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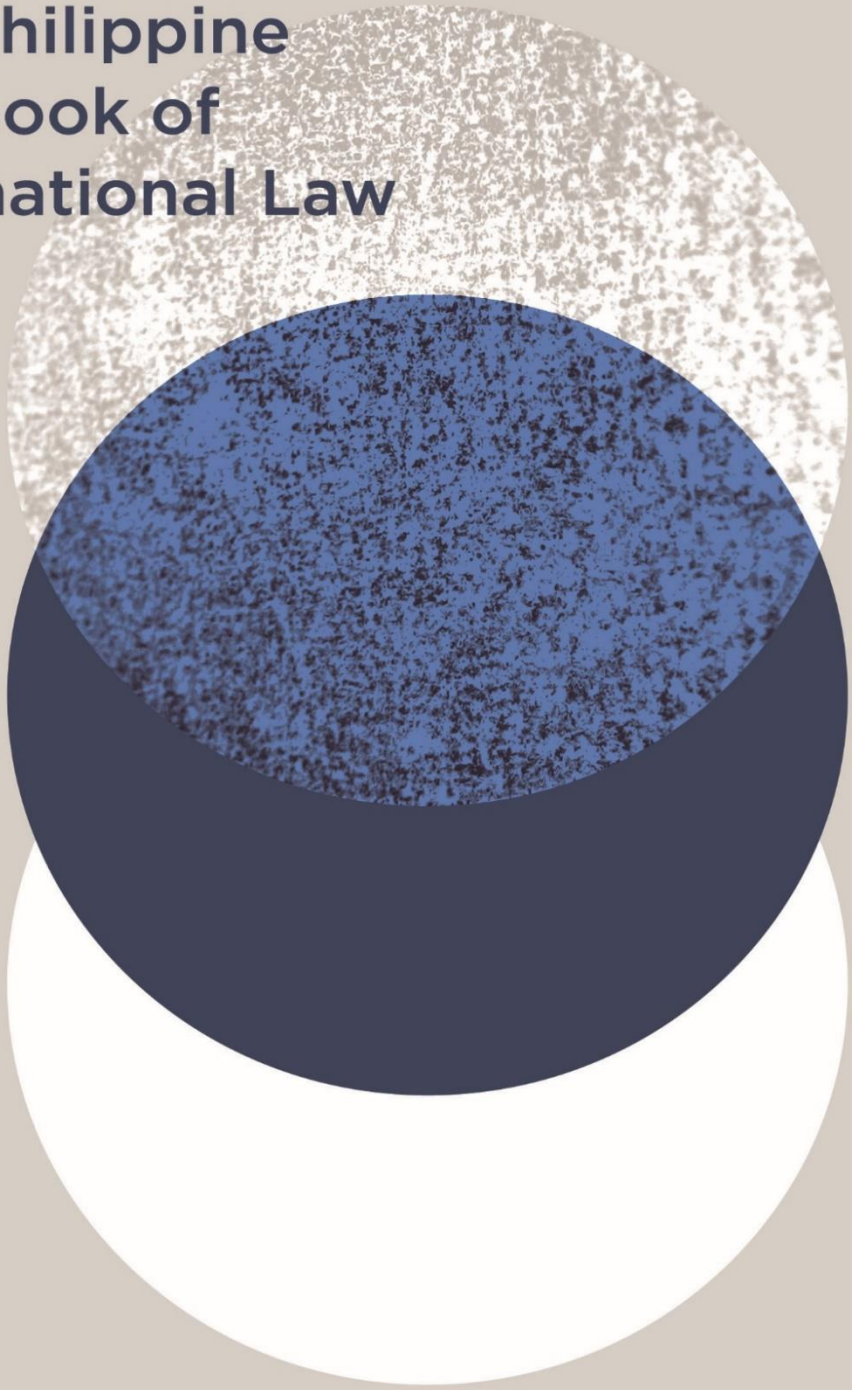
# The Philippine Yearbook of International Law



THE PHILIPPINE SOCIETY OF INTERNATIONAL LAW

# THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW

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On the cover: The cover design shows three overlapping circles representing the three related realms of the global sphere, jurisprudence and human affairs.

# THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW

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# TABLE OF CONTENTS

**ABSTRACTS PRESENTED IN THE 2018 PSIL INAUGURAL NATIONAL CONFERENCE**

# EDITOR'S NOTE

Dr. Lowell B. Bautista's paper, "The South China Sea Arbitration and Historic Rights in the Law of the Sea", examines the impact of the South China Sea arbitration on China's historic rights claim, and the development of the rules and principles of the United Nations Convention on the Law of the Sea (UNCLOS) on historic rights. The arbitral award clarified the concept of historic rights by demonstrating that historic rights claims incompatible with the rights provided for under the UNCLOS are superseded upon ratification of the Convention. The author further emphasizes that while the tribunal's pronouncement is only strictly binding between the Philippines and China, the repercussions of the award extend to other claimant States and can be used as leverage to induce lawful conduct amongst the parties.

In Prof. Rommel J. Casis' paper, "Dualism and the Incongruence between Objective International Law and the Philippine Practice of International Law", he discusses the distinction between *objective international law* ("OIL") and the *Philippine Practice of International Law* ("PPIL"), which was previously explored by Prof. Merlin M. Magallona. OIL is what international law actually is, as it operates in the international sphere, while PPIL is international law as interpreted by Philippine courts and incorporated into law. The author highlights the incongruence between the two concepts and the challenges that may be encountered in applying these to the dualist approach of Philippine law.

Dean Merlin M. Magallona, in "Some Problems and Approaches Arising from the United Nations Convention Against Corruption", offers some criticism on the provisions of the United Nations Convention Against Corruption ("UNCAC"). Of note is his discussion on the textual composition of the obligations of State Parties and the ambiguity it lends in defining the criminalization of specified acts against corruption. The author also shed light on self-contradicting provisions and the dangerous implications these may have on the standards by which State parties may legislate or establish an offense.

More than 40 bilateral and multilateral treaties were entered into force in 2018. The bilateral treaties and agreements span the areas of culture, air services, health, labor, transnational crimes, consular relations, taxation,

and economic cooperation. Notable multilateral conventions include the Budapest Convention on Cybercrime, which serves as a guideline for developing national legislation on cybercrimes and increasing cooperation among nations, and the SOLAS Protocol 78, which seeks to improve the safety of vessels at sea.

In 2018, there were four judicial decisions wherein the Court had the occasion to address issues of International law. In *Republic v. Palawan,* the Court ruled that there was no law clearly granting the Province of Palawan territorial jurisdiction over the Camago-Malampaya reservoir, and that the UNCLOS did not confer on local government units their own continental shelf. In a case assailing the validity of an act institutionalizing kindergarten education, the Court pronounced that there was nothing in the Universal Declaration of Human Rights ("UDHR"), International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), and the Convention on the Rights of the Child ("CRC") which proscribes the expansion of compulsory education beyond elementary education. The provisions of the UDHR were also invoked in defining the right to security in the case of *Marcos v. Farinas,* in which the Court ruled that the privilege of the writ of Amparo is confined to instances of extralegal killings and enforced disappearances, or threats thereof.

Abstracts from the Inaugural Conference of the Philippine Society of International Law ("PSIL"), held on September 7, 2018, are also included in this Issue. The conference brought together scholars from all over Asia with the theme "The Philippines and the Dynamics of International Law in a Time of Transition". Pursuant to this theme, the abstracts emphasize the relevance of International law, and its intersection with Philippine law. Issues explored encompass human rights, environmental law, terrorism, sustainable development, and territorial disputes.

# FOREWORD

The complete diversification of international society has posed serious challenges to how countries adapt and develop their own domestic laws in relation international law. Security threats and terrorist networks, the emergence of new states with different needs, capacities, and outlooks, and the evolution of the way people do business, all contribute to increased efforts by international courts and tribunals in enforcing and further developing international law. Still, in these turbulent times, when States become more inclined to challenge or disregard international norms, there is a need to protect the international rule of law.

The *Philippine Yearbook of International Law* aims to do just that, by providing a comprehensive look at the current state of the country's international affairs. The Philippines is experiencing a resurgence of interest in international law, particularly because of our participation in the South China Sea arbitration and the release of various scholarly publications. The *Yearbook* seeks to spark discussion among students and academics and encourage spirited debate in issues relating to state practice and enforcement. It should be the vocation of scholars of international law to be well-versed in the actual rules and stay current with key developments in modern international law.

The 2018 issue of the *Philippine Yearbook of International Law* showcases articles written by distinguished experts in international law, as well as the abstracts presented at the 2018 Inaugural National Conference of the Philippine Society for International law. It contains a comprehensive listing of treaties and agreements entered into by the Philippines and significant judicial decisions affecting international law for the Year 2018.

The University of the Philippines College of Law and the UP Law Center are instrumental to this publication. Congratulations are due to the UP Law Center – Institute of International Legal Studies (UPLC-IILS) and the Department of Foreign Affairs – Office of Treaties and Legal Affairs (DFA-

OTLA), without whose tireless and ceaseless dedication, this endeavor would not have come into fruition.

Despite the challenges faced by educators, lawyers, and scholars in applying, enforcing, and developing the international legal system, I commend them for taking on this immense responsibility. Without their hard work, the important issues in international law would undoubtedly be relegated to the sidelines.

FIDES C. CORDERO-TAN
*Dean*
University of the Philippines College of Law

# ARTICLES

# THE SOUTH CHINA SEA ARBITRATION AND HISTORIC RIGHTS IN THE LAW OF THE SEA

LOWELL BAUTISTA*

## I. Introduction

On July 12, 2016, the arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS")[1] issued its award in the dispute between the Philippines and China over maritime claims in the South China Sea.[2] The arbitral tribunal categorically declared that China's nine-dash line claim is incompatible with UNCLOS, which supersedes and nullifies any "historic rights" that may have existed prior to the Convention.[3]

In the final award, the Tribunal applied the rules of international law, principally UNCLOS, universally regarded as the constitution of the oceans, as well as other rules of international law not incompatible with the Convention.[4] The Arbitral Tribunal unanimously decided in favor of the Philippines.[5] However, the Chinese Government continues to stand in

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1 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3. [hereinafter, UNCLOS].

2 Philippines v. China, PCA Case No. 2013-19, Award, Permanent Court of Arbitration, Award, (July 12, 2016) [hereinafter, The South China Sea Arbitration Award of July 12, 2016] (The Philippine claim in the South China Sea encompasses the "maritime areas on the western side of the Philippine archipelago … as the waters around, within and adjacent to the Kalayaan Island Group and Bajo De Masinloc, also known as Scarborough Shoal", which has been renamed the "West Philippine Sea"); Adm. Order No. 29 (2012), secs. 1, 2 (For purposes of consistency, the disputed territorial and maritime areas will be referred to as the "South China Sea.").

3 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 261, 278, 1203 (B)(2); *see also id.* ¶¶ 232, 246, 252, 262, 263.

4 UNCLOS, *supra* note 1, art. 293(1); The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 236, 1173, 1201.

5 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 1202, 1203.

defiance of international law.[6] The community of nations, through categorical and strongly worded diplomatic notes, has responded strongly to reject and denounce China's maritime claims in the South China as having no basis under international law.[7]

This paper will discuss historic rights in the UNCLOS in light of the decision of the South China Sea arbitral award.[8] It will be in three parts. The first part will briefly discuss the concept of historic rights in the law of the sea and relevant case law prior to the South China Sea arbitration. The second part will examine China's historic rights claim and the relevant aspects of the

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[6] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of July 12, 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, July 12, 2016; Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines, Oct. 30, 2015; Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, Dec. 7, 2014; *see also* The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 166, 1180.

[7] Nguyen Hong Thao, *South China Sea: The Battle of the Diplomatic Notes Continues*, DIPLOMAT, (Aug. 4, 2020) (The following countries have submitted diplomatic notes to the UN in regarding their protest over China's claims in the South China Sea: Brunei, Malaysia, Vietnam, Indonesia, Australia, the United States, and a joint note verbale from France, Germany and the United Kingdom).

[8] The author has written extensively on various aspects of the South China Sea disputes. *Please see*, Lowell Bautista, *The South China Sea Arbitral Award amidst Shifting Philippine Foreign Policy*, 6 KOR. J. INT'L & COMP. L., 1-20 (2018); Lowell Bautista, *The South China Sea Arbitral Award: Evolving Post-Arbitration Strategies, Implications and Challenges*, 10 (2) ASIAN POL. & POL'Y, 178-189 (2018); Lowell Bautista, *There are no Davids and Goliaths in International Law: Some Lessons from Territorial and Maritime Disputes Settled through International Adjudication*, *in* THE SOUTH CHINA SEA READER 119 – 147 (Foreign Service Institute, Department of Foreign Affairs, 2016); Lowell Bautista and Aries Arugay, *Philippines v. China the South China Sea arbitral award: implications for policy and practice*, 9 (1) ASIAN POL. & POL'Y, 122-152 (2017); Lowell Bautista, *Philippine Arbitration Against China over the South China Sea*, 1 ASIA-PAC. J. OCEAN L. & POL'Y, 116-121 (2016); Lowell Bautista, *The Philippines and the Arbitral Tribunal's Award: A Sombre Victory and Uncertain Times Ahead*, 38 (3) CONTEMP. SOUTHEAST ASIA, 349-355 (2016); Lowell Bautista, *The arbitration case between Philippines and China over their dispute in the South China Sea*, 19 J. SOUTHEAST ASIAN STUD., 3-24 (2014); Lowell Bautista, *The Philippine Claim to Bajo de Masinloc in the Context of the South China Sea Dispute*, 6 (2) J. EAST ASIA & INT'L L. 497-529 (2013); Lowell Bautista, *Thinking Outside the Box: The South China Sea Issue and the United Nations Convention on the Law of the Sea (Options, Limitations and Prospects)*, 81 PHIL. L. J., 699-731 (2007).

decision of the arbitral tribunal. The third part, by way of conclusion, will offer some reflections on the impact and contribution of the South China Sea arbitral award to the clarification and development of the rules and principles of UNCLOS on historic rights.

## II. Historic Rights and the Law of the Sea

In international law, a State acquires historic rights of title over territories through a process of historical consolidation involving a long period of continuous and undisturbed exercise of sovereignty.[9] In order to ripen into a valid title in international law, historic rights require effective occupation and the acquiescence of the international community.[10] Such rules pertaining to the acquisition and loss of territory have developed largely from State practice, customary international law, and from the jurisprudence of international courts and tribunals.[11]

International law recognizes the acquisition of territorial sovereignty through occupation, accretion, cession, conquest, and prescription.[12] Acquisitive prescription, which is based on immemorial possession, applies to historic waters where original title is uncertain and is validated by long and uninterrupted possession.[13] Historic titles, "must enjoy respect and be

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[9] ROBERT Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 16-28 (Manchester University Press, 1963); *see also* YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW (Martinus Nijhoff, 1965); Yehuda Z. Blum, *Historic Rights*, in RUDOLF BERNHARDT (Ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 120 (North-Holland Publishing Company, 1984).

[10] GILLIAN TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 271-343 (Lexis Nexis, 2011).

[11] *See* academic writings on this topic, MALCOLM SHAW, TITLE TO TERRITORY (Ashgate, 2005); MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA INTERNATIONAL LEGAL ISSUES (Clarendon Press, 1986); JENNINGS, *supra* note 9; SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW (Springer, 1997); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (Clarendon, 2006); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (Cambridge University Press, 1995); JOSHUA CASTELLINO AND STEPHEN ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS (Ashgate, 2003), among others.

[12] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 127-128 (Oxford, 2008).

[13] *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/143, ¶¶ 63-66 [hereinafter, *Juridical Regime of Historic Waters*]; *see also* LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOLUME 1 294, ¶ 242 (Longmans, Green, and Company, 1905).

preserved as they have always been by long usage."[14] Historic title is exceptional in character by its very nature and is considered a derogation from general international law.[15] Historic rights, could only be acquired as a result of practices conducted "from time immemorial," or at least "over a long period."[16] A State, in order to validly assert historic rights over maritime areas necessitate immemorial possession accompanied by *animo domini* which is peaceful, continuous, and tolerated by the community of nations.[17] However, historic rights cannot be invoked or used as the basis for more extended and different maritime claims other than those allowed under UNCLOS.[18]

## A. Defining "Historic Rights"

The term "historic rights" is in itself ambiguous partly due to the lack of any specific treaty provision that defines or elaborates it and the montage of similarly confusing terms and concepts related to historic rights—historic

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[14] Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.; Nicar. Intervening), Judgment, 1992 I.C.J. Rep. 351, 589, ¶ 384 (Sept. 11) (citing *Gulf of Fonseca* case, I.C.J. Rep. 1982, p. 73).

[15] Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, 130 – 131 (Dec. 18).

[16] *See* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), Judgment, 2008 I.C.J. Rep. 12, 32 (May 23) (the Court citing Malaysia's argument of immemorial possession quoting the award rendered in the *Meerauge* arbitration); *see also* Subject of the Difference Relative to the Sovereignty over Clipperton Island (Fr. v. Mex.), 2. R.I.A.A. 1107, 1110 (1931) (for the original French text) and 26 Am. J. Int'l L. 390 (1932), 393 (for the English translation). However, these cases pertain to historic title over land territory and not over maritime areas.

[17] Land, Island and Maritime Frontier Dispute, *supra* note 14, at 591, ¶ 391 (In the context of land territory, the consolidation of title requires evidence of intention to claim the islands *à titre de souverain*); *see* JENNINGS, *supra* note 9, 23-27; 114 International Law Reports at page 69, paragraphs 239 and 241.

[18] As Judge Jiménez de Aréchaga cautions in the *Continental Shelf* case, "But these historic rights, based as they are on prolonged exercise, and having an exceptional character, by their very nature, cannot be invoked or used as having a potential effect which would make them capable of a projection seaward, and thus as the basis for more extended and different maritime claims. Historic rights must be respected and preserved, but as they were and where they were, that is to say, within the limits established by usage and history. In particular, to transform these historic waters into internal or territorial waters in order to project a further claim to a continental shelf beyond them is unjustified." Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), Separate Opinion of Judge Jiménez de Aréchaga, 1982 I.C.J. Rep. 18, 112, ¶ 114 (Feb. 24); The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 239, 243, 244, 246.

waters, historic title, historic claims, and historic bays.[19] Historic rights pertain to rights that exist "over certain land or maritime areas acquired by a State, through a continuous and public usage from time immemorial and acquiescence by other States, although those rights would not normally accrue to it under general international law."[20]

Historic rights, according to Clive Symmons, "implies, in its widest sense, a State claiming to exercise certain jurisdictional rights in what usually are international waters, most particularly fishing rights."[21] Nonetheless, there is an apparent distinction between "historic title" and "historic rights." Dupuy and Dupuy, distinguish "historic title," which comprise of "full territorial sovereignty" versus historic rights, which "may include rights falling short of sovereignty, such as exceptional fishing rights or the right of passage."[22] As for historic waters and historic bays, Franckx and Benatar simply put it as "historic rights" being the "genus under which one can place the species 'historic waters'" and "historic bays" as a "species of 'historic waters.'"[23]

The classical and much cited definition of "historic waters" provided by the International Court of Justice ("ICJ") in the *Fisheries Case*, establishes the intricate relationship between historic waters and historic title—"By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."[24] These claims are justified when a State "has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her

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[19] Professor Zou Keyuan pointed out this confusion noting that: "…there are a number of legal terms in the historical context, such as 'right', 'title' and 'consolidation', which may cause confusion. It is even more complicated when one tries to explore so-called historic rights in the maritime area, particularly when the term is used along with other related terms such as historic waters and historic bays." *See* Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32(2) Ocean Dev't & Int'l L., 149 (2001).

[20] Yoshifumi Tanaka, Predictability and Flexibility in the Law of Maritime Delimitation 299 (Hart Publishing, 2006).

[21] Clive R. Symmons, Historic Waters in the Law of the Sea: A Modern Re-Appraisal 4 (Martinus Nijhoff, 2008) (citing Blum, *supra* note 9, at 710–15).

[22] Florian Dupuy and Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 (1) Am. J. Int'l L., 137 (2013).

[23] Erik Franckx and Marco Benatar, *Dots and Lines in the South China Sea: Insights from the Law of Map Evidence*, 2 Asian J. Int'l L., 89, 95-96 (2012).

[24] Fisheries Case, *supra* note 15, at 130.

jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force."[25]

The above definition of historic waters should be read within the context explained by the ICJ in the *Libya/Tunisia Continental Shelf Case*:

> There are, however, references to "historic bays," or "historic titles" or historic reasons in a way amounting to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law which does not provide for a single "régime" for "historic waters" or "historic bays," but only for a particular régime for each of the concrete, recognized cases of "historic waters" or "historic bays." [26]

Historic waters, according to Leo Bouchez, "are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States." As a subset of the concept of "historic title," Gidel provides a narrower and more concise definition of "historic waters" as "those areas of water the legal status of which differs—with the consent of other States—from what it ought to have been according to the generally recognized rules."

The 1958 United Nations ("UN") Secretariat memorandum on historic bays clarified that historic rights "are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighboring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water."[27] The 1962 UN study on the juridical régime of historic waters, including historic bays, defined historic

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[25] *Id.*

[26] Continental Shelf, *supra* note 18, ¶ 100.

[27] U.N. Secretariat, *Historic Bays: Memorandum by the Secretariat of the United Nations*, 2, U.N. Doc. A/CONF.13/1 (Sept. 30, 1957) [hereinafter *Historic Bays*].

title as the "continued effective exercise of sovereignty by the coastal States over the area in question combined with the inaction of other States."[28]

## B. Historic Rights in UNCLOS

The UNCLOS constitutes the primary legal framework addressing maritime claims. However, the legal regime of historic rights, historic title or historic waters is not defined in the UNCLOS nor does it contain specific provisions which clarify, explain or elaborate the constitutive elements which define historic rights, historic waters, or historic bays.[29] Nevertheless, the Convention recognizes the legal regime of historic rights over waters.[30] Textually, the UNCLOS as well as the 1958 Convention on the Territorial Sea and the Contiguous Zone refer to historic rights in the context of territorial sea delimitation.[31] The Convention recognizes historic title in relation to maritime delimitation, the status of bays, and the rights of States in respect of archipelagic waters.[32] Article 46 of the UNCLOS, defining an "archipelago," makes reference to historical facts in the determination of what can be regarded as an archipelago under the Convention.[33] However, the reference to historical recognition was not expounded in the Conference.[34] Article 298(1)(a)(i) of the UNCLOS allows States when signing, ratifying or acceding to the Convention to declare in writing that it does not accept compulsory procedures entailing binding decisions with respect to disputes concerning

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[28] *Juridical Regime of Historic Waters*, *supra* note 13, ¶ 108.

[29] *Please see* Seokwoo Lee and Lowell Bautista, *Historic Rights*, *in* ØYSTEIN JENSEN (Ed.), THE DEVELOPMENT OF THE LAW OF THE SEA CONVENTION: THE ROLE OF INTERNATIONAL COURTS AND TRIBUNALS 244-261 (Edward Elgar Publishing, 2020); *also see* R. R. CHURCHILL AND A. V. LOWE, THE LAW OF THE SEA 43 (Manchester University Press, 1999); Guo Yuan, *On Historic Rights under the Law of the Sea*, 2008 (1) CHINA OCEANS L. REV., 190 (2008).

[30] R. R. CHURCHILL AND A. V. LOWE, *supra* note 29, at 41-45, 455-456; DONALD R. ROTHWELL AND TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 47-49, 454-455 (Hart Publishing, 2010).

[31] 1958 Convention on the Territorial Sea and the Contiguous Zone, 516 UNTS 205, Apr. 29, 1958, art. 12 (1); UNCLOS, *supra* note 1, art. 15.

[32] NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 249 – 279 (Cambridge University Press, 2005); The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, in art. 7, ¶ 6, recognized the historic rights of coastal States to "historic" bays regardless of their area or width of entrance.

[33] UNCLOS, *supra* note 1, art. 46(b).

[34] SATYA N. NANDAN AND SHABTAI ROSENNE (Eds.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, VOLUME II 414-415 (Martinus Nijhoff, 2003).

the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations, or those involving historic bays or titles.[35]

The Philippines in the preparatory work for the Third UN Conference on the Law of the Sea (UNCLOS III) submitted draft articles on "historic waters," and on the breadth of the territorial sea.[36] The proposed articles introduced by the Philippines were not reflected in any of the texts brought to UNCLOS III.[37] Out of the "historic waters" claimed by the Philippines evolved the *sui generis* concept of archipelagic waters.[38] China, on its part, in the negotiation of the UNCLOS, identified itself as a developing coastal State and was a vocal supporter of the demands of developing coastal States for exclusive jurisdiction over the natural resources in the exclusive economic zones ("EEZ") and continental shelves off their respective coasts.[39] China was consistently critical of any attempts to limit the content of the jurisdiction of developing coastal States.[40] It made no attempt whatsoever to secure an

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[35] SHABTAI ROSENNE AND LOUIS B. SOHN, (Eds.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, VOLUME V 115-116 (Martinus Nijhoff, 1989).

[36] The draft article on "historic waters" introduced by the Philippines stated, "Historic rights or title acquired by a State in a part of the sea adjacent to its coasts shall be recognized and safeguarded." (A/AC.l38/SC.II/L.46) The Philippines also introduced a draft article on the breadth of the territorial sea, which stated, "This article shall not apply to a part of the sea adjacent to the coasts of a State which it acquired by historic right or title." (A/CONF.138/SC.II/L.47/Rev.l) The second proposal on the breadth of the territorial sea stated, "Each State shall have the right to establish the breadth of its territorial sea up to a limit not exceeding ... nautical miles, measured from the applicable baseline. The maximum limit provided in this article shall not apply to historic waters held by any State as its territorial sea. Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided herein. (A/AC.138/SC.II/L.48).

[37] Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.; Nicar. Intervening), Dissenting Opinion of Judge Oda, 1992 I.C.J. Rep. 409, ¶ 43 (Sept. 11) [hereinafter Land, Island Maritime Frontier Dispute, Oda Dissent].

[38] *Id.* at 409, ¶ 44; *see* historical discussion of the problem of mid-ocean archipelagos pre-LOSC in C.F. Amerasinghe, *The Problem of Archipelagoes in the International Law of the Sea*, 23 INT'L & COMP. L. Q., 539 (1974).

[39] Third UN Conference on the Law of the Sea ("UNCLOS III"), Plenary, *191st Meeting*, ¶¶ 20-22, U.N. Doc. A/CONF.62/SR.191 (Dec. 9, 1982) [hereinafter UNCLOS III, *191st Meeting*]; UNCLOS III, Second Committee, *25th Meeting*, ¶¶ 13-14, 19, U.N. Doc. A/CONF.62/SR.25 (July 2, 1974) [hereinafter UNCLOS III, *25th Meeting*]; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 194.

[40] UNCLOS III, *191st Meeting*, *supra* note 39, ¶ 25; UNCLOS III, *25th Meeting*, *supra* note 39, ¶ 19.

exception protecting historic claims of maritime rights of the kind that are now at issue.

The issue of historic rights has always been connected to the economic interests and concerns, particularly fishing privileges, of both coastal and flag States as shown in discussions by State representatives from the records of both the First and Second UN Conferences on the Law of the Sea (UNCLOS I and UNCLOS II).[41] The recognition of historic rights in the UNCLOS was contentious because States argued that the recognition of historic rights would unjustly favor more capable States who have the capability to establish rights well beyond their territories and discriminate against countries which lack economic resources to have distant fishing fleets.[42] Meanwhile, States who favor the recognition of historic rights argue for the protection of their territorial waters, specifically for self-preservation or survival.[43]

Ultimately, the UNCLOS acknowledged historic rights in several of its provisions. Article 10(6) of the UNCLOS, which mirrors Article 7(6) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, provides: "The foregoing provisions do not apply to so-called 'historic' bays, or in any case where the system of straight baselines provided for in Article 7 is applied."[44] Article 15 of the UNCLOS, which reflects Article 12(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, states that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of *historic title* or other special

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[41] UN Conference on the Law of the Seas, U.N. Doc. A/CONF.19/9 (Mar. 17-Apr. 26, 1960).

[42] *Id.* at 66.

[43] *Id.* at 77, 98; UNCLOS III, Second Committee, *23rd meeting*, U.N. Doc. A/CONF.62/C.2/SR.23, 186, ¶ 54 (Aug. 1, 1974); UNCLOS, *supra* note 1, art. 51; *see* requirements for the right of traditional fishing in archipelagic waters in MOHAMMED MUNAVVAR, OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA 161 (Brill, 1995).

[44] NANDAN AND ROSENNE (Eds.), *supra* note 34, at 118-119.

> circumstances to delimit the territorial seas of the two States in a way which is at variance therewith. (emphasis added)

The relevant deliberations during UNCLOS III of Article 15 indicate that China favored a delimitation of the territorial sea "on the principles of mutual respect for sovereignty and territorial integrity, equality and reciprocity."[45] The proposal of the Philippines was that the proposed limits of the territorial sea should not apply to historic waters or territorial seas established prior to the approval of the Convention.[46]

The Philippines, as early as 1955, submitted a position paper applying the principle of historic waters.[47] The Philippine position was not adopted at the 1960 UNCLOS Conference, which was among the reasons why the Philippines refused to sign the four 1958 Geneva Conventions.[48] The head of the Philippine delegation outlined the history of the Philippine territorial waters claim at the 72nd meeting of Sub-Committee II of the Sea-Bed Committee on Aug. 9, 1973. These waters essentially referred to the Treaty of Paris limits, which passed from the sovereignty of Spain to that of the United States in 1898, over which the Philippines continued to exercise sovereignty after independence in 1946.[49]

A working paper which reflected generally acceptable formulations and main trends which have emerged from the proposals submitted to the

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[45] *Id.* at 137.

[46] *Id.*

[47] UNCLOS III, Second Committee, *36th meeting*, U.N. Doc. A/CONF.62/C.2/SR.36, 264, ¶¶ 57-66 (Aug. 12, 1974). The Philippines advocated strongly for the principle of "historic waters" to apply over "all waters around, between and connecting the different islands of the Philippine Archipelago, irrespective of their width or dimension, were necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines." This essentially reflected the proposal for a new concept of a *sui generis* regime that applies to archipelagic States, originally submitted by the Philippines, along with Fiji, Indonesia, and Mauritius; *id.* ¶ 72.

[48] *Id.* at 264, ¶ 57; *see also* UNCLOS III, Plenary, *104th Plenary Meeting*, U.N. Doc. A/CONF.62/SR.104, 70, ¶¶ 16-19 (May 18, 1978). The Philippines clarified, through Mr. Ingles, that, "The historic title which the Philippines claimed over its present territorial waters was based on the 1898 Treaty of Paris, under which Spain had ceded the Philippines to the United States and delimited its territorial boundaries. Those limits had been later confirmed by legislation enacted by the Philippine legislature in 1932 and by the United States Congress in 1934, and also in the Philippine Constitution of 1935."; *id.* ¶ 18.

