevant international law. The judgment will be influential in how states asserting sovereignty and maritime claims in the South China Sea view their positions, and will probably impact some states in their views as to whether a negotiated settlement of their claims would be beneficial or whether they would favour adjudication. In particular, the ICJ considered the definition in international law of islands and associated maritime features, their entitlements to maritime zones, and the impact of these features upon maritime boundary delimitation between two states with joint claims over a maritime area. Of particular significance to the situation in the South China Sea is how the court dealt with Colombia's maritime entitlements in the South-Western Caribbean Sea immediately adjacent to the Nicaraguan coast and at some distance from the Colombian metropolitan coast. This paper will assess the judgment of the ICJ in the Territorial and Maritime Dispute (Nicaragua v Colombia) case, consider the significance of the decision in the context of previous court decisions on these matters, and make some observations regarding the impact of the decision for states with territorial and maritime claims in the South China Sea.

## **The South China Sea Disputes: Procedures and Prospects for Third-Party Intervention under UNCLOS – *Nguyen Dang Thang***

The South China Sea (SCS) is fraught with a tangle of two types of territorial disputes, the one relating to sovereignty over the insular features and the other to maritime delimitation. Territorial sovereignty disputes are not as such part of the maritime delimitation process but they may become preliminary to it when the disputed features themselves give rise to overlapping maritime entitlements. The situation in the SCS is conventionally characterised that way: a definitive answer to the maritime delimitation question is consequential upon the determination of who has the title to the disputed features in the SCS which, nevertheless, cannot be determined by a third party without the consent of all the states concerned. From this perspective, there is not much prospect for a third-party (assisted) settlement of the territorial disputes in the SCS.

This paper canvasses for an unconventional but principled approach to the territorial disputes in the SCS. It leaves aside the territorial sovereignty disputes and focuses instead on the issue of maritime delimitation. The latter issue involves first and foremost the question concerning the interpretation and application of Article 121 which is susceptible to the compulsory binding dispute settlement procedure in Part XV of UNCLOS. Alternatively, this very legal question may also be brought to the International Tribunal for the Law of the Sea for a non-binding advisory opinion by agreement between some, and not necessarily all, claimant states to the SCS territorial disputes under Article 138 of the Tribunal's Rules. If the insular features in the SCS are determined to be 'islands' and hence entitled to an EEZ and continental shelf of their own according to Article 121 of UNCLOS, these maritime zones, which are 'contested' by virtue of the disputed nature of their generative features, will overlap with the 'uncontested' maritime zones generated by the coasts of the littoral states. The segregation of the contested and uncontested maritime zones in the SCS is arguably a pure delimitation question which is governed by Part

XV of UNCLOS, albeit subject to a different dispute settlement procedure. Given China's declaration under Article 298 of UNCLOS, a delimitation dispute involving China will only be subject to compulsory conciliation which will result in report(s) solely on the delimitation dispute(s) without any implications for the question of territorial sovereignty. Yet if the crux of the territorial disputes in the SCS is the entitlement to marine natural resources, determining the geographical scope of the contested waters and separating them from the uncontested ones in the SCS is of no less significance. An objective third-party opinion certainly carries weight and helps the states concerned to (jointly) manage and exploit the marine resources of the SCS.

The paper explores the different mechanisms for and assesses the prospects of third-party intervention in the settlement of the territorial disputes in the SCS under UNCLOS. Furthermore, on the delimitation question, the paper looks at the recent international jurisprudence and ventures to define the 'contested' maritime zones in the SCS.

## **The Legality of Law Enforcement against a Government Ship in a Territorial Sea – *Yurika Ishii***

This paper examines to what extent a government ship operated for non-commercial purposes (“a government ship,” which is distinguished from a warship) enjoys its immunity in the territorial sea of a foreign State. Article 30 of the Convention on the Law of the Sea (“UNCLOS”) provides that, if any warship does not comply with the laws and regulations of the coastal State, the latter may require it to leave the territorial sea. On its premise, the warship is under the prescriptive jurisdiction of the coastal States while its execution is strictly limited. However, because UNCLOS does not provide upon the government ship, arguably it is not completely immune from the enforcement jurisdiction and the coastal State’s protective right under Article 25(1) of the Convention.

The first issue involves the rationale for such a distinction between a government ship and a warship. Scholarly views provide several points. For example, a government ship is not necessarily recognizable whether it belongs to State from the external appearance. In addition, it is often the case that the government ship carries civilian mariners. Thus, the coastal State has greater interest in enforcing its law against such a ship in order to maintain its territorial integrity.

The next issue is to what extent the coastal State may take action against a government ship which violates the coastal State’s laws and regulations. The controversial question is whether it is allowed to take physical measures against a government ship in order to exclude it from the territorial sea. This requires a careful examination, but the majority of the jurisprudence supports such sort of use of force, especially when the harm affects the national security and it is of emergency. The law enforcement may not involve the capture of the vessel and the arrest of the crews because they are immune from judicial jurisdiction of the coastal States under general international law.

Then, the closely interrelated problem is whether there is any situation when such a law enforcement activity accounts as a use of force prohibited under Article 2(4) of the United Nations Charter. According to the relevant study, one of the essential criteria is whether the use of the authority of a state is exercised in the context of claiming its international rights against a state or the implementation of their domestic law. When the title of the territorial sea is disputed, the law enforcement shall be done carefully, because it could fall into the state-to-state situation. In addition, the activities shall be restricted to the extent necessary and reasonable.

This study is practically necessary because recent maritime disputes often involve law enforcement activities against government ships. It is also a significant contribution to the theory of State immunity under international law.

## **The Sino-Japanese War of 1894-1895 and Its Relevance to the Territorial Sovereignty of the Diaoyutai/Senkaku Islands**

– *Han-yi Shaw*

Japan incorporated the disputed Diaoyutai/Senkaku Islands on January 14, 1895 amid the ongoing Sino-Japanese War 1894-1895. However, the historical context of this major war and the surrounding geopolitical situation are often omitted from legal evaluations of the sovereignty claims. Since Japan's claim is based on "discovery-occupation" of terra nullius, this study examines the legal status of the Diaoyutai/Senkaku Islands prior to the war and the validity of Japan's incorporation process under international law. This study presents and evaluates over 40 Meiji and Taisho period Japanese official documents, many of which are newly unearthed and revealed for the first time. Collectively, these historical documents demonstrate that the Meiji government acknowledged Qing China's ownership prior to the war and did not "repeatedly investigate that the islands to confirm no traces of Qing China control", as Japan claims today. Instead, the Meiji government secretly and unilaterally annexed the islands under the cover of war. Accordingly, the disputed islands are subject to post World War II legal arrangements that required Japan to return territories taken by military force and revert them to their pre-1895 legal status. Ex injuria jus non oritur is a general principle of international law; and Japan's claim over the Diaoyutai Islands is invalid ab initio since the islands were not terra nullius.



## **Panel Abstracts**

### **Parallel Sessions**

**13:10-14:50** | **Panel A1** | **Law of the Sea**

Moderator: *Bing Ling*

## How to Solve East Asia's Island Disputes – *Miyazaki Takashi*

Apart from the issue of EEZ/continental shelf delimitation, Japan has territorial disputes with China and Taiwan (over Senkaku Islands), Korea (over Takeshima) and Russia (over the Southern Kuriles). Similar disputes in the seas east and south of the Chinese Continent involve China, Vietnam, the Philippines and other nations. While territorial disputes are commonplace throughout the world, those with China are characterized by China's forceful assertion that not only the islands at issue but also the entire adjacent sea areas as a whole historically belong to China. However, it is evident that these problems must be resolved peacefully in accordance with international law as typically indicated by the UN Charter and UNCLOS. My presentation will be an attempt to clarify the juridical framework for the settlement of the disputes in question. Two points of merit and procedure are to be cleared.

1. The applicable principles of international law: i) The title to the disputed islands and seas must be determined by ascertaining early and durable occupation. This means discovery of a terra nullius and pursuant effective control over it, which becomes durable when undisturbed for a long period of time by protest or counterclaim on the part of other states. ii) "Can there be sea expanses under the control of a state other than territorial waters, EEZs and continental shelves when this state is not an archipelago state (UNCLOS Part IV)?" is another question to be answered. iii) The issue of "island or rock" will have to be settled as well: current state practice seems to allow possession by a state of a rock and its adjacent territorial waters. Yet, the UNCLOS permits no EEZ nor continental shelf to be established around a rock (Article 121, para.3). iv) It is estimated that one third of the world's cargo passes through the disputed waters. This fact alone demonstrates how important it is for all shipping to secure the right of innocent passage through the waters under review.
2. Procedures whereby to resolve the disputes: i) negotiations between the parties; ii) establishment of regional practice or consensus in such fora as ASEAN, the East Asia Summit and so forth conducive to the formation of regional treaty or customary law; iii) international arbitration/legal settlement (i.e. recourse to ICJ, ITLOS or other international tribunals); iv) use of force to gain effective control of the territory at issue, and individual as well as collective self-defence counteraction, as provided in the UN Charter Article 51.

Given that the use of force is to be excluded, the parties are left with options i) through iii).

## Straight Baselines in the South China Sea: An International Legal Perspective – *Erik Franckx & Marco Benatar*

The South China Sea (SCS) dispute has proven to be a hotbed for numerous juridical quarrels, ranging from the extent of maritime zones, to territorial insular claims and navigational rights. One of the outlying issues warranting closer examination concerns the baselines around SCS islands. A reading of the United Nations Convention on the Law of the Sea (1982 Convention) leads to the conclusion that the normal baseline applies to the low-water line of the coast of each island separately. There are however two noteworthy factors at play with respect to the SCS. Firstly, some of the mid-ocean features can be viewed as island groups and/or "archipelagos". Secondly, the states which have made claims to these territories fall into different categories (continental/mainland states, island states, as well as an archipelagic state (i.e. the Philippines)), each with varying legal implications.

A key question thus comes to the fore: can these states validly enclose the islands (boxed together as a unit) in a system connecting the outward points of the group? The practical ramifications are significant, given that the baseline indicates from where to start measuring maritime zones falling under coastal state jurisdiction (seaward) and which waters are to become internal or archipelagic (landward). This is anything but a moot point in the context of the SCS. By way of illustration, we will pay close attention to legislation enacted by the PRC as regards the Paracel Islands.

With a view to adding legal clarity to this conundrum, we aim to place the SCS in a broader, more global context. More precisely, we propose a rigorous analysis of the framework on baselines applicable to countries other than archipelagic states, i.e. the so-called "mixed states". The research paper will draw upon the travaux préparatoires of the 1982 Convention, a comparative study of national practice from various regions of the world, the reaction of third parties to such practices, and the jurisprudence developed by the International Court of Justice and arbitral tribunals. We conclude that the use by mixed states of alternative systems for drawing baselines around offshore island possessions, whether archipelagic or straight baselines, lacks a sound basis under international law.

## **Multipolar Disorder in the East China Sea: Learning from the Experience in Building the Legal Systems in the Antarctic and the Arctic – *Chen-Ju Chen***

Since the Japanese government initiated their plan and action to nationalize the Diaoyutai/Senkaku islands in early 2012, the tension in the East China Sea (ECS), in particular between mainland China and Japan, has resulted in the chaos and instability in the region of the Asia Pacific. The disputes between mainland China and Japan in the ECS are mostly related to the sovereignty of the Diaoyutai/Senkaku islands and the delimitation of the maritime boundaries of the Exclusive Economic Zone and Continental Shelf. Moreover, the confrontation has been recently escalated by the patrol vessels navigating in the waters around the Diaoyutai/Senkaku islands sent by the governments of mainland China and Japan. In addition, the United States would not be able to escape from these disputes, not only because it is due to the mistake of the United States to return the administration of Diaoyutai/Senkaku islands to Japan, but also because the United States would be obliged to intervene based on the Treaty of Mutual Cooperation and Security between the United States and Japan, if any military conflict occurs. The claim of Taiwan is also on a similar basis to the one of mainland China. Furthermore, the disputes regarding the sovereignty of islands and the delimitation of the maritime boundaries also exist between mainland China and Korea as well as between Japan and Korea. These have led to the complexity of the issues and the difficulty to resolve the disputes. This situation can be considered as multipolar disorder.

