



OPINIO JURIS

DIREKTORAT JENDERAL HUKUM DAN PERJANJIAN INTERNASIONAL
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Yustia Rahma Priyantari

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PENGANTAR REDAKSI

Dalam rangka menjalankan tugas dan fungsi diseminasi informasi terkait isu-isu hukum dan perjanjian internasional, Direktorat Jenderal Hukum dan Perjanjian Internasional telah menerbitkan Jurnal Hukum dan Perjanjian Internasional yang diberi nama “Jurnal Opinio Juris”.

Dalam Jurnal Opinio Juris Volume 30 ini, 4 (empat) orang Penulis menyumbangkan tulisan yaitu :

1. Enforcing Justice : ‘Testing’ the Effectiveness of International Litigation (*Yustia Rahma Priyantari*)
2. Assessing the Significance of ASEAN Maritime Outlook in the Implementation of International Law and Response to Emerging Maritime Issues & ITLOS Advisory Opinion on Climate Change: Its Implications To The Interpretation And Implementation Of Part XII Of UNCLOS (*Dominique Virgil*)
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4. Diplomacy through Roving Ambassadors : General Overview and Indonesia’s Practice (*Abdurrahman Al-Fatih Ildal*)

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Terima kasih dan selamat membaca.

Redaksi Opinio Juris

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ENFORCING JUSTICE: 'TESTING' THE EFFECTIVENESS OF INTERNATIONAL LITIGATION

oleh:

Yustia Rahma Priyantari

ABSTRACT

International scholars are no strangers to the question: how can it be law if it cannot be enforced? No other international law instrument is scrutinized more than international tribunals and their perceived lack of power in enforcing their judgments and compliance from the State parties. This perceived powerlessness has resulted in the widespread belief that international tribunals are ineffective in dispute resolutions and maintaining the international order, as is the case with international as a whole. This article challenges the critical misassumption that law is only 'real law' when accompanied by an authoritative interpretation and enforcement by a 'higher power' that created the law. Viewing international law through the lens of domestic law undermines the normative effects of international law and its impact on State behavior. Likewise, the 'success' of international tribunals cannot be measured by the standards of their domestic counterparts. By examining various case studies from different international courts and tribunals, the study aims to assess how legal proceedings influence state behavior and compliance with international norms. The research employs a mixed-methods approach, combining quantitative data on case outcomes with qualitative analyses of legal arguments and state responses. The research finds and establishes that in all but one case thus far, international tribunals have been successful in resolving disputes and maintaining the international order.

A. INTRODUCTION

The 2016 South China Sea Arbitration is hailed as a landmark decision that significantly altered the legal regime of the seascape in the South China Sea.¹ However, the Philippines' sweeping legal victory is not reflected in reality; China refused to participate in the proceeding and denounced the arbitral award.² Six years since the deliverance of the arbitral award, China has not shown any inclination to uphold the arbitration's rulings.³ Furthermore, it also has not slowed down infrastructure projects in the contested areas of the South China Sea⁴ nor respected its neighbours' territorial claims.⁵ China's continuous belligerence against rule-based international order highlights the 'flaw' in international law: the lack of a compulsory

¹ *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China) (Award)* (Permanent Court of Arbitration, Case No 2013-19, 12 July 2016) 173 [378] ('*South China Sea Arbitration*'). See also Clive Schofield, 'A Landmark Decision in the South China Sea: The Scope and Implications of the Arbitral Tribunal's Award' (2016) 38(3) *Contemporary Southeast Asia* 339, 343.

² Fu Ying, 'Why China Says No to the Arbitration on the South China Sea', *Foreign Policy*, (online, 10 July 2016) <<https://foreignpolicy.com/2016/07/10/why-china-says-no-to-the-arbitration-on-the-south-china-sea/>>.

³ Praktik Jakhar, 'Whatever happened to the South China Sea ruling?', *The Interpreter* (Web Page, 21 July 2021) <<https://www.lowyinstitute.org/the-interpreter/whatever-happened-south-china-sea-ruling>>.

⁴ Associated Press, 'China has fully militarized three islands in South China Sea, US admiral says', *The Guardian* (online, 21 March 2022) < <https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says>>.