[49] *See* UNCLOS III, Second Committee, *5th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.5, 111-112, ¶30 (July 16, 1974) [hereinafter UNCLOS III, *5th Meeting*]; for academic material on the

Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction or to the UNCLOS III included two provisions on historic waters:

> Provision 2: The territorial sea may include waters pertaining to a State by reason of an historic right or title and actually held by it as its territorial sea.
>
> Provision 3: No claim to historic waters shall include land territory or waters under the established sovereignty, sovereign rights or jurisdiction of another State.[50]

The same working paper also reflected three formulas on the breadth of the territorial sea. The first formula sets the limit at twelve nautical miles from the baselines whilst the second formula sets a maximum distance of 200 nautical miles from the baselines. The third formula recognizes the exceptional nature of historic waters and its impact on the measurement of the breadth of the territorial sea:

> The maximum limit provided in this article shall not apply to historic waters held by any State as its territorial sea.
>
> Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the

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Treaty of Paris limits, *please see* LOWELL BAUTISTA, THE PHILIPPINE TREATY LIMITS: HISTORICAL CONTEXT AND LEGAL BASIS IN INTERNATIONAL LAW (Institute of International Legal Studies International, University of the Philippines Law Center, 2015); Lowell Bautista, *The Legal Status of the Philippine Treaty Limits in International Law*, 1 AEGEAN REV. L. SEA & MAR. L., 111-139 (2010); Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIAN PACIFIC L. & POL'Y J., 1 - 31 (2008); Lowell Bautista, *The Historical Background, Geographical Extent and Legal Bases of the Philippine Territorial Water Claim*, 8 J. COMP. ASIAN DEV., 365-395 (2009); Lowell Bautista, *The Philippine Treaty Limits and Territorial Water Claim in International Law*, 5 (1-2) SOC. SCI. DILIMAN, 107-127 (2009); Lowell B. Bautista, *International Legal Implications of the Philippine Treaty Limits on Navigational Rights in Philippine Waters*, 1(2) AUSTL. J. MAR. & OCEAN AFF., 88-96 (2009); *see also*, *Magallona v. Ermita*, G.R. No. 187167, 655 SCRA 477, 16 August 2011, where the Philippine Supreme Court rejected the argument that the Treaty of Paris lines should be the baselines of the Philippines from where to measure its maritime zones.

[50] UNCLOS III, *Statement of activities of the Conference during its first and second sessions*, U.N. Doc. A/CONF.62/L.8/REV.1, 109 (Oct. 17, 1974).

maximum provided in this article shall not be subject to the limit provided herein.[51]

The Second Committee, which is one of three main committees of the UNCLOS III, established an informal consultative group on historic bays and historic waters.[52] The Philippines submitted draft articles on historic waters and the delimitation of the territorial sea, which read as follows:

1. The territorial sea may include waters pertaining to a State by reason of an historic right or title and actually held by it as its territorial sea.
2. The maximum limit provided in this Convention for the breadth of the territorial sea shall not apply to historic waters held by any State as its territorial sea.
3. Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided herein.[53]

The substance of the Philippine draft articles was that any State which had already established a territorial sea with a breadth greater than the maximum provided in the Convention should not be subject to the limit set out therein.[54] Indonesia also submitted a draft article on historic waters, which stated, "No claim to historic waters shall include land territory or waters under the established sovereignty, sovereign rights or jurisdiction of another State."[55]

The archipelagic principle advanced by the Philippines during the negotiations was successfully adopted in the Convention.[56] However, the

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[51] *Id.* at 111.

[52] UNCLOS III, Second Committee, *Statement on the work of the Second Committee*, U.N. Doc. A/CONF.62/C.2/L.89/Rev.1 (July 15, 1975).

[53] UNCLOS III, *Philippines: revised draft article on historic waters and delimitation of the territorial sea*, U.N. Doc. A/CONF.62/C.2/L.24/Rev.l (Aug. 19, 1974).

[54] UNCLOS III, *5th Meeting*, *supra* note 49, at 111, ¶ 30.

[55] UNCLOS III, *Indonesia: draft article on historic waters*, U.N. Doc. A/CONF.62/C.2/L.67 (Aug. 16, 1974).

[56] UNCLOS, *supra* note 1, Part IV; for a discussion of Philippine archipelagic doctrine, *please see*, Jorge R. Coquia, *Analysis of the Archipelagic Doctrine in the New Convention on the Law of the Sea* 8 PHIL. Y.B. INT'L L. 24 (1982); Jorge R. Coquia, *The Territorial Waters of Archipelagos*, 1(1) PHIL. Y.B. INT'L L. 139 (1962); Agim Demirali, *The Third United Nations*

exception it sought for its territorial waters based on historic title, over which the 12 nautical mile maximum breadth of the territorial sea provided under the Convention it argued should not apply, was unsuccessful. Nonetheless, in the spirit of compromise and accommodation, the Philippines signed and ratified the Convention.[57]

## C. Case Law

The issue of historic rights is not novel in cases brought before international courts and tribunals. Even before the South China Sea arbitration, judgments of international courts and tribunals have dealt with the issue of historic rights in the context of maritime boundary and territorial boundary disputes.[58] However, since most of the cases on "historic rights" to

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*Conference on the Law of the Sea and an Archipelagic Regime*, 13 SAN DIEGO L. REV. 742 (1975-1976); BARRY HART DUBNER, THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES (1976); Florentino P. Feliciano, *Comments on Territorial Waters of Archipelagos*, 1 PHIL. INT'L L. J. 160 (1962); L. L. Herman, *The Modern Concept of the Off-Lying Archipelago in International Law*, 23 CAN. Y.B. INT'L L. 172 (1985); Jose D. Ingles, *The Archipelagic Theory*, 3 PHIL. Y.B. INT'L L. 23 (1974); Charlotte Ku, *The Archipelagic States Concept and Regional Stability in Southeast Asia*, 23 CASE WESTERN RES. J. INT'L L. 463 (1991); Barbara Kwiatkowska, *An Evaluation of State Legislation on Archipelagic Waters*, 6 WORLD BULL. 22 (1990); Barbara Kwiatkowska, *The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law*, 6 INT'L J. ESTUARINE & COASTAL L. 1 (1991); Estelito P. Mendoza, *The Baselines of the Philippine Archipelago*, 46 PHIL. L. J. 628 (1969-1973); MOHAMMED MUNAVVAR, OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA (1995); D. P. O'Connell, *Mid-Ocean Archipelagoes in International Law*, 45 BRIT. Y.B. INT'L L. 1 (1971); Miriam Defensor Santiago, *The Archipelago Concept in the Law of the Sea: Problems and Perspectives*, 49 PHIL. L. J. 315 (1974); Arturo M. Tolentino, *On Historic Waters and Archipelagos*, 3 PHIL. L. J. 31 (1974); Arturo M. Tolentino, *Philippine Position on Passage Through Archipelagic Waters*, 4 PHIL. Y.B. INT'L L. 44 (1975); Arturo M. Tolentino, *Territorial Sea and Archipelagic Waters*, 5 PHIL. Y.B. INT'L L. 47 (1976); Arturo M. Tolentino, *The Philippine Archipelago and the Law of the Sea*, 7 PHIL. L. GAZETTE 1 (1983); Arturo Tolentino, *Principles Relating to Archipelagic States* PHIL. Y.B. INT'L L. 28 (1974); Arturo Tolentino, *The Philippine Territorial Sea*, 3 PHIL. Y.B. INT'L L. 46 (1974).

[57] UNCLOS III, *189th Meeting*, U.N. Doc. A/CONF.62/SR.189 (Dec. 8, 1982), 69-70, ¶¶ 43-60. The Republic of the Philippines signed UNCLOS on 10 December 1982 at the close of the UNCLOS III in Montego Bay, Jamaica. The LOSC entered into force for the Philippines on Nov. 16, 1994.

[58] THOMAS COTTIER, EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION: THE QUEST FOR DISTRIBUTIVE JUSTICE IN INTERNATIONAL LAW 485-488 (Cambridge University Press, 2015).

maritime areas predate the UNCLOS, rules of general international law were applied. Nonetheless, it is clear from settled jurisprudence that there is no legal basis for a State to validly claim "historic rights" in the EEZ or continental shelf of another State. A State party to the UNCLOS is not entitled to maritime areas outside of what is provided for in the Convention. In the dissenting opinion of Judge Oda in the *Land, Island and Maritime Frontier Dispute*, he noted that:

> In sum, the concept of "historic waters" has become practically a redundancy, which is perhaps why it does not appear in either the 1958 or the 1982 Conventions. In fact, it is not so much a concept as a description expressive of the historic title on the basis of which a claim to a particular status for certain waters has been made.[59]

### 1. *Formation and Acquisition of Historic Rights*

The starting point of historic rights claims is the assertion of sovereignty, which in itself is not sufficient, but is considered indispensable.[60] The assertion of sovereignty could be exercised through domestic legislation and exercise of jurisdiction. In order to acquire legal title, the acts of the State must be carried out in a sovereign capacity, openly, peacefully, without protest or competing activity by the existing sovereign, and for a sufficiently long time.

In the *Anglo-Norwegian Fisheries* case, the Court considered "historic rights" in upholding Norway's method of straight baselines as not contrary to international law.[61] The Court premised its judgment on the grounds that: (1) "the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose;"[62] and (2) that "[t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty

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[59] Land, Island and Maritime Frontier Dispute, Oda Dissent, *supra* note 37, at 409, ¶ 44.

[60] *Historic Bays*, *supra* note 27, at 28-29.

[61] Anglo-Norwegian Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 128, 143 (1951) (In the dispositive, "Judge Hackworth declares that he concurs in the operative part of the Judgment but desires to emphasize that he does so for the reason that he considers that the Norwegian Government has proved the existence of an historic title to the disputed areas of water."); *id.* at 144.

[62] *Id.* at 138.

years the United Kingdom Government itself in no way contested it."[63] Applying the *Anglo-Norwegian Fisheries* case, in order for "historic rights" to be recognized, the practice should be constant and sufficiently long, notorious, enjoying the general tolerance of the international community as evidenced by the attitude of government which do not consider it to be contrary to international law.[64]

The ICJ directly addressed historic fishing rights in the *Fisheries Jurisdiction* cases *(United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*.[65] The decision, rendered in 1974, upheld Iceland's fisheries zone but noted that Iceland's "preferential rights" in respect of the fish stocks are not absolute or exclusive and limited by the rights of other States, including the coastal State, and of the needs of conservation.[66] It is well to remember that this case was decided before the UNCLOS was able to codify the consensus over the *sui generis* regime of the 200-nautical-mile EEZ.

In the *Libya/Tunisia Continental Shelf* case, the regime of historic rights was based on acquisition and occupation.[67] Notably, Tunisia based its historic rights claim on "long established interests and activities" of its fishing population over the seabed and waters of the Mediterranean Sea.[68] The ICJ did not undertake any thorough discussion regarding historic fishing rights but the Court recognized that "historic titles must enjoy respect and be preserved as they have always been by long usage."[69]

In the *North Atlantic Coast Fisheries* case, it was maintained that "a servitude [which in this case was manifested through historic fishing] in international law predicates an express grant of a sovereign right."[70] However, it is to be noted that such possession must also be exclusive. In the aforementioned case[71] and *Eritrea v. Yemen,* the Tribunals denied claims to

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[63] *Id.*
[64] *Id.* at 139.
[65] Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Reports 3.
[66] *Id.* at 31, ¶ 71, 34, ¶ 79.
[67] Continental Shelf, *supra* note 18, ¶ 100.
[68] *Id.* ¶ 98.
[69] *Id.* ¶ 100.
[70] N. Atl. Coast Fisheries (U.K. v. U.S.) 11 R.I.A.A. 167, 181 (Perm. Ct. Arb., 1910).
[71] *Id.* at 184.

historic rights mainly due to the non-exclusivity of fishing rights.[72] The unopposed shared access of multiple States cannot establish historic title over the maritime areas.[73]

The requirement of exclusivity was further established in *Qatar v. Bahrain* where the Tribunal recognized that although the pearling industry in the Gulf area was historically carried out by Bahraini fishermen, it was traditionally considered a "right which was common to the coastal population" and therefore, "never [...] led to the recognition of an exclusive quasi-territorial right to the fishing grounds."[74] In contrast, the ICJ held in the *Fisheries* case that Norway was able to prove the existence of a historic title to the disputed maritime areas as Norwegian fishermen had exploited the fishing grounds "from time immemorial" and that "British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906."[75] Thus, it seems clear that historic title over maritime areas may be formed by fishing activities, but only if such fishing grounds were exclusive to the claiming State's fishermen.

From case law, it also appears that historic rights must meet the test of intertemporal law, i.e., "it needs to be shown that these rights have been continuously exercised until present times."[76] This requirement of continuous exercise was not fulfilled in the *Gulf of Maine* case.[77] Thus, historic title cannot be said to have been created once the "effective exercise of sovereignty" has been interrupted or other States act against it.[78] In the *Gulf of Maine* case, the ICJ addressed the incompatibility of historic fishing rights with the regime of the EEZ established under the UNCLOS.[79]

While the ICJ in the *Fisheries* case found that the historic rights of Norway over the disputed fishing grounds included *sovereignty* based on historic title,

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[72] Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), 22 R.I.A.A. 209, 335-410, ¶¶ 38, 66, 126 (Perm. Ct. Arb., 1998).

[73] *Id.* ¶ 66.

[74] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 40, 112, ¶ 236 (March 16).

[75] Fisheries Case, *supra* note 15, at 124.

[76] COTTIER, *supra* note 48, at 487.

[77] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. Reports 246, 305 (Oct. 12).

[78] SYMMONS, *supra* note 21, at 151–152, 161-162.

[79] Delimitation of the Maritime Boundary in the Gulf of Maine Area, *supra* note 77, ¶ 235.

such is not always the case. A State can be recognized to have historic rights over a particular area, yet not territorial sovereignty. Such was the case in *Eritrea v. Yemen*, where the Tribunal concluded that while the southern Red Sea had become historical fishing grounds, the maritime area's openness for fishing, the unrestricted traffic, and the "common use of the islands by the populations of both coasts" created what the Tribunal described as a form of "*servitude international.*"[80] Such servitude, while arising out of a historic right, fell short of sovereignty since the said historic rights accrued in favor of both disputing States. Notably, the Tribunal also declared that no historic title can be established by either countries "as long as the colonial situation prevailed."[81] Thus, colonization is an interruption to "effective exercise of sovereignty."

A similar conclusion was established in the *North Atlantic Coast Fisheries* case. The United States argued that the treaty between the United Kingdom and itself granting American citizens "forever [...] the liberty to take fish of every kind" from the southern coast of Newfoundland, constituted an international servitude in its favor, and thus, negating any right for the United Kingdom to regulate American citizens fishing activity on the said coast.[82] The Tribunal disagreed and held that the right to fish which the United States had, was solely an economic right, and not an attribute of sovereignty. Contending otherwise would be inconsistent with the "historical basis of the American fishing liberty."[83] These "historic fishing rights" merely granted the liberty to fish over the coast of Newfoundland because they were primarily grounded on the fact that Americans, while still under British rule, enjoyed fishing rights concurrently with British citizens.[84] The Tribunal then described historic fishing rights as "a purely economic right" which do not entail

[80] Territorial Sovereignty and Scope of the Dispute, *supra* note 72.
[81] *Id.* ¶ 125.
[82] N. Atl. Coast Fisheries, *supra* note 70, at 173, 181.
[83] *Id.* at 181, 183.
[84] *Id.* at 183–184.

sovereignty.[85] The distinction then is clear; historic rights may or may not include sovereignty,[86] while historic title is closely linked to sovereignty.[87]

*2. Conduct by Other States*

The opposition, failure to or lack of a reaction of relevant States to the actions of the claiming States is a decisive factor in determining the existence of historic rights.[88] This is comparable with the general requirement that possession must be public, peaceful, and uninterrupted in cases of acquisitive prescription. It is universally recognized in international law that continuous, open, and notorious occupation and use of a defined territory over a long period of time, along with the exercise of sovereignty in the territory, and failure of the other party having knowledge of these facts to object, protest, or assert its rights will be sufficient to establish title to the territory by prescription.[89]

As stated by the Chamber of the Court in the *Gulf of Maine* case, "acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent."[90] In the *Fisheries* case, this was described as the "general toleration of foreign States."[91] Conversely, the presence of opposition from foreign states interferes with the "peaceful and continuous" possession of the State claiming historic rights and which effectively may prevent its formation.[92] Thus, unopposed,

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[85] *Id.*

[86] Xuechan Ma, *Historic Title over Land and Maritime Territory*, 4(1) J. TERRITORIAL & MAR. STUD. 31, 34 (2017).

[87] Yoshifumi Tanaka, *Reflections on Historic Rights in the South China Sea Arbitration (Merits)*, 32 *Int'l J. Mar. & Coastal L.* 458, 464 (2017).

[88] BROWNLIE, *supra* note 12, at 149.

[89] H. LAUTERPACHT (Ed.), L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 576 (8th ed 1955); ROBERT Y. JENNINGS AND A. WATTS (eds.), OPPENHEIM'S INTERNATIONAL LAW, 706; D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L L., 353-4 (1950); Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 93 (1928); Legal Status of Eastern Greenland (Den. v. Nor.), P.C.I.J. Series A/B, No. 53, 45 (1933).

[90] Delimitation of the Maritime Boundary in the Gulf of Maine Area, *supra* note 77, at 305.

[91] Fisheries Case, *supra* note 15, at 138.

[92] Ying Wang, *Rethinking the Concept of Historic Rights in International Law*, 7 KOR. J. INT'L & COMP. L., 153, 164 (2019).

uninterrupted possession of parts of the sea over a certain period of time is one factor in the acquisition of historic title.[93]

The time period sufficiently necessary for prescription is a question of fact, depending on all the circumstances.[94] In the *Fisheries* case, a silence of sixty years in the face of Norwegian use of the disputed waters was enough to preclude the claim of the United Kingdom.[95] In the *Temple of Preah Vihear* case, the ICJ held that Thailand is precluded by its own conduct from asserting that she did not accept the map of 1908. The Court noted the dates, observing they were a long time ago or a period of more than a century since Thailand recognized the line on map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory.[96]

A State having a potential historic title over a particular territory may nevertheless lose title because of subsequent inaction to adverse possession of the territory by another State.[97] Such was the case in *Pulau Batu Puteh*—albeit over land territory and not over maritime waters—where Malaysia lost its territorial sovereignty over the island of Pedra Branca, despite having historic title because it failed to take action against the occupation of the island by Singapore and its predecessors.[98] The investigation of marine accidents, control over visits, installation of naval communication equipment, and reclamation plans by Singapore and the United Kingdom (as Singapore's predecessor) were considered by the Court as "acts *à titre de souverain*"[99] and concluded that sovereignty over the disputed island had passed to Singapore because of the aforementioned acts and the failure of Malaysia and its predecessors to respond accordingly.[100] However, the Court did not make the same conclusion with regard to Middle Rocks, a maritime feature located a few nautical miles away from the Pedra Branca island.[101] It found that "none of the conduct reviewed in the preceding part of the Judgment which has led

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93 MALCOLM N. SHAW, INTERNATIONAL LAW 507 (Cambridge University, Press 2008).

94 JENNINGS AND WATTS (Eds.), *supra* note 89, at 707.

95 Fisheries Case, *supra* note 15, p. 138.

96 Temple of Preah Vihear (Cambodia v. Thai.), Merits, Judgment, 1962 I.C.J. Rep. 6, 32-3 (June 15).

97 Island of Palmas Case, *supra* note 89, at 831, 838.

98 Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malay. v. Sing.), Judgment, 2008 I.C.J. Rep. 12 (May 23).

99 *Id.* ¶ 274.

100 *Id.* ¶ 276.

101 *Id.* ¶ 278.

the Court to the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh passed to Singapore or its predecessor before 1980 has any application to the [case] of Middle Rocks."[102]

Nevertheless, such scenario can be prevented, as illustrated in the case of *Chamizal.*[103] In the territorial dispute between the United States and Mexico, the Tribunal found that the United States failed to acquire title over the disputed border territory by means of prescription because Mexico effectively interfered by constantly challenging and questioning the former's occupation through diplomatic agents.[104] Therefore, applying the Tribunal's decision, it seems that a State need not actually physically possess the disputed territory nor file an official action against another State for an international dispute settlement body to effectively prevent the abandonment of a title. Diplomatic protests, as long as consistent, are sufficient to impede the acquisition of title to a territory by another State.[105]

## III. The South China Sea Arbitration

On Jan. 22, 2013, the Philippines instituted arbitral proceedings against China under Annex VIII of the UNCLOS in respect of its maritime jurisdictional dispute in the South China Sea.[106] The arbitration is the first international litigation initiated by a claimant State in the South China Sea.[107] China neither accepted nor participated in the proceedings, articulating its position through public statements and in many diplomatic Notes Verbales to

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[102] *Id.* ¶¶ 289, 290.

[103] The Chamizal Case (Mex. v. U.S.), 11 R.I.A.A. 309 (1911).

[104] *Id.* at 330, 329.

[105] BROWNLIE, *supra* note 12 , at 149; SYMMONS, *supra* note 21, at 72-73,

[106] Republic of the Philippines, Department of Foreign Affairs, Notification and Statement of Claim, Manila, Jan. 22, 2013 [hereinafter *Notification and Statement of Claim*].

[107] For academic material on the UNCLOS dispute settlement, *please see*, Lowell Bautista, *Dispute settlement in the Law of the Sea Convention and territorial and maritime disputes in Southeast Asia: issues, opportunities, and challenges*, 6(3) ASIAN POL. & POL'Y, 375-396 (2014); Robin Churchill, *The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use*, 48 OCEAN DEV. & INT'L L., 216-238 (2017); NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA (Routledge, 2012); NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA (Cambridge University Press, 2005); IGOR V. KARAMAN, DISPUTE RESOLUTION IN THE LAW OF THE SEA (Martinus Nijhoff, 2012); *inter alia*.

the Philippines and to the Permanent Court of Arbitration.[108] In accordance with the provisions of the UNCLOS, the arbitration proceeded in China's absence.[109] In keeping with settled international jurisprudence, whilst China had chosen not to appear in the proceedings, it remains a party to the case, and bound by the eventual judgment.[110]

The award is only legally binding between the Philippines and China.[111] However, the landmark verdict will have significant, lasting, and far-reaching implications affecting the legal rights of all the claimant States because of the nature of the award as a subsidiary means for the determination of rules of law under Article 38(l)(d) of the ICJ Statute.[112] Judicial and arbitral decisions are not an independent source of obligations for States, except between the parties to the dispute.[113] Nonetheless, the jurisprudence and practice of

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[108] Philippines v. China, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, Permanent Court of Arbitration, ¶¶ 10, 27 (Oct. 29, 2015) [hereinafter Award on Jurisdiction and Admissibility]; Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, Feb. 19, 2013; Note Verbale from the Embassy of the People's Republic of China in The Hague to the Permanent Court of Arbitration, No. (013)-117, July 29, 2013.

[109] UNCLOS, *supra* note 1, art. 9, Annex VII; Rules of Procedure, South China Sea Arbitral Tribunal, art. 25; *see also*, Celeste Ruth L. Cembrano-Mallari, *Non-Appearance and Compliance in the Context of the UN Convention on the Law of the Sea Dispute Settlement Mechanism*, 88 (2) PHIL. L. J. (2014) 300-341.

[110] Arctic Sunrise Case (Neth. v. Russ), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, ¶ 48, 52; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 24, ¶ 28.

[111] UNCLOS, *supra* note 1, art. 296(2).

[112] *See for exampl*e, Vladyslav Lanovoy, *The authority of inter-state arbitral awards in the case law of the International Court of Justice*, 32 LEIDEN J. INT'L L. 561, 563 (2019), who argues that the International Court of Justice, in a significant number of decisions since the 1990s, "attributes considerable authority to arbitral awards in its reasoning, well beyond their subsidiary role in the classic theory of sources in international law."

[113] Statute of the International Court of Justice, arts. 38(1)(d), 59, Apr. 18, 1946, 33 U.N.T.S. 993. Decisions of international courts do not have stare decisis effect. The ICJ has clarified that, "To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so."; *see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, Judgment, 2008 I.C.J. Rep. 412, 428, ¶ 53 (Nov. 18); *see also*, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 292, ¶ 28.

international courts and tribunals confirm the weight attributed to judicial and arbitral decisions.[114]

## A. The Philippines' Claim

The Philippine arbitration case against China over the South China Sea asked the Tribunal three fundamental questions. First, whether "the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine-dash line" are inconsistent with the Convention and therefore invalid."[115] Second, whether "under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12M."[116] And lastly, whether the Philippines should be allowed "to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention."[117]

The Philippines formally set out 15 specific submissions in its Memorial of Mar. 30, 2014.[118] The Philippines wanted, *inter alia*, a declaration from the Tribunal that China's rights and entitlements in the South China Sea had to be based on UNCLOS and not on any claim to historic rights.[119] Specifically, the Philippines argued that China's claim to rights within its so-called nine-dash line marked on Chinese maps were without lawful effect to the extent that they exceeded the entitlements that China would be permitted under

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[114] Lanovoy, *supra* note 112, at 565; MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 26 (Cambridge University Press, 1996), who states that the ICJ "also follows its own case law."

[115] *Notification and Statement of Claim*, ¶ 6; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 28.

[116] *Id.*

[117] *Id.*

[118] Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 4-7; Memorial of the Philippines, Volume I, Mar. 30, 2014, 271-272.

[119] The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 7, 28; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 99, 101.

UNCLOS.[120] The Philippines requested, *inter alia*, for the Tribunal to adjudge and declare that:

(1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by UNCLOS;
(2) China's claims to sovereign rights jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS.[121]

The issues before the tribunal related exclusively to the interpretation or application of the UNCLOS, in respect of matters over which China has not availed itself of the optional exceptions provided in Article 298 of the Convention.[122] The Philippines at all stages of the arbitration never requested the Tribunal to rule on the territorial aspects of its disputes with China or to delimit any maritime boundaries.[123]

### *1. Jurisdiction*

The Philippines possesses the right to submit a dispute concerning the interpretation or application of the UNCLOS to a court or tribunal having jurisdiction using the compulsory procedures entailing binding decisions provided for in the Convention.[124] The UNCLOS is the principal basis for the arbitration, of which both the Philippines and China are States Parties, the Philippines having ratified it on May 8, 1984, and China on June 7, 1996.[125] The refusal of China to participate in the proceedings did not impair the

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[120] The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 7.

[121] *Id.* ¶ 112.

[122] *Id.* ¶¶ 1202(G), 1203; On 25 August 2006, China made the following Declaration under Article 298 of the Convention: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in Paragraph 1(a)-(c) of Article 298 of the Convention.".

[123] *See Notification and Statement of Claim*, ¶ 7; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 8, 152-154.

[124] UNCLOS, *supra* note 1, art. 286.

[125] *Id.* arts. 286, 287, 1, Annex VII.

arbitration.[126] The UNCLOS Annex VII arbitral procedure was so designed that even the failure of a party to take the requisite action will not frustrate the arbitral proceedings.[127] The non-participation of China in both the written and oral proceedings of the Arbitral Tribunal did not have any bearing on the process of the proceedings and the validity of the arbitral award.[128] The Arbitral Tribunal only needed to satisfy itself that it had jurisdiction and that the claim of the Philippines was well founded in fact and law.[129]

In consideration of the non-participation of China, the Tribunal carried out measures in order to ensure procedural fairness to both Parties without compromising the efficiency of the proceedings. The Tribunal ascertained the position of China on the issues based on public statements made by Chinese officials as well as through communications to the members of the Tribunal.[130] There was no duty for China to appear before the Tribunal. However, it does have the duty to comply with the decision of the Tribunal,[131] provided it had jurisdiction.[132] Its non-appearance did not affect the validity of the judgment. It is final and there is no provision for appeal.[133]

*2. Merits*

The Philippines asserted that prior to the UNCLOS, there were only two principles that govern the sea: "the principle of the freedom of the seas, which prohibits appropriation by any state; and the principle of control over a limited area by the immediately adjacent coastal state, which prohibits appropriation by any other state."[134] The Philippines argued that China's claim is not consistent with both of these principles. Before the UNCLOS was

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126 *Id.* art. 9, Annex VII.

127 Military and Paramilitary Activities in and against Nicaragua, *supra* note 109, ¶ 28; Arctic Sunrise Case, *supra* note 110, ¶¶ 48, 52.

128 UNCLOS, *supra* note 1, art. 9, Annex VII; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 143.

129 UNCLOS, *supra* note 1, art. 9, Annex VII; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 117, 143-144.

130 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 129-142.

131 UNCLOS, art. 11, Annex VII.

132 UNCLOS, sec. 2, Part XV.

133 UNCLOS, art. 11, Annex VII ("unless the parties to the dispute have agreed in advance to an appellate procedure."); *id.* art. 296; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 1172.

134 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 193.

adopted, the Philippines argued, international law did not allow "assertions of historic rights over such a vast area" similar to China's claims in the South China Sea.[135] The Philippines asserts that unless the Convention makes an express exception for prior uses or rights, "those historic rights would not have survived as derogations from the sovereignty, sovereign rights and high seas freedoms of other states."[136] Consequently, the Convention proscribes assertions of rights to control activities beyond the limits specified fixed in the Convention "in derogation of the sovereign rights of other coastal states or the rights and freedoms of all states."[137]

In respect of China's claim to historic rights, the Philippine presented a two-fold argument:

> First, the Philippines submits that international law did not historically permit the type of expansive claim advanced by China's "nine-dash line" and that, even if China did possess historic rights in the South China Sea, any such rights were extinguished by the adoption of the Convention. Second, the Philippines argues that, on the basis of the historical record of China's activities in the South China Sea, China cannot meet the criteria for having established historic rights within the "nine-dash line".[138]

The Philippines directly challenged the existence of Chinese historic rights in the maritime areas of the South China Sea, which according to the Philippines, were first claimed by China on May 7, 2009.[139] The Philippines presented Chinese historic maps that date back to 1136, including maps that purportedly illustrate the entirety of the Chinese Empire, which consistently depicted Hainan as China's southernmost territory.[140] The Philippines presented evidence to show that in the 14th century and for much of the 15th and 16th centuries, the Imperial Chinese Government actively prohibited maritime trade by Chinese subjects.[141] The Philippines relied on published archival records of the Taiwan Authority of China, which prove the absence of

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135 *Id.*

136 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 194.

137 *Id.*

138 *Id.* ¶ 192.

139 Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 195.

140 *Id.* ¶ 195, *citing* Merits Hearing Tr. (Day 1), pp. 79 – 80.

141 *Id.* ¶ 195, *citing* Merits Hearing Tr. (Day 1), p. 81; Supplemental Written Submission, paras. A13.3-A13.11.

"any documents evidencing any official Chinese activities in regard to any South China Sea feature prior to the beginning of the 20th century."[142] In the aftermath of the Second World War, following the defeat of Japan, the Chinese identified the features of the South China Sea using transliterations of their English names.[143]

The Philippines argued that historical documents obtained by the Tribunal from the *Bibliothèque Nationale de France* and the *Archives Nationales d'Outre-Mer* confirm that "prior to the Second World War France did not consider China to have made a claim in regard to any of the Spratlys, or to the waters of the South China Sea far removed from China's mainland coast."[144] In addition, post-war documents as well as internal records of France confirm that France retained its claim to those features, consistent with position of the United Kingdom and United States to protect the sovereignty claim of France in relation to the Cairo Declaration and Potsdam Proclamation.[145]

## B. China's Claim

The Tribunal, *proprio motu* on the basis of China's Position Paper of Dec. 7, 2014 and other communications, treated the objections as constitutive of China's plea against the Tribunal's jurisdiction.[146] In China's view, "the essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention."[147] The dispute raised by the Philippines, according to China, actually involves sovereignty because in order for the Tribunal to decide upon any of the Philippine claims, "the Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea."[148] China argues that even granting that the dispute were concerned with the

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[142] *Id.* ¶ 196.

[143] *Id.* ¶ 197. For example, according to the Philippines, "Lord Auckland Shoal was thus 'Ao ke lan sha', and Mischief Reef 'Mi-qi fu'. Gaven Reef was 'Ge wen', and Amy Douglas Reef 'A mi de ge la'." *Id.*, *citing* Merits Hearing Tr. (Day 1), p. 96.

[144] *Id.* ¶ 198.

[145] *Id.*, *citing* Written Responses of the Philippines on French Archive Materials, ¶ 31 (June 3, 2016).

[146] *Id.* ¶¶ 132-133.

[147] *Id.* ¶ 133, *citing* China's Position Paper, ¶ 3.

[148] *Id.* ¶ 134, *citing* China's Position Paper, ¶ 29; *id.* ¶¶ 138-139.