With reference to the modes to resolve the maritime disputes in the region, the legal systems in the Antarctic and the Arctic may provide a very good example to consider. First, the Antarctic Treaty System, constituting the core treaty, the Antarctic Treaty, and related agreements, provides a set of rules to regulate the

interaction between States regarding the Antarctic. This system to a great extent includes provisions on the environmental protection and fisheries conservation. Second, the Arctic Council was established in 1996 to promote cooperation, coordination and interaction among Arctic States with emphasis on the issues of sustainable development and environmental protection in the Arctic. In May 2011, the Arctic Council also adopted its first legally binding instrument, the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic. This demonstrates that the framework provided by the Arctic Council is developing and may reach a successful level in the future.

Given this background, this paper first looks into the current disputes between the States around the ECS to emphasize the need to resolve the disputes. Then, in order to refer to the successful modes developed based on international law, the paper investigates the experience of establishing the legal systems in the Antarctic and the Arctic. It finally concludes by answering what we can learn from the experience in the Antarctic and the Arctic in order to solve the disputes in the ECS. The same method could also be applied to the case of the South China Sea.



**The Principle of Effectivités: An Imperative Consideration in the Senkaku/Diaoyu Islands Dispute – *Abia Kadouf & Kyaw Hla Win***  
*Md. Hassan Ahmed*

Since 1970, the People's Republic of China, Taiwan and Japan have disputed claims of sovereignty over Senkaku/Diaoyu Islands in the East China Sea. These islands have been subjected to the dispute due to the existence of oil deposits under the Senkaku/ Diaoyu Islands and also being a strategic location for exploitation of energy resources in the East China Sea. The People's Republic of China claims historic title over the Diaoyu Islands as these have been an inherent part of it since ancient times. Furthermore, the People's Republic of China contends that the islands were seized by Japan in the 1895 Sino-Japan War. On the other hand, Japan asserts that it had occupied the Senkaku Islands since 1895 while these islands were terra nullius and totally uninhabited prior to that time. Moreover, the People's Republic of China had never challenged Japanese sovereignty over these islands until 1970, when the United Nations reported the substantial oil and gas reserves in the area. Nonetheless, as far as international law is concerned, a state will have immense prospects of having title over the territory if it can provide evidence of the exercise of state sovereignty or effective control over the disputed territory. Thus, the principle of 'effectivités' is an imperative element in inter-state territorial and boundary disputes. In practice, international courts and tribunals predominantly draw attention solely on the element of effective control in deciding the territorial and boundary disputes. It is apparent in the cases of *Minquiers and Ecrehos*, *Sovereignty over Pulau Ligitan and Pulau Sipadan* and *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge* in which the International Court of Justice reaffirmed that the element of effective occupation is the most important element to consider in the observation of territorial disputes similar to the arbitral award of the international arbitration in the case of *Island of Palmas* as well as the judgment of the Permanent Court of International Justice

in the case of *Legal Status of Eastern Greenland*. Accordingly, this paper aims to explore feasible solutions to address the Senkaku/Diaoyu Islands dispute among the People's Republic of China, Taiwan and Japan in the East China Sea in accordance with modes of acquisition of territory under international law. In view of that, the authors critically analyse the judicial decisions of the international courts and tribunals in relation to territorial and boundary disputes in which the principle of 'effectivités' is considered an imperative element because international courts and tribunals always fix their eyes on the element of effective control despite the fact that the concept of occupation, prescription and the principle of 'uti possidetis' are modes of acquisition of territory under international law.

## **Safeguarding the Interest of Taiwan in the Trilateral Dispute over Diaoyu/Senkaku Islands – *Raymond Chen-En Sung***

Disputes over the Diaoyu/Senkaku Islands are rapidly escalating into a major hot spot for international security concern in East Asia, as forcible actions are taken by Beijing in asserting China's territorial claim over the islands, prompted by the "nationalization" of them by Tokyo in September 2012. Should military activities break out -- which is no more a remote possibility if the recent trend continues --, the conflict has the potential to involve the three biggest economies in the world.

By comparison, Taipei has been demonstrating calm self-restraint amidst the disputes. Nevertheless, Taiwan occupies a key place in the disputes. As far as the Chinese claim of territorial sovereignty over the Diaoyu Islands is concerned, one of the essential connections is that historically the disputed islands had been appertaining to the Island of Formosa (Taiwan) and were ceded to Japan by the signing of the Treaty of Shimonoseki in 1895, thus were returned to China along with Taiwan after WWII. In short, the destiny of the Diaoyu Islands is bound up with that of Taiwan. On the other hand, Taiwan has never been ruled by the government of PRC. For more than 60 years now there exists a separate entity on Taiwan represented by the government of the Republic of China (ROC), although not generally recognized as a state.

The above gives rise to the question of how Taiwan may safeguard its interest with regard to the Diaoyu Islands, and what the legal strategies and arguments available to the government of the ROC are, in the face of further developments of the situation. This question is made complicated by the fact that the other parties involved have been unwilling to negotiate with Taiwan on the international plane, and that Taiwan has very limited access to international adjudication mechanisms. For example, if Beijing manages to get Tokyo on the negotiating table over the sovereignty or maritime issues of the Diaoyu/Senkaku Islands but refuses a role

for Taipei in the process, how is Taipei going to deal with the situation? Further, if China and Japan agree to submit the disputes to international adjudication – if both sides come to a realization that the road to military clashes is much more costly than a peaceful but limited *modus vivendi*, for example —, what can Taiwan do to safeguard its interest? Does she have the means to apply for an intervention in the proceedings? Does the tie with the disputed islands make Taiwan an indispensable party? How will such actions from Taiwan play out? Do they have the effect of precluding possible litigation from continuing? Those questions pose a test for the international judiciary on its capability in protecting an outcast such as Taiwan, not to mention carry huge implications for Taiwan as the Chinese party which has the closest bearings on the matter. This paper proposes to discuss the means and legal arguments to safeguard the interest of Taiwan in various scenarios in the possible developments of this trilateral dispute.



## Panel Abstracts

### Parallel Sessions

**13:10-14:50** **Panel B1** **International Human Rights**

Moderator: *Bernard Y. Kao*

#### **Countering Terrorism and Protecting Human Rights: An Asian International Legal Dimension – Irena Ilieva**

The paper proposal is aimed at studying the state of art of two regional instruments of fighting terrorism in Asia: the Shanghai Convention on Combating Terrorism, Separatism and Extremism (2001) and the ASEAN Convention on Counter Terrorism (2007).

There is a worldwide consensus that terrorism constitutes a serious violation of human rights and in particular a violation of the right of physical integrity, life, freedom and security, and impedes socio-economic development through destabilization of states.

The ASEAN Convention reaffirms the commitment of their member-states to protect human rights, fair treatment, the rule of law and due process.

The Shanghai Convention does not expressly contain the protection of human rights. But this Convention shall not limit the right of the parties to conclude other international treaties on matters that constitute the subject of the Convention and do not contradict its purposes and object, nor shall it affect the rights and obligation of the parties under other international treaties to which they are parties, including the obligations under the international standard of human rights.

The protection of human rights will be analyzed in two contexts. The first is the study of terrorism, based on the legal definitions in both conventions as a serious violation of human rights, especially of the victims. The second aspect is the standards for the protection of human rights with respect to the perpetrators or the potential suspects of terrorist crimes.

## **China, the Responsibility to Protect, and an Opportunity for Leadership? – Joanna Harrington**

The concept of a “responsibility to protect” populations from mass atrocities remains a topic of much discussion among states, especially with regards to the concept’s operationalization at its sharpest end through military intervention. It is also a concept for which support in favour and opposition against appears to divide along North-South lines, with many developing states still suspecting that the effort to recast “sovereignty as responsibility” serves to mask a hidden interventionist agenda. The endorsement of the responsibility concept by the UN General Assembly in 2005, with its limited focus on situations of genocide, war crimes, ethnic cleansing, and crimes against humanity, has not allayed such fears, and efforts undertaken since by the UN Secretary-General to emphasize the concept’s prevention and capacity-building roles has also highlighted the continuing controversy with regards to the exercise of the international community’s responsibility to protect through coercive collection action.

Showing sensitivity to these concerns should not be viewed as indicating a waning of support for the responsibility to protect concept, and indeed, such sensitivity may serve to enhance support in the long run. An illustration of this approach is provided by the recent proposal by Brazil to incorporate a concept of “responsibility while protecting” within the existing responsibility to protect framework. Brazil’s proposal also serves as a means to provide the needed space for the airing of concerns, including those arising from the use of the responsibility to protect to justify a UN-mandated intervention in Libya, and the desire for regime change provoking a strong reaction from emerging and developing states.

The Brazilian proposal also calls for the adoption of a set of principles, parameters and guidelines to govern any future exercise of the international community’s responsibility to protect in a post-Libya world. China, as an emerging leader with a support base within the developing world, as a permanent member of the Security Council, and as a state that has expressed support for the Brazilian initiative, faces an opportunity to assume a leadership role with respect to the development of the desired criteria and the broader goal of improving our institutions of global governance and civilian protection.

## **Taiwan’s “Ratification” and Domestication of International Human Rights Treaties: International Law Implications – Pei-Lun Tsai**

In 2007, the President of the Republic of China (ROC) signed the instrument of accession of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and in 2009, the government submitted instruments of ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Yet, the abovementioned instruments of accession/ratification were not accepted by the treaties’ depository, the United Nations (UN) Secretary-General, and the rejection was accompanied by a note from the Under Secretary-General for Legal Affairs, citing General Assembly Resolution 2758. Despite the failed attempt to become a State party, nonetheless, the ROC government has begun the domestication of these treaties. Laws were enacted to accord these treaties with domestic legal effect, and courts have increasingly referred to international human rights law in their judgments. Notably, pursuant to the treaty provisions, the government has produced State reports on the implementation of rights enumerated in the treaties. Regrettably, since the ROC is not officially considered a State party to any of the three treaties, the ROC cannot submit the reports to the respective UN treaty monitoring bodies and undergo the official reporting procedures. Still, as an alternative reporting mechanism, the government has invited international experts to examine these reports and provide critical comments, with a view to further strengthening the protection of human rights.

Among the literature of international law and international relations, few studies focus on the ROC’s practice in the field of international human rights. Also, since the ROC’s attempt to participate in the CEDAW, ICCPR, and ICESCR is relatively recent, this paper serves to fill the gap of current literature and provide a contemporary outlook on the domestication of international human rights law in the ROC. The paper would first recount the history of the ROC’s participation in the international human rights regime. Then the paper would examine the international law implications of Taiwan’s recent attempt to ratify international human rights instruments, as well as the subsequent domestication. In order to answer these questions, this paper analyses the treaty-making capacity of various subjects of international law and the means to express consent to be bound by a treaty. It is envisaged that these discussions would help formulate a theoretical framework for the applicability of the relevant international human rights treaties to the ROC.