⁵ Bureau of Oceans and Intellectual Environmental and Scientific Affairs, US Department of the State, *Limits in the Seas: People's Republic of China Maritime Claims in the South China Sea* (Report No. 150, 2022) 3.

enforcement mechanism along with the consent-based nature means compliance with international law greatly relies on the goodwill of each State.⁶ China has joined the ranks of States that refused to participate/rejected international arbitral awards/court judgments, which include Iceland,⁷ Israel,⁸ France,⁹ India,¹⁰ Pakistan,¹¹ Turkey,¹² Iran,¹³ Russia,¹⁴ and the US.¹⁵ As a result of this fundamental enforcement problem, critics of international law have raised the question regarding the effectiveness of international tribunals as arbiters of dispute due to their perceived inability to enforce their own decisions and control the actions of States.¹⁶

This study critically assesses the claim that the legal methods of international dispute resolution (IDR) are less effective due to the lack of coercive enforcement. The effectiveness of international litigation should be measured through various criteria, including the impact on States' behaviours and contribution to international law jurisprudence, not just compliance. The **first** section begins by defining 'effectiveness'. This section challenges the usage of 'compliance' to measure the effectiveness of international litigation. Over-reliance on compliance may, in fact, understate effectiveness. This paper asserts that the objective of international law is not to measure a State's conduct to a legal standard but to *change* the State's behaviours compared to what it would have been **without** the law. The **second** section presents two case studies: *Nicaragua*¹⁷ and the *Arctic Sunrise*.¹⁸ The two cases contrast because the US partly participated in the proceedings of *Nicaragua* but refused to implement the judgment. However, in the case of the *Arctic Sunrise*, Russia was absent in the Annex VII Arbitral Tribunal and International Tribunal for the Law of the Sea (ITLOS) but eventually partially complied with the awards. This section further demonstrates that, despite their belligerence, the US and Russia ended up complying with the judgment and awards, albeit in unorthodox manners. Examining the two cases in depth provides insight into the variables that influence a State's compliance with international judgments/awards. The **third** section presents

⁶ Elena K. Proukaki, *The Problem of Enforcement in International Law* (Routledge, 2010) 1.

⁷ *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland) (Judgment)* [1973] ICJ Rep 3, 6 [7] ('*Fisheries Jurisdiction*').

⁸ Committee on the Elimination of Racial Discrimination, *Inter-State communication submitted by the State of Palestine against Israel*, UN Doc. CERD/C/100/5 (12 December 2019) 5 [3.2].

⁹ *Nuclear Tests (New Zealand v. France) (Judgment)* [1974] ICJ Rep 457, 458 [4] ('*New Zealand Nuclear Test*').

¹⁰ *Trial of Pakistani Prisoners of War (Pakistan v India) (Provisional Measures)* [1973] ICJ Rep 328, 329-330 [7-8] ('*Pakistani Prisoners of War*').

¹¹ *Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan) (Jurisdiction)* [2016] ICJ Rep 552, 554 [8].

¹² *Aegean Sea Continental Shelf (Greece v Turkey) (Judgment)* [1978] ICJ Rep 3, 6 [7].

¹³ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 8 [10] ('*Tehran Hostages*').

¹⁴ *The Arctic Sunrise Arbitration (Netherlands v. Russia) (Award on Merits)* (Permanent Court of Arbitration, Case No 2014-02, 14 August 2015) 2 [6] ('*Merits: Arctic Sunrise*').

¹⁵ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14, 16 [3] ('*Nicaragua*'). See also Mark A. Uhlig, 'U.S. Urges Nicaragua to Forgive Legal Claim', *The New York Times* (online, 30 September 1990) <<https://www.nytimes.com/1990/09/30/world/us-urges-nicaragua-to-forgive-legal-claim.html>>.

¹⁶ Aloysius P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18(5) *The European Journal of International Law* 815, 816.

¹⁷ *Nicaragua* (n 15).

¹⁸ *Merits: Arctic Sunrise* (n 14).

the findings of the first and second sections to compare the effectiveness of litigation to other IDR mechanisms. It concludes that international litigation is generally effective and significantly contributes to international jurisprudence, but **not without limitations**.