Convention, the dispute would fall within the scope of its 2006 Declaration since maritime delimitation would be an integral part of this dispute.[149] As such, the subject matter of the proceedings are excluded from the Tribunal's jurisdiction by virtue of Article 298.[150] China maintains that in the event that the Philippines and China disagree with respect to whether the dispute is covered by China's declaration, "the Philippines should first take up this issue with China, before a decision can be taken on whether or not it can be submitted for arbitration."[151] The Tribunal considered and rejected China's characterization of the dispute and does not consider the dispute to be over maritime boundary delimitation.[152] Nevertheless, the Tribunal took into consideration how the exclusion of jurisdiction over disputes relating to sea boundary delimitations in Article 298 may constrain the Tribunal's jurisdiction.[153]

The Tribunal also addressed China's position that the Philippines is precluded from submitting the dispute to arbitration by virtue of other agreements between the Philippines and China which commit the parties to settle their disputes by consultations and negotiations.[154] This argument is premised on a number of statements jointly made by the parties starting in the mid-1990s and on the signing of the Declaration on the Conduct of Parties in the South China Sea in 2002.[155] In addition, the Tribunal also considered *proprio motu* whether the Treaty of Amity and Cooperation in Southeast Asia,[156] and the Convention on Biological Diversity could preclude the submission of the parties' dispute to arbitration.[157] The Tribunal concluded that these agreements and their dispute settlement provisions do not, by

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[149] *Id.* ¶ 133, *citing* China's Position Paper, ¶ 3.

[150] *Id.* ¶ 138.

[151] *Id.*, *citing* China's Position Paper, paragraph 73

[152] *Id.* ¶¶ 366, 155-157.

[153] *Id.* ¶¶ 368-371.

[154] The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 190, *citing* China's Position Paper, ¶¶. 3, 30-44; *see* Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, p. 1 (Feb. 19, 2013); *see also* UNCLOS, *supra* note 1, arts. 281, 282, 283.

[155] The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 198-229.

[156] *Id.* ¶¶ 252-269.

[157] *Id.* ¶¶ 270-289.

virtue of Article 281 or Article 282 of the UNCLOS, bar the Tribunal's jurisdiction.[158]

In respect of China's claim to historic rights, the Tribunal acknowledged that "China has never expressly clarified the nature or scope of its claimed historic rights. Nor has it ever clarified its understanding of the meaning of the 'nine-dash line'"[159] This ambiguity, the Tribunal admitted, makes the resolution of the Philippine submissions complicated.[160] Nonetheless, the Tribunal took cognizance of established facts regarding China's claim. The "nine-dash line," the Tribunal noted, originally depicted eleven dashes and first appeared in a 1948 official Chinese map.[161] In 1953, the two dashes in the Gulf of Tonkin were removed, consequently rendering it a "nine-dash line," in which form it has since consistently appeared in official Chinese cartography.[162]

On May 7, 2009, in response to the Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf, China sent two Notes Verbales to the UN Secretary-General, with a map depicting the 'nine-dash line' appended, which stated as follows:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.[163]

The statement above from China encapsulates its position in respect of the historic rights and maritime entitlements it claims over the South China Sea,

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158 *Id.* ¶¶ 229, 269, 289, 158-160, 164 (E).

159 *Id.* ¶ 180.

160 *Id.* ¶ 181; *see also* Keyuan Zou, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14(1) INT'L J. MAR. & COASTAL L., 27-56 (1999).

161 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 181.

162 *Id.* ¶ 181; *see for example* Zhiguo Gao and Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 (1) AM. J. INT'L L., 98 -124 (2013).

163 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (May 7, 2009); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (May 7, 2009).

which China has repeated—with some degree of variation—in diplomatic correspondence, public statements, and even academic literature from Chinese scholars.[164]

## C. Award of the Tribunal

The bifurcated nature of the South China Sea arbitration proceedings meant that there were two awards issued by the arbitral tribunal: first, is the award on jurisdiction and admissibility on Oct. 29, 2015; and secondly, the award on the merits on Jul. 12, 2016. The following sections will discuss these awards.

### *1. Award on Jurisdiction*

On Oct. 29, 2015, the arbitral tribunal issued an award on jurisdiction and admissibility, largely ruling in favor of the Philippines.[165] The arbitral tribunal decided that the proceedings be bifurcated in order to resolve the issue of jurisdiction before proceeding on the merits of the Philippine claim.[166] The unanimous award found that the Tribunal was properly constituted in accordance with Annex VII of the UNCLOS and that China's non-appearance does not deprive the Tribunal of jurisdiction.[167] As a preliminary matter, the Tribunal explained that the "dispute settlement provisions set out in Part XV of the Convention were heavily negotiated and reflect a compromise" and whilst States Parties possess the flexibility to resolve disputes in the manner of their choice, the UNCLOS provides strict and limited exceptions to the compulsory dispute procedures spelled out in the Convention itself.[168] The Tribunal emphasized that "States Parties to the Convention are accordingly

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[164] The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 186-187.

[165] Award on Jurisdiction and Admissibility, *supra* note 108.

[166] *Procedural Order No. 4*, Apr. 21, 2014, 6, ¶ 1(1.3); Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 68. On the fallacy of China's historic claim, *please see* Antonio T. Carpio, *The South China Sea Dispute: Philippine Sovereign Rights and Jurisdiction in the West Philippine Sea*, 90 PHIL. L. J., 459, 493-510 (2017).

[167] Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(a)(b), 112–123.

[168] *Id.* ¶ 107; *see* UNCLOS, *supra* note 1, arts 289, 298; Furthermore, beyond the specific exceptions provided under UNCLOS, art. 309 provides that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." Article 298, *inter alia*, excludes disputes "involving historic bays or titles", disputes concerning "military activities", as well as "law enforcement activities" related to marine scientific research or fisheries.

not free to pick and choose the portions of the Convention they wish to accept or reject."[169]

The arbitral tribunal recognized, which the Philippines concedes, that a dispute over land sovereignty exists between the China and the Philippines over certain maritime features in the South China Sea.[170] However, the Philippines has not asked the Tribunal to rule on the question of sovereignty, and on the contrary, has expressly and repeatedly requested that the Tribunal refrain from doing so.[171] The Tribunal ruled that the Philippine submissions do not require an implicit determination of sovereignty.[172]

The award on jurisdiction clarified that the dispute does not concern sovereignty over the features within the South China Sea or delimitation of maritime boundaries, since the Philippines was conscious that the Convention is not concerned with territorial disputes and aware of China's 2006 Declaration in accordance with the UNCLOS to exclude maritime boundary delimitations from its compulsory dispute settlement procedures,[173] but "unequivocally a dispute concerning the interpretation and application of the Convention."[174] The Tribunal also ruled that the arbitration case filed by the Philippines did not constitute an abuse of process,[175] and that there is no indispensable third party whose absence deprives the Tribunal of jurisdiction.[176]

The Tribunal further ruled that the 2002 China-Association of Southeast Asian Nations ("ASEAN") Declaration on the Conduct of the Parties in the South China Sea, being a political agreement which was not intended to be legally binding, along with other agreements and joint statements by China and the Philippines, do not preclude recourse to the compulsory dispute settlement procedures under the UNCLOS.[177] In respect of jurisdiction, the

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169 Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 107.

170 *Id.* ¶ 152; *see also* Memorial of the Philippines, Volume I, Mar. 30, 2014, paragraphs 1.16, 1.26, 2.13; Philippine Supplemental Written Submission, ¶ 26.8.

171 Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 153; *see also* Philippine Memorial, ¶ 1.16.

172 Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 153.

173 *Id.* ¶¶ 8, 26.

174 *Id.* ¶¶ 152–157, 168; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 283.

175 Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(c), 124–129.

176 *Id.* ¶¶ 413(d), 179–188.

177 *Id.* ¶¶ 413(e), 189–353.

Tribunal ruled that it has jurisdiction to consider seven out of the fourteen submissions of the Philippines,[178] except those that involve consideration of issues that do not possess an exclusively preliminary character, which the Tribunal reserves to the merits phase.[179]

The Tribunal considered the issue of jurisdiction, particularly the limitations and exceptions to jurisdiction in Articles 297 and 298 of the UNCLOS, as interwoven with the merits of the Philippine claim.[180] In respect of the Tribunal's jurisdiction to decide on the merits on the Philippines' submissions regarding the nature and validity of China's historic rights claim in the South China Sea, the Tribunal clarified that the nature of such historic rights may determine whether the dispute is covered by the exclusion from jurisdiction of "historic bays or titles" in Article 298 and whether there is overlapping entitlement to maritime zones in the area where certain Chinese activities are alleged to have occurred, which in turn, will potentially impact the application of other limitations and exceptions in Articles 297 and 298 of the UNCLOS.[181]

In respect of the first Philippine submission on the question of whether China's maritime entitlements in the South China Sea, may not extend beyond those permitted by the UNCLOS,[182] the Tribunal ruled that it "reflects a dispute concerning the source of maritime entitlements in the South China Sea and the role of the Convention" and it is "not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV."[183] The Tribunal, in reserving its decision on its jurisdiction with respect to the Philippines' Submission No. 1 for consideration in conjunction with the merits of the Philippines' claims, reasoned as follows:

> The Philippines' Submission No. 1 does, however, require the Tribunal to consider the effect of any historic rights claimed by China to maritime entitlements in the South China Sea and the interaction of

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[178] Philippine Submissions No. 3, 4, 6, 7, 10, 11 and 13; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(g), 398–412.

[179] Philippine Submissions No. 1, 2, 5, 8, 9, 12 and 14; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(h), 398–412.

[180] *Id.* ¶ 392.

[181] *Id.*; *see also id.* ¶¶ 394 to 396 (in respect of the Tribunal's reasoning on its jurisdiction to decide on the merits of the other Philippine submissions).

[182] Memorial of the Philippines, Volume I, Mar. 30, 2014, 271.

[183] Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 398.

> such rights with the provisions of the Convention. This is a dispute concerning the interpretation and application of the Convention. The Tribunal's jurisdiction to consider this question, however, would be dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The nature and validity of any historic rights claimed by China is a merits determination.[184]

In respect of Philippine Submission No. 2, which pertains to "China's claims to sovereign rights and jurisdiction, and to 'historic rights', with respect to the maritime areas of the South China Sea encompassed by the so-called 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS,"[185] the Tribunal also ruled that this is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV.[186] The Tribunal, in reserving its decision on its jurisdiction with respect to the Philippines' Submission No. 2 for consideration in the merits phase of the arbitration, reasoned as follows:

> The Philippines' Submission No. 2 directly requests the Tribunal to determine the legal validity of any claim by China to historic rights in the South China Sea. This is a dispute concerning the interpretation and application of the Convention. The Tribunal's jurisdiction to consider this question, however, would be dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The nature and validity of any historic rights claimed by China is a merits determination. The possible jurisdictional objections with respect to the dispute underlying Submission No. 2 therefore do not possess an exclusively preliminary character.[187]

The Tribunal concluded that a determination of its jurisdiction to consider Philippine Submission Nos. 1 and 2 (as well as Philippine Submission Nos. 5, 8, 9, 12, and 14) "would involve consideration of issues that do not possess an

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[184] *Id.*

[185] Memorial of the Philippines, Volume I, March 30, 2014, 271.

[186] Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 399.

[187] *Id.* ¶ 399; *please see id.* ¶ 400-412 (for the Tribunal's conclusion on its jurisdiction in respect of the Philippines' other submissions).

exclusively preliminary character," and reserved consideration of its jurisdiction on these submissions to the merits phase.[188]

*2. Award on Merits*

The South China Sea arbitral tribunal categorically declared that China's nine-dash line claim is incompatible with the UNCLOS,[189] and China's historic rights claim over living and non-living resources in the South China Sea finds no basis in international law and is incompatible with the UNCLOS.[190] The Tribunal, in deciding in favor of the Philippines, concluded that any historic rights which China may have had over the disputed territory were extinguished as far as they were incompatible with the regime of the exclusive economic zone provided for in the Convention.[191] In the words of the Tribunal:

> [B]etween the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.[192]

In the final award on the merits, the Arbitral Tribunal distinguished the concept of historic rights and historic title:

> The term "historic rights" is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. "Historic title", in

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[188] *Id.* ¶ 413.

[189] The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 261, 278, and 1203 (B)(2); *see also id.* ¶¶ 232, 252, 246, 262-263.

[190] *Id.* ¶¶ 239, 243, 278.

[191] *Id.* ¶ 261.

[192] *Id.* ¶ 278.

> contrast, is used specifically to refer to historic sovereignty to land or maritime areas. "Historic waters" is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although "general international law . . . does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'." Finally, a "historic bay" is simply a bay in which a State claims historic waters.[193]

In the view of the Tribunal, the reference to 'historic titles' in Article 298(1)(a)(i) of the UNCLOS, as understood by the drafters of the Convention, pertains to claims of sovereignty over maritime areas derived from historical circumstances.[194] This is reflected in Article 15 of the UNCLOS, which also mentions this terminology.[195] In contrast, the UNCLOS does not mention "historic rights," and the Tribunal concludes that there is "nothing to suggest that Article 298(1)(a)(i) was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty."[196]

On the basis of this critical terminological distinction, as well as China's conduct,[197] the Tribunal distinguishes China's claim as one of "historic rights" rather than "historic title."[198] The Tribunal concludes that "China does not claim historic title to the waters of South China Sea, but rather a constellation of historic rights short of title."[199] Since China has not made a historic title claim, the exception to jurisdiction in Article 298(1)(a)(i), which is limited to

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193 *Id.* ¶ 225. This view is shared by commentators, who also differentiate between historic title as being "sovereignty-based rights" as opposed to non-sovereign type historic rights falling short of title. *See* Symmons, *First Reactions to the Philippines v China Arbitration Award Concerning the Supposed Historic Claims of China in the South China Sea*, 1 ASIA-PACIFIC J. OCEAN L. & POL'Y 260, 262-263 (2016); SYMMONS, *supra* note 21, at 5; Zou Keyuan, *China's U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEV. & INT'L L. 18, 23 (2012).

194 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 226.

195 Art. 298 (1)(a)(i) also mentions "historic bays or titles" in reference to disputes concerning the interpretation or application of arts. 15, 74 and 83 of UNCLOS relating to sea boundary delimitations.

196 The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 226.

197 *Id.* ¶¶ 228, 207-214.

198 *Id.* ¶ 227.

199 *Id.* ¶ 229.

disputes involving historic titles, does not apply, which assures the jurisdiction of the Tribunal to consider Philippine Submission Nos. 1 and 2.[200]

The Tribunal further clarified that "historic waters are merely one form of historic right and the process is the same for claims to rights short of sovereignty."[201] It also reiterated, as summarized in the UN Secretariat's 1962 Memorandum on the Juridical Regime of Historic Waters, Including Historic Bays, that the formation of historic rights in international law "requires the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States."[202]

The Tribunal ruled that China failed to establish any exclusive historic right to living and non-living resources within the "nine-dash line." The Tribunal declared that:

> [U]pon China's accession to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the "nine-dash line" were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention.[203]

In order to establish the emergence of a historic right, historical navigation and fishing beyond the territorial sea are insufficient; rather, it is "necessary to show that China had engaged in activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right."[204] China failed to show that it had historically prohibited or restricted the exploitation of such resources by the nationals of other States and that these States acquiesced to such restrictions. There is likewise no evidence to support the argument that China has historically regulated or controlled fishing in the South China Sea, beyond the limits of the territorial sea.[205]

The Tribunal recognized the theoretical difficulty of extending China's historic right claim over non-living resources of the seabed, which was only at

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[200] *Id.*
[201] *Id.* ¶ 265.
[202] *Id.* ¶ 263.
[203] *Id.* ¶¶ 262-263.
[204] *Id.* ¶ 270.
[205] *Id.*

its nascent stages during the UNCLOS negotiations. The Tribunal concluded that China has no basis for a historic right with respect to the seabed since there is no evidence of any historical activity that China could have restricted or controlled since offshore oil extraction was then still in its infancy and only recently became possible in deep water areas.[206] The Tribunal explained that "China's ratification of the Convention in June 1996 did not extinguish historic rights in the waters of the South China Sea;" rather, "China relinquished the freedoms of the high seas that it had previously utilised with respect to the living and non-living resources of certain sea areas which the international community had collectively determined to place within the ambit of the exclusive economic zone of other States.[207]" China's ratification of the UNCLOS allowed it a greater degree of control over the maritime zones adjacent to and projecting from its coasts and islands, and preserved China's freedom to navigate the South China Sea.[208]

In the final award, the Tribunal took the occasion to clarify that the question of historic rights with respect to maritime areas is separate and distinct from claims to historic rights to land. In this regard, the Tribunal emphasized that "nothing in this Award should be understood to comment in any way on China's historic claim to the islands of the South China Sea. Nor does the Tribunal's decision that a claim of historic rights to living and non-living resources is not compatible with the Convention limit China's ability to claim maritime zones in accordance with the Convention, on the basis of such islands."[209]

There are other aspects of the final award, for example, pertaining to the status and maritime entitlements of the disputed insular features in the South China Sea which were part of the Philippine submissions, *inter alia*, which are not covered in this paper.[210]

## IV. Concluding Remarks

The South China Sea arbitral tribunal directly addressed the question placed squarely before it: whether China's "historic rights" claims in the South

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[206] *Id.*

[207] *Id.* ¶ 271.

[208] *Id.*

[209] *Id.* ¶ 272.

[210] Some of the more notable aspects of the final include the declaration of the Tribunal that none of the high tide features in dispute are "islands" being incapable of sustaining human

China Sea are in accordance with the rules of international law. The arbitral tribunal unequivocally responded to this question in the negative. China's "historic rights" claim contravenes the practice of the majority of States, and represents a brazen violation of existing international conventions—which China does not deny—particularly its obligation to respect the international commitments which it had entered into when it signed and ratified the UNCLOS. Notwithstanding the non-appearance and non-participation of China in the arbitration, it remains a party to the proceedings and bound by the decision of the Tribunal.[211]

The notion of historic rights whilst not sufficiently clarified in treaty law or in international jurisprudence, the South China Sea arbitral award did shed some light on the subject matter. Notably, the award demonstrated that historic rights claims that are incompatible or inconsistent with the rights

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habitation or economic life of their own, but merely "rocks" for purposes of art. 121(3) of the UNCLOS, which do not generate entitlements to an exclusive economic zone or continental shelf. The Tribunal, after a detailed examination, concluded that the following features in their natural condition are high-tide features: Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North); and the following features are low-tide elevations: Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, Second Thomas Shoal, and as such, generate no entitlement to maritime zones of their own. The Tribunal is of the opinion, applying its measured considerations in the application of art. 121(3) of the UNCLOS, that the following features are considered "rocks" for purposes of art. 121(3) of the UNCLOS: Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), and McKennan Reef. The Tribunal concluded that Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay are not capable of sustaining human habitation or economic life of their own within the meaning of art. 121(3) of the UNCLOS, and therefore such features are not entitled to have an exclusive economic zone or continental shelf. In respect of Mischief Reef and Thomas Shoal, the Tribunal decided that they form part of the EEZ and continental shelf of the Philippines, both being located within 200 nautical miles of the coast of the Philippine island of Palawan in an area which does not overlap with any entitlements generated by any maritime feature claimed by China. The tribunal also declared China's reclamation activities have interfered with the rights of the Philippines under the UNCLOS, aggravated the dispute and undermined the integrity of the proceedings, irreparably damaged the fragile marine environment of the South China Sea, and are clearly in violation of China's obligations under UNCLOS. *Please see* The South China Sea Arbitration Award of July 12, 2016, ¶¶ 382-383, 540-551, 554-570, 622, 625-626, 643- 647, 852-890, 983, 992-993, 1038, 1043, 1177-1179, 1181.

[211] Military and Paramilitary Activities in and against Nicaragua, *supra* note 109, at 24, ¶ 28; Arctic Sunrise Case, *supra* note 110, at 242, ¶ 51; *Arctic Sunrise Case* (Neth. v. Russ.), Jurisdiction, Award of Nov. 26 2014, ¶ 60; Arctic Sunrise Case (Neth. v. Russ.), Merits, Award of Aug. 14, 2015, ¶ 10.

provided for under the UNCLOS are nullified or superseded or relinquished upon a State's accession or ratification of the Convention. In the event of such incompatibility, the UNCLOS treaty regime prevails.

The arbitral tribunal's pronouncement that China's "historic rights" are invalid having without foundation in international law, is only strictly binding between the Philippines and China. However, it will be reasonable to argue by logical extension, that China's "historic rights" claim in the South China Sea is *ipso jure*, illegal and invalid *erga omnes*. China's position is unsupported *de lege lata*, and difficult to imagine *de lege ferenda*. The Arbitral Tribunal's denial of any historic rights over the South China Sea is not merely a denial of their opposability *vis-à-vis* the Philippines, but is a complete denial of their effect *erga omnes*. Claims of historic title are effectively restrictions on the rights of the international community in those waters. These claims constitute a derogation from general international law. In order for such exceptional claims to succeed and be recognized, the State claiming derogation needs to have exercised the necessary jurisdiction over them for a long period of time without opposition from other States. This is clearly not the case in the waters claimed by China.

China's "historic rights" claim within the areas encompassed by the nine-dash line clearly exceeds the limits of its potential maritime jurisdictional entitlement under the Convention, and is therefore legally invalid. Its claim is patently incompatible with the rights of the Philippines and other States under the UNCLOS and bereft of legal basis under international law. The general rule of interpretation as embodied in Article 31 of the Vienna Convention on the Law of Treaties provides that the treaty and its relevant provision must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[212] The ordinary meaning of Article 56 of UNCLOS is clear and unambiguous. The coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil…" These rights in the EEZ, are necessarily exclusive

[212] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331; *see also id.* art. 32, which sets out as supplementary means of interpretation, recourse to the preparatory work of the treaty to confirm its meaning, or determine the meaning when it is otherwise ambiguous, obscure, or leads to a manifestly absurd or unreasonable result. A textual reading, as well as analysis of the context, the object and purpose of the Convention, and the *travaux préparatoires*, will bear the same result.

to the coastal State. Therefore, no other State may exploit the natural resources in the EEZ without the express consent of the coastal State.

Furthermore, China's "historic rights" claim within the nine-dash line does not satisfy the requirements for historic rights under general international law. In order for historic rights to be established, three elements need to be satisfied: first, the State exercised open, notorious and effective authority over the area where it claims the historic rights; second, the authority exercised was continuous and for a long period of time; and third, other States either acquiesced or failed to oppose those rights.[213] China does satisfy any of these requirements. China never exercised continuous, uninterrupted, unopposed, let alone exclusive authority over the area enclosed by the nine-dash line. The littoral States and other States never acquiesced or recognized China's historic rights claim over the same area. The opposite is true: China's historic rights claim in the South China Sea has been widely criticized and denounced by the relevant littoral States as well as major maritime States.[214]

Indeed, the interpretation provided by the Award on the concept of historic rights represents continuity and does not considerably depart from previous case law on the matter. The award of the South China Sea arbitral tribunal is a significant contribution to the development and clarification of the concept of historic rights. The South China Sea award will certainly carry

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[213] *Juridical Regime of Historic Waters*, *supra* note 13, ¶ 80.

[214] The Philippines, Malaysia, Vietnam, Brunei and Indonesia, through their respective official communications and note verbales to the UN, have submitted their opposition to the historic rights claimed by China over the South China Sea. *See, for example*, the Joint Note Verbale of France, Germany and the United Kingdom, UK NV No. 162/20, New York, Sept. 16, 2020, which categorically states that "France, Germany and the United Kingdom also highlight that claims with regard to the exercise of "historic rights" over the South China Sea waters do not comply with international law and UNCLOS provisions and recall that the arbitral award in the Philippines v. China case dating to 12 July 2016 clearly confirms this point."; *see also* Letter of United States Representative to the United Nations Ambassador Kelly Craft to the Secretary-General of the United Nations, June 1, 2020, which states that "the United States objects to China's claim to "historic rights" in the South China Sea to the extent that claim exceeds the maritime entitlements that China could assert consistent with international law as reflected in the Convention. The United States notes in this regard that the Tribunal unanimously concluded in its ruling—which is final and binding on China and the Philippines under Article 296 of the Convention—that China's claim to historic rights is incompatible with the Convention to the extent it exceeds the limits of China's possible maritime zones as specifically provided for in the Convention."

substantial and compelling precedential weight upon future cases involving similar issues.

The precedential aspect of the South China Sea arbitral award—not just in the context of its pronouncements in respect of historic rights but all other aspects of the award—carries its own force of law.[215] The practical reality is that the pronouncement of the South China Sea arbitral tribunal will be difficult to disregard let alone challenge in any future litigation or negotiated agreement in respect of the South China Sea.[216] It will also strongly impact the management and resolution of the conflicting claims in the South China Sea since the claimant States may use the award as a legal and political leverage to induce conduct amongst the parties which are more in line with international law, especially on the part of China.

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[215] The empirical study of the behavior and practice of international courts towards precedential reasoning strongly support this argument. *See* Wolfgang Alschner and Damien Charlotin, *The Growing Complexity of the International Court of Justice's Self-Citation Network*, 29 (1) EUR. J. INT'L L. 83 (2018); Cesare Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 NYU J. INT'L L. & POL. 755 (2008); Aldo Zammit Borda, *The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals*, 14 MELBOURNE J. INT'L L. 608(2013). The study by Alschner and Charlotin point out that, "Overall, 101 out of 126 ICJ cases (80 per cent) in our database refer to prior ICJ or PCIJ judgments.27 The remaining 25 out of the 126 cases (20 per cent) in which we did not detect any self-citations, are concentrated in the Court's early years, with citations becoming virtually ubiquitous in more recent decades." *id*. at 89.

[216] Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) J. INT'L DISPUTE SETTLEMENT 5, 9-10, 12 (2011), who observes that "the Court refers to itself frequently to ensure 'consistency of jurisprudence'. It sometimes does this by simply insisting on its 'settled jurisprudence' (*jurisprudence constante*) and sometimes by mentioning judgments previously rendered." The ICJ, for example, does not recognize any binding value to its own precedent; however, previous cases are given great consideration, and usually result in confirmation of earlier decisions especially in matters of procedure.

# DUALISM AND THE INCONGRUENCE BETWEEN OBJECTIVE INTERNATIONAL LAW AND THE PHILIPPINE PRACTICE OF INTERNATIONAL LAW*

ROMMEL J. CASIS**

## Introduction

Professor Merlin M. Magallona, widely regarded as one of the Philippines' foremost experts on international law, has written about the distinction between what he refers to as *objective international law* ("OIL") and the *Philippine Practice of International Law* ("PPIL"). The former is what international law actually is—based on treaties, customs, general principles of law, judicial decisions of international courts, and the teachings of publicists. The latter is the Philippine Supreme Court's interpretation of international law and the practice of the Philippine government as a whole.[1] In Magallona's words, the former is "international law as it operates in the international sphere," while the latter is composed of the norms of international law "when they are incorporated into Philippine law." Magallona, in his writings, would often criticize how the latter does not correspond to the former.

While such criticisms of the Supreme Court's decisions seem called for considering the incongruity between OIL and PPIL, are they valid considering the alleged dualist approach of Philippine law?

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[1] The term "Philippine Government" should not be limited to the executive or any of the branches of government but should refer to all of its branches and agencies. However, in Prof. Magallona's writing he seems to be referring to the decisions of the Philippine Supreme Court.

# I. The Dualist Debate

## A. The Dualist Versus Monist Perspectives

### *1. The Dualist Position*

According to the dualist position, international law and internal law are two separate legal orders, existing independently of one another.[2] Thus, international law and national law operate on different levels.[3] Thus, international rules cannot alter or repeal national legislation and, by the same token, national laws cannot create, modify or repeal international rules[4] and neither legal order has the power to create or alter rules of the other.[5] Furthermore, in order to become binding, international law must be "transformed" into national law. Thus, international law cannot directly address itself to individuals.

### *2. Monist Position*

Under the monist position, both international law and national law are part of the same order, one or the other being supreme over the other *within that order*.[6] Thus, the national and international form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent.[7] In other words, there is a single system with international law at its apex, and all national constitutional and other legal norms below it in hierarchy.[8] Because of this, there is no need for international obligations to be "transformed" into rules of national law.[9]

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2 DJ Harris, Cases and Materials on International Law 66 (6th ed.).

3 Eileen Denza, The Relationship Between International and National Law (Malcolm Evans ed.), *in* International Law 428 (2nd ed.).

4 Antonio Cassese, International Law 214 (2nd ed.).

5 James Crawford, Brownlie's Principles of Public International Law 48 (8th ed.),

6 Harris, *supra* note 2, at 66.

7 Crawford, *supra* note 5, at 48.

8 Denza, *supra* note 3, at 428.

9 Denza, *supra* note 3, at 428.

## B. Is the Philippines Dualist or Monist?

There are a number of arguments which may be raised to explain why the Philippines follows the dualist position.

### 1. *The Dualist Argument*

#### a. Magallona's argument

Magallona states: "Of a dualist character, the Philippine legal order may be interpreted to require that norms and principles of objective international law be made part of national law."[10] Furthermore: "The methods of internalization provided in the fundamental law affirm the dualist premise of the national law in relation to the international legal order. It is by reason of constitutional prescription, not of automatic incorporation or transformation, that norms of international law are internalized into Philippine law.[11]

After quoting the incorporation clause and the treaty clause of the Constitution, Magallona argues: "Thus, it is by no less than constitutional mandate that customary norms and conventional rules of objective international law be internalized into national law before they may be applied in Philippine jurisdiction."[12]

It seems that Magallona's argument is that while the Constitution seems to automatically accept custom as part of the law of the land by virtue of the incorporation clause, the internalization happens when the courts determine whether a rule is part of customary international law. He says: "Domestic courts must determine that such principles have assumed that character in the international legal order, and not by whimsical or arbitrary estimate."[13] Furthermore: "The Treaty Clause completes the process of transforming a treaty or international convention into national law."[14]

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[10] MERLIN M. MAGALLONA, THE SUPREME COURT AND INTERNATIONAL LAW: PROBLEMS AND APPROACHES IN PHILIPPINE PRACTICE 2 (2010).

[11] MAGALLONA, *supra* note 10, at 3.

[12] MAGALLONA, *supra* note 10, at 2-3.

[13] MAGALLONA, *supra* note 10, at 3.

[14] *Id.*

He explains further:

> From these postulates, it is necessarily implied that compliance with these *constitutional methods of internalization* is a condition *sine qua non* to the application of norms and principles of objective international law. On this account, they may be said to derive their validity as "part of the law of the land" from the Constitution, based on their substantive content determined by objective international law.[15]

b. Jurisprudence

In Justice Vitug's Separate Opinion in *Government of the United States of America v. Purganan,*[16] the Court said:

> In the Philippines, while specific rules on how to resolve conflicts between a treaty law and an act of Congress, whether made prior or subsequent to its execution, have yet to be succinctly defined, the established pattern, however, would show a leaning towards the dualist model. The Constitution exemplified by its incorporation clause (Article II, Section 2), as well as statutes such as those found in some provisions of the Civil Code and of the Revised Penal Code, would exhibit a remarkable textual commitment towards "internalizing" international law.

The Court added:

> The principle being that treaties create rights and duties only for those who are parties thereto—*pacta tertiis nec nocre nec prodesse possunt*—it *is considered* necessary to transform a treaty into a national law in order to make it binding upon affected state organs, like the courts, and private individuals who could, otherwise, be seen as non-parties.

It concluded that: "The constitutional requirement that the treaty be concurred in by no less than two-thirds of all members of the Senate (Article

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[15] *Id.* (Emphasis supplied.)

[16] Gov't of the United States of America v. Purganan, G.R. No. 148571 (Resolution) (2002).

21, Article VII) is, for legal intent and purposes, an equivalent to the required transformation of treaty law into municipal law."

*2. The Monist Argument*

a. The Doctrine of Incorporation

The doctrine of incorporation is stated in Article II, Section 2 of the Constitution, which states: "The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

In *Tañada v. Angara,*[17] the Court explained that by the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws.