### **International Law and Dispute Resolution: Challenges and Opportunities of Forging Collaborative Partnerships for Humanitarian Relief in Precarious Times – *Shahla Ali***

The resolution of disputes in the context of evolving international law, and in particular the use of collaborative governance in public-private partnerships to address humanitarian aid distribution challenges in the wake of natural disasters is an important area for research and study. Concerted efforts by the United Nations (“UN”) and its subsidiary bodies have, to a large extent, laid the foundations for post-disaster relief efforts. At the same time, the private sector is increasingly playing a significant role in contributing to the development of humanitarian aid. Public-private partnerships involved in the development of technology for humanitarian relief, are emerging. This paper attempts to provide an overview of the humanitarian framework by which the UN and its bodies collaborate with its private partners, and some recent notable achievements in the private sector regarding developing and utilizing technology for humanitarian relief efforts.

Drawing on selected case studies, this paper aims to offer policy suggestions for encouraging increasingly more effective public-private partnerships to aid in humanitarian relief.

### **Jus Cogens Norm Invalidates State Immunity? : International Restorative Justice and Japanese War Compensation Cases – *Yamashita Tomoko***

A war compensation case is a social problem whose legal solution is not always considered legitimate. Even today, some individuals continue law suits asking reparations for their damages against the governments which infringed their rights in an inhumane way during the WWII. Indeed, several national courts, especially those of “victims,” have recently ruled in favour of them. In 2012, the Supreme Court of South Korea ordered a Japanese private company to compensate Korean victims who were forced engaging intensive labour (*Gap et al. v. Mitsubishi Heavy Industries Ltd.*, 24/052012). It was a result of Japan’s policy during the war; however, the company itself was not a State organ and hence could not enjoy jurisdictional immunity in Korea. A more advanced argument can be found in Italian and Greek courts which invalidated German immunity, declaring that a jus cogens’s violation does not allow a State invoking its jurisdictional immunity (Italy, *Ferrini case*, Court of Cassation, 11/03/2004; Greece, *Distomo case*, Court of Cassation, 04/05/2000; *Margellos case*, Special Supreme Court, 17/09/2002). The international courts, on the other hand, still support States’ immunity in light of lex lata of international law (ECHR, *Kalogeropoulou case*, No. 59021/00, 12/12/2002; ICJ, *Jurisdictional Immunity (Germany v. Italy)* 03/02/2012).

My paper, which will form part of my doctoral thesis, examines whether jus cogens norms can invalidate State’s immunities, and, if so, how it works at theoretical and practical levels. With special attention to Japanese WWII’s compensation cases, it features possible “lifting” of State immunity in view of victims’ protection. A confrontation is to be found between traditional State-oriented international legal order and international (retroactive) criminal law.

The first chapter engages in case studies of (1) Italian-German disputes resulted in Jurisdictional Immunity case and (2) Korean-Japanese war compensations cases in which each Supreme Court has arrived at a different conclusion. In Japan, though all the demands were finally dismissed for procedural reasons, an important detail was nuanced by the Supreme Court, affirming the substantive existence of individual rights to litigate for war compensations (*Nishimatsu Construction Co. v. Song Jixiao et al.*, 27/04/2007). Comparing two cases, my paper explores the questions of how and to what extent such violations of fundamental human right affect State immunity. The second chapter is devoted to a theoretical exploration as to the denial of jurisdictional immunity in cases of jus cogens violation as well as of inexistence of alternative remedies (cf. *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2004] EWCA Civ 1394, [2005] QB 699).

In light of the fragmentation of legal order in the International Community, it is now difficult to decide which judiciary we should follow, especially if we take into account the effective execution of the judgment. By studying war-compensation cases, I propose a possible dispute settlement to realise the international restorative justice in East Asian legal order.



## Panel Abstracts

### Parallel Sessions

**13:10-14:50** **Panel C1** **The Discipline of International Law**

Moderator: *Huei-Yi Shyu*

## **The Settlement of a Private Person's Claim against a Foreign "State": The Case of Japan's Foreign State Immunity Act**

– Tomonori Mizushima

Principles of international law concerning dispute resolution between a private person and a foreign State include that of foreign State immunity. According to this principle, a foreign State is immune from the jurisdiction of a forum State's courts under certain circumstances. In this field, Japan enacted an Act on the Civil Jurisdiction of Japanese Courts over Foreign States (Japanese Foreign State Immunity Act or FSIA) in 2009. This Act was modeled on the United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention), which Japan accepted in 2010, but the Act applies irrespective of whether the foreign State concerned is a party to the UN Convention.

There was some discussion in the past about whether an unrecognized State enjoys foreign State immunity under international law. In a debate in the Diet which enacted the Japanese FSIA, a question was raised about this Act's applicability to a State that is not recognized by the Japanese government, such as Taiwan or North Korea, and it was explained that this Act does not apply to such a State. Likewise, drafters of the Japanese FSIA took the position that, even if an unrecognized State accedes to the UN Convention, not applying this Act does not cause a legal problem because no rights and obligations arise under the UN Convention between Japan and such a State.

This position apparently reflects judgments of the Tokyo District Court and the Intellectual Property High Court in the North Korean Copyright case, decided in 2007 and 2008 respectively. In this case, the lower courts, as well as the Supreme Court of Japan which gave its judgment in December 2011 after the enactment of the Japanese FSIA, stated that when an unrecognized State (North Korea) accedes to a multilateral treaty to which Japan is a contracting party (Berne Convention for

the Protection of Literary and Artistic Works), an obligation under the treaty does not arise except in a case which concerns an obligation under general international law of universal value.

By critically analyzing the question about the applicability of the Japanese FSIA to an unrecognized State, my paper examines some issues concerning dispute resolution between a private person and a foreign but unrecognized State from the viewpoint of international law. It may also examine, insofar as relevant, an obiter dictum of the lower courts in the North Korean Copyright case to the effect that works of nationals of Taiwan would be protected, as distinct from the case of North Korean works, under the Agreement on Trade-Related Aspects of Intellectual Property Rights, because an unrecognized State may accede to the WTO Agreement, as Taiwan did in 2002, as a "separate customs territory".

## The Discipline of International Law in Republican China and Contemporary Taiwan – Pasha L. Hsieh

The article examines the evolution of international law as a professional and intellectual discipline in the Republic of China (ROC), which has governed Mainland China (1911-1949) and post-1949 Taiwan. In particular, the article demonstrates the role of China's first-generation international lawyers in global governance and foreign policy. The article argues that pragmatism and idealism define the major features of the ROC's international law approach, hence facilitating the transformation of the Eurocentric discipline into universally valid normative claims. This research unveils much-neglected international law development in East Asia and its interactions with Western powers, including the Netherlands, the United Kingdom, and the United States.

Section I explains the introduction of international law into China in response to urgent diplomatic needs. It explores statism as a Chinese characteristic of international law education, which seeks to elevate the status of the "fringe discipline" to official studies. International law scholarship's development in Republican China not only laid the academic foundation for Taiwan, to which the ROC relocated, but was also essential to the restoration of international law research in the People's Republic of China (PRC) after the Cultural Revolution. Section II analyzes the cultivation and influence of early China's international lawyers, who served as foreign ministers and judges of the PCIJ and the ICJ. It examines how they utilized the discipline of international law in reconciling *pacta sunc servanda* with China's unequal treaties and in forming the League of Nations and the UN. Section III discusses contemporary implications of international law for the discipline's evolution. Government recognition issues have formed the core of China's legal dilemmas since the founding of the ROC. This section provides insights into the creativity of international law intellectuals who have handled pragmatic recognition issues and utilized international law principles in structuring the legal framework for divided-China dialogues.

## Global Administrative Lawyers & the Discipline of International Law – A Singapore Story – Mahdev Mohan

Singapore has relied on the application of international law in international judicial and arbitral proceedings in order to address specific foreign policy issues. This included the first dispute brought under the WTO's dispute settlement system, although the dispute was subsequently withdrawn. More recently, in the Land Reclamation dispute, Malaysia requested provisional measures from the International Tribunal on the Law of the Sea to halt Singapore's land reclamation activities. The Tribunal ordered that a Group of Experts (G.O.E.) be established to inquire into various facts pertaining to the dispute. The unanimous G.O.E. report which resulted eventually played a highly constructive role in helping both countries reach an amicable solution. As a result, the dispute over the merits before an ad hoc tribunal established pursuant to the terms of the *U.N. Convention on the Law of the Sea*, 10 December 1982, was withdrawn subsequently. Another dispute with Malaysia concerning sovereign title over Pedra Branca (or 'Pulau Batu Puteh') led to a decision by the International Court of Justice,<sup>1</sup> and informs Singapore's approach towards the 'discipline of international law'.

This 'discipline of international law' is no longer limited to traditional inter-state relations. As Stephan notes, it now traverses the private sphere in connection with a wide range of public services.<sup>2</sup> This is evident in Singapore's approach towards investor-state arbitration, which relate to disputes arising from foreign investment treaties. Running the gamut from mining to telecoms, these cross-border arbitrations typically involve billions of dollars and require lawyers who have expertise in all aspects of public international law and acting for sovereign clients. A recent Court of Appeal decision concerning Maldives' cancellation of its S\$623 million contract with a foreign consortium to develop the country's airport, is also apposite.



Examining the *Pedra Branca* and *Male International Airport* cases, this paper will study Singapore's reception of the evolution of public international law(yers) and legal advisers in connection with what some scholars have labelled global administrative law discourse.<sup>3</sup> It will suggest how a corpus of international norms, practice and jurisprudence can be developed based on good governance; the rule of international law; and an appreciation for the nuances of domestic public interest concerns and harmonious and responsible regional foreign policy.<sup>4</sup>

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<sup>1</sup> For all these, see the annual volumes of the Singapore Year Book of International Law.

<sup>2</sup> Paul B. Stephan, *Privatizing International Law*, Virginia Law Review, Vol. 97, no. 7, p.1573 (2011).

<sup>3</sup> Benedict Kingsbury and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law"; "Investment Treaty Arbitration as a Species of Global Administrative Law" Gus Van Harten & Martin Loughlin, *European Journal of International Law* (2009).

<sup>4</sup> Speaking extra-judicially, Singapore's Chief Justice has noted this and has called for multiple stake-holders "to develop a rich jurisprudence to add flesh and texture to various aspects of the law", see Chief Justice Sundaresh Menon 'The Privatization of Public international Law & Its Implications for the Singapore Community' (22 October 2012).

### **International law in Russian-Asian relationship: Perspectives, Challenges and Contributions – *Lysun Olga Valerevna***

Russia's presence in the Pacific Coast (Primorsky, Khavarovsk, Sakhalin, Kamchatk, Chukotka), with a population of 4.5 million people, Russian Far East is very close to the markets of China, Japan and Korea through the Sea of Japan, but cannot be compared to the 50.6 million people of Pacific-USA (California, Oregon, Hawaii, Washington, Alaska, Guam), but Russia's presence in Asia, including the Urals, Siberian and Far East Federal districts, amounts to a combined population of 37.7 million people bordering China (Heilongjiang, Inner Mongolia and Xingiang provinces), Kazakhstan, Japan, Korea and Mongolia.

The international relationship of Russian Far East with its neighbor countries has its own long history of being so interrelated in different spheres of Russian-Asian people life. It influenced legal international practice with specific legal traditions and norms. Can one speak of Russian-Asia international law? If yes, then a number of questions arise. What are the peculiarities of Russian-Asian international law, considering the historical baggage? What are the new tendencies in the doctrine of international law in Russian-Asian relationship? Do the processes of regional integration contribute to the forming of a unique Russian-Asian model of international law? In order to respond to these questions, it is important first to analyze the historical background of the development of international law in the Asian-Russian relationship. Secondly, it is interesting to assess the specificity of this relationship in the development of the new international approaches of international norm formation.