Due to the breadth of the subject matter, it is not feasible to discuss every international judicial institution and its case laws. This paper limits its studies to interstate disputes in first-generation international tribunals, e.g. International Court of Justice (ICJ), Permanent Court of Arbitration (PCA), and ITLOS.

B. DEFINING 'EFFECTIVENESS'

This study begins by defining and exploring the 'effectiveness' of international litigation. International tribunals have proliferated since the end of the Cold War;¹⁹ the Project on International Courts and Tribunals has recorded over ninety international judicial institutions, including several quasi-judicatory mechanisms.²⁰ The caseload has likewise increased in the past two decades.²¹ Nevertheless, dispute settlement through an international tribunal remains the least utilised IDR mechanism. Bilateral dialogue and diplomacy are still considerably more frequently preferred to resolve international disputes.²² Litigation is typically only invoked as a last resort after several failed negotiations.²³ For example, New Zealand spent a decade of bilateral negotiations and engagement through the UN General Assembly before lodging a complaint against France in the *Nuclear Test* case.²⁴ The territorial dispute between Indonesia and Malaysia over Pulau Sipadan and Pulau Ligitan began in 1969 and was submitted to the ICJ in 1996 after decades of deadlocked diplomatic engagements.²⁵ The UK and West Germany spent a decade in negotiations with Iceland to no avail, resulting in the filing of the *Fisheries Jurisdiction* case.²⁶

History, politics, and culture, along with a State's legal systems and foreign policy, significantly affect how it sees and participates in third-party conflict resolutions under international law.²⁷ However, States' approach to litigation is almost universal: States are naturally inclined to preserve their sovereignty, which stands in opposition to litigation because international tribunals limit the arguments and measures States may take.²⁸ Some States went as far as going to war to preserve

¹⁹ Gary Born, 'A New Generation of International Adjudication' (2012) 61(4) *Duke Law Journal* 775, 782.

²⁰ 'The Project on International Courts and Tribunals: The International Judiciary in Context', Project on International Courts and Tribunals (Web Page, August 2001) <https://elaw.org/system/files/intl%20tribunals%20synoptic_chart2.pdf>.

²¹ Born (n 19) 783. See also *Report of the International Court of Justice 1 August 2021-31 July 2022*, UN GAOR, 77th sess, UN Doc A/77/4, para 1.

²² Shirley Scott, 'Litigation versus dispute resolution through political processes' in Natalie Klein (ed), *Litigating International Law Disputes* (Cambridge University Press, 2014) 24.

²³ *Ibid* 29.

²⁴ *New Zealand Nuclear Test* (n 9) 464 [26]. See also Kenneth Keith, 'New Zealand and the International Court of Justice' (2020) 21 *Melbourne Journal of International Law* 1, 9.

²⁵ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* (Judgment) [2001] ICJ Rep 575, 642 [31] ('*Sipadan and Ligitan*'). See also Ranjit Singh, *The Indonesia-Malaysia Dispute Concerning Sovereignty over Sipadan and Ligitan Islands: Historical Antecedents and the International Court of Justice Judgment* (ISEAS Publishing, 2019) 13.

²⁶ *Fisheries Jurisdiction* (n 7) 12 [25].

²⁷ Scott (n 22) 32.

²⁸ *Ibid* 29.

their sovereign options. In certain territorial disputes, the matter was referred to the tribunals after military conflicts that either resulted in a stalemate or because the disputing Parties decided that prolonged military conflict was costly and unsustainable.²⁹ The following factors dissuade States from bringing their issues to international tribunals: 1) litigation is expensive, arduous, and time-consuming and (2) the outcome is unpredictable.³⁰ The importance of (2) cannot be overstated: in all cases submitted to the ICJ, particularly on the grounds of compulsory jurisdiction from Article 36(2) of the ICJ Statute³¹ or treaty provisions, the Applicants believed that they had the upper hand in facts and legal arguments to 'win' the dispute.³²