Under the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere.[18]

Thus, under the doctrine of incorporation, there is no transformation required before customs form part of the law of the land. As a response to Magallona's internalization argument, it may be argued that what actually happens is mere recognition on the part of the court that a customary norm exists. When a court invokes customary norms, they are invoked as international law concepts and not as national principles, thus no transformation happens.

b. Direct application Human Rights Instruments

In *Republic v. Sandiganbayan*,[19] the Court held what while the Bill of Rights under the 1973 Constitution was not operative during the period after the EDSA revolution and before the provisional constitution, the protection accorded to individuals under the International Covenant on Civil and

[17] G.R. No. 118295 (1987).
[18] Sec. of Justice v. Lantion, G.R. No. 139465 (2000).
[19] Republic v. Sandiganbayan, G.R. No. 104768 (2003).

Political Rights ("ICCPR") and the Universal Declaration of Human Rights ("UDHR") remained in effect during the interregnum. It explained that the revolutionary government, after installing itself as the *de jure* government, assumed responsibility for the State's good faith compliance with the Covenant to which the Philippines is a signatory. As for the Declaration, it said "the Court considers the Declaration as part of customary international law, and that Filipinos as human beings are proper subjects of the rules of international law laid down in the Covenant."

What is most relevant here is the Court's treatment of the UDHR. The Court identified its provisions as being customary and binding even though at the time of the incident in question, there was no incorporation clause as there was no Philippine Constitution in effect. Thus, by virtue of this ruling, it may be argued that Philippine law accepts the possibility of international law directly applying in the Philippines as a customary norm of international law, even without an incorporation clause.

## C. International Versus National Law

### *1. Supremacy of International Law Over National Law*

#### a. State Responsibility

Under the Articles on State Responsibility, the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[20] This means that a State cannot avoid international responsibility simply because its national law allowed it to commit an otherwise internationally wrongful act. The articles also provide that the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations of cessation and reparation.[21] These rules reinforce the primacy of international law when it comes to issues of state responsibility.

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[20] Articles on Responsibility of States for Internationally Wrongful Acts art. 3, UN Doc. A/56/10 (2001).

[21] Art. 3.

b. Law on Treaties

Under the Vienna Convention on the Law of Treaties ("VCLT") a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[22] The only exception is in the case of Article 46 of the VCLT which provides that a State may invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties, and that its consent is invalidated only when the violation was manifest[23] and concerned a rule of its internal law of fundamental importance.

Thus, the general rule with respect to treaties is that a State may not invoke its national law, even its constitution, to justify non-compliance with its treaty obligations. This demonstrates the primacy of international law when it comes to the law on treaties.

c. Philippine Jurisprudence

In *Tañada v. Angara*,[24] the Court seemed to be in support of the primacy of international law over national law. While in the process of determining the constitutionality of the WTO Agreement, it stated: "However, while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations."

It explained further by stating that:

> By their inherent nature, *treaties really limit or restrict the absoluteness of sovereignty*. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit

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[22] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, U.N.T.S. 331.

[23] Vienna Convention on the Law of Treaties art. 46.2, May 23, 1969, U.N.T.S. 331. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

[24] Tañada v. Angara, G.R. No. 118295 (1997).

> the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, *the regulation of commercial relations*, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. *The sovereignty of a state therefore cannot in fact and in reality be considered absolute.*[25]

The implication of the ruling is that even the sovereignty of the State can be subject to the State's treaty obligations. While seemingly logical, the problem with this ruling is that what it considers a rule is actually the very issue that the Court had to address. In Magallona's words:

> One absurd feature of this theorizing is that if the status of a treaty as an inherent limitation to sovereignty is to be attributed to the WTO Agreement in a case where its very constitutionality is in question, then what is to be resolved as an issue in *Tanada* is already determine *a priori* as a premise, namely, a treaty is a restriction on state sovereignty.

Thus, if the Court begins with the premise that a treaty is a limitation on sovereignty, then how can a treaty ever be unconstitutional?

In *Bayan v. Zamora,*[26] the Court said:

> As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. While the international obligation devolves upon the state and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. As an integral part of the community of nations, *we are responsible to assure that our government, Constitution and laws will carry out our international obligation.*

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[25] *Id.* (Emphasis supplied.).

[26] Bayan v. Zamora, G.R. Nos. 138570, 138572, 138587, 138680 & 138698 (2000).

Notice that the Court said that the Philippine Constitution has a duty to carry out the State's international obligations. This clearly implies that international law has primacy over the Philippine Constitution.

*2. Supremacy of National Law Over International Law*

a. Treaties

The supremacy of Philippine law over international law can be demonstrated by the Court's power to invalidate treaties by subjecting them to constitutional requirements. Section 2 of Article VIII of the Constitution provides that the Supreme Court may not be deprived "of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in — (1) All cases in which the *constitutionality or validity* of any *treaty,* law, ordinance, or executive order or regulation is in question."

The Court has interpreted this provision to mean that our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, *but, also, when it runs counter to an act of Congress.*[27]

The Court has explained that a :treaty is always subject to qualification or amendment by a subsequent law [...] and the same may never curtail or restrict the scope of the police power of the State.[28] Thus, police power may not be curtailed or surrendered by any treaty or any other conventional agreement.[29]

Magallona states: "The core of dualist jurisdiction is composed of the power of judicial review by which the courts may determine the constitutionality or validity of a treaty or executive agreement."[30]

Because a treaty is only the equal of legislation "the *principle lex posterior derogat priori* takes effect—a treaty may repeal a statute and a statute may repeal a treaty."[31]

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[27] Gonzales v. Hechanova, G.R. No. L-21897 (1963).
[28] Ichong v. Hernandez, G.R. No. L-7995 (1957).
[29] *Id.*
[30] MAGALLONA, *supra* note 10, at 3.
[31] Sec. of Justice v. Lantion, G.R. No. 139465 (2000).

Neither can treaties affect rules established by the Philippine Supreme Court. The Court has ruled that a treaty could not:

> [M]odify the laws and regulations governing admission to the practice of law in the Philippines, for the reason that the Executive Department may not encroach upon the constitutional prerogative of the Supreme Court to promulgate rules for admission to the practice of law in the Philippines, the power to repeal, alter or supplement such rules being reserved only to the Congress of the Philippines.[32]

Thus, based on these rulings, a treaty, at best, is only equal to a statute and may in fact be overridden by another statute.

b. Customs

The Court has stated that:

> Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to national legislative enactments.[33]

Thus, the process of incorporation of customary international law only makes the custom in question equal to an act of legislation.

Magallona explains that the Incorporation Clause[34] is the "formal acceptance and recognition of principles of general international law as part of Philippine law; by this constitutional process they are transmuted into national law."[35]

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[32] In re: Garcia, UNAV (Resolution) (1961).

[33] Philip Morris, Inc. v. Court of Appeals, G.R. No. 91332 (1993); Secretary of Justice v. Lantion, G.R. No. 139465 (2000).

[34] SECTION 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

[35] MAGALLONA, *supra* note 10, at 39.

As a consequence of this:

> In the Philippine jurisdiction, these principles are subordinated to the Constitution; their operation is subject to constitutional standards [...] Indeed they derive their validity from the Constitution under the Incorporation Clause.[36]

If Magallona is correct, then the application of international custom under Philippine law is not automatic. This means that the Court can make a determination as to whether the international custom is consistent with the Constitution, in the same way that it evaluates treaty provisions. If so, this is further proof that national law is supreme over international law.

The Court would seem to agree with Magallona. It has said that:

> [I]f there is a conflict between a rule of international law and the provisions of the constitution or statute of the local state [...] [e]fforts should first be exerted to harmonize them, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the Incorporation Clause [...] [But] where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts.[37]

### 3. *Supreme in Separate Fields*

As can be seen in the previous two sections, there is authority for saying that "international law has primacy over national law" and for arguing that "national law has supremacy over international law." Perhaps the only way to reconcile these seemingly contradictory statements is to recognize that dualist perspective and allow each to have primacy or supremacy over the other in their respective fields.

In practical terms, national courts are justified in holding international law principles subject to national law rules and limitations. International

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[36] *Id.*

[37] Sec. of Justice v. Lantion, G.R. No. 139465 (2000).

courts, on the other hand, need not consider national law justifications for international law breaches.

But, as will be later on discussed, this does not resolve the problem as far as teaching law is concerned, or in its application by the Philippine government.

## II. Objective International Law v. Philippine Practice

The following discussion illustrates the differences and conflicts between OIL and PPIL by providing a comparison between the rules of international law on the one hand, and Philippine jurisprudence and executive issuances on the other.

### A. The Problem

Magallona defines *objective international law* as the "norms of international law" while "their status when they are incorporated into Philippine law" is referred to as the *Philippine practice in international law*.

The problem, as Magallona puts it is:

> Where a resolution of a controversy by a domestic court requires the application of a norm or principle of international law, this may be done without a clear understanding as to whether it is to be applied as objective international law or as national law. Confusion of one with the other may produce bizarre consequences or absurd implications, even as the controversy is formally resolved.[38]

### B. The Practice

#### 1. *The Sources of Law*

Article 38 of the ICJ Statute provides the authoritative listing of the sources of international law. It lists three formal law creating processes:

- international conventions;

[38] MAGALLONA, *supra* note 10, at 5.

- international custom; and
- the general principles of law recognized by civilized nations.

Article 38 also lists two material sources (law determining agencies) which serve as a "subsidiary means for determination of rules of law":

- judicial decisions; and
- the teachings of the most highly qualified publicists.

Unfortunately, the three formal sources and the two material sources do not track with Constitutional provisions on how international law may be applied in the Philippine jurisdiction. In summary, the Constitution appears to allow for international conventions or treaties and international custom, but not general principles of law of civilized nations.

International custom becomes part of the law of the land under the Incorporation Clause. Article II, Section 2 of the Constitution provides:

> SECTION 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

On the other hand, international conventions are recognized under the Treaty Clause. Article VII, Section 21 of the Constitution provides: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

a. Custom

i. Coverage of Incorporation Clause

The incorporation clause is intended to be the portal through which international custom makes its way into the Philippine jurisdiction. However, as Magallona notes:

> Jurisprudence does not seem to observe a consistently reasoned standard based on the nature of the sources of international law, in

> the determination of what are the "generally accepted principles of international law" to be subsumed under the Incorporation Clause.

In *Kuroda v. Jalandoni*,[39] the Court considered "the Hague Convention, the Geneva Convention and significant precedents of international jurisprudence established by the United Nations" as generally accepted principles of international law. The Court added:

> *the rules and regulations of the Hague and Geneva conventions* form part of and *are wholly based on the generally accepted principles of international law* [...] *Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them*, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.

There are other cases such as *Agustin v. Edu*,[40] *Reyes v. Bagatsing*, and *Marcos v. Manglapus,*[41] where after the Court identifies a treaty the Philippines is a party, it goes on to say that is part of "generally accepted principles of law."

It is possible that what the Court meant was that these treaties embodied customary norms and such norms, therefore, form part of the law of the land under the Incorporation Clause. A customary norm has an independent existence from the conventional norm identical to it. However, there is no mention of that in any of the aforementioned decisions. These decisions are written in such a way that a casual reader will identify treaties as being covered by the Incorporation Clause. This is not what the Incorporation Clause is supposed to do.

ii. Confusion with General Principles of Law of Civilized Nations

As explained earlier, treaties and customs become applicable in the Philippines by virtue of the Treaty Clause and the Incorporation Clause. Thus,

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[39] Kuroda v. Jalandoni, G.R. No. L-2662 (1949).
[40] Agustin v. Edu, G.R. No. L-49112 (1979).
[41] Marcos v. Manglapus, G.R. No. 88211 (1989).

there appears to be no explicit rule for the application of general principles of law of civilized nations ("GPL"). GPL is the third category of formal sources of international law found in Article 38 of the ICJ Statute. GPL are principles found in municipal law which international courts can apply when there is no custom or treaty applicable.

The Court seems to have recognized GPL, although it wrongly characterized it. After citing Article 38 of the ICJ Statute, it said that international law, "springs from general principles of law." It seemed to be confusing GPL with custom.

But the Court also said that, "[t]he Philippines, through its Constitution, has incorporated this principle as part of its national laws."[42] The Court seems to be referring to the Incorporation Clause. This means that the Court has identified the Incorporation Clause as the portal through which GPL can be applied under Philippine law. But is this a valid authority considering that the Court may have confused GPL with custom?

b. Treaties

i. Definition of Treaty

Under the Vienna Convention on the Law of Treaties ("VCLT"), a "treaty" is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." This is found in paragraph 1 (a) of Article 2 of the VCLT. However, paragraph 2 of the same article of the VCLT states, "[t]he provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

Therefore, the VCLT, while it provides for a definition for a treaty, allows the national law to define it. Thus, a treaty is one that complies with the definition as provided by national law.

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[42] Int'l School Alliance of Educators v. Quisumbing, G.R. No. 128845 (2000).

The Philippine definition of a treaty does seem to deviate from the VCLT definition. Under Executive Order No. 459 ("EO 459") issued by then President Ramos, the VCLT definition for a treaty was instead assigned to the term "international agreement." Section 2(a) of EO 459 states that an *international agreement* "shall refer to a contract or understanding regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments."

But EO 459 also defines the term "treaties" and states that these are "international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This term may include compacts like conventions, declarations, covenants and acts." EO 459 also defines the term "executive agreements" which are described as "similar to treaties except that they do not require legislative concurrence." Therefore, what is defined as a "treaty" under OIL is designated as "international agreement" under PPIL. The term "treaty" under PPIL is relegated to only one type of international agreement.

ii. Effect of Signature

Under Article 11 of the VCLT,[43] signature is one of the means by which a State may express its consent to be bound by a treaty. More specifically, Article 12 of the VCLT provides:

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

    a) the treaty provides that signature shall have that effect;
    b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
    c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

[43] Article 11. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Thus, under international law, signature may be sufficient to bind states in certain cases.

However, in *Pimentel v. Executive Secretary,*[44] the Court downplays the importance of signature:

> It should be underscored that the signing of the treaty and the ratification are two separate and distinct steps in the treaty-making process. As earlier discussed, the signature is primarily intended as a means of authenticating the instrument and as a symbol of the good faith of the parties. It is usually performed by the state's authorized representative in the diplomatic mission.

Perhaps the statement in *Pimentel* should only be limited to treaties which require ratification under international law.

However, under Philippine law, is it not the case that all treaties are required to undergo ratification as described in the Treaty Clause? When will *signature* ever be sufficient to render a treaty effective under Philippine law? Under OIL, it is possible for a state to be bound by mere signature. But under PPIL, due to the Treaty Clause, this does not seem to be possible.

iii. The Meaning of Ratification

The VCLT identifies ratification as one of the acts whereby a State establishes on the international plane its consent to be bound by a treaty.[45]

Under Philippine jurisprudence, ratification is "the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative. It is generally held to be an executive act, undertaken by the head of the state or of the government."[46] The Court has reiterated that "[i]n our jurisdiction, the power to ratify is vested in the President and not, as commonly believed, in the legislature. The role of the Senate is limited only to giving or withholding its consent, or concurrence, to the ratification."[47]

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[44] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088 (2005).
[45] Vienna Convention on the Law of Treaties art. 2(b), May 23, 1969, U.N.T.S. 331.
[46] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088 (2005).
[47] Bayan v. Zamora, G.R. Nos. 138570, 138572, 138587, 138680 & 138698 (2000).

Clearly there is a divergence here between OIL and PPIL. Under OIL, ratification, when required, is the final act to demonstrate the State's consent to be bound to a treaty. But according to PPIL, ratification is not the final act but concurrence by the Senate.

## III. Challenges Caused by the Incongruence

There are other areas of incongruence between OIL and PPIL (e.g. executive agreements, state immunity, international organizations, etc.) that could have been added to this discussion. But this paper is not intended to be a treatise or detailed discussion on all the discrepancies and conflicts between OIL and PPIL. The topics discussed in the previous section should be sufficient to demonstrate that there is an incongruence between OIL and PPIL.

This section will highlight the challenges created by this incongruence.

### A. Teaching of international law in Philippine law schools

The first area affected by the incongruence is in the teaching of international law in Philippine law schools. Teaching Public International Law would require teaching both OIL and PPIL. Teaching one without the other would render law students' education incomplete.

But what should law professors do about examinations? Should a professor avoid questions that would have a different answer depending on whether they answer on the basis of OIL or PPIL?

For example, how will a Philippine law student respond to these questions:

- Is the Philippines monist or dualist?
- What are the sources of international law?
- What is supreme: Philippine law or international law?
- Can the Philippines be bound by a treaty which has been signed but not ratified?
- Is the Philippines bound by a treaty which has been ratified?
- Can general principles of law of civilized nations be applied in the Philippines?

In law schools, perhaps students and professors could come to an agreement and resolve most of the conflicts. But what about the Bar Examinations? How will the bar examinee know whether the examiner is seeking an answer from OIL or PPIL?

### B. Application of International Law by the Philippine Government

Some agencies of government are engaged in treaty negotiations and/or treaty drafting. So, the other area directly affected by the incongruence is how these agencies are supposed to understand international law. When there is a conflict, should these agencies apply OIL or PPIL? Considering the incongruence between VCLT provisions and Philippine law what should be their guide in negotiating and drafting treaties? Certainly, while they can inform their foreign counterparts about the idiosyncrasies of PPIL, they cannot impose this on them.

Then there are the courts. Should the courts continue to apply executive interpretation of international law concepts even though they can determine that OIL provides otherwise?

## IV. Conclusion

There are no easy answers for the issues raised in the previous section. There is one obvious answer: fix the incongruence between OIL and PPIL—but this cannot easily be achieved.

Fixing the incongruence would require correcting mistakes in jurisprudence and aligning them with OIL. It will also require amending executive issuances with provisions that are inconsistent with OIL. Furthermore, decades of preconceived notions and traditions emanating from these notions would have to be discarded in order to be compliant with OIL. This would take vast amounts of energy and humility for the people involved.

The easier way out may simply be the dualist solution. Let OIL be applied in the international sphere, but in the domestic sphere, PPIL reigns. Afterall, why bother with fixing PPIL if the Philippines is supposed to be dualist anyway?

# SOME PROBLEMS AND APPROACHES ARISING FROM THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

MERLIN M. MAGALLONA*

## I. Introduction

On October 31, 2003, the U.N. General Assembly adopted the United Nations Convention Against Corruption ("UNCAC").[1] It entered into force on December 14, 2005, in accordance with its Article 68(1) which provides *inter alia*: "This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession."

The Philippines signed the UNCAC on December 9, 2003 and ratified it on November 8, 2006. Having expressed its consent to be bound by the UNCAC, the Philippines is a party to it, and it must perform it in good faith. Under the treaty clause of the Constitution in Section 21, Article VII, the UNCAC has acquired the status of a valid and effective law, subject to the obligations which the Philippines has assumed vis-à-vis the other parties to the UNCAC.

## II. A Normative Problem

In one of its policy premises in the Preamble, the UNCAC underscores the view "that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another." Such reference to "responsibility of all States" is not to be taken in the normative sense; it is outside the context of the law of state responsibility for internationally wrongful acts of states.

Strictly, for purposes of state responsibility, an action or omission of a State becomes an internationally wrongful act when it constitutes a *breach of*

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[1] United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 145.

*an international obligation* under international law, without regard as to how it is characterized by national law.

In this sense, the method by which the textual composition of rights and duties as defined under UNCAC deserves focus. On the whole, the UNCAC is not clear whether it intends to compose an international obligation in this context. For example, in dealing with fundamental principles, UNCAC uses the mandatory language of "shall" with respect to the principle of sovereignty as in Article 4(1): "States Parties *shall carry out their obligations* under this Convention in a manner consistent with the principle of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[2] Or, in Article 4(2), the mandatory force of its provision is unqualified: "Nothing in this Convention *shall entitle a State Party to undertake* in the territory of another State the exercise of its jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."[3]

Under UNCAC's Chapter III on criminalization of acts intentionally committed by public officials, the textual composition of what appears as statement of duties of States Parties runs along the following clause: "Each State Party *shall adopt* such legislative and other measures as may be necessary to establish as a criminal offense, when committed intentionally."[4] This is true with respect to bribery of national officials in Article 5, bribery of foreign public officials in Article 16(1), embezzlement in Article 17, and obstruction of justice in Article 25. But as to trading in influence in Article 18, abuse of functions in Article 19, illicit enrichment in Article 20, and concealment in Article 24, the expression used is: "Each State Party *shall consider adopting*."[5] Article 16 consists of two paragraphs: paragraph 1 deals with bribery of *foreign public officials* and paragraph 2 is devoted to bribery of *officials of public international organizations*; in the first case, "shall adopt" is used, but in the second case, "shall consider adopting" instead is

[2] Emphasis supplied.
[3] Emphasis supplied.
[4] Emphasis supplied.
[5] Emphasis supplied.

expressed, which may imply a nuanced difference in interpretation, intended or not.

And yet all these offenses sought to be established by the UNCAC are all equally subject to the following prescription under Article 30(1): "Each State Party shall make the commission of an offense established in accordance with this Convention liable to sanctions that take into account the gravity of that offense."

The determination of the "gravity of that offense" does not appear to be reflected in the varying obligatory characteristics of the duty required on the State Parties.

The question raised above in regard to the textual composition of the obligations of State Parties becomes a matter of central concern in light of UNCAC's intent in defining the criminalization of specified acts against corruption under the domestic law as among the principal objectives and purposes of UNCAC.

## III. Knowledge and Intent as Element of the Crime (*Mens Rea*)

In defining standards for the criminalization of acts against corruption, the UNCAC invariably requires that the State Parties adopt or consider adopting such measures "as may be necessary to establish as a criminal offense, *when intentionally committed*." Thus, UNCAC intends that the State Parties are required to make knowledge, intent, and purpose of the act as an element of an offense. Since the UNCAC, with express deliberation, has established *mens rea* as an element of the anti-corruption offense, in domestic law the States Parties must comply strictly with this requirement in order for each offense to be deemed as "established in accordance with this Convention." If the UNCAC does not require that *mens rea* is an expressly separate element of the offense, the way may be open to interpret *mens rea* as a presumption, i.e., that knowledge of the wrongfulness of an act inheres as an essential ingredient of the offense which needs no separate proof. But the emphasis of UNCAC that it is necessary to establish a criminal act as "intentionally committed" may have the effect of displacing the

aforementioned presumption, implying that *mens rea* be proven by the prosecutor as a separate element of the offense.

In this light, the UNCAC appears to be self-contradictory. It affirms that every anti-corruption offense be defined as "intentionally committed" and yet it stipulates in Article 28 that "knowledge, intent or purpose" is an element of an offense that may sufficiently be proven by *inference* from "objective factual circumstances". Does the UNCAC consider such inference as evidence to prove *mens rea* as a separate element of an offence?

## IV. Offenses Committed by Foreign Public Officials and by Officials of Public International Organizations

The UNCAC introduces two new categories of public officials in Article 16, namely:

- "Foreign public officials" which shall mean any person holding legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected, and any person exercising a public function for a foreign country, including for a public agency or public enterprise;
- "Official of a public international organization" which shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.

Our primary concern with respect to these categories of officials is that the UNCAC appears to create conditions by which the State Parties may exercise criminal jurisdiction over both categories in the face of state immunity based on sovereign equality of states and non-intervention, in matters within the domestic jurisdiction of any state; and taking into account international immunity as provided in conventional international law, provided for the benefit of officials of the United Nations and of its specialized agencies.

State immunity may take the form of diplomatic and consular privileges and immunities as embodied in the Vienna Convention on Diplomatic Relations ("VCDR") and on Consular Relations ("VCCR"). Of particular relevance is the provision on immunity from criminal jurisdiction which the

VCDR in Article 31(1) sets forth, thus: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."[6]

What inevitably comes out from UNCAC's *travaux preparatoire* is that the inclusion of the new categories of officials is "not intended to affect any immunities that foreign public officials or officials of public international organization[s] may enjoy" in accordance with international law, perhaps relying on the prospect of waiver of immunity.

Pursuing further UNCAC's intent, the following limitations to immunity may be identified with respect to criminal liability.

1. In diplomatic law, members of the administrative and technical staff of the diplomatic mission enjoy immunity from criminal jurisdiction with respect to acts whether official or personal. But if they are nationals or permanent residents of the receiving state, they are entitled to such immunity only with respect to acts performed within their official duties.[7]

2. Members of the service staff of the diplomatic mission enjoy immunity from criminal jurisdiction only with respect to "acts performed in the course of their [official] duties," if they are not nationals or permanent residents of the receiving state. No immunity is accorded them for personal acts. If they are such nationals or permanent residents, "they receive no privileges or immunities."[8]

3. In consular law, immunity from criminal jurisdiction applies to consular officers only with respect to acts in the exercise of their official functions, which are deemed to be sovereign acts of the sending state. Excluded from immunity are private or personal acts with respect to which they are regarded as any private person subject to the criminal jurisdiction of the receiving state.[9]

4. International immunity as provided for the officials of the United Nations and those of its specialized agencies has its limits. The Convention

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6 Vienna Convention on Diplomatic Relations, art. 31(1), April 18, 1961, 500 U.N.T.S. 95.

7 *See* Vienna Convention on Diplomatic Relations, art. 37(2), April 18, 1961, 500 U.N.T.S. 95.

8 Vienna Convention on Diplomatic Relations, art. 37(3), April 18, 1961, 500 U.N.T.S. 95. *See also* EILEN DENZA, DIPLOMATIC LAW (2nd ed.) 337 (1998).

9 *See* MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 141-42 (1995).

on the Privileges and Immunities of the United Nations rests on the restrictive principle that the immunities are granted to UN officials "in the interest of the United Nations and not for the personal benefit of the individuals themselves."[10] It becomes the *duty* on the part of the UN Secretary-General to waive the immunity of any official in any case where it would "impede the cause of justice."[11]

5. The same restrictive principle limits the immunity of officials of specialized agencies of the United Nations, such as the International Monetary Fund ("IMF"), the World Bank, the World Health Organization ("WHO"), the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), Food and Agriculture Organization ("FAO"), International Labor Organization ("ILO"), and Universal Postal Union ("UPU"). Section 22 of the Convention on the Privileges and Immunities of the Specialized Agencies provides that "immunities are granted to officials in the interests of the specialized agencies only and not for the personal benefit of the individuals themselves." Immunities are subject to waiver, which is described as "the right and the duty" of each specialized agency "in any case where, in its opinion, the immunity would impede the cause of justice and can be waived without prejudice to the interest of the specialized agency."

With respect to the members of the diplomatic staff of the diplomatic mission whose immunity from criminal jurisdiction does not make a distinction between official acts and private or personal conduct, most likely the approach is through the authority of the receiving state to declare them *persona non grata*. As to officials of the UN as well as to specialized agencies, the application of the waiver provisions of the corresponding Convention may provide room for negotiation in the balancing of interests between the UN or the specialized agency, and the prosecuting State Party of the UNCAC. Such waiver provisions may find relevance in Article 30(2) of the UNCAC which reads:

> Each State Party shall take such measures as may be necessary to establish or maintain in accordance with the legal system and constitutional principles and appropriate balance between any immunities or jurisdictional privileges accorded for the performance

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[10] Convention on the Privileges and Immunities of the United Nations art. 20, Feb. 13, 1946, 1 U.N.T.S. 15.

[11] Convention on the Privileges and Immunities of the United Nations art. 20, Feb. 13, 1946, 1 U.N.T.S. 15.

> of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offenses established in accordance with this Convention.

This provision may come into relevance on the part of the State Parties to the UNCAC with respect to the categories of officials covered by its Article 16. The conduct of such officials of private or personal character may no longer be deemed as acts of the sending State in diplomatic or consular law or acts associated with the public international organization, and thus not protected by immunity from criminal jurisdiction. In which case, such private acts may become the concern of the State Parties of the UNCAC insofar as they may be covered by their domestic law establishing "offenses in accordance with this Convention".

## V. The UNCAC and the Presumption of Innocence of the Accused

In establishing standards for the offense of illicit enrichment, the UNCAC stipulates:

> Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offense, when committed intentionally, illicit enrichment, that is, a significant increase in the asset of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

This formulation lends itself to the implication that the UNCAC goes further than determining standards by which a State Party may legislate or establish an offense; it defines the offense of illicit enrichment itself, and in doing so, it may collide with the State Party's "constitution and the fundamental principles of its legal system", so fundamental as the presumption of innocence of the accused. In the first place, it is required that the act constituting the offense be "committed intentionally," which under Article 28 of the UNCAC may be "inferred from objective factual circumstances". In determining such knowledge or intent of wrongfulness of the act, judicial discretion may not interpret this as a separate element of the offense. The risk is that this inference may be drawn from the *a priori* assertion that there exists "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income." It is true that the official in question is afforded a reasonable ground

to provide an explanation, but note that this "right" to explain becomes meaningful only in denial of the assumption that he or she committed illicit enrichment. In other words, his explanation is by way of proving that he is innocent; he is the one under duty to prove his innocence because the definition of the offense is such that it excludes presumption of his innocence. His guilt is built into the formulation of the offense under the UNCAC.

There is no need to belabor the constitutional principle: "In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved."[12] This requirement ramifies into the premises of other constitutional mandates on human rights, among which is the prescription of the fundamental law that "[n]o person shall be held to answer for a criminal offense without due process of law."[13]

What has been deservedly characterized as a norm of general international law is the principle of human rights which is embodied in the International Covenant on Civil and Political Rights ("ICCPR") that "[e]veryone charged with criminal offense shall have the right to be presumed innocent until proven guilty according to law."[14] Under Articles 55 and 56 of the United Nations Charter, it is an obligation of every Member State to observe and respect human rights and fundamental freedoms. In the *Barcelona Traction Case*, the International Court of Justice affirms "the principles and rules concerning the basic rights of the human person" as among those which "all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[15]

At any rate, Article 20 on illicit enrichment does not appear in its textual composition as defining a binding force amounting to an international obligation of the State Parties of the UNCAC. They are, at the maximum, enjoined to "consider adopting" such measures, or they may consider this as recommendatory on the basis of their limiting "constitution and the fundamental principles of [...] [their] legal system."

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[12] CONST. art. III, § 14(2).

[13] Art. III, § 14(1).

[14] Art. III, § 14(2).

[15] I.C.J. Reports, 1970, pp. 3, 33.

## Annex

## United Nations Convention Against Corruption

### Preamble

*The States Parties to this Convention*,

*Concerned* about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

*Concerned also* about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

*Concerned further* about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,

*Convinced* that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential,

*Convinced also* that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,

*Convinced further* that the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively,

*Convinced* that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law,

*Determined* to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international co-operation in asset recovery,

*Acknowledging* the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights,

*Bearing in mind* that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective,

*Bearing also in mind* the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption,

*Commending* the work of the Commission on Crime Prevention and Criminal Justice and the United Nations Office on Drugs and Crime in preventing and combating corruption,

*Recalling* the work carried out by other international and regional organizations in this field, including the activities of the African Union, the Council of Europe, the Customs Cooperation Council (also known as the World Customs Organization), the European Union, the League of Arab States, the Organisation for Economic Cooperation and Development and the Organization of American States,

*Taking note with appreciation* of multilateral instruments to prevent and combat corruption, including, inter alia, the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997, the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January

1999,[4] the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999,[5] and the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003,

*Welcoming* the entry into force on 29 September 2003 of the United Nations Convention against Transnational Organized Crime,[6]

*Have agreed as* follows:

## Chapter I

## General provisions

### *Article 1. Statement of purpose*

The purposes of this Convention are:

*(a)* To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

*(b)* To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

*(c)* To promote integrity, accountability and proper management of public affairs and public property.

### *Article 2. Use of terms*

For the purposes of this Convention:

*(a)* "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any

other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

*(b)* "Foreign public official" shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;

*(c)* "Official of a public international organization" shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization;

*(d)* "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

*(e)* "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

*(f)* "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

*(g)* "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

*(h)* "Predicate offence" shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention;

*(i)* "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their

competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

*Article 3. Scope of application*

1. This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention.

2. For the purposes of implementing this Convention, it shall not be necessary, except as otherwise stated herein, for the offences set forth in it to result in damage or harm to state property.