This article is an attempt at rethinking the Russian-Asian international law practice in terms of its growing significance to better cooperate with and to better protect human rights of foreigners. The article has three basic objectives:

- 1) to provide knowledge about the most important processes and trends in Russian Asian international law with a special emphasis on the human rights protection of Russian-Asian citizens;
- 2) to provide policymakers with the recommendations of improving the international legislation, paying special attention to its growing political and economic links with the Asia-Pacific.
- 3) to supply a joint strategy of Russian-Asian international law development;

And the main expected outcomes are as follows:

- knowledge of the contemporary international problems in legal practice and processes that ensure good awareness of the major trends and vectors of the Russian-Asian international law development;
- knowledge of major research tools and theories of Russian Asian international law;
- evaluation of possible influences of regional and national factors on Russian-Asian international law;
- information regarding the influence on the process of decision-making in international norm formation and for analytical evaluations of current events, major legal documents;
- the major methods of representing the knowledge of international issues to students and teach the subjects of international law major in educational institutions;
- the influence of humanitarian factors on Russian-Asian international law development as a whole.

### **Pawns of Empire ‘Revisited’: Postwar Taiwan, Japan and the Dilemma of War Crimes – Barak Kushner**

During the late 1940s and early 1950s, propaganda campaigns in East Asia moved away from establishing empire and instead began to raise the banner of “humanity and justice.” In the wake of the dismantling of the Japanese empire and the nascent Chinese civil war, nations tried to prove their level of “justness” by enacting what they deemed to be the proper and legal pursuit of Japanese war criminals in the immediate postwar. The idea of a war crimes trial to process these individuals became a crucial symbol and served to help galvanize the new leadership that replaced previous Japanese or occupied authority with a renewed sense of responsibility but one that tied it to notions of justice and peace.

Legal questions concerning jurisdiction, international law and the nature of colonial responsibility still weigh heavily today within the historical legacy of Japanese imperialism in East Asia. Who exactly was responsible at the ground level for Japan’s war in Asia in which ethnic Chinese joined collaborationist regimes and Taiwanese (aboriginal and Han Chinese) became soldiers for the Japanese and guarded Allied POWs? As legal theorist Ruti Teitel explains, the Nuremberg and Tokyo Trials were state crimes but adjudicated individual justice; the nationality of the defendant became a key issue and nowhere was this a greater issue than with Taiwan related war crimes. In addition, the entire selection process for defendants was not exactly neutral.

The legal restructuring of East Asia and Japan’s relations with its neighbors in East Asia played a vital function in redressing colonial and imperial power domains in the early Cold War. The Tokyo War Crimes Trial was East Asia’s sole Class A war crimes trial while the much more numerous BC class trials were reserved for B, “conventional war crimes” and C class, “crimes against humanity.” In traditional

international law a defendant could not be tried by a third party for action against his own people or for actions committed before the war began.

Part of this problem when dealing with Taiwanese war crimes, or the application of law to such actions, derives from the complex manner in how Japan's war in Asia legally ended. A legal gap lies between Japan's relations with the KMT and then with the country of "Taiwan" that emerged later. Basically, Japan's formal legal and diplomatic relationship with KMT back on the mainland essentially continued. In a sense, this confluence further complicated the issue of Taiwanese war crimes because here is where the *waishengren*, the KMT, stepped into the parlor of the *benshengren* (native Taiwanese), who had up until that point a specific relationship with the former Japanese colonial overseers that carried different historical baggage. Because of these relationships Japan was sort of stuck in the middle, questioning who owned or managed China. Taiwan's relations with Japan after 1950 also greatly involved the Cold War, particularly after the start of the Korean War. Taiwan, like Japan, got pulled into the US bulwark against communism and postwar into the Cold War superpower alliance framework.

## Panel Abstracts

### Parallel Sessions

15:10-17:00	Panel A2	Recognition/Non-Recognition in International Law
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Moderator: *Władysław Czapliński*

## **The Role of Recognition with Regard of Non-State Actors**

– *Władysław Czaplinski*

Two competing theories of recognition: declarative and constitutive, have been formulated with regard of legal personality of States. Together with a mixed theory (combining the two above mentioned theories), it is relatively easy to evaluate their impact upon a position of states under international law. It is disputable to what extent a controversy on a nature of recognition is still relevant, as differences between the three theories seem to be less and less clear. The matter is different so far as non-state actors are concerned. The purpose of the present study is to investigate whether recognition is a precondition of the legal personality of those subjects. We concentrate on selected groups of NSA, excluding the rule of international organizations, and including belligerent parties in civil conflicts, national liberation movements, militating entities (like Hamas or Hezbollah), and representations of population of states governed by illegitimate regimes (the cases of Libya or Syria). We do suppose that the international personality of those subjects is created by their recognition that also influences a possible (potential) scope of rights and obligations.

## **Is Recognition a Legal (Juridical) Act? Is It a Unilateral Legal Act?**

– *Przemysław Saganek*

Discussion of recognition is an important part of every manual on public international law. In that respect the very posing of a question whether recognition has by definition legal consequences seems to be impolite. The affirmative answer seems to be granted. On the other hand, the task of establishing those consequences happens to be very difficult. For example, the adoption of a constitutive view of recognition of states presupposes those consequences, but their shape is hardly acceptable. With the adoption of a declarative view those consequences are somehow obscured. Also the authors writing on recognition of governments indicate many effects. What deserves discussion, however, is their character. We can wonder, whether they are legal or may-be only political ones. But what turns out to be a kind of “mission impossible” is a precise establishment of legal consequences of acts of recognition of an organization, of a foreign army, of insurgents and national liberation movements. Can we find a sound theoretical solution of such problems?

The change of perspective may be helpful for the tackling of the problem. For the present author, the perspective of long studies of the problem of unilateral acts of States in public international law happened to be of much help.

The solution proposed by the present author is to concentrate on an act of recognition as such. Such an act seems to be a much more stable point of reference than highly speculative views on the essence of recognition or non-recognition. Secondly, one should give up the expectation of automatic legal consequences of every act of recognition. We should instead concentrate on searching for those consequences. One should not be astonished when finding them but also not be embarrassed in situations in which they could not be found. That is why one should get accustomed to the picture in which some acts of recognition have legal consequences and some are deprived of them. The former deserve the notion of a legal act; the latter do not deserve it.

When looking for the consequences of recognition of a given object, the main point of reference is the very definition of recognition. According to it, recognition makes it impossible for a state to put into question the object or situation which has been recognized. The intention of the present author is to prove that the latter statement is in many cases an apparent definition and does not lie at the bottom of the identification of any real legal consequences. In some cases those consequences are however visible. Such an examination will concentrate on the following topics: recognition of rights and duties, recognition of facts, recognition of states, governments, belligerents and insurgents.

The supposed conclusion is the following: in some cases acts of recognition are legal acts; in some other cases – they are not.

The second topic to be discussed has to do with the question of whether recognition is a unilateral act. The simple answer to that question is very difficult. On one hand, it is evident that recognition may stem from different instruments. They could be: unilateral, bilateral or multilateral. It is, however, with respect to recognition that the references to the character of the instrument are especially doubtful. There is a strong feeling according to which recognition is always unilateral. The position of the present author is that the adoption of that feeling would turn the entire definition of a unilateral act upside down. That is why one cannot accept the view that recognition is unilateral by definition. This is however not the end of the story. Also the teaching on unilateral acts of states must take into consideration the anomaly connected with recognition.

### **Parsing “Mutual Non-Recognition and Mutual Non-Denial”: An International Law Perspective on Taipei’s Current Framework for Cross-Strait Relations – Brad R. Roth**

The Republic of China on Taiwan has never ceased to assert its sovereignty and dignity as a co-equal member of the international legal order. Yet different governments in Taipei – pan-Green (DPP-led) and pan-Blue (KMT-led) – have advanced vastly different versions of this sovereignty claim. Whereas the pan-Green government of President Chen Shui-bian contended provocatively that “the two sides of the Taiwan Strait ... are two independent, sovereign countries, with neither exercising jurisdiction over the other,” the succeeding pan-Blue government of President Ma Ying-jeou asserts that “the cross-strait relationship is not one between states, but a special relationship for which the model of recognition under conventional international law is not applicable.” President Ma’s formula of “mutual non-recognition and mutual non-denial” – in which Beijing and Taipei both persist in their full claims to sovereignty over the undivided whole of China, yet concede the authority of the other to govern the latter’s respective geographic zone – has proved a diplomatic success for the time being. Yet from an international law standpoint, the implications are uncertain. President Ma has invoked as precedent the 1972 *Grundlagenvertrag*, or Basis of Relations Agreement, between West and East Germany.

This article will assess the juridical viability of “mutual non-recognition and mutual non-denial” framework, and the applicability of the analogy to inter-German agreement. It will argue that President Ma’s concession that “international law is not directly applicable to cross-strait relations” presents long-term dangers that diplomatic successes have tended to obscure, and that Taipei must walk a tightrope so as to preserve a legal foundation for Taiwan’s inviolability.

### **The 2011 “Japan-Taiwan Bilateral Investment Agreement” or How to Establish International Law Relations with an Unrecognized Entity – Hamamoto Shotaro**

In September 2011, Japanese newspapers reported that Japan and Taiwan had concluded a bilateral investment agreement. The report is of course technically not correct since Japan has never recognized Taiwan as a sovereign State. However, if one looks at the text of the “arrangement” for the mutual cooperation on the liberalization, promotion and protection of investment concluded between the Association of East Asian Relations and the Interchange Association, one cannot but get the impression that it is nothing but an ordinary BIT providing the obligation of fair and equitable treatment, the obligation of compensation in case of (direct or indirect) expropriation, the obligations observance clause (so-called umbrella clause), the investor-State dispute settlement clause, etc. However, at least one of the parties to the “arrangement” does not have the formal legal power to make commitments legally binding the State that it is supposed to “represent”. Thus, the Interchange Association is a foundation established under the Japanese law, i.e. a private entity, although its board of councillors includes officials of the Ministry of Foreign Affairs of Japan. In this situation, when a dispute arises between an investor and the host “State”, how should it be settled? Although Article 17(4) grants the investor to unilaterally initiate arbitration, Article 17(5) provides that either party to the “arrangement” “shall facilitate that the authorities concerned... consents to the submission of an investment dispute”. How would it function in practice? More importantly, how would this sort of “arrangement” affect the theory of recognition? Is it possible for States to maintain international law relations with a non-State entity with respect to investment protection? Or, does the “arrangement” amount to some kind of recognition? If so, what kind of recognition is it, given the official position of the Japanese Government remains that it has not recognized Taiwan as a sovereign State or the Taipei Government as the legitimate government of China?

### **The “Duty” of Non-Recognition in Contemporary International Law: Issues and Uncertainties – Alison Pert**

In the early 20th century a practice developed – refusing to recognise the legality of a situation resulting from a breach of international law. This became known as the doctrine of non-recognition and was regarded as an appropriate, but largely discretionary, response by individual states, and the international community generally, to particularly serious breaches of international law.

At some point this doctrine came to be regarded as a duty, and is now widely accepted as such, especially where the breach is of a jus cogens norm. Beyond that deceptively simple proposition, however, views differ and the law is undeveloped. Is the duty self-executing, or does it depend on a binding decision by an organ such as the Security Council or the General Assembly? If the latter, is it really an independent duty at all? If it is self-executing, when precisely does it arise? Does it arise in consequence of any breach of international law, or only a breach of a jus cogens norm? It is frequently stated that a distinction must be drawn between recognition of an illegal act and recognition of that act’s effects, but in practice that distinction can be extremely difficult to identify.