Respondents did not always share this sentiment. Respondents may refuse to participate because a) they contest the tribunal's competence/jurisdiction³³ (e.g. France)³⁴ and/or b) the Respondents, recognising their weaker legal grounds, attempt to undermine the legitimacy of the proceeding through nonparticipation.³⁵ It should be noted that nonparticipation is rare. Notwithstanding the resurgence of nonparticipation in the past decade,³⁶ States have maintained a respectable track record of participation.³⁷ Jurisprudence holds that nonparticipation offers no legal advantage and in fact *worsens* the outcome for the Respondents. Iran³⁸ and Guatemala³⁹ emerged victorious after both reversed their nonparticipation. Nonparticipation likewise has not barred international tribunals from passing rulings. the ICJ did so in *Nicaragua*⁴⁰ and the PCA in *Arctic Sunrise*⁴¹ and the *South China Sea*.⁴² *Nicaragua* and the *South China Sea* are particularly significant because, in addition to nonparticipation, the US and China have rejected and not complied with the rulings. Their noncompliance is often invoked to criticise the effectiveness of international tribunals because the international legal system lacks an autonomous enforcement mechanism. States, especially great powers and with veto privileges in the UN Security Council, could ignore rulings they do not like without much consequence.

Professor Gross correlates how a case was brought to the ICJ (special agreements versus treaty-based or compulsory jurisdiction) to compliance, arguing

²⁹ Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', (2000) 54 *International Organization* 457, 480. See also Scott (n 22) 29.

³⁰ Scott (n 22) 29.

³¹ Statute of the International Court of Justice, art 36 (2).

³² Scott (n 22) 32.

³³ Bernard H. Oxman, 'Nonparticipation and Perceptions of Legitimacy' (2019) 46(1) *Ecology Law Quarterly, Berkeley Journal of International Law* 235, 241.

³⁴ New Zealand *Nuclear Test* (n 9) 458 [4].

³⁵ Peter Tzeng, 'A Strategy of Non-Participation before International Courts and Tribunals' (2019) 19(1) *The Law & Practice of International Courts and Tribunals* 1, 25. See also Oxman (n 33) 245; Andrew Coleman, 'The International Court of Justice and Highly Political Matters' (2003) 4(1) *Melbourne Journal of International Law* 29, 40.

³⁶ Tzeng (n 35) 16.

³⁷ *Ibid.*

³⁸ *Anglo-Iranian Oil Co. (United Kingdom v Iran) (Provisional Measures)* [1951] ICJ Rep 89, 92; *Anglo-Iranian Oil Co. (United Kingdom v Iran) (Jurisdiction)* [1952] ICJ Rep 93, 94-97.

³⁹ *Nottebohm (Liechtenstein v. Guatemala) (Jurisdiction)* [1953] ICJ Rep 112, 118; *Nottebohm (Liechtenstein v. Guatemala) (Judgment)* [1955] ICJ Rep 3, 5-6.

⁴⁰ *Nicaragua* (n 15).

⁴¹ *Merits: Arctic Sunrise* (n 14)

⁴² *South China Sea Arbitration* (n 1) 5 [15].

that 'cases initiated by special agreement held more promise of being effective'.⁴³ Within the ICJ, Judge Oda concurred. In his observation, Respondents vehemently opposed cases brought on the grounds of treaty-based compulsory jurisdiction, thus increasing the likelihood of noncompliance.⁴⁴ A study by Professors Posner and Yoo, in reference to Professors Ginsburg and McAdams, appears to support this assertion: cases with special agreements yielded an 85.7% compliance rate, compared to 60% for treaty-granted jurisdiction and 40% for compulsory jurisdiction. At a glance, their findings support the interplay between sovereignty and consent: because States could ignore an unfavourable ruling, international tribunals should 'avoid cases where a judgment was likely to be resisted'.⁴⁵ Takane Sugihara, in his observation of the ICJ, quotes an old Anglo-Saxon proverb, 'hard cases make bad law', implying the creation of 'bad international law' no State would follow should highly political matters be heard in international tribunals.⁴⁶