*Article 4. Protection of sovereignty*

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

## Chapter II

## Preventive measures

*Article 5. Preventive anti-corruption policies and practices*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

*Article 6. Preventive anti-corruption body or bodies*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

   *(a)* Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

   *(b)* Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

*Article 7. Public sector*

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

   *(a)* That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;

   *(b)* That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;

   *(c)* That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;

   *(d)* That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.

3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

*Article 8. Codes of conduct for public officials*

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

*Article 9. Public procurement and management of public finances*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

   *(a)* The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

   *(b)* The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

   *(c)* The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

   *(d)* An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

   *(e)* Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

*(a)* Procedures for the adoption of the national budget;

*(b)* Timely reporting on revenue and expenditure;

*(c)* A system of accounting and auditing standards and related oversight;

*(d)* Effective and efficient systems of risk management and internal control*; and*

*(e)* Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

*Article 10. Public reporting*

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

*(a)* Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

*(b)* Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

*(c)* Publishing information, which may include periodic reports on the risks of corruption in its public administration.

*Article 11. Measures relating to the judiciary and prosecution services*

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial

independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

*Article 12. Private sector*

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

2. Measures to achieve these ends may include, inter alia:

   *(a)* Promoting cooperation between law enforcement agencies and relevant private entities;

   *(b)* Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;

   *(c)* Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;

   *(d)* Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

*(e)* Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

*(f)* Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

*(a)* The establishment of off-the-books accounts;

*(b)* The making of off-the-books or inadequately identified transactions;

*(c)* The recording of non-existent expenditure;

*(d)* The entry of liabilities with incorrect identification of their objects;

*(e)* The use of false documents; and

*(f)* The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

*Article 13. Participation of society*

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

   *(a)* Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

   *(b)* Ensuring that the public has effective access to information;

   *(c)* Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;

   *(d)* Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

      (i) For respect of the rights or reputations of others;
      (ii) For the protection of national security or *ordre public* or of public health or morals.

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the re-porting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

*Article 14. Measures to prevent money-laundering*

1. Each State Party shall:

   *(a)* Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

   *(b)* Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

   *(a)* To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

   *(b)* To maintain such information throughout the payment chain; and

(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

## Chapter III

## Criminalization and law enforcement

### *Article 15. Bribery of national public officials*

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

### *Article 16. Bribery of foreign public officials and officials of public international organizations*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue

advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

*Article 17. Embezzlement, misappropriation or other diversion of property by a public official*

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

*Article 18. Trading in influence*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

*(a)* The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

*(b)* The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or

her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

*Article 19. Abuse of functions*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

*Article 20. Illicit enrichment*

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

*Article 21. Bribery in the private sector*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

*(a)* The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

*(b)* The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

*Article 22. Embezzlement of property in the private sector*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

*Article 23. Laundering of proceeds of crime*

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

   *(a)* (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

   (i) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

   *(b)* Subject to the basic concepts of its legal system:

   (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

   (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

   *(a)* Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

*(b)* Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

*(c)* For the purposes of subparagraph *(b)* above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

*(d)* Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

*(e)* If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

*Article 24. Concealment*

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

*Article 25. Obstruction of justice*

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

*(a)* The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere

in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

*(b)* The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

*Article 26. Liability of legal persons*

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

*Article 27. Participation and attempt*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

*Article 28. Knowledge, intent and purpose as elements of an offence*

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

*Article 29. Statute of limitations*

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

*Article 30. Prosecution, adjudication and sanctions*

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall con-sider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

   *(a)* Holding public office; and

   *(b)* Holding office in an enterprise owned in whole or in part by the State.

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

*Article 31. Freezing, seizure and confiscation*

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

   *(a)* Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

   *(b)* Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

*Article 32. Protection of witnesses, experts and victims*

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

   *(a)* Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

   *(b)* Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as

permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

*Article 33. Protection of reporting persons*

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

*Article 34. Consequences of acts of corruption*

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

*Article 35. Compensation for damage*

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

*Article 36. Specialized authorities*

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or per-sons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

*Article 37. Cooperation with law enforcement authorities*

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law,

concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

*Article 38. Cooperation between national authorities*

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

*(a)* Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

*(b)* Providing, upon request, to the latter authorities all necessary information.

*Article 39. Cooperation between national authorities and the private sector*

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

*Article 40. Bank secrecy*

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

*Article 41. Criminal record*

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

*Article 42. Jurisdiction*

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

   *(a)* The offence is committed in the territory of that State Party; or

   *(b)* The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

   *(a)* The offence is committed against a national of that State Party; or

   *(b)* The offence is committed by a national of that State Party or a state-less person who has his or her habitual residence in its territory; or

   *(c)* The offence is one of those established in accordance with article 23, paragraph 1 *(b)* (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 *(a)* (i) or (ii) or *(b)* (i), of this Convention within its territory; or

   *(d)* The offence is committed against the State Party.

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged

offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

## Chapter IV

## International cooperation

*Article 43. International cooperation*

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

*Article 44. Extradition*

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

*(a)* At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General

of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

*(b)* If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall

cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

*Article 45. Transfer of sentenced persons*

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

*Article 46. Mutual legal assistance*

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

   *(a)* Taking evidence or statements from persons;

   *(b)* Effecting service of judicial documents;

   *(c)* Executing searches and seizures, and freezing;

   *(d)* Examining objects and sites;

   *(e)* Providing information, evidentiary items and expert evaluations;

   *(f)* Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

*(g)* Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

*(h)* Facilitating the voluntary appearance of persons in the requesting State Party;

*(i)* Any other type of assistance that is not contrary to the domestic law of the requested State Party;

*(j)* Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

*(k)* The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said in-formation remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9 *(a)* A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

*(b)* States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

*(c)* Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

*(a)* The person freely gives his or her informed consent;

*(b)* The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

    *(a)* The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

    *(b)* The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

    *(c)* The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

    *(d)* The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for

this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

*(a)* The identity of the authority making the request;

*(b)* The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

*(c)* A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

*(d)* A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

*(e)* Where possible, the identity, location and nationality of any person concerned; and

*(f)* The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

    *(a)* If the request is not made in conformity with the provisions of this *article;*

*(b)* If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

*(c)* If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

*(d)* If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reason-able requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the re-quested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

    *(a)* Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

    *(b)* May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

*Article 47. Transfer of criminal proceedings*

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

*Article 48. Law enforcement cooperation*

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

   *(a)* To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

   *(b)* To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

      (i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

      (ii) The movement of proceeds of crime or property derived from the commission of such offences;

      (iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

   *(c)* To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

*(d)* To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

*(e)* To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

*(f)* To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

### *Article 49. Joint investigations*

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved

shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

*Article 50. Special investigative techniques*

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

## Chapter V

## Asset recovery

### *Article 51. General provision*

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

### *Article 52. Prevention and detection of transfers of proceeds of crime*

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

   *(a)* Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

   *(b)* Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity

of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

3. In the context of paragraph 2 *(a)* of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

*Article 53. Measures for direct recovery of property*

Each State Party shall, in accordance with its domestic law:

*(a)* Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

*(b)* Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

*(c)* Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

*Article 54. Mechanisms for recovery of property through international cooperation in confiscation*

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

*(a)* Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

*(b)* Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 *(a)* of this article;

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 *(a)* of this article; and

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

*Article 55. International cooperation for purposes of confiscation*

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

*(a)* Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

*(b)* Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 *(a)*, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

*(a)* In the case of a request pertaining to paragraph 1 *(a)* of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

*(b)* In the case of a request pertaining to paragraph 1 *(b)* of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value.

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

*Article 56. Special cooperation*

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations,

prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

*Article 57. Return and disposal of assets*

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

   *(a)* In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

   *(b)* In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

   *(c)* In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the re-quested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

*Article 58. Financial intelligence unit*

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

*Article 59. Bilateral and multilateral agreements and arrangements*

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

## Chapter VI

## Technical assistance and information exchange

*Article 60. Training and technical assistance*

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. Such training programmes could deal, inter alia, with the following areas:

   *(a)* Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;

*(b)* Building capacity in the development and planning of strategic anti-corruption policy;

*(c)* Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;

*(d)* Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;

*(e)* Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;

*(f)* Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;

*(g)* Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;

*(h)* Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;

*(i)* Methods used in protecting victims and witnesses who cooperate with judicial authorities; ang

*(j)* Training in national and international regulations and in languages.

2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialized knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.

3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organizations and in the framework of relevant bilateral and multilateral agreements or arrangements.

4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.

5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.

6. States Parties shall consider using subregional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.

7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.

8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

*Article 61. Collection, exchange and analysis of information on corruption*

1. Each State Party shall consider analysing, in consultation with experts, trends in corruption in its territory, as well as the circumstances in which corruption offences are committed.

2. States Parties shall consider developing and sharing with each other and through international and regional organizations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption.

3. Each State Party shall consider monitoring its policies and actual measures to combat corruption and making assessments of their effectiveness and efficiency.

*Article 62. Other measures: implementation of the Convention through economic development and technical assistance*

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations:

   *(a)* To enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat corruption;

   *(b)* To enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement this Convention successfully;

   *(c)* To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to that account a percentage of the money or of the

corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

*(d)* To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of corruption.

## Chapter VII

## Mechanisms for implementation

*Article 63. Conference of the States Parties to the Convention*

1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.

2. The Secretary-General of the United Nations shall convene the Conference of the States Parties not later than one year following the entry into force of this Convention. Thereafter, regular meetings of the Conference of the States Parties shall be held in accordance with the rules of procedure adopted by the Conference.

3. The Conference of the States Parties shall adopt rules of procedure and rules governing the functioning of the activities set forth in this article, including

rules concerning the admission and participation of observers, and the payment of expenses incurred in carrying out those activities.

4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:

   *(a)* Facilitating activities by States Parties under articles 60 and 62 and chapters II to V of this Convention, including by encouraging the mobilization of voluntary contributions;

   *(b)* Facilitating the exchange of information among States Parties on patterns and trends in corruption and on successful practices for preventing and combating it and for the return of proceeds of crime, through, inter alia, the publication of relevant information as mentioned in this article;

   *(c)* Cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations;

   *(d)* Making appropriate use of relevant information produced by other international and regional mechanisms for combating and preventing corruption in order to avoid unnecessary duplication of work;

   *(e)* Reviewing periodically the implementation of this Convention by its States Parties;

   *(f)* Making recommendations to improve this Convention and its implementation;

   *(g)* Taking note of the technical assistance requirements of States Parties with regard to the implementation of this Convention and recommending any action it may deem necessary in that respect.

1. For the purpose of paragraph 4 of this article, the Conference of the States Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the States Parties.

2. Each State Party shall provide the Conference of the States Parties with information on its programmes, plans and practices, as well as on legislative and administrative measures to implement this Convention, as required by the Conference of the States Parties. The Conference of the States Parties shall examine the most effective way of receiving and acting upon information, including, inter alia, information received from States Parties and from competent international organizations. Inputs received from relevant non-governmental organizations duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties may also be considered.

3. Pursuant to paragraphs 4 to 6 of this article, the Conference of the States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.

*Article 64. Secretariat*

1. The Secretary-General of the United Nations shall provide the necessary secretariat services to the Conference of the States Parties to the Convention.

2. The secretariat shall:

   *(a)* Assist the Conference of the States Parties in carrying out the activities set forth in article 63 of this Convention and make arrangements and provide the necessary services for the sessions of the Conference of the States Parties;

   *(b)* Upon request, assist States Parties in providing information to the Conference of the States Parties as envisaged in article 63, paragraphs 5 and 6, of this Convention; and

*(c)* Ensure the necessary coordination with the secretariats of relevant international and regional organizations.

## Chapter VIII

## Final provisions

*Article 65. Implementation of the Convention*

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.

*Article 66. Settlement of disputes*

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

*Article 67. Signature, ratification, acceptance, approval and accession*

1. This Convention shall be open to all States for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at United Nations Headquarters in New York until 9 December 2005.

2. This Convention shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Convention in accordance with paragraph 1 of this article.

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

*Article 68. Entry into force*

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

*Article 69. Amendment*

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and transmit it to the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the States Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.

*Article 70. Denunciation*

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Convention when all of its member States have denounced it.

*Article 71. Depositary and languages*

1. The Secretary-General of the United Nations is designated depositary of this Convention.

2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

# TREATIES & AGREEMENTS

# TREATIES AND AGREEMENTS

## 1. Agreement between the Government of the RP and the Government of the French Republic Relating to Air Services

Objective

To conclude an agreement complementary to the Convention on International Civil Aviation for the purpose of establishing air services between and beyond their respective territories.

Obligation/s of the Parties

To grant to the other contracting party the right to fly across the territory without landing, the right to make stops in its territory for non-traffic purposes, and the right to make stops at the points specified for that route for the purpose of disembarking and embarking international passengers, cargo, and mail coming from or destined for other points specified. Moreover, if any dispute arises between the contracting parties relating to the interpretation or application of the agreement, the parties shall, in the first place, endeavor to settle it by direct negotiations between the aeronautical authorities.

Status of Ratification and Effectivity

The convention was ratified on Dec. 13, 2017 and took effect on Mar. 1, 2018.

## 2. Agreement between the Republic of the Philippines and the Government of his Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on Cultural Cooperation

Objective

To promote cooperation between the two countries in the fields of culture and the halal industry, and to further strengthen, promote, and develop culture, arts, and heritage cooperation on the basis of equality and mutual benefit.

To reduce barriers to trade, facilitate bilateral relations between the Philippines and Brunei, particularly with respect to halal export development and promotion programs.

Status of Ratification and Effectivity

The convention was ratified on Nov. 19, 2017 and entered into force on Mar. 27, 2018.

### 3. Memorandum of Understanding between the PH and Qatar on Cooperation in the Field of Culture

Objective

To promote and encourage bilateral cultural exchanges of musical, theatrical and artistic groups as well as artistic exhibitions and translation of literary works to foster appreciation and understanding of Qatari and Philippine cultures.

Obligation/s of the Parties

To promote and facilitate cultural cooperation between their countries by means of organizing cultural weeks and artistic exhibitions as well as the exchange of the visits of musical, theatrical, and artistic groups.

To encourage the translation of the newly issued cultural, artistic, and literary works into each other's language and meet for periodic bilateral consultations on the implementation of cultural cooperation programmes.

The delegating party will bear the travel costs of its delegations to and from the host party, and the host party will bear the costs of accommodation, inland transportation and medical treatment in cases of emergency of the delegating party.

Status of Ratification and Effectivity

The convention was ratified on Apr. 3, 2018 and entered into force on May 3, 2018.

### 4. Air Services Agreement between the Government of the Republic of the Philippines and the Government of the State of Israel

Objective/s

To establish and operate air services between their respective territories and contribute to the progress of civil aviation.

Obligation/s of the Parties

To grant to the airline designated by the other party the privilege to fly without landing across the territory of the other party, and to make stops in the said territory at the points on the routes for the purpose of putting down and taking on board international traffic in passengers, cargo and mail, separately or in combination.

Neither party shall give preference to its own or any other airline over an airline of the other party engaged in similar international air transportation in the application of its immigration, customs, quarantine, and similar regulations.

To recognize as valid certificates of airworthiness, certificates of competency and licenses issued or rendered for the purpose of operating the agreed service.

Status of Ratification and Effectivity

The convention was ratified on Apr. 3, 2018 and took effect on Feb. 20, 2018.

### 5. Air Services Agreement between the Government of the Republic of the Philippines and the Government of the Lao People's Democratic Republic

Objective/s

To continue the progress of international civil aviation and to conclude an agreement for the purpose of establishing and operating air services between the respective territories.

Obligation/s of the Parties

Each party shall grant to the other party (1) the right to fly without landing across the territory of the other party; (2) to make stops in the territory of the other party for non-traffic purpose; and (3) to make stops in the said territory at the stops specified for that route for purposes of putting down and taking on international traffic in passengers, cargo and mail coming from or destined for other points so specified.

Each party shall accord the airlines of other party the right to sell and market international air services in its territory directly or through agents or

other intermediaries of the airline's choice, including the right to establish offices, both online and offline.

Neither party shall unilaterally limit the volume of traffic, frequency, or regularity of service, or the aircraft type or types operated by the designated airline(s) of the other party, except as may be required for customs, technical, operation, or environmental reasons under uniform conditions consistent with Article 15 of the Convention.

The parties shall inform each other, upon request, about their competition laws, policies and practices or changes thereto, and any particular objectives thereof, which could affect the operation of air transport services under this agreement and shall identify the authorities responsible for their implementation.

The parties shall notify each other whenever they consider that there may be incompatibility between the application of their competition laws, policies, and practices and matters related to the operation of this agreement.

Status of Ratification and Effectivity

The convention was ratified on Apr. 3, 2018 and entered into force on Aug. 29, 2018.

### 6. Memorandum of Understanding between the Government of the Republic of the Philippines and the Kingdom of Denmark on the Establishment of a Mechanism for Bilateral Consultation

Objective/s

To enhance bilateral relations, particularly in political-security cooperation; economic cooperation; socio-cultural, educational, and scientific and technological cooperation; consular and law enforcement cooperation; and regional and global cooperation.

To develop their bilateral relations building on the long-lasting diplomatic relations established in 1946.

Obligation/s of the Parties

To inform each other on major political and security developments in the Philippines and in Denmark, and encourage and promote dialogue between their governments and officials across sectors.

To work towards strengthening bilateral trade and investments, and pursue other areas of economic cooperation that may be mutually agreed upon.

To promote cooperation in science, technology, and innovation (STI) in the fields of mutual interest and benefit through the exchanges of scientists and researchers, capacity-building activities, and joint R&D.

To consult, when needed, on immigration matters through first and foremost their diplomatic mission and the relevant ministries and agencies.

Status of Ratification and Effectivity

The convention entered into force on Jan. 8, 2018.

### 7. Memorandum of Understanding between the Philippine National Police of the Republic of the Philippines and the Cambodian National Police of the Kingdom of Cambodia on Cooperation in Combating Transnational Crimes

Objective/s

To build cooperation in combating transnational crime to build peace, security, stability, and safety for society as well as for people's harmony and country development.

To strengthen law enforcement cooperation and close relationships between the participants and to combat transnational crime effectively.

Obligation/s of the Parties

As jointly decided by the participants and in compliance with relevant international treaties and agreements, subject to participants' domestic laws, the areas of cooperation include: terrorism, drug trafficking, arms smuggling, piracy on high seas, cybercrimes, trafficking in persons and smuggling of migrants, illegal wildlife trade and other environmental crimes, identity fraud, smuggling of cultural property, and other forms of transnational crimes as may be agreed by the parties.

Each participant will bear their respective costs in furtherance of this MOU unless otherwise decided by both participants.

Status of ratification and effectivity

The convention was ratified on Nov. 22, 2017 and entered into force on Apr. 24, 2018.

## 8. Memorandum on Labor Cooperation between the Government of the Republic of the Philippines and the Government of the United Arab Emirates

Objective/s

To enhance the existing friendly relations between the two countries through cooperation in the field of manpower to promote mutual benefits which is intended to guide the development of an institutional partnership between the two participants with a focus on practical outcomes from an improved administration.

Obligation/s of the Parties

Responsibilities of the Philippine Government

To ensure that the recruitment and preparation for deployment of workers to the UAE will be in accordance with the existing Philippine Laws and that the workers have the necessary qualifications to perform the work for which they are being employed.

To ensure that, prior to his/her departure from the Philippines, the Filipino workers to be deployed to the UAE are in possession of an employment offer duly signed by both the worker and the employer, verified and approved by the second participant.

To ensure that the workers are provided with proper briefing/orientation prior to their departure on relevant laws in both countries of origin and destination relative to their employment.

Responsibilities of the UAE Government

To ensure that the entry and employment in the UAE of Filipino workers will be in accordance with the relevant UAE laws, procedures, guidelines, and regulations.

To ensure the enforcement and implementation of the employment contract duly authenticated by the UAE government.

To ensure that applications for the employment of Filipino workers shall indicate the job specifications, required qualifications, types of jobs for which recruitment is proposed as well as the terms and conditions of employment offered including waged, no-wage benefits, accommodation and transportation when applicable, end-of-service entitlement, and any other details required by the UAE Ministry of Human Resources and Emiratisation.

To ensure that that workers will have the right to remit their incomes to their country of origin or elsewhere, at their discretion, in accordance with and subject to UAE financial and other relevant regulations.

Status of Ratification and Effectivity

The convention was ratified on Mar. 8, 2018 and entered into force on Apr. 15, 2018.

### 9. Agreement on the Establishment of the ASEAN coordinating Centre for Animal Health and Zoonoses

Objective/s

To enhance trade, investment, and economic relations; facilitate growth of trade and investments and economic opportunities in their respective countries; promote closer trade and industrial cooperation and facilitate networking activities between entrepreneurial entities of both countries; promote greater understanding between the parties, other relevant authorities and the private sector of the two countries regarding their respective trade, investment, and economic policies; and encourage cooperation in areas of mutual interest.

Obligation/s of the Parties

To exchange information on macroeconomic issues, trade, investment and economic development, forecast, and strategies.

To exchange information on opportunities concerning trade fairs, exhibitions, business missions, and other trade and investment promotional activities

To promote cooperation and partnerships between natural and juridical persons of both countries, including micro, small and medium enterprises in sectors and areas of mutual interest.

To encourage implementation of projects of common interest in support of the promotion of bilateral trade, investment, and industrial cooperation.

Status of Ratification and Effectivity

The convention was ratified on Apr. 3, 2018.

**10. Agreement on Cultural Cooperation between the Government of the Republic of the PH and the Government of Burkina Faso which was signed respectively by National Commission for Culture and the Arts Chairperson Virgilio S. Almario in Manila on Oct. 5, 2017 and by Ambassador Francois Oubida in Tokyo on Oct. 19, 2017**

Objective/s

To promote the development of mutually beneficial relations in the fields of culture and the arts on the basis of mutual respect for sovereignty and the laws and regulations of each country, and bearing in mind the interest of their respective peoples.

Obligation/s of the Parties

To encourage both in the public and private sectors, reciprocal visits of cultural officials, artists, experts, students and professionals, for research, training, performances, exhibitions, and participations in cultural and artistic activities.

To promote the establishment of bilateral agreements between creative organizations and cultural institutions on matters of mutual interest.

To endeavor to promote networking and exchanges between libraries, museums, archives, cultural agencies, and other establishments from both the public and private sectors.

Status of ratification and effectivity

The convention was ratified on Apr. 3, 2018 and entered into force on Sep. 5, 2018.

## 11. MOU on Cooperation in the Field of Health between the Government of the RP and the Government of the State of Qatar

Objective/s

To understand and enhance mutual relations in the field of health and medical research, disease prevention and control, ways of promoting the well-being, application of new technologies, medicine and medical equipment, and other issues of mutual interest.

Obligation/s of the Parties

To cooperate in all important fields of health and support cooperation between institutions and individuals in both countries in the fields of medical sciences and public health.

Status of Ratification and Effectivity

The convention was ratified on Feb. 5, 2018 and entered into force on Feb. 28, 2018.

## 12. MOU between the DOA of the RP and the Ministry of Agriculture of the Republic of Indonesia on Agricultural Cooperation

Objective/s

To promote cooperation of the participants in various fields of agriculture on the basis of equality and mutual respect.

Obligation/s of the Parties

To promote cooperation in the development of agriculture and agro-industries pursuant to their respective laws and regulations.

To promote mutual consultation, exchange of technical assistance, and joint research on specific areas of agriculture.

Status of Ratification and Effectivity

The convention was ratified on Nov. 24, 2017 and took effect on Apr. 11, 2018.

### 13. Protocol to Armed the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 Relating Thereto

Objective/s

To improve further the prevention and control of marine pollution from ships, particularly oil tankers.

To implement the regulations for the prevention of pollution by oil.

Obligation/s of the Parties

To give effect to the present protocol and the annex which shall constitute an integral part of the present protocol.

To give effect to the International Convention for the Prevention of Pollution from ships, subject to the modifications and additions set out in the present protocol.

Status of Ratification and Effectivity

The convention was ratified on Aug. 9, 2017 and entered into force on Apr. 24, 2018.

### 14. Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974, (SOLAS protocol 78)

Objective/s

To further improve the safety of ships.

Obligation/s of the Parties

To give effect to the provisions of the present protocol and the annex hereto which shall constitute an integral part of the present protocol. Every reference to the present protocol constitutes at the same time a reference to the annex thereto.

Status of Ratification and Effectivity

The convention was ratified on Aug. 10, 2017 and entered into force on Apr. 24, 2018.

## 15. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

Objective/s

To develop the parties fishing sectors in accordance with their national policies, and the need to promote cooperation with developing countries to enhance their capabilities to fulfill their obligations under this agreement.

Obligation/s of the Parties

Each party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.

No party shall allow any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities of that party. A fishing vessel so authorized shall fish in accordance with the conditions of the authorization.

No party shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel.

Each party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offense under national legislation.

Status of Ratification and Effectivity

The convention was ratified on Aug. 10, 2017 and entered into force on Apr. 24, 2018.

### 16. MOU between the Royal Thai Police and the PDEA on Cooperation in Combating Illicit Trafficking in Narcotic Drugs, and Controlled Precursor and Essential Chemicals

Objective/s

To provide a basic framework for cooperation between the participants in combating transnational crime related to trafficking in narcotic drugs and controlled precursors and essential chemicals.

Obligation/s of the Parties

To establish and maintain channels of communication between them to facilitate the rapid and timely exchange of relevant information on various matters.

To coordinate in in organizing and fulfilling the countermeasures to illicit drug use and trafficking.

To provide mutual assistance in actions carried out to combat trafficking of illicit drugs and precursors thereof, including controlled deliveries and monitoring of the licit circulation of drugs.

To establish channels of communication to facilitate coordination and cooperation with the objective of ensuring rapid responses.

Status of Ratification and Effectivity

The convention was ratified on Aug. 10, 2017 and entered into force on May 30, 2018.

### 17. Agreement on Social Security between the RP and the Kingdom of Sweden on Social Security

Objective/s

To regulate their mutual relations in the field of social security.

Obligation/s of the Parties

The competent institution in the Philippines shall calculate the amount of benefit payable to the person in the manner provided by the agreement.

The competent authorities and competent institutions shall communicate to each other any information necessary for the application of this agreement.

When the competent institution of one contracting State receives an application benefit regarding a person who has completed creditable periods under the legislation of the other contracting State, the competent institution receiving the application without delay will send the application, without delay, to the competent institution in the other contracting state, and indicating the date on which the application is received.

Status of Ratification and Effectivity

The convention was ratified on Feb. 21, 2017 and entered into force on Jun. 1, 2018.

## 18. Agreement between the RP and the Federal Republic of Germany on Social Security

Objective/s and Primary Function

To regulate the parties' relations in the area of social security.

Obligation/s

To ensure that an employee shall be subject only to the legislation of the contracting State in whose territory he or she actually works.

To ensure that a person who is a member of the flying personnel of an enterprise which operations international transport services for passengers or goods and has its registered office in the territory of one contracting State shall be subject to the legislation of the contracting State.

Status of Ratification and Effectivity

The convention was ratified on Feb. 21, 2017 and entered into force on Jun. 1, 2018.

## 19. International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004

Objective/s

To continue the development of safer and more effective Ballast Water Management options that will result in continued prevention, minimization, and ultimate elimination of the transfer of Harmful Aquatic Organisms and Pathogens.

To prevent, minimize, and ultimately eliminate the risks to the environment, human health, property, and resources arising from the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships, Ballast Water and Sediments, as well as to avoid unwanted side-effects from that control and to encourage developments in related knowledge and technology.

Obligation/s of the Parties

To give full and complete effect to the provisions of this Convention and the Annex thereto in order to prevent, minimize, and ultimately eliminate the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships Ballast Water and Sediments.

To cooperate for the purpose of effective implementation, compliance and enforcement of this Convention.

To encourage the continued development of Ballast Water Management and standards to prevent, minimize, and ultimately eliminate the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships Ballast Water and Sediments.

To cooperate under the auspices of the Organization to address threats and risks to sensitive, vulnerable, or threatened marine ecosystems and biodiversity in areas beyond the limits of national jurisdiction in relation to Ballast Water Management.

Status of Ratification and Effectivity

The convention was ratified on Apr. 3, 2018 and entered into force on Sep. 6, 2018.

## 20. Agreement between the Government of the RP and the Government of Burkina Faso on the Waiver of Visa Requirements for Holders of Diplomatic Official, and Service Passports

Objective/s

To enhance bilateral relations and facilitate the travel of the Parties' nationals who are on official mission for the respective laws and regulations.

Obligation/s of the Parties

Both parties shall exchange, through diplomatic channels their respective valid passport specimens within 30 days after the signing of the agreement.

The parties shall inform each other about the new types and classifications of passports as well as modifications and changes to those in use and exempt nationals of the other party who are holders of valid diplomatic, official or service passports from the obligation to obtain visas for entry and stay in the territory of the other party, if such stay does not exceed 30 days from the first date of entry.

Status of Ratification and Effectivity

The convention was ratified on Apr. 3, 2018 and took effect on Jul. 7, 2018.

**21. MOU on the Establishment of a Bilateral Consultation Mechanism between the DGA of the RP and the Ministry of Foreign Affairs and International Cooperation of the Italian Republic**

Objective

To further develop friendly relations of cooperation between the two countries in order to contribute to the achievement of peace and mutual understanding in International Relations.

Obligation/s of the Parties

To carry out consultations and exchanges of views on matters of common interest, and in particular, but not exclusively, on (1) bilateral issues, which may include political issues of common interest as well as economic, cultural, scientific, social and educational cooperation and other issues of common interest; (2) political issues of common interest which may include political issues in the framework of Asian Europe Meeting ("ASEM") relations between Europe and Asia between the EU and ASEAN as well as regional issues of common interest including the East Asia Summit; and (3) Global Issues of common interest, which may include multilateral issues.

Status of Ratification and Effectivity

The convention entered into force on Jan. 18, 2018.

## 22. MOU Between Bangko Sentral ng Pilipinas and the State Bank of Pakistan

Objective/s

To establish cooperation concerning the exchange of information and experience on central banking areas of mutual interest to the Participants.

Obligation/s of the Parties

To exchange information and/or experiences in the development and performance of the banking system, and other areas of central banking that are of mutual interest to the participants.

To conduct consultations, seminars, workshops, internships, short-term attachments, study visits, and experts' visits covering the areas of central banking within the competence of both participants.

To conduct research in various areas related to central banking.

Status of Ratification and Effectivity

Pakistan was notified on Nov. 24, 2017.

## 23. MOC Between the Governments of the Member States of ASEAN and the Governments of the People's Republic of China, Japan, and the Republic of Korea on Strengthening Tourism Cooperation

Objective/s

The participants will, subject to the relevant laws, rules, regulations, and national policies from time to time in force in their respective countries, endeavor to cooperate: (a) In facilitating travel and tourist visits; (b) In promoting the development of quality tourism through, where appropriate, the promotion of ASEAN's environmental management standards and certification programmes for sustainable tourism, and forging concrete collaboration in cultural and eco-tourism, cruise tourism, youth exchange, manpower development, joint tourism marketing and promotion, and quality assurance, as well as safety measures for tourists; and (c) In promoting linkages and strengthening cooperation among the education and training institutions of the participants covering areas such as tourism information exchange, human resource development, and crisis communication and encouraging the involvement of the private sector in such cooperation.

Obligation/s of the Parties

To share best practices for the development of responsible and/or sustainable tourism development, including the preservation of attraction sites and their surrounding environment.

To support and encourage the participation of business communities and other tourism segments in travel marts, exhibitions, and tourism festivals with emphasis on the Participants' tourism destinations and products.

To promote and facilitate the implementation of tourism related projects or other related activities on mutually decided terms through, *inter alia,* the empowerment of the centers established by the participants.

Status of Ratification and Effectivity

The convention was ratified on Aug. 2, 2018.

**24. Convention Between the Government of the RP and the Government of the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes of Income**

Objective/s

To allocate taxing jurisdiction between the parties so as to eliminate or mitigate double taxation on income and permit the contracting states to better enforce their domestic laws in order to reduce tax evasion.