A further but important question that has scarcely been addressed in the literature is, what are the legal effects for, and remedies against, a state violating the duty of non-recognition? Was the 1989 Timor Gap treaty between Indonesia and Australia, for example, void as alleged by Portugal in the East Timor case, and was the responsibility of Australia and Indonesia therefore engaged?

This paper analyses the history and development of the duty of non-recognition, with particular focus on state practice in the Asia-Pacific region. It endeavours to identify when the doctrine of non-recognition became – if indeed it has become – a legally binding duty on all states. It challenges the commonly held view that the duty is self-executing, and suggests that the application and effects of the duty are not as clear as many writers assert. It therefore proposes a framework or matrix by which these questions might be answered, by first analysing and categorising the nature of the original obligation breached, and the nature of the breach itself, and determining the legal consequences for third states accordingly.

## **The Concept of Collective Recognition in Contemporary International Law – *Jure Vidmar***

Theoretically, the importance of the act of recognition in international law has declined. With regard to states, it seems to be generally-accepted that recognition is declaratory and, as such, not required for the existence of a state. With regard to governments, international practice is said to have accepted the Estrada doctrine whereby recognition of new foreign governments is not granted explicitly. But some recent international practice negates these theoretical axioms.

The wide international acceptance of Kosovo's unilateral declaration of independence may well have had constitutive effects. We have also seen an attempt at creation of the Palestinian state through implicit recognition in international organizations. In the context of recognition of governments, we have witnessed clear collective departures from the Estrada doctrine in the examples of Libya and, more recently, also Syria. A number of states recognized the competing authorities as legitimate governments of these states, either explicitly or through action in UN organs. Such recognition not only departs from the Estrada doctrine but may also lead to conflating the concepts of recognition of states and governments.

Namely, if the incumbent government governs only a part of the state's territory and the challenging authority another part (as this was the case for a period of time with the Benghazi government in Libya), recognition of the challenging authority could ultimately lead to division of the state. The question also arises with respect of Taiwan. Is recognition of Taiwan in contemporary international law recognition of a government of the Chinese state or rather recognition of an independent Taiwanese state?

This paper considers recent international practice to (1) identify the avenues of granting recognition collectively; (2) determine the legal relevance and irrelevance of international recognition; and (3) draw the conceptual difference between the concepts of collective recognition of states and governments in contested territorial situations.

## **Panel Abstracts**

### **Parallel Sessions**

**15:10-17:00** **Panel B2** **International Economic Law**

Moderator: *Spenser Y. Hor*

### **The Principle of Human Dignity as an Indispensable Requirement for Sustainable Regional Economic Integration – *Seung-Hwan Choi***

This article proposes the principle of human dignity as an indispensable requirement for sustainable regional economic integration, in consideration of different political systems, religion and culture in East Asia. The contribution of free trade to economic growth and development is widely acknowledged. Workers and farmers lacking international competitiveness have, however, been threatened not to survive, because of damage caused by the expansion of trade liberalization and investment based on economic integration. This article argues that economic integration ignoring human dignity cannot ensure sustainable regional economic integration. Economic integration ensuring human dignity will promote successfully and sustainably regional economic integration, by balancing economic prosperity and social integration. Economic integration and trade liberalization should not sacrifice human dignity for the sake of economic benefits.

In this context, this article reviews the value and concept of human dignity in terms of a goal and principle for regional economic integration. The author advocates that contrary to the general understanding, sustainable prosperity or high level of economic development is not in itself a goal of economic integration, but merely a means for improving human dignity. The economic integration should, therefore, serve not only to maintain sustainable prosperity but also to maximize human dignity. The author proposes some procedural rules for sustainable economic integration ensuring human dignity, and substantive rules for sustainable economic integration ensuring human dignity. Institutional mechanisms such as the East Asian Free Trade Joint Committee, the East Asian Security Cooperation Committee, and the East Asian Court of Justice will be also proposed with a view to maintaining sustainable peace and prosperity by increasing economic interdependence and solidarity among the countries in East Asia.

### **Trading with Foreigners: An Interdisciplinary Analysis of China's Core Interests in Trade and Foreign Policy – *Phoenix Cai***

This article examines the international governance implications of China's recent proactivity in initiating cases both as complainant and as a third party at the WTO in the last 3 years. China joined the WTO in December 2001. It was relatively quiescent for the first few years of its membership, initiating only one case in 2002, followed by another case in 2007. Both of these cases were against the United States. However, since 2008, China has dramatically stepped up its involvement in WTO dispute settlement. It has initiated 6 cases since 2008 as an original complainant – four against the United States and 2 against the European Union. Even more strikingly, it has acted as a third party in a total of 43 cases since 2008, making it the biggest repeat player in the WTO in this arena. In the same period (2008-2011), China has been a defendant in 11 cases. Thus, adding in third party complainants, China is suing 5 times more often than it is being sued.

This article examines the legal, political and economic implications of China's increased proactivity, with a particular focus on the governance implications for the WTO. While the focus of the article may shift depending on research, I currently plan on weaving together three main threads in my examination of the of the 2008-12 cases: (1) the effect on US.- China trade relations, many of which center on controversial areas like anti-dumping (in which China has been aggressively attacking US and EU policies) and intellectual property protection (in which China has been on the defensive); (2) whether or not China has succeeded in changing WTO jurisprudence in areas that matter most to China; and (3) the implications of a more active China for WTO governance and dispute settlement reform, which would build on my existing scholarship.



## The WTO and Tobacco Control in Asia: Feasibility of Plain Packaging Requirements – Yoshimichi Ishikawa

In 2011, the *Tobacco Plain Packaging Act 2011* (Act No. 148 of 2011) and its implementing regulations were enacted in Australia. In response to this enactment, Ukraine (DS434), Honduras (DS435) and the Dominican Republic (DS441) have respectfully required the establishment of a panel before the WTO Dispute Settlement regarding the consistency of this Act with several provisions under the *TBT Agreement*, the *TRIPS Agreement* and the *GATT*.

In addition to Australia, it is reported that there are other WTO Members who are currently considering introducing the similar legislations; such as Canada, the European Union, Norway, France, India, New Zealand, Turkey, and the United Kingdom. Given the global trends and concerns for tobacco control through the plain packaging requirement, it would not be surprising that some countries in Asia, which comprise almost 40% of the world market share of tobacco consumption as of 2009, would follow the same line and adopt such a requirement as one of the tobacco control policies.

Among a number of legal claims contained in this dispute, this presentation will focus on the one regarding the consistency of the plain packaging requirement with Article 2.2 of the *TBT Agreement*, paragraph 2 of which provides that “...technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create.” The question to be addressed here is how to strike a balance under this provision between, on the one hand, the objective of trade liberalization and, on the other hand, Member’s right to regulate.

The jurisprudence on Article 2.2 of the *TBT Agreement* has recently developed by the Appellate Body in *US – Tuna* (DS381) and *US – COOL* (DS384/386). The Appellate Body has interpreted the necessity test under this provision in a different

way from the one under Article XX of the *GATT* developed in *Brazil – Tyres* and so forth. It has taken the way of weighing and balancing all relevant factors, including the comparison of the measure at issue with alternative measures, especially in light of the “risks that non-fulfilment of legitimate objectives would create”. One could declare that the proportionality principle is clearly incorporated into Article 2.2 of the *TBT Agreement*, unlike Article XX of the *GATT*. Under this circumstance, the focus will be how to practically balance and weight the relevant factors on the facts of this dispute, rather than a theoretical analysis.

Thus, this presentation will attempt to explore the feasible and practical balance between health protection and trade liberalization under the plain packaging requirements by examining the consistency of the Australian measures with Article 2.2 of the *TBT Agreement* on the basis of the recent jurisprudence on this provision. On this basis, it will present a preliminary view on tobacco control in Asia through the plain packaging requirements.

## Trade and Energy: Inspirations from the Case Canada-Feed-in Tariff Program to Taiwanese Renewable Energy Policies and Regulations – Yao-Ming Hsu

In the epoch of post-Kyoto regime, the development of renewable energy becomes more and more crucial for mitigation measures for climate change, and even for energy security. Yet, the energy policies and regulations in one country would have their impacts elsewhere. In the regime of WTO, principles of non-discriminations prevail for assuring free trade among its Members. Besides, the Agreement on Subsidies and Countervailing Measures also urges each Member to avoid using subsidies for protecting its domestic industries.

Nevertheless, the industry of renewable energy in every country is often at its early stage of development; and the costs of renewable energy production at least for now are still higher than ones from traditional fossil energy. That's why in certain countries, subsidies or other policies and laws are used for encouraging the development of renewable energy. A dilemma emerges for trying to find a balanced way between the compliance of international trade law and the needs for combating climate change and securing energy supplies. That's the case of what Canada is facing.

In 2010, Japan (and the EU, hereinafter Japan) requested consultations with Canada regarding Canada's measures relating to "domestic content requirements" in the feed-in tariff program. Japan claimed that the measures were inconsistent with Canada's national treatment obligations under GATT 1994. In December 2012, the Panel Report was issued and upheld Japan's claims. However, the Panel majority dismissed Japan's allegations about the Canadian violation of SCM agreement on the grounds that Japan had failed to establish the existence of a subsidy. Nevertheless, the Panel set out its own *observations* on one approach it considered could have been validly pursued in these disputes to determine the existence of

"benefit" under the SCM Agreement. In this rare occasion, one member of the Panel expressed a dissenting opinion on Japan's subsidization claims, finding that Japan had demonstrated that the challenged measures conferred a "benefit" under the SCM Agreement.

The arguments in the Canada case illuminate some key issues for the development of renewable energy in other countries, Taiwan included. In fact, Taiwan has promulgated its Statute for the Development of Renewable Energy in 2009. In that Statute, a mechanism of guarantee for purchasing the renewable energy is designed at the price set by the Committee of fares. Even though it does not seem to be a direct financial benefit for now, the future implementation and further possible revisions of policies and laws for renewable energy still need to keep pace with the judgments made by the Panel mentioned above.

Last but not least, how to overcome the probable huddles between trade and energy would be also crucial both in doctrinal and practical meanings. The exceptional clauses in GATT Art. XX, especially the exhaustible resources clause, would be very possible to be used as the justification for developments of renewable energy policies and laws. Maybe the pending consultation for wind power equipment between the US and China, and other pending cases, will provide us further indications for the harmonization between trade and energy.

## The Intertemporal Rule and Investment Arbitration in Asia

– James Fry

The backlash against investor-state arbitration is building,<sup>5</sup> to the point that some commentators even talk about termination or amendment of investment treaties in order to strip international arbitral tribunals of their jurisdiction after the arbitration process already has started.<sup>6</sup> This suggestion has been made in the context of the Philip Morris Asia plain packaging ICSID arbitration involving the Australia-Hong Kong bilateral investment treaty.<sup>7</sup> This suggestion raises a number of interesting issues for international law and dispute settlement, especially the limits of the intertemporal rule.

States are free to agree to amend or terminate treaties, including ones relating to investment, even before they expire.<sup>8</sup> Such amendments or termination do not have retroactive effects unless the parties to the treaty agree otherwise.<sup>9</sup> This same freedom is available to states in relation to investment treaties. However,

the analysis may vary in the context of investor-state arbitration. An arbitration clause in an investment treaty represents an offer made by those states to arbitrate disputes with investors.<sup>10</sup> When investors accept that offer, the consent to arbitrate becomes perfected and cannot be withdrawn unless both parties to the arbitration – the investor and the host state – agree. This conclusion is based on the principle of irrevocability of the consent to arbitrate, which is a pillar of arbitration law and also is established in article 25 of the ICSID Convention.<sup>11</sup> Moreover, the applicable law to the dispute would be the law that was binding on the parties at the moment of the acts that created the dispute.<sup>12</sup> The same principle applies in state responsibility disputes.<sup>13</sup> Therefore, the argument that Australia simply can amend its BIT with Hong Kong to stop the Philip Morris arbitration might be incorrect. This paper will explore these issues.