Obligation/s of the Parties

In the case of Thailand : (a) Philippine tax payable in respect of income derived from the Philippines shall be allowed as a credit against Thai tax payable in respect of that income; (b) Where such income is a dividend paid by a company which is a resident of the Philippines to a company which is a resident of Thailand and which owns not less than 15 per cent of voting shares of the company paying the dividend, the credit shall take into account the Philippine tax payable by that company in respect of its income; and (c) The credit shall not, however, exceed that part of the Thai tax, as computed before the credit is given, which is appropriate to such item of income.

In the case of the Philippines: Subject to the laws of the Philippines regarding the allowance as a credit against Philippine tax of tax payable in any country other than the Philippines, a) Thai tax payable in respect of income

derived from Thailand shall be allowed as credit against the Philippine tax payable in respect of that income; (b) Where such income is a dividend paid by a company which is a resident of Thailand to a company which is a resident of the Philippines and which owns not less that 15 per cent of voting shares of the company paying the dividend, the credit shall take into account the Thai tax payable by that company in respect of its income; and (c) The credit shall not, however, exceed that part of the Philippine tax as computed before the credit is given, which is appropriate to such item of income.

Status of Ratification and Effectivity

The convention was ratified on Jan. 17, 2017 and entered into force on Mar. 5, 2018.

### 25. Convention Between the Government of the RP and the Government of the Democratic Socialist Republic of Sri Lanka for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income

Objective/s and Primary function

To conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

Obligation/s of the Parties

Services derived by a resident of a Contracting State shall be taxable only in that Contracting State, unless the services are performed in the other Contracting State.

Status of Ratification and Effectivity

The convention was ratified on Mar. 3, 2017 and entered into force on Mar. 14, 2018.

### 26. Protocol to Amend and Supplement the Air Services Agreement Between the Government of the RP and the Kingdom of Bahrain as Amended by the Protocol Signed Between the 2 Countries on 15 December 2003

Objective/s

To amend and supplement the previous Agreement signed on August 29, 1992 between the Government of the Republic of the Philippines and the Kingdom of Bahrain.

Obligation/s of the parties

To request consultations at any time concerning safety standards in any area relating to aircrew, aircraft or their operation adopted by the other party.

If one contracting party finds that the other contracting party does not effectively maintain and administer safety standards in any such area that are at least equal to the minimum safety standards established at that time pursuant to the convention, the first contracting party shall notify the other contracting part of those findings and the steps considered necessary to conform with those minimum standards, and that the other contracting party shall take appropriate corrective action.

Status of Ratification and Effectivity

The date of ratification is April 3, 2018.

## 27. Agreement Between the Government of the RP and the Government of the Russian Federation on Military-Technical Cooperation

Objective/s

To cooperate in the military-technical area, based on mutual respect, trust and respect for the interests of each of the parties.

To develop and strengthen friendly relations between the Republic of the Philippines and the Russian Federation.

Obligation/s of the Parties

Neither party shall, without prior written consent of the other party, sell or transmit to a third party, technical documentation relating to their production, as well as information received or acquired in the course of military-technical cooperation and implementation of the agreements and contracts.

To inform the other party beforehand of the necessity of keeping in secret of the fact of cooperation between the parties or other information on cooperation.

To take measures necessary to ensure the legal protection of the results of the intellectual activity and/or intellectual property in relation to the different areas of military technical cooperation.

Status of Ratification and Effectivity

The Agreement was ratified on April 3, 2018, and it entered into force on May 3, 2018.

## 28. Agreement Between the Government of the RP and the Government of the Russian Federation Regarding Cooperation and Mutual Administrative Assistance in Customs Matters

Objective/s

To activate the cooperation in the field of interdiction of international trade of counterfeit goods considering that illicit trafficking in narcotic drugs, psychotropic substances and their precursors constitute a danger to public health and to society.

To ensure the accurate assessment of customs duties, taxes, and other charges collected on the importation or exportation of goods.

To ensure proper enforcement of measures of prohibition, restriction, and control of import and export of goods.

Obligation/s of the Parties

To undertake measures in order to facilitate and expedite movement of goods between the territory of parties.

To assist each other in the prevention, investigation and repression of customs offenses.

To exchange information for the purposes of ensuring compliance with the customs legislation, collection of customs duties and taxes, including information that may contribute to ensure the correct determination of the classifications, customs value, and origin of goods.

To cooperate in research, development, and testing of new customs procedures, in the training and exchange of personnel, and in any other matters that may require their joint efforts.

To strive for harmony and uniformity of their customs procedures and to improve customs techniques.

Status of Ratification and Effectivity

The Agreement was ratified on April 3, 2018 and entered into force on June 2, 2018.

## 29. Depository of the Free Trade Agreement Between the EFTA States and the Republic of the Philippines

Objective/s

To create new employment opportunities, improve living standards, and raise levels of protection of health and safety, and of the environment; and to pursue the objective of sustainable development and recognising the importance of coherence and mutual supportiveness of trade, environment, and labour policies in this respect.

Obligation/s of the parties

To ensure the observance of all obligations and commitments under this Agreement by its respective central, regional and local governments and authorities, and by non-governmental bodies in the exercise of governmental powers delegated to them by central, regional, and local governments or authorities.

To publish, or otherwise make publicly available, their laws, regulations, judicial decisions, administrative rulings of general application, as well as their respective international agreements that may affect the operation of this Agreement.

Upon entry into force of this Agreement, the Philippines shall eliminate its import duties and charges having equivalent effect to import duties on goods originating in an EFTA State covered by this Chapter, except as otherwise provided for in Annex III (Schedule of Tariff Commitments of the Philippines on Non-Agricultural Products Originating in the EFTA States).

Upon entry into force of this Agreement, the EFTA States shall eliminate all import duties and charges having equivalent effect to import duties on goods originating in the Philippines covered by this Chapter. The Parties shall, upon entry into force of this Agreement, eliminate all customs duties and other charges, including any form of surcharges and other forms of contributions, in connection with the exportation of goods to another Party, except as provided for in Annex IV (Export Duties).

Status of Ratification and Effectivity

This was ratified on April 3, 2018 and entered into force on June 1, 2018.

### 30. Convention on Abolishing the Requirements for Foreign Public Documents

Objective/s

The objective of this Convention is to abolish the requirement of diplomatic or consular legalisation for foreign public documents.

Obligation/s of the Parties

To exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates. The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an "allonge"; it shall be in the form of the model annexed to the present Convention.

Status of Ratification and Effectivity

This convention was ratified on April 3, 2018.

### 31. MOU Between the Philippines and Australia on Employment of the Dependents of Diplomatic and Consular Personnel

Obligation/s of the parties

To permit a family member from the sending state to engage in gainful employment in the receiving state in accordance with this memorandum and the laws of the receiving state. The receiving state will not restrict the type of gainful employment of the family member, subject to this memorandum and the laws of the receiving state.

Status of Ratification and Effectivity

The memorandum entered into force on April 18, 2018.

## 32. Convention on Cybercrime

Objective/s

To pursue a common criminal policy aimed at the protection of society against cybercrime, *inter alia*, by adopting appropriate legislation and fostering international co-operation.

To ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy.

Obligation/s of the Parties

To adopt such legislative and other measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the access to the whole or any part of a computer system without right. A Party may require that the offence be committed by infringing security measures, with the intent of obtaining computer data or other dishonest intent, or in relation to a computer system that is connected to another computer system.

To adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system, including electromagnetic emissions from a computer system carrying such computer data. A Party may require that the offence be committed with dishonest intent, or in relation to a computer system that is connected to another computer system.

To adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the damaging, deletion, deterioration, alteration or suppression of computer data without right.

To adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the serious hindering without right of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data.

To ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality. The Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

Status of Ratification and Effectivity

This convention was ratified on Dec. 9, 2016 and entered into force on July 1, 2018.

### 33. Agreement Between the RP and Japan on Social Security

Objective/s

To regulate the mutual relations of the parties in the field of social security.

Obligation/s of the Parties

Where a person does not have sufficient periods of coverage to fulfill the requirement for entitlement to Japanese benefits, the competent institution of Japan shall take into account, for the purpose of establishing entitlement to these benefits, the periods of coverage under the legislation of the Philippines insofar as they do not coincide with the periods of coverage under the legislation of Japan.

Status of Ratification and Effectivity

The agreement was ratified on Jan. 12, 2017 and entered into force on Aug. 1, 2018.

## 34. MOU Between the Foreign Service Institute of the RP and the National Institute of Diplomacy and International Relations of the Kingdom of Cambodia

Objective/s

To encourage and strengthen the friendship between the two states and consolidate the academic exchange between both institutes.

Obligation/s of the Parties

To promote the following activities: (1) exchange of information and expertise related to programs of study and research, various courses, seminars, as well as other academic activities and training; (2) support the exchange of contacts and students, diplomats, academics, officials, experts and researchers; (3) studies, research and exchange of national and international specialized information in fields of mutual interest; (4) exchange of information and points of view regarding directives and international developments on training, research and studies in diplomacy, and participation in international meetings in academic and research institutions and private centers related to diplomatic academies; (5) joint seminars in both countries; and (6) other forms of cooperation within the framework of the memorandum.

To provide a joint two-year plan for the effective execution of this MOU. Each participant will fulfill its commitments undertaken under this MOU in conformity with the legislation of their respective laws and procedures.

Status of Ratification and Effectivity

This MOU entered into force on May 24, 2018.

### 35. MOU of Understanding in the Field of Technical Vocational Education and Training between the Technical Educational and Skills Development Authority (TESDA) and the National Qualifications

Objective/s

To recognize the existing technical vocational education and training qualifications framework in both countries including competency standards for existing occupations, system of training, competency assessment, quality assurance, and certification.

To develop a mechanism by which the recognition of systems can be formalized and implemented.

To cooperate in planning and conducting capacity building programs; and

To upgrade the competencies of workers in both countries to improve the quality of work.

Obligation/s of the Parties

To work towards the promotion and cooperation in the field of technical vocational education and training through comparability of both TVET systems in competency standards, competency assessment and competency certification, recognition of education and training credentials, capacity building programs as related to the objectives of this MOU, and the exchange of visits of vocational training instructors, experts, managers and technical staff.

To establish a joint working group composed of Senior officials of both participants.

Status of Ratification and Effectivity

This MOU entered into force on May 9, 2018.

### 36. Budapest Convention on Cybercrime

Objective/s

To achieve greater unity between its members, recognizing the value of fostering cooperation with the other States parties to this Convention.

Obligation/s of the Parties

To adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, in the areas of (1) illegal access to computer system, (2) illegal interception, (3) data interference, (4) system interference, (6) misuse of device, (7) computer-related forgery, (8) computer-related fraud, (9) offences related to child pornography, (10) offences related to infringements of copyright and related rights, (11) attempt and aiding or abetting, and (12) corporate liability. Each Party shall adopt such legislative and other measures as may be necessary to establish the powers and procedures for, (1) the purpose of specific criminal investigations or proceeding, (2) conditions and safeguards, (3) expedited preservation of stored computer data, (4) expedited preservation and partial disclosure of traffic data, (5) production order, (6) search and seizure of stored computer data, (7) real-time collection of traffic data, and (8) interception of content data.

To adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention.

Status of Ratification and Effectivity

This convention was done at Budapest, on Nov. 23, 2001. The Convention was ratified with respect to the Philippines on Mar. 28, 2018 and took effect on July 1, 2018.

## 37. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

Objective/s

To prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

Obligation/s of the Parties

To apply this Agreement in respect of vessels not entitled to fly its flag that are seeking entry to its ports or are in one of its ports, except for: (a) vessels of a neighboring State that are engaged in artisanal fishing for subsistence, provided that the port State and the flag State cooperate to ensure that such vessels do not engage in IUU fishing or fishing related activities in support of such fishing; and (b) container vessels that are not carrying fish or, if carrying

fish, only fish that have been previously landed, provided that there are no clear grounds for suspecting that such vessels have engaged in fishing related activities in support of IUU fishing.

Each Party agreed to the following: (1) designate and publicize the ports to which vessels may request entry, (2) ensure that every port designated and publicized in accordance with paragraph 1 of this Article has sufficient capacity to conduct inspections, and (3) a minimum standard, and the information requested in Annex A to be provided before granting entry to a vessel to its port, Each Party shall communicate its decision taken pursuant to paragraph 1 of this Article to the flag State of the vessel and, as appropriate and to the extent possible, relevant coastal States, regional fisheries management organizations and other international organizations. Each Party shall not deny a vessel in using the port services in case of safety or health of the crew or the vessel.

Status of Ratification and Effectivity

The Agreement was signed on Nov. 22, 2009 in Rome, Italy. The Agreement was ratified by the Philippines on Aug. 10, 2018 and concurred by the Philippine Senate on Mar. 5, 2018. The Agreement took effect on May 27, 2018.

## 38. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

Objective/s

The Agreement has the objective of enhancing the role of flag States and ensuring that a State strengthens its control over its vessels, ensuring compliance with international conservation and management measures.

Obligation/s of the Parties

To take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.

To ensure that all fishing vessels entitled to fly its flag has entered such in the record maintained under Article IV, and are marked in such a way that they can be readily identified in accordance with generally accepted

standards, such as the FAO Standard Specifications for the Marking and Identification of Fishing Vessels.

To cooperate as appropriate in the implementation of this Agreement, and shall, in particular, exchange information, including evidentiary material, relating to activities of fishing vessels in order to assist the flag State in identifying those fishing vessels flying its flag reported to have engaged in activities undermining international conservation and management measures, so as to fulfil its obligations under Article III.

To exchange information regarding the, (1) name of the vessel, (2) previous flag, (3) International Radio Call Sign, (4) name and address of owner or owners, (5) where and when built, (6) type of vessel, and (7) length.

To cooperate, at a global, regional, sub regional or bilateral level, and, as appropriate, with the support of FAO and other international or regional organizations, to provide assistance, including technical assistance, to Parties that are developing countries in order to assist them in fulfilling their obligations under this Agreement.

Status of Ratification and Effectivity

The Agreement was signed on Nov. 24, 1993. It was ratified in respect with the Philippines on Aug. 10, 2017 and concurred by the Philippine Senate on Mar. 5, 2018. The Agreement took effect on May 30, 2018.

## 39. International Convention for the Control and Management of Ships' Ballast Water and Sediments

Objective/s

To prevent the spread of harmful aquatic organisms from one region to another, by establishing standards and procedures for the management and control of ships' ballast water and sediments.

Obligation/s of the Parties

To give full and complete effect to the provisions of this Convention and the Annex thereto in order to prevent, minimize and ultimately eliminate the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ship' Ballast Water and Sediments. Parties taking action pursuant to this Convention shall endeavor not to impair or damage their environment, human health, property or resources, or those of other States.

To ensure that Ballast Water Management practices used to comply with this Convention do not cause greater harm than they prevent to their environment, human health, property or resources, or those of other States.

To encourage ships entitled to fly their flag, and to which this Convention applies, to avoid, as far as practicable, the uptake of Ballast Water with potentially Harmful Aquatic Organisms and Pathogens, as well as Sediments that may contain such organisms, including promoting the adequate implementation of recommendations developed by the Organization.

To endeavor to cooperate on, (1) control of the transfer of harmful aquatic organisms and pathogens through ships 'ballast water and sediments, (2) sediment reception facilities, (3) scientific and technical research and monitoring, and (4) survey and certification.

Status of Ratification and Effectivity

This Convention was adopted in London, United Kingdom on Feb. 13, 2004. The Agreement was ratified with respect to the Philippines on Apr. 3, 2018 and entered into force on Sept. 6, 2018.

## 40. International Convention on the Control of Harmful Anti-Fouling Systems of Ships

Objective/s

To work towards the expeditious development of a global legally binding instrument to address the harmful effects of anti-fouling systems as a matter of urgency.

To recognize the importance of protecting the marine environment and human health from adverse effects of anti-fouling systems, recognizing that the use of anti-fouling systems to prevent the build-up of organisms on the surface of ships is of critical importance to efficient commerce, shipping and impeding the spread of harmful aquatic organisms and pathogens.

To continue to develop anti-fouling systems which are effective and environmentally safe and to promote the substitution of harmful systems by less harmful systems, or preferably harmless systems.

Obligation/s of the Parties

To give full and complete effect to its provisions in order to reduce or eliminate adverse effects on the marine environment and human health caused by anti-fouling systems.

To endeavor to cooperate for the purpose of effective implementation, compliance and enforcement of this Convention. The Parties undertake to encourage the continued development of anti-fouling systems that are effective and environmentally safe.

Status of Ratification and Effectivity

The Convention was signed on Oct. 5, 2001 and ratified with respect to the Philippines on May 16, 2017. It entered into force on Sept. 6, 2018.

## 41. Framework Agreement on Partnership and Cooperation Between the European Union and its Member States, of the One Part, and the Republic of the Philippines, of the Other Part

Objective/s

To strengthen bilateral relations and the EU's role in South-East Asia, based on shared universal values such as democracy and human rights. It paves the way for enhanced political, regional and global cooperation.

Obligation/s of the Parties

To hold a comprehensive dialogue and promote further cooperation between them on all sectors of mutual interest as provided under this Agreement.

To aim their efforts at: (1) establishing cooperation on political, social, and economic matters in all relevant regional and international fora and organisations; (2) establishing cooperation on combating terrorism and transnational crimes; (3) establishing cooperation on human rights and dialogue on the fight against serious crimes of international concern; (4) establishing cooperation on countering the proliferation of weapons of mass destruction, small arms and light weapons as well as promoting peace processes and conflict prevention; (5) establishing cooperation in all trade and investment area of mutual interest, in order to facilitate trade and investment flows and to remove obstacles to trade and investment, in a manner consistent with the WTO principles and ongoing and future regional EU-ASEAN initiatives; (6) establishing cooperation in the area of justice and

security, including legal cooperation; illicit drugs; money laundering; combating organized crime and corruption; data protection and refugees and internally displaced persons; (7) establishing cooperation in the area of migration and maritime labour; (8) establishing cooperation in all other sectors of mutual interest, notably employment and social affairs; development cooperation; economic policy; financial services; good governance in the tax area; industrial policy and SMEs; information and communication technology (ICT); audiovisual, media and multimedia; science and technology; transport, tourism; education, culture, intercultural and interfaith dialogue; energy; environment and natural resources including climate change; agriculture, fisheries and rural development; regional development; health; statistics; disaster risk management (DRM); and public administration; (9) enhancing both Parties 'participation in sub-regional and regional cooperation programmes open to the participation of the other Party; (10) raising the roles and profiles of the Philippines and of the European Union; and (10) promoting people-to-people understanding and effective dialogue and interaction with organized civil society.

Status of Ratification and Effectivity

This agreement was done at Phnom Penh on the July 11, 2012 and entered into force on the Mar. 1, 2018.

# JUDICIAL DECISIONS

# JUDICIAL DECISIONS

## REPUBLIC vs. PROVINCIAL GOVERNMENT OF PALAWAN

**EN BANC**

**[ G.R. No. 170867, December 04, 2018 ]**

REPUBLIC OF THE PHILIPPINES, REPRESENTED BY RAPHAEL P.M. LOTILLA, SECRETARY, DEPARTMENT OF ENERGY (DOE), MARGARITO B. TEVES, SECRETARY, DEPARTMENT OF FINANCE (DOF), AND ROMULO L. NERI, SECRETARY, DEPARTMENT OF BUDGET AND MANAGEMENT (DBM), PETITIONERS, VS. PROVINCIAL GOVERNMENT OF PALAWAN, REPRESENTED BY GOVERNOR ABRAHAM KAHLIL B. MITRA, *Respondent.*

**[G.R. No. 185941]**

BISHOP PEDRO DULAY ARIGO, CESAR N. SARINO, DR. JOSE ANTONIO N. SOCRATES, PROF. H. HARRY L. ROQUE, JR., PETITIONERS, VS. HON. EXECUTIVE SECRETARY EDUARDO R. ERMITA, HON. ENERGY SECRETARY ANGELO T. REYES, HON. FINANCE SECRETARY MARGARITO B. TEVES, HON. BUDGET AND MANAGEMENT SECRETARY ROLANDO D. ANDAYA, JR., HON. PALAWAN GOVERNOR JOEL T. REYES, HON. REPRESENTATIVE ANTONIO C. ALVAREZ (1ST DISTRICT), HON. REPRESENTATIVE ABRAHAM MITRA (2ND DISTRICT), RAFAEL E. DEL PILAR, PRESIDENT AND CEO, PNOC EXPLORATION CORPORATION, *Respondents*.

**DECISION**

TIJAM, *J.*:

**Facts**

On December 11, 1990, the Republic of the Philippines entered into Service Contract No. 38 with Shell Philippines Exploration B.V. and Occidental Philippines, Incorporated (collectively SPEX/OXY) for the

exclusive conduct of petroleum operations in the area known as "Camago-Malampaya" located offshore northwest of Palawan. The exploration led to the drilling of the Camago-Malampaya natural gas reservoir about 80 kilometers from the main island of Palawan and 30 kms from the platform.

The said service contract provided for a production sharing scheme entitling the National Government to sixty percent (60%) of the net proceeds from the sale of petroleum produced from petroleum operations. The Government of Palawan is thus claiming that it is entitled to 40% of the National Government's share pursuant to Sec. 290 of the Local Government Code, since the reservoir is located within its jurisdiction. The Republic, however, is arguing that a local government unit's jurisdiction refers only to its land area, hence the reservoir is outside the territorial boundaries of Palawan as defined in its Charter. In deciding a petition for declaratory relief filed by the Government of Palawan, the RTC declared that the province was entitled to 40% share of the national wealth pursuant to the provisions of Sec. 7, Article X of the 1987 Constitution and this right is in accord with the provisions of the Enabling Act, R.A. 7160 (The Local Government Code of 1991. A petition for review on *certiorari* under Rule 45 was thus filed before the Supreme Court, assailing this decision.

During the oral arguments, one of the appointed *amici curiae*, Dean Raul Pangalangan of the University of the Philippines, posited that under *the United Nations Convention on the Law of the Sea* (UNCLOS) and applying the doctrine of transformation, Palawan's territorial boundaries may be considered to include the continental shelf where the Camago-Malampaya reservoir is located. The court disagreed with the said argument and ruled in favor of the Republic.

**Ruling**

**No law clearly granting the Province of Palawan territorial jurisdiction over the Camago-Malampaya reservoir**

xxx

As defined in its organic law, the Province of Palawan is comprised merely of islands. The continental shelf, where the Camago-Malampaya reservoir is located, was clearly not included in its territory.

An island, as herein before-mentioned, is defined under Article 121 of the UNCLOS as "a naturally formed **area of land**, surrounded by water, which is **above water** at high tide." The continental shelf, on the other hand, is defined in Article 76 of the same Convention as comprising "**the seabed and subsoil** of the submarine areas that extend beyond (the coastal State's) territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." Where the continental shelf of the coastal state extends beyond 200 nm, Article 76 allows the State to claim an extended continental shelf up to 350 nm from the baselines.

Under Palawan's charter, therefore, the Camago-Malampaya reservoir is not located within its territorial boundaries.

xxx

**The UNCLOS did not confer on LGUs their own continental shelf**

Dean Pangalangan posited that since the Constitution has incorporated into Philippine law the concepts of the UNCLOS, including the concept of the continental shelf, Palawan's "area" could be construed as including its own continental shelf. The Province of Palawan and Arigo, et al. accordingly assert that Camago-Malampaya reservoir forms part of Palawan's continental shelf.

The Court is unconvinced. The Republic was correct in arguing that the concept of continental shelf under the UNCLOS does not, by the doctrine of transformation, automatically apply to the LGUs. We quote with approval its disquisition on this issue:

> The Batasang Pambansa ratified the UNCLOS through Resolution No. 121 adopted on February 27, 1984. Through this process, the UNCLOS attained the force and effect of municipal law. But even if the UNCLOS were to be considered to have been transformed to be part of the municipal law, after its ratification by the Batasang Pambansa, the UNCLOS did not automatically amend the Local Government Code and the charters of the local government units. No such intent is manifest either in the UNCLOS or in Resolution No. 121. Instead, the

> UNCLOS, transformed into our municipal laws, should be applied as it is worded. *Verba legis*.
>
> x x x
>
> It must be stressed that the provisions under the UNCLOS are specific in declaring the rights and duties of a state, not a local government unit. The UNCLOS confirms the sovereign rights of the States over the continental shelf and the maritime zones. The UNCLOS did not confer any rights to the States' local government units.
>
> x x x
>
> At the risk of being repetitive, it is respectfully emphasized that the foregoing indubitably established that under the express terms of the UNCLOS, the rights and duties over the maritime zones and continental shelf pertain to the State. No provision was set forth to even suggest any reference to a local government unit. Simply put, the UNCLOS did not obligate the States to grant to, much less automatically vest upon, their respective local government units territorial jurisdiction over the different maritime zones and the continental shelf. Hence, contrary to the submission of Dean Pangalangan, no such application can be made.

Atty. Bensurto took a similar stand, declaring during the oral argument that:

> ATTY. HENRY BENSURTO: x x x x [T]here was an assertion earlier, Your Honor, that there was a reference in fact to the continental shelf, that there is an automatic application of the continental shelf with respect to the municipal territories. I submit, Your Honor that this should not be the case, why? Because **the United Nation Convention on the Law of the Sea which is the conventional law directly applicable in this case is an International Law. International Law by definition is a body of rules governing relations between sovereign States or other entities which are capable of having rights and obligations under International Law.** Therefore, it is the State that is the subject of lnternational Law, the only exception to this is with respect to individuals with respect to the issue of Humanitarian and Human

> Rights Law. From there, it flows the principal [*sic*] therefore that International Law affects only sovereign States. With respect to the relationship between the State and its Local Government Units this is reserved to the sovereign right of the sovereign State. It is a dangerous proposition for us to make that there is an automatic application because to do that would mean a violation of the sovereign right of a State and the State always reserves the right to promulgate laws governing its domestic jurisdiction. **Therefore, the United Nations Convention of the Law of the Sea affects only the right of the Philippines *vis a vis* another sovereign State.** And so, when we talk of the different maritime jurisdictions enumerated, illustrated and explained under the United Nations Convention on the Law of the Sea **we are actually referring to inter state relations not intra state relations**. x x x (Emphasis ours)

In fact, Arigo, et al. acknowledged during the oral argument that the UNCLOS applies to the coastal state and not to their provinces, and that Palawan, both under constitutional and international, has no distinct and separate continental shelf, thus:

> ASSOCIATE JUSTICE VELASCO: **You admit that under UNCLOS it is only the coastal states that are recognized not the provinces of the coastal state.**
>
> ATTY. BAGARES: **That is true, Your Honor, and we do not dispute that, Your Honor.**
>
> ASSOCIATE JUSTICE VELASCO: That's correct. And you cited that in your petition ....
>
> ATTY. BAGARES: Yes, Your Honor. That is true, Your Honor.
>
> ASSOCIATE JUSTIUCE VELASCO: .... **that under Article 76, it is the continental shelf of the coastal state.**
>
> ATTY. BAGARES: **Yes, Your Honor.**
>
> ASSOCIATE JUSTICE VELASCO: **And in our case, the Republic of the Philippines, right?**
>
> ATTY. BAGARES: **Yes, Your Honor.**

ASSOCIATE JUSTICE VELASCO: Okay. You also made the submission that under Republic Act 7611 and Administrative Order 381, there is a provision there that serves as basis for, what you call again the continental shelf of Palawan. What provisions in 7611 and AO 381 are there that serves as basis, for you to say that there is such a continental shelf of Palawan?

ATTY. BAGARES: Your Honor, I apologize that perhaps I've been like Atty. Roque very academic in the language in which we make our presentations but our position, Your Honor, exactly just to make it clear, Your Honor, we're not saying that there's a separate continental shelf of the Province of Palawan outside the territorial bounds of the sovereign State of the Republic of the Philippines. We are only saying, Your Honor, that that continental shelf is reckoned, Your Honor, from the Province of Palawan. **We are not saying, Your Honor, that there is a distinct and separate continental shelf that Palawan may lay acclaim [*sic*] to, under the Constitutional Law and under International Law, Your Honor.**

ASSOCIATE JUSTICE VELASCO: Alright. **And that is only the continental shelf of the coastal State, which is the Philippines.**

ATTY. BAGARES. **Yes, Your Honor. I hope that is clear, Your Honor.** (Emphasis ours)

xxx

**WHEREFORE**, the Petition in G.R. No. 170867 is **GRANTED**. The Decision dated December 16, 2005 of the Regional Trial Court of the Province of Palawan, Branch 95 in Civil Case No. 3779 is **REVERSED** and **SET ASIDE**. The Court declares that under existing law, the Province of Palawan is not entitled to share in the proceeds of the Camago-Malampaya natural gas project. The Petition in G.R. No. 185941 is **DENIED**.

**SO ORDERED.**

## COTESCUP vs. SECRETARY OF EDUCATION

## EN BANC

## [G.R. No. 216930, October 09, 2018]]

COUNCIL OF TEACHERS AND STAFF OF COLLEGES AND UNIVERSITIES OF THE PHILIPPINES (CoTeSCUP), SENTRO NG MGA NAGKAKAISANG PROGRESIBONG MGA MANGGAGAWA (SENTRO), FEDERATION OF FREE WORKERS (FFW), NATIONAL CONFEDERATION OF LABOR (NCL), PUBLIC SERVICES LABOR INDEPENDENT CONFEDERATION (PSLINK), PARTIDO MANGGAGAWA (PM), ADAMSON UNIVERSITY FACULTY AND EMPLOYEES ASSOCIATION, FACULTY ALLIED AND WORKER UNION OF CENTRO ESCOLAR UNIVERSITY, FACULTY ASSOCIATION MAPUA INSTITUTE OF TECHNOLOGY, FAR EASTERN UNIVERSITY FACULTY ASSOCIATION, HOLY ANGEL UNIVERSITY TEACHERS AND EMPLOYEES UNION, LYCEUM FACULTY ASSOCIATION, SAN BEDA COLLEGE ALABANG EMPLOYEES ASSOCIATION, SILIMAN UNIVERSITY FACULTY ASSOCIATION, UNIVERSITY OF THE EAST RAMON MAGSAYSAY EMPLOYEES ASSOCIATION-FFW (UERMEA-FFW), UNION OF FACULTY AND EMPLOYEES OF ST. LOUIS UNIVERSITY, UNIVERSITY OF SANTO TOMAS FACULTY UNION, PROF. FLORDELIZ ABANTO (IN HER CAPACITY AS VICE PRESIDENT OF ST. SCHOLASTICA'S COLLEGE FACULTY ASSOCIATION), PROF. REBECCA T. AÑONUEVO (IN HER CAPACITY AS PRESIDENT OF MIRIAM COLLEGE FACULTY ASSOCIATION), PROF. MARIA RITA REYES CUCIO (IN HER CAPACITY AS FACULTY OF SAN BEDA COLLEGE), AND MR. JOMEL B. GENERAL (IN HIS CAPACITY AS EMPLOYEE OF PHILIPPINE SCHOOL OF BUSINESS ADMINISTRATION AND OFFICER OF THE FFW), *Petitioners*, *v.* SECRETARY OF EDUCATION, SECRETARY OF LABOR AND EMPLOYMENT, CHAIRPERSON OF THE COMMISSION ON HIGHER EDUCATION, SECRETARY OF THE TECHNICAL EDUCATION AND SKILLS DEVELOPMENT AUTHORITY, SECRETARY GENERAL OF THE HOUSE OF REPRESENTATIVES, AND MIRIAM COLLEGE, *Respondents*.

## [G.R. NO. 217451, October 9, 2018]

DR. BIENVENIDO LUMBERA (PAMBANSANG ALAGAD NG SINING AT PROFESSOR EMERITUS, UNIVERSITY OF THE PHILIPPINES/UP); CONG. ANTONIO TINIO (ACT TEACHERS' PARTYLIST); CONG.