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<sup>5</sup> See generally THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et. al. eds., 2010); European Parliament, Resolution of 6 April 2011 on the Future European International Investment Policy, Doc. 2010/2203(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN> (last visited Jan. 19, 2013); Jürgen Kurtz, Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication, 27 ICSID REV. 65 (2012).

<sup>6</sup> See generally Luke Nottage, Abandoning all Investor-State Dispute Settlement Mechanisms also not Supported by the Facts, Aug. 15, 2012, available at [http://blogs.usyd.edu.au/japaneselaw/2012/08/abandoning\\_all\\_investor-state.html](http://blogs.usyd.edu.au/japaneselaw/2012/08/abandoning_all_investor-state.html) (last visited Jan. 19, 2013).

<sup>7</sup> See *id.*

<sup>8</sup> See LASSA FRANCIS OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 571 (2d ed., 1912).

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<sup>9</sup> See Vienna Convention on the Law of Treaties (1969), pts. IV & V. Also articles 1 and 3 of the 1975 Resolution of the Institute of International Law, 56 ANNIDI 536 (1975).

<sup>10</sup> See, e.g., Christoph Schreuer, Denunciation of the ICSID Convention and Consent to Arbitration, in Waibel et al., *supra* note 11, at 353-368.

<sup>11</sup> See ICSID Convention, art. 25(1).

<sup>12</sup> See Anthony D'Amato, International Law, Intertemporal Problems, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1234, 1235 (1992); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 34-45 (2008).

<sup>13</sup> See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 131 (2002).

## **Compliance and Contention: China's Participation in the WTO's Dispute Settlement Body – Timothy Webster**

In the West, China is often portrayed as an international law renegade. Whether staking excessive territorial claims in the South and East China Seas, torturing prisoners and detainees in violation of human rights treaties, or arming African militants, China does not pay to heed global governance regimes. Even trade, where its successes have earned admiration across the world, China supposedly disrupts the international trade system.

This paper empirically analyzes China's implementation of DSB rulings. Following Davey (2009), I examine China's record of compliance along temporal and qualitative axes. First, did China withdraw the offending measures within a "reasonable period of time?" Second, what type of legislative or regulatory reform did China undertake? DSB rulings and bilateral MOUs highlight one or more inconsistencies between the member state's legal system and a WTO covered agreement. When thus apprised, did China withdraw the offending measures, or maintain the offending measures and submit to arbitration to determine the cost of the non-compliance (compensation or retaliation)?

China shows high rates of compliance in both temporal and qualitative dimensions. China timely complied in seven of eight cases (87.5%). In the eighth case, China needed an additional twelve months to complete the various reforms to its domestic legal system. This comports well with Davey's 80% figure for developing countries.

But China amassed a stronger record in qualitative compliance. When the DSB said a particular law was inconsistent and should be repealed, China did so. When a Memorandum of Understanding between China and the US laid out a road map of legal and policy changes China would have to undertake, China proceeded to make those changes. Over the eight disputes, China has agreed to repeal national laws

and various regulations, to enact new laws to cover the newly formed holes, and to prune regulations of occasionally inconsistent terms. The numbers of regulations and laws are not large in the aggregate, particularly in light of the thousands of statutes and regulations China revised to accede in the first place. But that only tells one half of the story. Just as important, once notified of the inconsistency, China endeavored to implement the ruling in toto within a reasonable period of time. That compares favorably with other members of the WTO, such as the United States, which have quite clearly stated they will not follow the DSB's ruling.

In the final part of the paper, I unpack China's DSB behavior with the help of international relations. Using realist, liberal institutionalist and constructivist theories, I show how China's behavior challenges many assumptions about liberal state on the one hand, and illiberal authoritarian regimes on the other. Interestingly, one-party control over an entire state's legal and regulatory environments can lead to high compliance levels with international institutions. I conclude that China's strong level of compliance betokens a willingness to cooperate in global governance regimes, at least in the field of international trade. The WTO DSB does enhance compliance by providing willing members a meaningful opportunity to discuss the issue of conformity, and then sufficient time to implement adverse rulings.



## Panel Abstracts

### Parallel Sessions

15:10-17:00 Panel C2 Dispute Resolution and International Law

Moderator: *Sea-Wain Yau*

15:10-17:00 Panel C2 Dispute Resolution and International Law

### Dispute Settlement and the Right to Peace – *Peter van Krieken*

- 1) Dispute Resolution and the obligation to settle disputes peacefully can be linked to the emerging right to peace. The latter issue threatens to become a complex one as many recent (legal) developments seem to politicize this issue.
- 2) Last November the ASEAN Heads of State agreed on an ASEAN Human Rights Declaration, including the right to peace (Art.38).
- 3) The UN Charter focuses on pacific/peaceful settlement of dispute/conflict. In the Charter's purposes and principles chapter, the maintenance of peace, prohibition of the use of force and the obligation to solve conflict peacefully stand out.
- 4) Also the individual is connected/linked to this obligation. The individual is obliged not to use his rights and freedoms contrary to the purposes and principles of the UN, as per the UDHR (general principle of law) art. 29.3 (and indirectly art. 14.2). The duty to solve conflict peacefully is one of those principles.<sup>14</sup>
- 5) When it comes to human rights we differentiate three generations (whilst recognizing that human rights are indivisible, inalienable and interdependent)
  - a. First generation: civil and political rights (abstain, respect, protect fulfil)
  - b. Second generation: economic and social rights (active role community state)
  - c. Third generation: group rights, collective rights.
- 6) To formulate the right to peace as a third generation right will carry some serious challenges once the right to peace is formulated as a group's right, a people's right. Who will be the main stakeholders? What exactly can be understood under the term 'people'; does it refer to minority groups (be it ethnic, religious, linguistic). This will complicate the discussion, not to mention the implementation, transposition and justiciability.

- 7) Recent events at the HRC (Geneva) should give reason for contemplation, as the right to peace was linked to e.g. disarmament and conscientious objection. Last July, the HRC decided to establish an open-ended intergovernmental working group with the mandate of progressively negotiating a draft UN declaration on the right to peace, on the basis of the draft submitted by the Advisory Committee, and without prejudging relevant past, present and future views and proposals.<sup>15</sup>
- 8) The draft focused inter alia on International peace and security; Disarmament; Human security; Resistance to oppression; Peacekeeping; Right to conscientious objection and freedom of religion and belief; Private military and security companies; all as core dimensions: and Peace education; Development; The environment, in particular climate change; Victims and vulnerable groups as other dimensions.
- 9) The draft submitted by the Advisory Committee contained an article 7 in which it was stated that all peoples and individuals have the right to resist and oppose oppressive colonial or alien domination that constitutes a flagrant violation of their human rights, including the right of peoples to self-determination, in accordance with international law. In other words a thus formulated right to peace includes the right to use force.
- 10) It is herewith submitted that such a right to peace, trying to encompass so many issues and topics will meet major resistance; a unanimous adoption cannot be expected.<sup>16</sup>

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<sup>14</sup> Somewhat surprisingly, the 1997 draft Universal Declaration on Human Responsibilities does not refer to any responsibility linked to the purposes and principles of the UN.

<sup>15</sup> It is herewith recalled that the GA already in 1984 adopted a Declaration on the Right of Peoples to Peace.

<sup>16</sup> HRC resolution 20/15: Adopted by a recorded vote of 34 to 1, with 12 abstentions. It should be noted that India was among the countries that abstained from the vote.

### **Beyond the ASEAN Way: the Legalization of Dispute Settlement Mechanisms in ASEAN, ASEAN plus Three and Even More** – *Chien-huei Wu*

On 29 November 2004, Member States of the Association of South East Asian Nations signed the Protocol on Enhanced Dispute Settlement Mechanism that superseded the 1996 Protocol on Dispute Settlement Mechanism (the 1996 Dispute Settlement Mechanism). Under this Enhanced Dispute Settlement Mechanism, a permanent Appellate Body composing seven members was established. This replaced the pre-existing appellate designation that was heard by the ASEAN Economic Ministers with the decision-making by simple majority. The establishment of a standing Appellate Body can be seen as a step forward for the legalization and judicialization of the ASEAN Dispute Settlement Mechanism.

By contrast, while the 1996 Dispute Settlement Mechanism has been amended by the ASEAN Protocol on Enhanced Dispute Settlement, it is nevertheless exported into free trade agreements between ASEAN and China, Korea and Japan (the ASEAN+3). The ASEAN-China and ASEAN-Korea agreement on Dispute Settlement Mechanism under the respective Framework Agreements on Comprehensive Economic Cooperation mainly follow the model of the 1996 Dispute Settlement Mechanism. The same applies to the dispute settlement mechanism of the ASEAN-Japan Agreement on Economic Partnership. In essence, disputes arising from these agreements are to be resolved by ad hoc arbitral tribunals.

This paper aims to examine the Dispute Settlement Mechanism established in the ASEAN and the dispute settlement mechanism included by the agreements of the ASEAN+3. On the one hand, the establishment of an Appellate Body in the ASEAN contributes its capacity to review the consistency and conformity of the measures of Member States. The Enhanced Dispute Settlement Mechanism may have the

potential to evolve into a global administrative court. Nevertheless, the persisting diplomatic approach prevents the ASEAN Appellate Body from mirroring the WTO Appellate Body regardless the similarity of major legal instruments.

On the other hand, the ASEAN-China Agreement on Dispute Settlement Mechanism is the first agreement where China goes beyond amicable negotiation and accepts the jurisdiction of arbitral tribunals when economic cooperation agreements are at stake. It points to the direction of legalization/judicialization of China-related trade disputes. By analyzing the scope of jurisdiction, third party rights, remedies, and compliance, this paper aims to draw a contrast between the ASEAN Enhanced Dispute Settlement and the ASEAN+3 dispute settlement mechanisms.

Going beyond the ASEAN+3, a free trade agreement between ASEAN and Australia and New Zealand (AANZFTA) was concluded in 2010. Further, a Regional Comprehensive Economic Partnership for East Asia (RCEP) has already been proposed. The RCEP is expected to be equipped with dispute settlement mechanism providing an effective, efficient and transparent process for consultations and dispute resolution.

In light of these diversities, this paper thus aims to explore the path of the transformation of Asian approaches in dispute resolution and ascertain whether an ongoing process of legalization/judicialization can be registered. This paper attempts to identify the factors which promote, facilitate and prevent this legalization/judicialization process in East Asia.

### **Governing Unilateral Acts in Maritime Dispute – Hsiu-An Hsiao**

The development of the modern international law of the sea regime has allowed States to extend their claim and exercise of sovereignty beyond the traditional territorial domain. However, this also leads to overlapping maritime claims between two or more States whose coasts are either adjacent or opposite to one another, particularly in the 200 – nautical mile Exclusive Economic Zone (EEZ) or the continental shelf. States that face such kinds of situation often take unilateral measures to consolidate their own claims or safeguard important economic interests, resulting in rivalry over sovereignty and national interests, sometimes even armed conflict.

To manage and settle disputes through peaceful means is a fundamental obligation of States under international law. The 1982 UN Convention on the Law of the Sea (UNCLOS) reaffirms such a principle. Furthermore, UNCLOS stipulates that, pending a settlement on the delimitation of the EEZ or the continental shelf boundary, States concerned shall cooperate to enter into provisional arrangements, and to avoid jeopardizing or hampering the reaching of a final agreement during the transitional period. On the other hand, the relevant provisions in the treaty fail to define what measures amount to the appropriate provisional arrangements, or what conducts may constitute acts that jeopardize or hamper the reaching of a solution. The 2007 arbitral award rendered by the Permanent Court of Arbitration on the disputes between Guyana and Suriname over maritime boundary delimitation and other issues associate with the boundary dispute, provides authoritative views on the issue for the first time. The opinions of the arbitral tribunal offer some important jurisprudence for assessing the legality and legitimacy of unilateral acts in overlapping maritime zones under the law of the sea and international law generally, e.g. prohibiting threat or use of force. Recent development in case-law provides a new insight into the existing framework of managing the South China Sea dispute, including the 2002 Declaration on the Conduct of Parties in the South China Sea.

## **The Maritime Disputes in the Aegean Sea and the Mediterranean: A Turkish Perspective – Kemal Başlar**

There are several problems that Turkey and Taiwan have in common and can make use of each other's experience.

- (1) One of them is the law of the sea disputes in the Aegean Sea and the Mediterranean.
  - (a) The term 'dispute' in the context of the Aegean Sea is mostly pronounced in its singular form, in reality, the term epitomises five different (for Greeks only two) disputes: These are, namely (1) the delimitation and breadth of the territorial seas, (2) the demarcation (delimitation or delineation) of the continental shelf, (3) the status quo of Kardak (Imia) and other uninhabited islands (just in the case of Daioyu/Senkaku Islands), (4) the Greek fortification and militarization of the Eastern Aegean islands and (5) the status of air space & air defence identification zones.
  - (b) As to the Mediterranean Sea, the exploitation of petroleum resources cause tensions with the Greek Administration of Southern Cyprus. The tension in the Mediterranean Sea is ever increasing as Turkey is on the way to declaring its own EEZ.

It is hoped that drawing lessons from the Turkish experience on the law of the sea disputes with Greece may open new vistas for young Taiwanese academics.

- (2) The second common problem between two States is the legal status of two Islands: namely, Cyprus and Taiwan.

The legal status of the Turkish Republic of Northern Cyprus -- which was not recognized by the World with the exception of Turkey -- is uncertain ever since

its establishment in 1983. As long as Turkey would like to be a part of European Union, the TRNC problem remains a stumbling block on the way to accession. In the presentation, I would like to focus on several diplomatic problems Turkey faces. For example, the Republic of Cyprus is a member of the EU and part of the Customs Union. But Turkey refuses that the Greek Cypriots should have no right to use this name in their dealings with other nations. But, Turkey is under pressure of the EU since it did not open its borders to Greek Cypriot ships and lorries. Turkey agreed on the Annan Plan in 2004 and the Turkish Cypriots voted in favour; but the Greek side voted against.

In the Forum, I would like to assess to what extent a revised Annan Plan setting up a United Republic of Cyprus is rationale.

I wonder whether the Taiwanese model could be a solution in applying to Cyprus. The legal status and experience of Taiwan should be pondered over to see how much the legal status of two states resemble and whether the experience of each nation might help each other.

Even if I may not touch on all these issues during my presentation, in future they could be fully published.



## **Preliminary Comments on the Arbitration between the Philippines and China on South China Sea (9 Dash Line) Disputes**

– *Michael Gau*

On 22 January 2013, the Philippines presents a diplomatic notification to China under Article 287 and Annex VII of UNCLOS, in order to initiate arbitral proceedings to establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippines Sea/South China Sea (SCS). Based on the Relief Sought under Section V of the Notification, the Philippines is making five groups of claims, as follows:

(1) China's rights concerning maritime areas in the SCS are those established by UNCLOS only. China's maritime claims therein based on the "nine dash line" contravene UNCLOS and are invalid. (2) Mischief Reef and McKennan Reef are submerged features forming part of the Continental Shelf of the Philippines, while Gaven Reef and Subi Reef are submerged features neither above sea level at high tide, nor forming part of the Continental Shelf of China. China's occupation thereof and construction activities thereon are unlawful and shall be terminated. (3) Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef shall be considered as rocks under Article 121(3) of UNCLOS, and only capable of generating entitlement to a Territorial Sea. Having unlawfully claimed maritime entitlements beyond 12 M, China shall refrain from preventing Philippine vessels from exploiting the living resources in waters adjacent to Scarborough Shoal and Johnson Reef, and from undertaking other activities inconsistent with UNCLOS at or in the vicinity of these features. (4) The Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M EEZ, and a Continental Shelf measured from its archipelagic baselines. China has unlawfully claimed and exploited the living and non-living resources in such EEZ and Continental Shelf, and prevented the Philippines from exploiting living and non-living resources therein. (5) China has

unlawfully interfered with the exercise by the Philippines of its rights to navigation and other rights under UNCLOS within and beyond EEZ of the Philippines. China shall desist from these unlawful activities.

On 19 February 2013 China refused to cooperate in such request. One of the reasons is that its declaration made in 2006 covers the claims made by the Philippines and deprives the arbitral tribunal of the necessary jurisdiction to entertain the case. The Philippines argues otherwise and applies the default rule under UNCLOS to establish the arbitral tribunal despite China's declination. This paper will study the preliminary issues in the procedural phrase of the arbitration and to discuss whether the arbitral tribunal to be established will have the jurisdiction or not. The scope of the 2006 Declaration will be explored first and then each of the claims made by the Philippines in the Relief Sought will be analyzed. The last part of this paper introduces the role played by the Republic of China on Taiwan, which has been occupying the Island of Itu Aba, the largest island in the Spratly Islands and close to the islands/rocks/maritime features identified by the Philippines in this case.



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Challenges in the Asia Pacific*

## Poster Sessions

## Poster Sessions

### Morning

#### **Performing Sovereignty in the South China Sea/East Sea: The Politics of Cartography, International Law and Customary Fishing Practices in Vietnam and China – *Edyta Roszko***

In the conflict-ridden international arena involving China, the US, India, and the ASEAN countries, China — claiming sovereignty and exclusive rights to resource exploitation in the South China Sea (SCS) — is the dominant force and Vietnam its main challenger. In contrast with those studies that analyse the SCS dispute and the increasing competition over natural resources by looking exclusively at the major state actors, this article situates claims to political sovereignty within broader, vernacular notions of social space. I suggest that complex territorial claims, new technologies and forms of knowledge applied by the state to delineate their material borders at the sea can be understood best by looking at how sovereignty is performed on a day-to-day basis. I show that the performance of sovereignty through the use of maps and customary fishing practices is a particular projection of a socially constructed image of the state geo-body capitalizing on strong nationalistic sentiments. Thus, I argue that sovereignty is much more than a legal issue, supported by historical arguments; rather, it is a social and cultural performance involving many actors within and outside of the state.

### **Recent Practice of Recognition as “Representatives of the People” – Rupture or Continuity? – Szymon Zaręba**

The practice of recognition as ‘representatives of the people’ seems to have started to evolve recently. Previously, the term in inverted commas had been used exclusively in colonial context with regard to national liberation movements like the PLO in Palestine, SWAPO in Namibia, ANC in South Africa and several others. The first visible departure from this practice was marked by the use of the notion in the International Court of Justice advisory opinion concerning the unilateral declaration of independence of Kosovo, where the Court referred to the authors of the declaration as to “persons who acted together in their capacity as representatives of the people of Kosovo”. Leaving aside the rightfulness of that determination of the Court, one shall notice a significant increase of the number of instances of recognition as ‘representatives of the people’ since the pronouncement of that opinion which has manifested itself in particular in the case of two civil wars in the North Africa and Middle East, namely in Libya and Syria. In both cases, there have been numerous declarations issued by the representatives of states and international organizations referring to the armed movements seeking to overthrow the government as such representatives.

The aim of the paper is to assess to what extent the previous and current usage of the term in question are similar. In order to achieve this aim, the common patterns of past practice will be identified, followed by an examination of the legal consequences of recognition as ‘representatives of the people’. The outcomes will be contrasted with an assessment of current use of the term and of the legal effects which states appear to attribute to it. This will provide an answer to the question of whether or not it is possible to reconcile the former and latter practice.

### **The Strait between China’s Accession Protocol and General Exceptions under the GATT – Tsai-fang Chen & Yi-Ting Chen**

This paper aims to study the legal status of the China’s Accession Protocol (AP) and its relationship with the WTO Agreement, Article XX of the GATT 1994 in particular. The understanding of which will greatly influence the applicability of general exceptions of the GATT in justifying the breach of the AP. This matter was addressed by the Appellate Body (AB) in recent WTO disputes and the rulings stirred up quite a few discussions in academia. This issue is not only of great importance to China but also to Russia Federation as Russia just acceded to the WTO in August 2012 and is bound by its AP.

Recently, the WTO Dispute Settlement Body was challenged with this thorny situation and rendered different decisions in two cases. In 2009, the AB dealt with the legal status of the China’s AP in *China — Audiovisual Services*. In that case, the AB found that China’s measures which restricted the importation of certain audiovisual products violated the China’s AP. In response to this finding, China invoked GATT Article XX (a) as a defense. This allegation brings out the question of the applicability of GATT Article XX in justifying breach of the AP. Put differently, as the text of GATT Article XX clearly points out that “nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures ... ,” is GATT Article XX still an available defense for violation in the AP?

Not long after *China — Audiovisual Services*, the same issue was raised again in *China — Raw Materials* in 2012. This time, China was found violating its AP. Resorting to the same strategy, China invoked GATT Article XX (b) and Article XX (g). Interestingly, China’s defense was treated differently in these two cases. Relying on textual interpretation, the AB reached different conclusions in these two cases. In *China — Audiovisual Services*, the applicability of GATT Article XX was

confirmed; whereas in China — Raw Materials, the applicability of GATT Article XX was rejected.

This paper aims to analyze the reasoning in these two cases and explain these seemingly different outcomes. In these two cases, the AB applied a strictly textual interpretation method, which was criticized by some scholars. This paper will explore the real concerns of the AB for taking such a rigorous approach. Yet, the paper argues that the AB should take a contextual approach, reading the WTO Agreement in a harmonious way. Instead of rigidly relying on the text only, the AB should examine the root of the issue, i.e., the relationship between the China's AP and the GATT and determine the nature of the breached obligation and that of the general exceptions.

## **Emergence of Plurilateral Services Agreement and the Implications** – *Hsu-Hua Chou*

The Multilateral Trading System, operated under the de-facto international organization of GATT and the WTO consecutively, has played a pivotal role in governing world trade for several decades since 1947. Today, the System continues to demonstrate its competence as a forum of dispute settlement as well as its expertise in providing specialized information and technical assistance. But the WTO is losing its credibility as an institution of producing commitments and rules. While the demand side of global trade governance changes rapidly, the stalemate in the Doha Agenda negotiations during the past years makes the WTO less irrelevant in dealing with desperate issues. By contrast, countries began to place heavy efforts on regional deals to meet their needs.

The WTO Eighth Ministerial Conference of 2011 (MC8), under political guidance from the G20, recognized some new realities and agreed on the urgency of taking new approaches to save the centrality of the WTO and to avoid undesirable consequences caused by the proliferation of regionalism. Negotiating plurilateral agreements has been proposed as an alternative approach to the unfeasible Single Undertaking. Soon after the MC8, negotiations on a new international services agreement (ISA) gained speed among several WTO members. The emergence of ISA is noteworthy not just because it will shape new obligations on a booming trade sector in the 21st century but also because the ISA pioneered in the upcoming wave of plurilateral agreements negotiations that its experience may have important implications for the future of the WTO. More specifically, it is possible to draw lessons from the case of the ISA because all trade plurilaterals share some common challenges such as: inside/outside WTO, MFN, Critical Mass, Dispute Settlement.