FERNANDO "KA PANDO" HICAP (ANAKPAWIS PARTYLIST AT TAGAPANGULO NG PAMALAKAYA); CONG. JAMES MARK TERRY RIDON (KABATAAN PARTYLIST); DR. RHODERICK NUNCIO (VICE-DEAN, NG KOLEHIYO NG MALALAYANG SINING, DE LA SALLE UNIVERSITY/DLSU); PROP. AURA ABIERA (TAGAPANGULO NG DEPARTAMENTO NG FILIPINO AT PANITIKAN NG PILIPINAS SA UNIVERSITY OF THE PHILIPPINES-DILIMAN); DR. ERNESTO CARANDANG II (TAGAPANGULO NG DEPARTAMENTO NG FILIPINO, DE LA SALLE UNIVERSITY-MANILA); DR. ROBERTO AMPIL (TAGAPANGULO NG DEPARTAMENTO NG FILIPINO NG UNIVERSITY OF SANTO TOMAS); PROP. MARVIN LAI (TAGAPANGULO NG DEPARTAMENTO NG FILIPINOLOHIYA NG POLYTECHNIC UNIVERSITY OF THE PHILIPPINES/PUP); PROP. NELSON RAMIREZ (TAGAPANGULO NG DEPARTAMENTO NG FILIPINO, UNIVERSITY OF THE EAST/UE-MANILA); DR. ESTER RADA (TAGAPANGULO NG KAGAWARAN NG FILIPINO, SAN BEDA COLLEGE-MANILA); PROP. JORGE PACIFICO CUIBILLAS (TAGAPANGULO NG DEPARTAMENTO NG FILIPINO, FAR EASTERN UNIVERSITY-MANILA); PROP. ANDREW PADERNAL (TAGAPANGULO NG KAGAWARAN NG FILIPINO, PAMANTASAN NG LUNGSOD NG PASIG/PLP); PROP. MICHAEL DOMINGO PANTE (FACULTY MEMBER SA HISTORY DEPARTMENT, ATENEO DE MANILA UNIVERSITY); BENJAMIN VALBUENA (TAGAPANGULO NG ALLIANCE OF CONCERNED TEACHERS/ACT-PHILIPPINES); DR. PRISCILLA AMPUAN (PANGULO NG QUEZON CITY PUBLIC SCHOOL TEACHERS' ASSOCIATION/QCPSTA); PROP. CARL MARC RAMOTA (PANGULO NG ALLIANCE OF CONCERNED TEACHERS-STATE UNIVERSITIES AND COLLEGES/ACTSUC); DR. ROWELL MADULA (PANGULO NG ALLIANCE OF CONCERNED TEACHERS-PRIVATE SCHOOLS/ACTPRIVATE); DR. AURORA BATNAG (PANGULO NG PAMBANSANG SAMAHAN SA LINGGWISTIKA AT LITERATURANG FILIPINO/PSLLF); DR. JUDY TAGUIWALO (FULL PROFESSOR SA COLLEGE OF SOCIAL WORK AND COMMUNITY DEVELOPMENT, UP DILIMAN); DR. DANILO ARAO (ASSOCIATE PROFESSOR SA DEPARTMENT OF JOURNALISM, COLLEGE OF MASS COMMUNICATION, UP DILIMAN); DR. DAVID MICHAEL SAN JUAN (EXECUTIVE COUNCIL MEMBER NG NATIONAL COMMISSION FOR CULTURE AND THE ARTS-NATIONAL COMMITTEE ON LANGUAGE AND TRANSLATION/NCCANCLT); RONNEL B. AGONCILLO JR., (PANGULO NG PHILIPPINE NORMAL UNIVERSITY/PNU-STUDENT GOVERNMENT); DR. REUEL MOLINA AGUILA (PALANCA HALL OF FAMER AT TAGAPAYO NG KATAGASAMAHAN NG MGA MANUNULAT SA PILIPINAS); ERICSON

ACOSTA (MANUNULAT AT DATING BILANGGONG POLITIKAL, AT KASAPI NG ANAKPAWIS PARTYLIST); PROP. ADRIAN BALAGOT (DIREKTOR NG CENTER FOR CONTINUING EDUCATION, PAMANTASAN NG LUNGSOD NG MARIKINA/PLMar); PROP. PENAFRANCIA RANIELA BARRAZA (ASSOCIATE PROFESSOR, DEPARTAMENTO NG FILIPINO AT PANITIKAN NG PILIPINAS, UNIVERSITY OF THE PHILIPPINES-DILIMAN); PROP. HERMAN MANALO BOGNOT (FACULTY MEMBER SA DEPARTMENT OF EUROPEAN LANGUAGES, UNIVERSITY OF THE PHILIPPINES); PROP. LAURENCE MARVIN CASTILLO (INSTRUCTOR SA DEPARTMENT OF HUMANITIES, UNIVERSITY OF THE PHILIPPINES-LOS BAÑOS); DR. ANTONIO CONTRERAS (FULL PROFESSOR SA POLITICAL SCIENCE DEPARTMENT, DE LA SALLE UNIVERSITY/DLSU); PROP. RAMILITO CORREA (PANGULO NG SANGGUNIAN SA FILIPINO/SANGFIL); GEROME NICOLAS DELA PEÑA (PANGULO NG SAMAHAN NG MGA MAG-AARAL SA ASIGNATURANG FILIPINO, SAMFIL-PAMANTASAN NG LUNGSOD NG PASIG/PLP); PROP. WENNIELYN FAJILAN (FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO, UNIVERSITY OF SANTO TOMAS); FLODY FERNANDEZ (PANGULO NG RAMON MAGSAYSAY HIGH SCHOOL (CUBAO) FACULTY CLUB); PROP. SANTIAGO FLORA (VICE-PRESIDENT FOR OPERATIONS NG QUEZON CITY POLYTECHNIC UNIVERSITY); PROP. MELANIA FLORES (NATIONAL PRO NG ALL UP ACADEMIC EMPLOYEES' UNION, UNIVERSITY OF THE PHILIPPINES/UP); DR. LAKANDUPIL GARCIA (FULL PROFESSOR NG DEPARTAMENTO NG FILIPINO, DE LA SALLE UNIVERSITY-DASMARIÑAS); DR. FANNY GARCIA (PALANCA AWARDEE AT FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO, DE LA SALLE UNIVERSITY/DLSU); PROP. JONATHAN GERONIMO (COORDINATOR NG KATAGA-MANILA UNIVERSITY OF SANTO TOMAS/UST); PROP. VLADIMEIR GONZALES (ASSISTANT PROFESSOR SA DEPARTAMENTO NG FILIPINO AT PANITIKAN NG PILIPINAS-UNIVERSITY OF THE PHILIPPINES-DILIMAN); PROP. FERDINAND PISIGAN JARIN (PALANCA AWARDEE AT PANGULO NG KATAGA-SAMAHAN NG MGA MANUNULAT SA PILIPINAS); JOHN ROBERT MAGSOMBOL (PANGULO NG UNIVERSITY OF SANTO TOMAS-PANULAT); PROP. JOEL MALABANAN (TAGAPAYO NG KAPISANANG DIWA AT PANITIK/KADIPAN SA PHILIPPINE NORMAL UNIVERSITY/PNU); PROP. DENNIS MANGUBAT (FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO NG SAN BEDA COLLEGE-MANILA); PROP. JOANNE MANZANO (FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO AT PANITIKAN NG PILIPINAS-UNIVERSITY OF THE PHILIPPINES-

DILIMAN); PROP. BERNADETTE NERI (ASSISTANT PROFESSOR SA DEPARTAMENTO NG FILIPINO AT PANITIKAN NG PILIPINAS, UNIVERSITY OF THE PHILIPPINES-DILIMAN); RAYMOND PALATINO (TAGAPANGULO NG BAGONG ALYANSANG MAKABAYAN/BAYAN-NATIONAL CAPITAL REGION); PROP. APRIL PEREZ (ASSISTANT PROFESSOR SA DEPARTAMENTO NG FILIPINO AT PANITIKAN NG PILIPINAS, UNIVERSITY OF THE PHILIPPINES-DILIMAN); PROP. JAYSON PETRAS (DEPUTY DIRECTOR NG INSTITUTE OF CREATIVE WRITING, UNIVERSITY OF THE PHILIPPINESDILIMAN); PROP. CRIZEL SICAT-DE LAZA (KATUWANG NG KALIHIM NG SANGGUNIAN NG FILIPINO/SANGFIL AT FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG UNIVERSITY OF SANTO TOMAS/UST); PROP. DENNIS JOSEPH RAYMUNDO (FACULTY MEMBER NG KALAYAAN COLLEGE); DR. BEVERLY SARZA (FACULTY MEMBER NG PHILOSOPHY DEPARTMENT, DE LA SALLE UNIVERSITY-MANILA); DR. RAQUEL SISON-BUBAN (ASSOCIATE PROFESSOR SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); PROP. VIVENCIO M. TALEGON, JR. (FULL-TIME FACULTY SA UNIVERSITY OF ASIA AND THE PACIFIC, ORTIGAS CENTER, PASIG); ISAAC ALI TAPAR (PANGULO NG MANILA SCIENCE HIGH SCHOOL FACULTY ASSOCIATION); DR. DOLORES TAYLAN (ASSOCIATE PROFESSOR SA DEPARTAMENTO NG FILIPINO, DE LA SALLE UNIVERSITY-MANILA); DR. ALITA TEPACE (PROPESOR SA PHILIPPINE NORMAL UNIVERSITY-MANILA); PROP. OM NARAYAN VELASCO (INSTRUCTOR SA UNIVERSITY OF THE PHILIPPINES-LOS BAÑOS); ANDREA JEAN YASOÑA (PANGULO NG KAPISANANG DIWA AT PANITIK-PNU); PROP. REYNELE BREN ZAFRA (FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO NG UNIVERSITY OF SANTO TOMAS); DR. RUBY ALUNEN (FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); PROP. BAYANI SANTOS, JR. (FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO NG MANUEL LUIS QUEZON UNIVERSITY/MLQU); PROP. CHRISTO REY ALBASON (GURO SA SINING NG BAYAN/GUSI); PROP. LILIBETH OBLENA-QUIORE (FACULTY MEMBER NG DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); PROP. DANIM MAJERANO (DIREKTOR NG PANANALIKSIK AT EDUKASYON, SAMAHANG SALIKSIK PASIG, INC.); RUSTUM CASIA (KM 64 POETRY COLLECTIVE); CHARISSE BERNADINE BAÑEZ (TAGAPAGSALITA NG LEAGUE OF FILIPINO STUDENTS/LFS); DR. JENNIFOR AGUILAR (CHAIRPERSON NG DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION NG POLYTECHNIC UNIVERSITY OF THE PHILIPPINES/PUP); PROP.

MOREAL NAGARIT CAMBA (TAGAPANGULO NG DEPARTAMENTO NG FILIPINO, UNIVERSITY OF ASIA AND THE PACIFIC - PASIG); PROP. CLEVE ARGUELLES (CHAIRPERSON NG POLITICAL SCIENCE PROGRAM, DEPARTMENT OF SOCIAL SCIENCES, UNIVERSITY OF THE PHILIPPINESMANILA); DR. MARIA LUCILLE ROXAS (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); PROP. VOLTAIRE VILLANUEVA (FACULTY MEMBER SA PHILIPPINE NORMAL UNIVERSITY); DR. JOSEFINA MANGAHIS (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); PROP. EMMA SISON (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); AYLEEN ORTIZ (MANUNULAT); PROP. EFREN DOMINGO (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITYMANILA); PROP. LESLIE ANNE LIWANAG (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); DR. LAKANGITING GARCIA (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITYMANILA); PROP. MIRYLLE CALINDRO (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); DR. LAKANDUPIL GARCIA (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITYDASMARIÑAS); DR. DEXTER CAYANES (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); DR. TERESITA FORTUNATO (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITY-MANILA); DR. MA. RITA ARANDA (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITYMANILA); DR. EMMA BASCO (FACULTY MEMBER SA DEPARTAMENTO NG FILIPINO NG DE LA SALLE UNIVERSITYMANILA), *Petitioners*. *v.* PANGULONG BENIGNO SIMEON "NOYNOY" C. AQUINO III, AT PUNONG KOMISYUNER NG KOMISYON SA LALONG MATAAS NA EDUKASYON/COMMISSION ON HIGHER EDUCATION (CHED) DR. PATRICIA LICUANAN, *Respondents*.

**[G.R. NO. 217752, October 9, 2018]**

ANTONIO "SONNY" F. TRILLANES IV, GARY C. ALEJANO AND FRANCISCO ASHLEY L. ACEDILLO, *Petitioners*, *v.* HON. PAQUITO N. OCHOA, JR., IN HIS CAPACITY AS EXECUTIVE SECRETARY, HON.

ARMIN A. LUISTRO, IN HIS CAPACITY AS SECRETARY OF EDUCATION AND THE DEPARTMENT OF EDUCATION, *Respondents.*

**[G.R. NO. 218045, October 9, 2018]**

EDUARDO R. ALICIAS, JR. AND AURELIO P. RAMOS, JR., *Petitioners*, *v.* DEPARTMENT OF EDUCATION (DepEd) AND THE SECRETARY OF THE DepEd, *Respondent*.

**[G.R. NO. 218098, October 9, 2018]**

RICHARD TROY A COLMENARES, RENE LUIS M. TADLE, ERLINDA C. PALAGANAS, RUTH THELMA P. TINGDA, RONALD TAGGAOA, JOSEPH PORFIRIO ANDAYA, FLORANTE DULACA, FROILAN A. ALIPAO; KATHLEA FRANCYNN GAWANI D. YAÑGOT, MIEL ALEXANDRE A. TAGGAOA, AGATHA ZITA DISTOR, ISABELLE C. UMINGA, ALDWIN GABRIEL M. PINAS, ATREENA MARIE DULAY, ZION GABRIEL SANTOS, SIBLINGS BRENNAN KEANE, BREN KIMI, AND BASLEY KICH, ALL SURNAMED DELA CRUZ, JASSEL ANGELO ENRIQUEZ, SIBLINGS GYRO MATTHEW AND MARGA RAUXIELLE AGLAIA, BOTH SURNAMED GUEVARRA, SIBLINGS ALTHEA, ALEXA, AND AMANDA, ALL SURNAMED ABEJO, AND ELEANNIE JERECE S. CAWIS, REPRESENTED BY THEIR PARENTS LEANDRO B. YAÑGOT, JR., JENNIFER A. TAGGAOA, MILO DISTOR, JOSE MARI UMINGA, GABRIEL PAUL PINAS, SOFRONIO DULAY, LUZ A. SANTOS, BARBY M. DELA CRUZ, RUBY G. ENRIQUEZ, ROWENA C. GUEVARRA, MARISEL P. ABEJO, AND VITTORIO JERICO L. CAWIS, RESPECTIVELY, FOR THEMSELVES AND THE CLASS THEY REPRESENT; REVENENDO R. VARGAS, ANNIELA R. YU-SOLIVEN, VILMA C. BENIGNO, MARIA CRISTINA F. DUNGCA, LIZA DAOANIS, ROMMEL M. FRANCISCO, FELIZA G. AGUSTIN, EMELITA C. VIDAL, ROMMEL D. RAMISCAL, JOCELYN ELEAZAR DE GUZMAN, ANDREA P. VILLALON, AND JOYCE FE T. ALMENARIO, FOR THEMSELVES AND THE CLASS THEY REPRESENT, *Petitioners*, *v.* DEPARTMENT OF EDUCATION SECRETARY ARMIN A. LUISTRO, COMMISSION ON HIGHER EDUCATION CHAIRPERSON PATRICIA B. LICUANAN, TECHNICAL SKILLS AND DEVELOPMENT AUTHORITY DIRECTOR-GENERAL JOEL J. VILLANUEVA, DEPARTMENT OF LABOR AND EMPLOYMENT SECRETARY ROSALINDA D. BALDOZ, DEPARTMENT OF FINANCE SECRETARY CESAR V. PURISIMA, SENATE PRESIDENT

FRANKLIN M. DRILON, AND HOUSE OF REPRESENTATIVES SPEAKER FELICIANO R. BELMONTE, *Respondents.*

**[G.R. NO. 218123, October 9, 2018]**

CONG. ANTONIO TINIO (REPRESENTATIVE, ACT TEACHERS PARTY-LIST); CONG. NERI COLMENARES (REPRESENTATIVE, BAYAN MUNA PARTY-LIST); DR. BIENVENIDO LUMBERA (NATIONAL ARTIST FOR LITERATURE AND PROFESSOR EMERITUS, UP); CONG. CARLOS ZARATE (REPRESENTATIVE, BAYAN MUNA PARTY-LIST); CONG. FERNANDO "KA PANDO" HICAP (REPRESENTATIVE, ANAKPAWIS PARTY-LIST; CHAIRPERSON, PAMALAKAYA); CONG. LUZVIMINDA ILAGAN (REPRESENTATIVE, GABRIELA WOMEN'S PARTY); CONG. EMMI DE JESUS (REPRESENTATIVE, GABRIELA PARTY-LIST); CONG. TERRY RIDON (REPRESENTATIVE, KABATAAN PARTYLIST); RENATO REYES, JR. (SECRETARY-GENERAL, BAGONG ALYANSANG MAKABAYAN/ BAYAN AND PARENT OF AN ELEMENTARY STUDENT); BENJAMIN VALBUENA (CHAIRPERSON, ALLIANCE OF CONCERNED TEACHERS-PHILIPPINES); MARTIN DIÑO (CHAIRPERSON OF THE VOLUNTEERS AGAINST CRIME AND CORRUPTION); JOVITA MONTES (SPOKESPERSON, PARENTS' MOVEMENT AGAINST K TO 12); KHARLO FELIPE MANANO (SECRETARY-GENERAL, SALINLAHI ALLIANCE FOR CHILDREN'S CONCERNS); GERTRUDES LIBANG, (NATIONAL VICE-CHAIRPERSON, GABRIELA); RONEL AGONCILLO (STUDENT REGENT, PNU); VENCER MARIE CRISOSTOMO (NATIONAL CHAIRPERSON, ANAKBAYAN); CHARISSE BERNADINE BAÑEZ (NATIONAL SPOKESPERSON, LEAGUE OF FILIPINO STUDENTS/LFS); EINSTEIN RECEDES (NATIONAL CHAIRPERSON STUDENT CHRISTIAN MOVEMENT OF THE PHILIPPINES); MICHAEL BELTRAN (NATIONAL SPOKESPERSON, KABATAANG ARTISTA PARA SA TUNAY NA KALAYAAN); SARAH JANE ELAGO (NATIONAL PRESIDENT, NATIONAL UNION OF STUDENTS OF THE PHILIPPINES); MARC LINO ABILA (NATIONAL PRESIDENT, COLLEGE EDITORS GUILD OF THE PHILIPPINES); VANESSA FAYE BOLIBOL (CONVENOR, STOP K TO 12); DR. ROLANDO TOLENTINO (DEAN, COLLEGE OF MASS COMMUNICATION, UP); DR. FEDELIZ TUY (ASSOCIATE VICE DEAN, COLLEGE OF ARTS AND SCIENCES, SBC MANILA); DR. ERNESTO CARANDANG II (CHAIRPERSON, FILIPINO DEPARTMENT, DLSU MANILA); PROF. MARIA LOURDES AGUSTIN (CHAIRPERSON, INSTITUTE OF TEACHING AND LEARNING, PNU); PROF. ROWENA

RIVERO (CHAIR, ENGLISH, FOREIGN LANGUAGES AND LITERATURE DEPARTMENT, SBC MANILA); PROF. CLEVE ARGUELLES (CHAIRPERSON, POLITICAL SCIENCE PROGRAM, DLSU MANILA); DR. ANNABEL QUILON (CHAIR, PSYCHOLOGY DEPARTMENT, SBC MANILA); DR. BAYANI MATITU (CHAIR, HUMAN KINETICS DEPARTMENT, SBC MANILA); PROF. MARVIN LAI (CHAIRPERSON, DEPARTAMENTO NG FILIPINOLOHIYA, PUP MANILA); PROF. MERDEKA C. MORALES (CHIEF, PUP CENTER FOR CREATIVE WRITING); DR. ROBERTO AMPIL (CHAIRPERSON, FILIPINO DEPARTMENT, UST); PROF. NELSON RAMIREZ (CHAIRPERSON, FILIPINO DEPARTMENT, UNIVERSITY OF THE EAST MANILA); DR. JENNIFOR AGUILAR (CHAIRPERSON, MA FILIPINO PROGRAM, GRADUATE SCHOOL, PUP); DR. LIWAYWAY ACERO (CHAIRPERSON, HUMAN BIOLOGY AND SCIENCES DEPARTMENT, SBC MANILA); DR. ESTER RADA (CHAIRPERSON, FILIPINO DEPARTMENT, SBC MANILA); DR. MARVIN REYES (PREFECT OF STUDENT ACTIVITIES, COLLEGE OF ARTS AND SCIENCES, SBC MANILA); PROF. NEILIA BALANON-RAMIREZ (ASSISTANT PREFECT OF STUDENT DISCIPLINE, COLLEGE OF ARTS AND SCIENCES, SBC MANILA); PROF. LUISITO MACAPAGAL (CHAIRPERSON, MATHEMATICS DEPARTMENT, SBC MANILA); DR. NOEL SANTANDER (CHAIRPERSON, THEOLOGY DEPARTMENT, SBC MANILA); PROF. GERARD SANTOS (ASSISTANT PREFECT OF STUDENT DISCIPLINE, COLLEGE OF ARTS AND SCIENCES, SBC MANILA); PROF. ALBERT OASAN (ASSISTANT PREFECT OF STUDENT DISCIPLINE, COLLEGE OF ARTS AND SCIENCES, SBC MANILA); PROF. JULIUS TUTOR (ASSISTANT PREFECT OF STUDENT ACTIVITIES, COLLEGE OF ARTS AND SCIENCES, SBC MANILA); PROF. SYBIL AGREDA (ASSISTANT PREFECT OF STUDENT ACTIVITIES, COLLEGE OF ARTS AND SCIENCES, SBC MANILA); PROF. LEOMAR REQUEJO (CHIEF, MUSIC SECTION, PUP); DR. AURORA BATNAG (PANGULO, PAMBANSANG SAMAHAN SA LINGGWISTIKA AT LITERATURANG FILIPINO); PROF. RAMILITO CORREA (PRESIDENT, SANGGUNIAN SA FILIPINO/SANGFIL); PROF. CHRISTO RAY ALBAZON (PRO, GURO SA SINING NG BAYAN, PUP); DR. RAMON GUILLERMO (PRESIDENT, ALL UP ACADEMIC EMPLOYEES' UNION); PROF. MELANIA FLORES (NATIONAL PRO, ALL UP ACADEMIC EMPLOYEES' UNION); PROF. ORESTES DE LOS REYES (PRESIDENT, ADAMSON UNIVERSITY FACULTY AND EMPLOYEES); PROF. JAMES PLATON (VICE PRESIDENT FOR LABOR EDUCATION, UST FACULTY UNION); MR. FELIX PARINAS, JR., (PUBLIC RELATIONS OFFICER, ALL UP WORKERS' UNION); PROF. MICHAEL PANTE (FACULTY, HISTORY DEPARTMENT, ATENEO DE MANILA UNIVERSITY); PROF. VLADIMEIR

B. GONZALES (FACULTY, UP-DILIMAN); PROF. LAURENCE MARVIN S. CASTILLO (FACULTY, UP-LOS BAÑOS); DR. ROMMEL RODRIGUEZ (ASSOCIATE PROFESSOR, UP-DILIMAN); DR. DOLORES TAYLAN (FACULTY MEMBER, FILIPINO DEPARTMENT, DLSU MANILA); DR. TERESITA FORTUNATO (FACULTY MEMBER, FILIPINO DEPARTMENT, DLSU MANILA); DR. RAQUEL SISONBUBAN (FACULTY MEMBER, FILIPINO DEPARTMENT, DLSU MANILA); PROF. LILIBETH QUIORE (FACULTY MEMBER, FILIPINO DEPARTMENT, DLSU MANILA); DR. MA. RITA ARANDA (FACULTY MEMBER, FILIPINO DEPARTMENT, DLSU MANILA); PROF. PORTIA PLACINO (FACULTY MEMBER, UP DILIMAN); PROF. JOEL MALABANAN (FACULTY MEMBER, COLLEGE OF LANGUAGE AND LITERATURE, PNU); DR. LUCIA B. DELA CRUZ (REGISTERED GUIDANCE COUNSELOR; PROFESSOR, UNIVERSITY OF MAKATI); PROF. GERARDO LANUZA (PROFESSOR, DEPARTMENT OF SOCIOLOGY, UP DILIMAN); PROF. SARAH JANE S. RAYMUNDO (ASSISTANT PROFESSOR, CENTER FOR INTERNATIONAL STUDIES, UP DILIMAN); PROF. FERDINAND JARIN (FACULTY MEMBER, PHILIPPINE NORMAL UNIVERSITY); PROF. EMELITO SARMAGO (FACULTY MEMBER, UST); PROF. MARY ANNE MALLARI (FACULTY MEMBER, UST); PROF. WENNIELYN FAJILAN (FACULTY MEMBER, UST); PROF. REYNELE BREN ZAFRA (FACULTY MEMBER, UST); PROF. JOHN KELVIN BRIONES (FACULTY MEMBER, ENGLISH DEPARTMENT, COLLEGE OF ARTS AND LETTERS, BULACAN STATE UNIVERSITY); PROF. DENNIS MANGUBAT (FACULTY MEMBER, FILIPINO DEPARTMENT, SBC MANILA); PROF. MINERVA SERRANO (FACULTY MEMBER, MATHEMATICS DEPARTMENT, SBC MANILA); PROF. MARIE JOCELYN BENGCO (FACULTY MEMBER, PSYCHOLOGY DEPARTMENT, SBC MANILA); PROF. CLYDE CORPUZ (FACULTY MEMBER, SOCIAL SCIENCES DEPARTMENT, SBC MANILA); DR. LIZA CRUZ (FACULTY MEMBER, HUMAN BIOLOGY AND SCIENCES DEPARTMENT, SBC MANILA); DR. SOCORRO DE JESUS (FACULTY MEMBER, ENGLISH, FOREIGN LANGUAGES, AND LITERATURE DEPARTMENT); PROF. TERESITA DULAY (FACULTY MEMBER, MATHEMATICS DEPARTMENT, SBC MANILA); PROF. JULIO CASTILLO, JR. (FACULTY MEMBER, DEPARTMENT OF MANAGEMENT, SBC MANILA); PROF. ESTHER CUARESMA (FACULTY MEMBER, INFORMATION AND COMMUNICATION TECHNOLOGY DEPARTMENT, SBC MANILA); PROF. ARNOLD DONOZO (FACULTY MEMBER, MATH DEPARTMENT, SBC MANILA); PROF. ROAN DINO (FACULTY MEMBER, KAGAWARAN NG FILIPINOHIYA, PUP); DR. MARIA ELIZA CRUZ (FACULTY MEMBER, NATURAL SCIENCES DEPARTMENT, SBC MANILA); PROF. JOSEPHINE

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(PROFESSOR, RELIGION DEPARTMENT, SAINT LOUIS UNIVERSITY); GEORGE M. TAWAO (SPECIAL SERVICES DEPARTMENT, SAINT LOUIS UNIVERSITY); DONNIE D. EVARISTO (SPECIAL SERVICES DEPARTMENT, SAINT LOUIS UNIVERSITY); CHERRY M. RAFANAN (NURSING AIDE, HOSPITAL OF THE SACRED HEART SLU); JULIO U. BERSAMIRA, JR. (PRINTING PRESS ASSISTANT, PRINTING PRESS OFFICE SLU); JONES Q. CALINGAYAN (FACULTY, PHYSICAL EDUCATION DEPARTMENT, SAINT LOUIS UNIVERSITY); BRIAN LORENZO A. SALVALEON (KITCHEN HELPER, SLU LADIES' RESIDENCE HALLS); ROLLY L. MARANES (LABORATORY TECHNICIAN, SCHOOL OF ENGINEERING, SLU); CAROL ANN F. BALAUS (ACCOUNTING CLERK, UFESLU SLU EMPLOYEES UNION); MICHELLE B. BRAGAS (ACCOUNTING CLERK, UFESLU SLU EMPLOYEES UNION); ERNESTO JOEY F. CHOMAWIN (SPECIAL SERVICES DEPARTMENT, SAINT LOUIS UNIVERSITY); GIAN CARLO C. GEGUIERA (FACULTY, RELIGION DEPARTMENT, SAINT LOUIS UNIVERSITY); MON KARLO MANGARAN (BARANGAY COUNCILOR, CANIOGAN, MALOLOS, BULACAN); MARY ANGELICA H. REGINALDO (STUDENT, M.A. MALIKHAING PAGSULAT, DFPP-KAL, UP DILIMAN); RUSTUM CASIA (KM64 POETRY COLLECTIVE); ELIZABETH ANTHONY (PRESIDENT, UST PANULAT); ARIES GUPIT (LEAGUE OF FILIPINO STUDENTS); BRIX JUSTINE PAGTALUNAN (PARTIDO-PAGKAKAISA NG DEMOKRATIKONG MAG-AARAL/PDM-BULACAN STATE UNIVERSITY); FRANCIS JAMES PAGDANGANAN (PARTIDOPAGKAKAISA NG DEMOKRATIKONG MAG-AARAL/BULSU); ANGELO SUALIBIO (STUDENTS FOR THE ADVANCEMENT OF DEMOCRATIC RIGHTS IN BULACAN STATE UNIVERSITY/STAND BULSU); MARK JOSEPH DOMASIG (STUDENTS FOR THE ADVANCEMENT OF DEMOCRATIC RIGHTS IN BULSU); JOHN RAVEN BALDOVINO (STUDENTS FOR THE ADVANCEMENT OF DEMOCRATIC RIGHTS IN STAND BULSU); CEDRIQ CLEMENTE (STUDENTS FOR THE ADVANCEMENT OF DEMOCRATIC RIGHTS IN STAND BULSU); MARIE ANTONETTE VALENCIA (STUDENTS FOR THE ADVANCEMENT OF DEMOCRATIC RIGHTS IN STAND BULSU); REINARD SANCHEZ (STAND BULSU); RICHARD PATRIARCA (STUDENTS FOR THE ADVANCEMENT OF DEMOCRATIC RIGHTS IN BULACAN STATE UNIVERSITY/STAND BULSU); JOEL A. CAPULONG (TONTONGAN TI UMILI, BAGUIO CITY); JEANETTE R. CAWIDING (TONTONGAN TI UMILI); MILAGROS K. AO-WAT (TONTONGAN TI UMILI); HILDRINE L. ALVAREZ (TONTONGAN TI UMILI); VICENTE R. TOCA III (TONTONGAN TI UMILI); TRACY ANNE D. DUMALO (TONTONGAN TI UMILI); KING CRIS P. PULMANO (TONTONGAN TI

UMILI); MARBEN M. PANLASIGUI (TONTONGAN TI UMILI); LUKE T. BAGANGAN (TONTONGAN TI UMILI); NINO JOSEPH Q. OCONER (TONTONGAN TI UMILI); DR. PRISCILLA AMPUAN (PRESIDENT, QUEZON CITY PUBLIC SCHOOL TEACHERS' ASSOCIATION/ QCPSTA); JACKSON BACABAC (TREASURER, QCPSTA); RAYMOND PALATINO (CHAIRPERSON, BAYAN-NATIONAL CAPITAL REGION); LOUIE ZABALA (PRESIDENT, MANILA PUBLIC SCHOOL TEACHERS' ASSOCIATION); PROF. CARL MARC RAMOTA (PRESIDENT, ACT SUC); DR. ROWELL MADULA (PRESIDENT, ACT PRIVATE); PROF. JONATHAN GERONIMO (SECRETARY GENERAL, ACT PRIVATE SCHOOLS); MICHAEL ESPOSO (AUDITOR, ACT PRIVATE SCHOOLS); DR. DAVID MICHAEL SAN JUAN (PUBLIC INFORMATION OFFICER, ACT PRIVATE SCHOOLS); MR. ISAAC ALI TAPAR (PRESIDENT, MANILA SCIENCE HIGH SCHOOL FACULTY ASSOCIATION); PROF. RAMIR M. CRUZ (PRESIDENT, FACULTY ASSOCIATION, COLLEGE OF ENGINEERING, PUP), *Petitioners*, *v.* PRESIDENT BENIGNO SIMEON "NOYNOY" C. AQUINO, COMMISSION ON HIGHER EDUCATION (CHED) CHAIRPERSON DR. PATRICIA LICUANAN, DEPARTMENT OF EDUCATION (DEPED) SECRETARY BR. ARMIN LUISTRO, TECHNICAL EDUCATION AND SKILLS DEVELOPMENT AUTHORITY (TESDA) DIRECTOR JOEL VILLANUEVA, *Respondents.*

**[G.R. NO. 218465, October 9, 2018]**

MA. DOLORES M. BRILLANTES, SEVERO L. BRILLANTES, EMELITA C. VIDAL, FELIZA G. AGUSTIN, EVELYN G. ASTILLA, BRENDA P. BASCOS, ENRICO C. PUNO, MERIAM N. CHAMACKALAYIL, MA LINDA T. FERNANDO, MARIBEL R. LORENZO, CARMELO A. YAMBAO, JOSEPHINE M. DE GUZMAN, ELENA B. CABARLES, GIRLIE M. TALISIC, JACQUELYN N. MARQUEZ, VIVIAN G. SADAC, FELIZA G. AGUSTIN, MARIBEL R. LORENZO, GRACE G. ORALLO, ROSARIO ANTES, GERALDINE G. LUI, WALLY Y. CAMACHO, STANLEY FRANCIS M. LIBERATO, MARJORIE M. SUN, BELEN PANTALEON, IRENE N. ROCHA, CRISTINA T. SANTOS, MARIFE P. OROLFO, CRISTINA L. GANALON, MARITES R. LAZARO, JUANITO SALAZAR, CHRISTINA G. CRUZ, RAMONETTE P. SONCUYA, PAUL ROMMEL C. CAPISTRANO, EDGARDO B. ALVINEZ, JENNIFER C. RODELAS, MARIA VILMA M. ANOS, TERESITA F. ESPEJO, CHRIS C. KATAPANG, FERDINAND BADULIS, MELODY M. RAMIREZ, MINERVA DV. CRUZ, MARIA BERNADETTE A. CALORACAN, MA. CINDERELLA B. ESPIQUE, EVANGELINE A. OBNIAL, ANALYN B.

REYES, MARY E. BALLELOS, ANALEA A. RIVERA, HELEN T. TABIOS, VALENTINE B. CUSTODIO, ROSE ANDRADE, CHERYL JOY MIRANDA, JOCELYN MARIANO, REBECCA C. CUARTERO, MARIA MARIETES B. LAURETA, SPS. GIL L. ANISTA & MARLYN P. ANISTA, MARLOUE ABAINZA, FLORDELIZA C. DE VERA, MA. MARGIE G. MIRALLES, MILAGROS M. ESTABILLO, ANGELICA D. BINGCO, ROSFELIZ GEMINI CATIPAY, CHERRYL C. MIRHAN, ROGER S. BERNAL, SAMUEL C. EGUIA, LIZA C. SALVADOR, SLENDA CAGAS, MA. FRANCISCA ANTONIO, EVELYN R. SUMAYLO, LESLEY V. ARGUELLES, FOR THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, MATTHEW M. BRILLANTES, PATRICIA GINGER C. VIDAL, JELIZA G. AGUSTIN, ANGELO JOSE G. ASTILLA, BRYAN CHRISTOPHER P. BASCOS, RENEE LOUISE L. PUNO, RUBEENA N. CHAMACKALAYIL, KIMBERLY T. FERNANDO, SHANAYAH R. LORENZO, MICHAEL ADRIAND G. YAMBAO, JOHANSSON EDWARD DE GUZMAN, RANIER B. CABARLES, JAELA MARIE TALISIC, JANUS ROMELL N. MARQUEZ, RYAN DAVID G. SADAC, SHANAYAH R. LORENZO, PAUL ORALLO, EMILSON RYAN ANTES, GRACE ANN ERICKA LUI, SOFIA MARIYA KYSHA CAMACHO, BEATRICE COLLEEN LIBERATO, CHLOE SOFIA SUN, GELAH PANTALEON, JUSTINE ELIZA N. ROCHA, EDRIN CLYDE T. SANTOS, CONSTANCIO P. OROLFO III, RONIN RIC GANALON, SOFIA KAYLE LAZARO, DJ SALAZAR, DAN PRECIOSO G. CRUZ, JULIE ANNE LOI P. SONCUYA, RICCI PAULINE CATHERINE J. CAPISTRANO, PAUL ED JEREMY M. ALVINEZ, JOSEPH C. RODELAS, RONALD M. ANOS, JASON F. ESPEJO, LAURA CHRISTINE C. KATAPANG, KEITH GABRIEL BADULIS, RON EDRICH RAMIREZ, TOMMIE DANIEL DV. CRUZ, DENISE ANN A. CALORACAN, ELLA MAE B. ESPIQUE, ROSEMARY KEITHLEY A. OBNIAL, RONALDO B. REYES, JR. & ANNA LETICIA B. REYES, CARYLLE ALEX E. BALLELOS, JACKLORENZ A. RIVERA, KARL ADRIAN TABIOS, BREN CHRISTIAN B. CUSTODIO, SHANIA CHIER ANDRADE, CARL JUSTINE MIRANDA, ERIN MARIANO, DENISE NICOLE CUARTERO, GRANT PAUL LAURETA, MA. PATRICIA ANN P. ANISTA, MARDI LOUISE ABAINZA, JAYLORD MOSES C. DE VERA, HANNAH MARIE MIRALLES, SANREE M. ESTABILLO, GIO ANN TRINIDAD BINGCO, ARFEL DOMINICK B. CATIPAY, KITH CEAZAR MIRHAN, JEAN RYAN A. BERNAL, SAMANTHA NICOLE EGUIA; OFFICERS OF THE MANILA SCIENCE HIGH SCHOOL FACULTY AND EMPLOYEES CLUB, REPRESENTED BY: ISAAC ALI TAPAR, RUTH DAYRIT, RAYMOND APOSTOL, GINAROSE HABAL, CYNTHIA LYNNE CAUZON, ANABELLE BAYSIC, CRISTINA RICO, KRISTIN MACARANAS, ROMEO BINAMIRA, AND THE CLASS HEREIN REPRESENTED, *Petitioners*, *v.* PRESIDENT BENIGNO SIMEON C. AQUINO III, DEPT. OF

EDUCATION SECRETARY BR. ARMIN LUISTRO, NCR REGIONAL DIRECTOR LUZ S. ALMEDA, MANILA SCHOOLS DIVISION SUPERINTENDENT PRISCILA C. DE SAGUN, MANILA SCIENCE HIGH SCHOOL PRINCIPAL MARIA EVA S. NACION, SENATE PRESIDENT FRANKLIN M. DRILON AND HOUSE OF REPRESENTATIVES SPEAKER FELICIANO R. BELMONTE, *Respondents*.

**DECISION**

CAGUIOA, *J.*:

**Facts**

These are consolidated petitions under Rule 65, assailing the constitutionality of RA No. 10533 (K to 12 Law), RA No. 10157 (Kindergarten Education Act), and related issuances of the Department of Education (DepEd), Commission on Higher Education (CHED), Department of Labor and Employment (DOLE) and Technical Education and Skills Development Authority (TESDA) implementing the K to 12 Basic Education Program. The *Kindergarten Education Act* institutionalized kindergarten education, which is one (1) year of preparatory education as part of basic education and is made compulsory for entrance to Grade 1. On the other hand, the K to 12 Law expanded basic education from ten (10) years to thirteen (13) years, divided into one (1) year of kindergarten, six (6) years of elementary education, and six (6) years of secondary education—which was divided into four (4) years of junior high school and two (2) years of senior high school. In line with this, one of the petitioners' contentions is that the expansion of compulsory education to include kindergarten and secondary education violates the Universal Declaration of Human Rights (UDHR), the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). The Court ruled in the negative upon this issue and denied the consolidated petitions, ultimately upholding the constitutionality of the subject laws and issuances.

**Ruling**

Petitioners' argument is misleading.

There is nothing in the UDHR, ICESCR and CRC which proscribes the expansion of compulsory education beyond elementary education.

Article 26 of the UDHR states:

1. Everyone has the right to education. **Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.** Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children. (Emphasis and underscoring supplied)

There is absolutely nothing in Article 26 that would show that the State is prohibited from making kindergarten and high school compulsory. The UDHR provided a minimum standard for States to follow. Congress complied with this minimum standard; as, in fact, it went beyond the minimum by making kindergarten and high school compulsory. This action of Congress is, in turn, consistent with Article 41 of the CRC which provides that "[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) [t]he law of a State party; or (b) [i]nternational law in force for that State."

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**WHEREFORE**, the consolidated petitions are hereby **DENIED**. Accordingly, the Court declares Republic Act No. 10533, Republic Act No. 10157, CHED Memorandum Order No. 20, Series of 2013, Department of Education Order No. 31, Series of 2012, and Joint Guidelines on the Implementation of the Labor and Management Component of Republic Act No. 10533, as **CONSTITUTIONAL**. The Temporary Restraining Order dated April 21, 2015 issued in G.R. No. 217451 is hereby **LIFTED**.

**SO ORDERED.**

## RE: CONTRACTS WITH ARTES INTERNATIONAL, INC.

## EN BANC

## A.M. No. 12-6-18-SC, August 7, 2018

## RESOLUTION

BERSAMIN, *J.*:

### Facts

Shortly after then Chief Justice Artemio V. Panganiban took his oath, he declared his "judicial philosophy of safeguarding the liberty and nurturing the prosperity of the people under the rule of law." Pursuant to this philosophy, the National Forum on Liberty and Prosperity (held on 24-25 August 2006) and the Global Forum on Liberty and Prosperity (held on 18-20 October 2006) were conceptualized and launched.

This Court, through the Program Management Office with Evelyn Toledo-Dumdum (Dumdum) as then Administrator, entered into several contracts with Artes International, Inc. (Artes) relative to the said fora, as well as other activities relative to the Retirement Ceremony of then Chief Justice Panganiban. There is also no dispute that the Court successfully hosted these events, with Artes being the events specialist hired "[t]o assist the Ad Hoc Committees, specifically by addressing the creative, logistical, physical and technical requirements of the Forum, x x x."

Thereafter, Artes requested payment for allegedly unpaid balances arising from its contracts with the Court. However, Artes subsequently submitted a Release, Waiver & Quitclaim to the effect that it was waiving any and all its rights and interests in the claim; and expressly stated that it was releasing the Court from any further financial liability.

### Ruling

The loan agreement between the Republic of the Philippines and the International Bank for Reconstruction and Development (IBRD), or the World Bank (WB), was signed on October 2, 2003 to fund the Judicial Reform

Support Project (JRSP) whose objective was "to assist the Borrower in developing a more effective and accessible Judiciary that would foster public trust and confidence through the implementation of the Supreme Court's Action Program for Judicial Reform."

SC Administrative Circular No. 60-2003 entitled Procurement Policy and Procedures for the Judicial Reform Support Project was issued on November 18, 2003 "to ensure the effective implementation of the Judicial Reform Support Project (JRSP) through the timely procurement of Goods, Works, and Services, guide the concerned Supreme Court Offices in their respective roles in the procurement process, prescribe the allowed lead times for each procurement activity, and monitor and resolve bottlenecks and problem areas in the procurement process." Thus, SC Administrative Circular No. 60-2003 applied when procuring goods, works, and services in furtherance of the implementation of the JRSP.

Under the A.C., the procurement rules for the JRSP were not exclusively culled from the IBRD Guidelines, but also from the provisions of R.A. No. 9184, which were to be applied suppletorily. The OCA noted that under the procurement rules the borrower, which was the Court itself, should identify the body that would conduct the procurement activities for the borrower. For the purpose, SC Administrative Circular No. 60-2003 adopted Article V of R.A. No. 9184 to establish the JRSP Bids and Awards Committee (JRSP BAC) to be in charge of the conduct of the procurement activities. In light of this, and given that the PMO Program Director was tasked with the overall monitoring of the procurement process, Ms. Dumdum and the PMO should not have engaged in actual procurement activities, as their doing so would mean that she and the PMO were risking not being able to perform the monitoring function properly.

The IBRD Guidelines defined two modes of procurement: the international competitive bidding (ICB); and the other methods of procurement. The latter included limited international bidding (LIB); national competitive bidding (NCB); shopping; direct contracting; etc. Specifically, shopping was defined by the January 1999 IBRD Guidelines in the following manner: "Shopping is a procurement method based on comparing price quotations obtained from several Suppliers, usually at least three, to assure competitive prices, and is an appropriate method for procuring readily available off-the-shelf goods or standard specification

commodities that are small in value. Requests for quotations shall indicate the description and quantity of the goods, as well as desired delivery time and place. Quotations may be submitted by telex or facsimile. The evaluation of quotations shall follow sound public or private sector practices of the purchaser. The terms of the accepted offer shall be incorporated in a purchase order."

The PMO appeared to have resorted to shopping as the method of procurement in canvassing three suppliers for the goods and supplies intended for the Nation Forum. By resorting to national shopping, however, the PMO ignored the last sentence of the IBRD Guidelines on such alternative method of procurement that required a purchase order (PO) in which the accepted offer should be indicated. The PO was akin to a "contract between the parties as it requires inputs showing the requisites of a contract of consent, object certain, and cause of obligation." Instead of the PO, the PMO used and relied on letter-quotations to reflect and contain the agreements between the parties.

Moreover, as the OCA has correctly observed, the IBRD Guidelines mentioned of contract documents instead of a single document. This observation is consistent with the Generic Procurement Manual (GPM) that synchronized the provisions of R.A. No. 9184 with the procurement rules of the Asian Development Bank, Japan Bank for International Cooperation, and the World Bank itself by requiring that contracts resulting from procurement activities for goods should be supported not only by a contract document but by a number of documents, including the bid documents. Yet, based on the detailed study made by the OCA, no proper bidding procedure pursuant to the guidelines of SC Administrative Circular No. 60-2003 was followed by the JRSP-BAC in choosing Artes as the service provider for the National Forum and the Global Forum. Consequently, the patent nullity of the contracts with Artes became the only legal consequence to be reached from the failure to comply with the proper procurement procedure.

**WHEREFORE**, acting on the Report dated June 20, 2012 submitted by the Office of the Chief Attorney, the Court **RESOLVES** to:

1. **CONSIDER** the claim of Artes International, Inc. for payment extinguished in accordance to the unilateral *Release, Waiver & Quitclaim* executed and submitted by Artes International, Inc.; and

2. **FURNISH** a copy of this **RESOLUTION** to the **OFFICE OF THE OMBUDSMAN** and the **COMMISSION ON AUDIT** as basis for whatever further action may be warranted or necessary to be taken against **MS. EVELYN DUMDUM**.

The matter subject of this case is now considered **CLOSED** and **TERMINATED.**

**SO ORDERED.**

## Separate Opinions

CARPIO, *J*:

The Resolution cites the Report of the Office of the Chief Attorney on the contracts with Artes in concluding that "violations of law in the disbursement of funds of the Court as well as of funds derived from the loans extended by the World Bank appear to have been committed. The laws on procurement as well as those on auditing and official accountability were also contravened."

The Chief Attorney is gravely mistaken.

Republic Act No. 9184 or the Government Procurement Reform Act does not apply to executive agreements.

In the Loan Agreement, dated 2 October 2003, between the Republic of the Philippines, represented by then Secretary of Finance Jose Isidro N. Camacho, and the International Bank for Reconstruction and Development, the Bank has agreed to extend a Loan to the Philippine government in an amount equal to $21,900,000 to assist in the financing of the Judicial Reform Support Project (the Project or JRSP).

There is no question that the Loan Agreement in this case is in the nature of an executive agreement. It was entered into by the Philippine government, as a subject of international law possessed of a treaty-making capacity, and the International Bank for Reconstruction and Development, which, as an international lending institution organized by world governments to provide loans conditioned upon the guarantee of repayment by the borrowing

government, is also regarded a subject of international law and possessed of the capacity to enter into executive agreements with sovereign states.

Considering that the Loan Agreement is an executive agreement, Republic Act No. 9184 (RA 9184), or the "Government Procurement Reform Act" does not apply. Section 4 of RA 9184 provides:

> SEC. 4. Scope and Application. — This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.

Section 4 of RA 9184 clearly recognizes the government's commitment to the terms and conditions of executive agreements, such as the Loan Agreement in this case. Considering that Loan Agreement No. 4833-PH expressly provides that the procurement of the goods to be financed from the loan proceeds shall be in accordance with the IBRD Guidelines and the provisions of Schedule 4, and that the accessory SLA contract merely follows its principal's terms and conditions, the procedure for competitive public bidding prescribed under RA 9184 therefore finds no application to the procurement of goods for the Iligan City Water Supply System Development and Expansion Project.

Being an executive agreement, the Loan Agreement subject of this case is governed by international law. As the Court has consistently ruled in numerous cases, the Philippine government, particularly the implementing agency, in this case the Supreme Court, is therefore obligated to comply with the terms and conditions of the Loan Agreement under the international law principle of *pacta sunt servanda* which is embodied in Section 4 of RA 9184.

## MARCOS vs. FARIÑAS

PEDRO S. AGCAOILI, JR., ENCARNACION A. GAOR, JOSEPHINE P. CALAJATE, GENEDINE D. JAMBARO, EDEN C. BATTULAYAN, EVANGELINE C. TABULOG, petitioners, MARIA IMELDA JOSEFA "IMEE" R. MARCOS, co-petitioner, vs. THE HONORABLE REPRESENTATIVE RODOLFO C. FARIÑAS, THE HONORABLE REPRESENTATIVE JOHNNY T. PIMENTEL, Chairman of the Committee on Good Government and Public Accountability, and LT. GEN. ROLAND DETABALI (RET.), in his capacity as Sergeant-at-Arms of the House of Representatives, respondents, THE COMMITTEE ON GOOD GOVERNMENT AND PUBLIC ACCOUNTABILITY, *co-respondent*.

**[G.R. No. 232395. July 3, 2018.]**

### Facts

House Resolution No. 882 was introduced by respondent Fariñas, along with Representatives Pablo P. Bondoc and Aurelio D. Gonzales, Jr., directing House Committee to conduct an inquiry, in aid of legislation, pertaining to the use by the Provincial Government of Ilocos Norte of its shares from the excise taxes on locally manufactured virginia-type cigarettes for a purpose other than that provided for by Republic Act (R.A.) No. 7171. Petitioners allege that they were subjected to threats and intimidation during the legislative hearings, in that they were asked "leading and misleading questions" and that regardless of their answers, the same were similarly treated as evasive. Specifically, Jambaro claims that because she could not recall the transactions Petitioner Fariñas alluded to requested to see the original copy of a document presented to her for identification, she was cited in contempt and ordered detained. Petitioner Agcaoili, Jr. was likewise cited in contempt and ordered detained when he failed to answer Fariñas's query regarding the records of the purchase of the vehicles. Allegedly, the same threats and intimidation were employed by Fariñas in the questioning of Tabulog who was similarly asked if she remembered the purchase of 70 mini trucks. In common, petitioners and sought the issuance of a writ of Amparo to protect them from alleged actual and threatened violations of their rights to liberty and security of person.

**Ruling**

**The privilege of the writ of Amparo is confined to instances of extralegal killings and enforced disappearances, or threats thereof**

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The writ of Amparo is designed to protect and guarantee the (1) right to life; (2) right to liberty; and (3) right to security of persons, free from fears and threats that vitiate the quality of life.

The rights that fall within the protective mantle of the Writ of Amparo under Section 1 of the Rules thereon are the following: (1) right to life; (2) right to liberty; and (3) right to security.

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Secretary of National Defense, et al. v. Manalo, et al., thoroughly expounded on the import of the right to security, thus:

A closer look at the right to security of person would yield various permutations of the exercise of this right.

First, the right to security of person is "freedom from fear." In its "whereas" clauses, the Universal Declaration of Human Rights (UDHR) enunciates that "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people." x x x Some scholars postulate that "freedom from fear" is not only an aspirational principle, but essentially an individual international human right. It is the "right to security of person" as the word "security" itself means "freedom from fear." Article 3 of the UDHR provides, *viz.*:

Everyone has the right to life, liberty and security of person.

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The Philippines is a signatory to both the UDHR and the ICCPR.

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Here, it appears that petitioners and co-petitioner Marcos even attended and participated in the subsequent hearings on House Resolution No. 882 without any untoward incident. Petitioners and co-petitioner Marcos thus failed to establish that their attendance at and participation in the legislative inquiry as resource persons have seriously violated their right to liberty and security, for which no other legal recourse or remedy is available.

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**WHEREFORE, the Omnibus Petition is DISMISSED.**

# ABSTRACTS

# ABSTRACTS
## PRESENTED IN THE 2018 PSIL INAUGURAL NATIONAL CONFERENCE

### JUSTICE ACROSS BORDERS: THE STATE OBLIGATION OF THE PHILIPPINES TO RECOGNIZE AND ENFORCE FOREIGN JUDGMENTS AWARDING REPARATION TO VICTIMS OF GROSS HUMAN RIGHTS VIOLATIONS COMMITTED WITHIN PHILIPPINE JURISDICTION

REUEL ANGELO P. REALIN*

On 03 February 1995, the District Court of Hawaii (Hawaii Court) rendered a judgment awarding USD1.9 Billion to the plaintiffs in a class action against the estate of former President Ferdinand Marcos (Marcos Estate). On appeal, the Ninth Circuit Court of the US Court of Appeals affirmed the judgment. Pursuant to Section 50 (now Section 48), Rule 39 of the Rules of Court, the class action plaintiffs instituted a complaint for the recognition and enforcement of the foreign judgment of the Hawaii Court. The trial court dismissed the complaint, without prejudice, on the ground of non-payment of the correct filing fees. The Supreme Court in *Mijares v. Ranada,* reinstated the complaint before the trial court on the ground that filing fees were properly paid, without ruling on the enforceability of the foreign judgment. However, the trial court eventually dismissed the case for lack of jurisdiction by the US district court over the parties. On appeal, the Court of Appeals rendered its decision in *Mijares et al. vs. the Estate of Ferdinand Marcos,* dismissing the petition due to want of jurisdiction, being constitutionally infirmed, and want of basis. While such decision finds legal foundation under Philippine law, the court failed to take cognizance of international law norms fundamental to the plaintiffs' cause of action.

*Mijares* presents an opportunity to address the normative tension between two contending legal realms of international law and domestic law especially as regards to the enforcement of human rights norms within the domestic sphere. International law imposes on every State the obligation to give effective remedy to victims of human rights violations. This obligation

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becomes binding and non-derogable particularly when it already involves *jus cogens* norms as in cases of torture, enforced disappearance, and summary execution. On the other hand, Philippine conflict rules empower domestic courts to allow or refuse recognition of foreign judgments. While decisions by foreign tribunals may be recognized and enforced by Philippine courts, these may nevertheless be impeached on account of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

The article argues that Philippine courts are duty-bound to recognize and enforce foreign judgments in favor of victims of human rights violations when the violations amount to breaches of peremptory or *jus cogens* norms. In these instances, States have an *ergo omnes* obligation to provide effective remedy to the victims, and that effective remedy is allowing the enforcement of the foreign judgment. To further this argument, the article delves into the application of the Incorporation Clause of the 1987 Constitution as a means by which domestic law internalizes international law norms. This transformation creates an interrelation between both realms, allowing substantive rights and obligation derived from *jus cogens* norms to prevail over procedural rules.

# *NON DOMINUS SED PRO DOMINO:* REEXAMINING SABAH AND TAIWAN UNDER INTERNATIONAL LAW AND PHILIPPINE PRACTICE

NEIL SIMON S. SILVA*

The Philippines has problematic relations with two regimes that it considers to be, at best, *de facto* in character: Sabah, currently administered by Malaysia, over whose territory the Philippines has a subsisting claim; and Taiwan, legally identified as a province of China but currently administered outside central government control.

In relation to these areas, the Philippines has maintained a general stance of official non-recognition, while struggling to find non-official modalities for engaging their respective administering authorities and serving Filipinos under their control and jurisdiction. Those with regard to Sabah modalities have been relatively unstructured, being focused mainly on avoiding official statements relating to the province; while those relating to Taiwan are more developed, centering on the work of the Manila Economic and Cultural Office (MECO).

Both sets of modalities proved barely adequate to respond to stresses such as the 2013 incidents involving an alleged Taiwanese fishing vessel and acts of the *soi disant* army of the Sultanate of Sulu in Lahad Datu, Sabah. Furthermore, they provide no legal basis for other necessary administrative acts such as the delimitation of maritime zones drawn from these areas vis-à-vis those drawn from Philippine owned and administered territory; and in the case of Sabah, they prevent adequate provisio of consular and other services to hundreds of thousands of Filipinos who are present in the area as native inhabitants or as migrants.

It is the author's contention that a juridical examination of Sabah, in light of international norms on territorial title and sovereignty, would show that the Philippines may officially recognize it as an area under *de jure* Malaysian administration without losing historic title as successor-State to the Sultanate

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of Sulu. In contrast, the One China Policy requires the Philippines to treat Taiwan as an integral part of China and its administration outside central government control as non-legitimate; but a review of state practice concerning *de facto* entities would show that the Philippines need not wholly disregard the Taipei government's control of Taiwan and its appurtenant waters in its administrative acts.

It is believed that such a clarification would help in identifying the permissible means of working with the respective administrations of Sabah and Taiwan. This would allow the Philippines to enter into official relations with the Sabah State Government, and provide consular services to Filipinos in Sabah, without violating its indisputable.

# INDONESIAN RATIFICATION OF THE ARMS TRADE TREATY: ACHIEVING SUSTAINABLE DEVELOPMENT GOALS

NANDANG SUTRISNO S.H., LL.M., M.HUM., PH.D.*
HAEKAL AL ASYARI S.H.**

The Arms Trade Treaty is a multilateral, legally-binding agreement that establishes common standards for the international trade of conventional weapons. The treaty aims to reduce human suffering caused by illegal and irresponsible arms transfers, improve regional security and stability, as well as to promote accountability and transparency by state parties concerning transfers of conventional arms with the view to control the virtually unregulated import, export, transit, and brokering of conventional arms. After nearly two decades of advocacy, diplomacy and years of preparation, ever since the conclusion of the ATT in early 2013, Indonesia has yet to become a signatory to the Treaty. Indonesia's reason for abstention circles around the argument that the ATT is still inadequate to be implemented. Inevitably, for any new legal instrument, it is almost impossible to reach an almost perfect set of regulations. Even treaties that have been established for decades are still prone to imperfections. As a newborn international instrument, the ATT may potentially help States to start making a significant difference in their arms exports and imports to ensure that they are compatible with development goals. Implementation of the ATT and its universalization will complement the aims of the Sustainable Development Goals (SDGs) and provide States with an effective tool to bring about the reduction of armed violence and human suffering. None of the ASEAN member States have ratified the ATT—only Malaysia and Thailand are signatories. Indonesia, Myanmar, and Brunei Darussalam voted to abstain while Vietnam did not cast a vote. It is necessary for Indonesia to not overlook the ATT for its weaknesses and putting aside the advantages it may bring, specifically for the ATT's contribution towards sustainable development. Ratification of the ATT will become one significant milestone for Indonesia because other than it being in line with the ASEAN Political-Security Community Blueprint it will so contribute to the State's SDGs. The ATT has

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much to offer to the development agenda, and vice versa. It is in the interest of all States to join the treaty to ensure a safer, more secure, and prosperous future for all. Therefore, this research will analyze the role of the ATT for its contribution towards sustainable development, and the urgency of Indonesia's ratification towards it.

# SECURITY THREATS IN THE EASTERN COAST OF SABAH: ISSUES AND CHALLENGES

SU WAI MON*

Apart from the Straits of Malacca where piracy cases are rampant, another problematic area in Malaysia is the eastern coast of Sabah or the "Tri-Border Area" (TBA) of Southeast Asia which comprises the territory and territorial seas of three States—the Philippines, Indonesia and Malaysia. Sabah's maritime area covers "54,360 km2, constituting 30 percent of the Malaysia's Economic Exclusive Zone (EEZ). It stretches from the South China Sea in the west and the Sulu Sea to the north of Kudat and extends to the eastern coast, covering the Sulu Sea, and the Celebes Sea in the districts of Semporna and Tawau." A porous and extremely long border have made the place vulnerable to various security threats. The security threats in the TBA are non-traditional and from non-state actors which includes kidnapping and robberies by armed groups. The lahat Datu incident, an intrusion by Sulu militants in 2013, accentuates the need for Malaysian authorities to be better prepared and beef up security in the Sabah's eastern seaboard. Hijacking of fishing boats and kidnapping for ransom by armed groups are found to be the most rampant in the area, although the place has also been exposed to other non-traditional security threats. The presence of small and isolated islands makes it difficult for authorities to track and monitor the area. The primary concern of this study is to identify the major security threats which are challenging sustainable maritime security in the eastern coast of Sabah. This research is mainly based on qualitative approach by means of analytical and synthesis of secondary sources such as books, journal articles, newspapers and so forth. Despite the commercial significance of the area, the Tri-Border Area (TBA) or the eastern coast of Sabah has been largely overlooked by policymakers and security strategists from all three littoral states, namely, Indonesia, Malaysia, and the Philippines, perhaps to avoid tensions on the issue of sovereignty and jurisdiction. The absence of a policy framework and lack of inter-State coordination create lacuna in exercising effective law enforcement by respective authorities. This study encourages the authorities of three countries, namely Indonesia, Malaysia, and the Philippines, to strengthen cooperation and communication in order for law enforcement to be more effective and for sustaining maritime security in the Tri-Border Area.

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# PROTECTING THE CORAL REEF ENVIRONMENT IN THE SOUTH CHINA SEA AS AN OBLIGATION *ERGA OMNES*

JOHN PAOLO ROBERTO A. VILLASOR*

On 12 July 2016, the Permanent Court of Arbitration in the South China Sea Arbitration Case (*The Republic of the Philippines v. The People's Republic of China, Merits and Final Award*) rendered a decision finding that the massive reclamation activities and the construction of artificial islands by China at seven features in the disputed Spratly Islands have caused severe harm to the coral environment. In addition, the Arbitral Tribunal made a finding that Chinese fishermen engaged in the harvesting of endangered sea turtles, coral, and giant clams on a substantial scale in the South China Sea, applying methods that inflict severe damage on the coral reef environment.

This paper examines the notion that the ruling of the arbitration tribunal establishes not just an obligation for China's breach in protecting the marine environment with respect to fragile ecosystems and the habitat of depleted, threatened or endangered species under Articles 192 and 194 of the United Nations Convention on the Law of the Sea against the Philippines, but more significantly, creates a rule of state responsibility against China for violating its obligation towards the international community as a whole in protecting the coral reef environment in the South China Sea. Obligations *erga omnes*, first discussed by the International Court of Justice in the *Barcelona Traction Case*, are obligations of a State towards the international community as a whole which are the concern and responsibility of all States and for whose protection all States have a legal interest. These obligations are fundamentally different from those existing vis-à-vis another State. The protection of community environmental interests in the South China Sea is based on the preservation of the right to a balanced and healthy environment under the 1972 U.N. Conference on the Human Environment (Stockholm Declaration), Environment and Development (Rio Declaration), and the 2002 WSSD, the 1992 U.N. Conference on (Johannesburg) Declaration.

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In compliance with the obligation *erga omnes* to protect the coral reef environment in the South China Sea, the paper further explores the proposal of respected international law experts on the enforcement of the arbitral ruling with respect to the protection and preservation of the coral reef environment in the West Philippine Sea, a portion of the South China Sea within Philippine territorial jurisdiction: the establishment of a marine park or sanctuary over those maritime areas in the West Philippine Sea where the Philippines exercises sovereignty or jurisdiction, for the benefit of future generations.