This paper covers the following aspects:

(1) First, it clarifies new realities in supply and demand sides of global trade

governance and undesirable consequences of the WTO marginalization. Focusing on the MC8, the WTO's overall response to desperate challenges and promise of the approach of negotiating plurilateral agreements are examined.

- (2) Secondly, it discusses the emergence of the ISA in a larger context. The legal basis as well as the politico-economic momentum is explored, and key provisions are introduced and analyzed.
- (3) Thirdly, this paper identifies major types of plurilateral trade agreements, listing all major examples so far, and exploring their legal basis and applicability as a model. Here, using the ISA as a case study, major common problems with plurilateral trade agreements are discussed in detail.
- (4) Fourthly, this paper discusses implications of the ISA for Asia Pacific Region. Major positions of selected key players are identified. It also attempts to make initial evaluation on possible impacts of the ISA on some ongoing trade arrangements in this region. The issue of "open membership" or "inclusiveness," which particularly concerns Taiwan, is also discussed.

### **Communicating through Conditional Deference – Taking Solange Global? – Martin Björklund**

Proportionality and the balancing of different values is demanding but has become a staple of many dispute settlement mechanisms such as the WTO, regional PTA-dispute settlement and investment arbitration. Communication has to be particularly imaginative between jurisdictions without, or with nascent or disputed hierarchic relations (Kadi I, II...) or between dispute settlement organs and member states (WTO) on matters where legitimacy, mandates and powers are uncertain (Korea Beef, Asbestos, Brazil Tyres, US Gambling, China Periodicals as they deal with GATT art XX and the relative worth of protected values).

A particular mode of establishing communication, division of labour, separation of powers, even (conditional) superiority can be found in various ways in which deference is given, withheld, or merely alluded to. One model that seems to have caught on comes from the realm of European legal integration in the response of domestic constitutional courts to the then ECJ establishing primacy over domestic law (ECJ: Costa => BVerfG: Solange I, II...). The model has been used and abused repeatedly since (ECtHR/UNSC/ECJ: Bosphorus I, ECJ/UNSC: Bosphorus II, ECJ-CJEU/UNSC/MS Kadi etc. etc.)

What are the prerequisites for a successful "Solange"? Much is at stake when communication is attempted on questions of fundamental values and legitimacy. How does one communicate and promote values where robust universality is in scant supply?

Could something be learned from studying examples of conditional deference as attempts at a dialogue, a dialogue where successful forms of co-existence could be found – or lost? What would be the methods for such scrutiny? Could some patterns be discerned?

Perhaps some help could be found in theoretical work with practical ambitions

within the realm of rhetoric and law (Chaim Perelman, Stephen Toulmin, James Boyd White and others).

The dispute settlement organs of the WTO have in several cases balanced the importance of values protected in the legislation of a Member State with the goal of upholding the covered agreements of the WTO. The idea that the AB could be called upon to judge the relative worth of a certain value was first mentioned in an obiter dictum in the AB report of the Korea Beef-case. Since then this has become part of a whole chain of cases. How has the communication of values and their relative worth been dealt with so far within WTO dispute settlement and could something be learned from other instances of conditional deference of the “Solange”-type if read as part of an ongoing dialogue?

Could this offer a view to grasping the reasonable rather than the never-ending uneasy oscillation between universal (abstract) absolutes and local (concrete) relativism.

A paper is proposed based on previous work made on the context of the Solange-decisions (Halberstam) and the particularities of the European setting as concerns the feasibility of balancing and proportionality (Avbelj), a reading of the usage made since of conditional deference (Bosphorus, Kadi) an analysis of similar language in the WTO-context (Korea Beef->) and the possible difficulties with this mode of communication.

### Afternoon

#### **The European Doctrine of Margin of Appreciation: What Can ASEAN Learn from Its Concept and Application in Universalizing “Controversial” ASEAN Declaration of Human Rights?**

– *Rachminawati*

The European Court of Human Rights has developed the doctrine of margin of appreciation when considering whether a member state of the Council of Europe has breached the European Convention of Human Rights (ECHR). This doctrine allows the Court to consider the implications arising from the ECHR that will be interpreted differently in different member states. Judges are obliged to take into account the cultural, historical and philosophical differences between The European Court of Human Rights (ECtHR) and the nation in question. Most scholars and human rights activists in the Europe countries argue that the application of margin of appreciation is not intended as a particularity of human rights and that it will not erode the universality of human rights.

This paper argues that the margin of appreciation is not a particularity in the traditional sense; it is a moderate way to bridge unresolved issue between universality and particularity of human rights. The universality of human rights is a matter of recognition while the implementation of it is pertaining to respect for the cultural, historical and philosophical differences among the nations.

In the ASEAN context, particularity and universality of human rights has been an everlasting debate among the scholars and human rights activists. Most of them have argued that ASEAN promote the particularity of human rights by inserting “Asean values” to its human rights concept as stated in the ASEAN Declaration of Human Rights. They argue that it can erode the universality of human right, and therefore it needs to be dismissed.

The paper examines the concept and historical background of the doctrine of margin of appreciation, the implementation of the doctrine by the ECtHR, and the positive contribution of the doctrine to the protection of human rights in European Countries. To that end, ASEAN can learn from the European countries experience in harmonizing the differences between particularity and universality of human rights.

### **Another Chance of Approving International Investment Law: Is TPP Another Option? - Ting Chang & David Tzaan**

The significant growth of signing bilateral investment treaties (BITs) among countries lately has shown a pessimistic attitude of making international investment law into realistic globally. Integrating different standpoints and balancing interests between developed and developing countries is a great task to deal with. Thus, BITs and other regional investment regulations have dominated the field of international investment law. However, Trans-Pacific Partnership (TPP), a regional gathering of nine both big and small countries so far, covering both capitalism and socialism notions oriented countries seems to supply another stage to set up international investment standards regionally. Investment is one part of the negotiation fields. This paper attempts to analyze reasons why, compared to trade, a global investment rule is so challenging to build up. This paper also tries to interpret the meaning of the investment chapter under TPP. Furthermore, Taiwan, as a member of Eastern Asia, being a significant role in the global market, what are strengths and weakness for Taiwan to be one part of the TPP. A SWOT analysis will be used in this paper as well. Last but not least, facing post-ECFA era, Taiwan and mainland China both encounter challenges and chances. Will chapters under TPP another great start for cross-straits to start negotiating in the next stage?

### **Exclusion in PRC Criminal Justice: Compliance with International Norm and General Principles of Criminal Law**

– Mark D. Kielsgard

In 2010 then-PRC Premier WEN, Jiabao stated “There has been problems with [Chinese] judicial injustice that need to be faced.” Thereafter, in 2012, China made extensive changes to its Criminal Procedure Law in its second amendment (taking effect on 1 January 2013). Among the changes are increased protections for disappeared persons, exclusion of certain illegally obtained evidence, greater access to defense counsel and judicial impartiality/competence. Though not a panacea, these protections bring China closer to international standards, particularly the rights of the accused as noted in the ICCPR. Among other reforms, China has adopted a rudimentary exclusionary rule not significantly different from many other legal systems. Moreover, these reforms also reflect changes in amendments to the Criminal Law of the PRC and the 2010 Evidence Rule. Indeed, there is a clearly discernible trend in domestic Chinese criminal law toward greater compliance with international norm and the safeguards guaranteed in many other domestic legal systems.

Among the factors driving these changes are a number of high profile cases of police misconduct, the dictates of legislative complexity and/or consistency, and broad-based public pressure brought to bear on Chinese policy-makers. The vigor of public opinion is emerging as a principle conditioning factor driving Chinese policy. Yet, the process is slow as the Standing Committee of the Supreme People’s Congress took nine years of consultation before the Criminal Procedure amendment was passed and then neglected many protections commonly afforded under generally recognized principles of criminal law. Additionally, the implementation of these developing protections is often unevenly applied, especially on the provincial or local level. Moreover, there are institutional barriers in the PRC that cut against the trends and make China lag behind other states. These barriers include poor

infrastructure and cultural and legal impediments. They stem not only from legislative and judicial lethargy but also from substandard police and investigation technique and a cultural disposition favoring substantive justice over procedural due process.

By contextualizing the recent history of Chinese criminal jurisprudence and relevant political initiative, insight can be gained into the nature and vitality of trending Chinese criminal procedure law. This thereby generates a framework for predicting future changes. Identification of current legal trends and their conditioning factors is essential in fashioning recommendations to further encourage compliance with international standards. Moreover, as the PRC has many of the same barriers as other states in Asia-Pacific, the strides China makes may significantly influence the entire region.

### **The Rights of Disaster Victims: Japan's Triple Disaster Two Years On – Emika Tokunaga**

The human rights situation of the victims by the Japan's Triple Disaster still remains severe. In the aftermath of the disaster a huge number of people were evacuated to the evacuation centers, most of which were adapted from school gymnasiums, and some of them gradually moved to the temporary housings provided by the government. However, these facilities were lacking of basic necessities, including water, food, and clothing, as well as failing to give due consideration to various needs of the victims, including those of vulnerable group, especially children, women, the elderly, and people with disabilities, among others. Furthermore, Fukushima residents are currently facing the danger of high-level nuclear exposure and thereby negative effect to their health. A number of the displaced people outside Fukushima are also suffering from unreasonable prejudice and discrimination, such as bullying in school and refusal of housing.

My research focus is on the exploration of the law and legal issues surrounding the victims affected by the Japan's Triple Disaster in the light of international human rights law; what are the law and legal issues, what are the human rights issues, and what steps and measures should Japanese Government take administratively and legislatively, respecting and ensuring the rights of victims by this Triple Disaster? I would like to indicate some valid points on the significance of the rights of victims from the legal and human rights analysis.



**International Law on Trademark Related to the China-ASEAN  
Free Trade Agreement (CAFTA) as a Challenge for ASEAN  
Countries – *Edy Santoso & Martin Roestamy***

The objectives of this paper are to identify intellectual property policy on trademark in ASEAN region and to examine the impact of international law on international trade related to AC-FTA. The signing of the ASEAN-China Free Trade Agreement (AC-FTA), effective on January 1, 2010, makes people have to deal with the issue of free trade which is very worrying. This means, the ASEAN market will be more open than before. The six major ASEAN countries such as Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand will add that the tariff was reduced to zero. At the same time, ASEAN also agreed to liberalize its trade with China. This means that import tariffs between China and ASEAN countries will drop very significantly. The condition is not only faced by Indonesia but also by the other ASEAN member countries. One of the issues in international trade on AC-FTA is how to create innovative product so that one can compete in a free trade environment. International trade viewed that innovative products based on intellectual property are important in producing commercial goods.

Keywords: trademark protection, free trade agreement, ASEAN economic community, intellectual property, and ASEAN-CHINA agreement.

Cross-border relevancy: This paper will use the concept of intellectual property rights approach which is considered in seizing competition and developing new economic policy. Nowadays, the issue is that the industry and business must be ready to compete with the big players from abroad who seek to compete in the domestic market. Obviously, this will have an impact on the industry for ASEAN member countries such as Indonesia. In fact, the value of Indonesia's exports in 2009 dropped sharply up to 14.98 % compared to 2008. In this situation, some people think Indonesia is not ready to face AC-FTA. Thus, this paper is also aims to examine the impact of international law on international trade related AC-FTA.

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