Llamzon contests the methodology and findings of these studies: there is little explanation in the research of Professors Posner and Yoo or Professors Ginsburg and McAdams, for example, as to how they determined whether a particular ICJ case is categorised as 'compliant' or 'noncompliant'.⁴⁷ Professors Ginsburg and McAdams, in particular, acknowledge the difficulty of establishing compliance as an empirical matter, yet deem any case wherein a State party delayed the 'implementation of an order by greater than one year' as a case of noncompliance.⁴⁸ The studies did not consider relevant long-term post-adjudicative developments in cases categorised as 'noncompliant'. *Corfu Channel*⁴⁹ and *Cameroon v. Nigeria*⁵⁰ are classified as noncompliant because it took Albania four decades to pay compensation to the UK,⁵¹ while the situation in Lake Chad and Bakassi Peninsula was only fully resolved four years after the judgment.⁵² Llamzon criticises the usage of such a short timeframe in the methodologies: understanding what internal law's context of "compliance" entails is challenging enough, let alone deciding empirically whether one state 'complied' or not.⁵³ Many levels of local and federal government enforcement are involved in the compliance process. Each of these levels may show differing degrees of compliance

⁴³ Leo Gross, 'Presentation by Professor Christine Chinkin' in Connie Peck, Roy S. K. Lee, Roy S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court, the Peace Palace, 16-18 April 1996* (Martinus Nijhoff, 1997) 45-46.

⁴⁴ Shigeru Oda, 'The Compulsory Jurisdiction of the International Court of Justice: A Myth?' (2000) 49(2) *The International and Comparative Law Quarterly* 251, 264.

⁴⁵ *Ibid* 297.

⁴⁶ Takane Sugihara, 'The Judicial Function of the International Court of Justice' in Sam Muller, David Raič and Johanna M. Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (M. Nijhoff, 1997) 117.

⁴⁷ Llamzon (n 16) 845.

⁴⁸ Tom Ginsburg and Richard H. McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution' (2004) 45(4) *William and Mary Law Review* 1229, 1310.

⁴⁹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment)* [1949] ICJ Rep 4.

⁵⁰ *The Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Judgment)* [2002] ICJ Rep 303.

⁵¹ *Ibid* 1310.

⁵² Llamzon (n 16) 823.

⁵³ *Ibid* 845.

concerning other branches of the same government.⁵⁴ *LaGrand*⁵⁵ and *Avena*⁵⁶ highlight the American federal government's uneasy relationship with some of its states.⁵⁷ As seen in the case of Nigeria, Indonesia,⁵⁸ and Libya,⁵⁹ which faced strong nationalistic opposition against ceding their territories to the 'enemy', governments may also have to carefully navigate through domestic pressure to not exacerbate existing tensions in territorial disputes.⁶⁰

Assigning such a short time frame to measure compliance creates a disservice to governments' efforts and commitment to upholding judgments/awards. Nor, in the author's view, is compliance the appropriate metric to measure litigation's effectiveness. Professor Meyer argues that over-reliance on compliance in the context of international law and relations may understate its effectiveness.⁶¹ He defines compliance as 'whether or not a state's conduct meets the prescribed legal standard' and effectiveness as 'whether the law has changed a state's behaviour from what it would have been in the absence of the law'.⁶² States could simply – and routinely do – agree to 'shallow commitments' with broad room for interpretation that do not require them to alter their conduct,⁶³ thus generating a high level of compliance to the legal instrument but low practical impact because their behaviour is not changed.⁶⁴ In such a situation, compliance becomes a poor tool for discerning effectiveness. Judge Donoghue likewise emphasises the need to differentiate one's expectations of international courts from those of their national counterparts.⁶⁵ The way that international tribunals influence state conduct differs from how a national judicial system does so since they operate in a distinctly different legal environment.⁶⁶ The international legal system is built on negotiations, sovereignty, and consent, which cannot fulfill expectations of coercive enforcement and complete compliance.⁶⁷ She recalls Professor Shany's method of measuring a court's effectiveness: 'the identification of the goals against which effectiveness is measured'.⁶⁸ Based on this

⁵⁴ *Ibid.*

⁵⁵ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466.

⁵⁶ *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12 ('*Avena*').

⁵⁷ Llamzon (n 16) 823.

⁵⁸ '*Sipadan and Ligitan*' (n 25).

⁵⁹ *Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Judgment)* [1994] ICJ Rep 6 ('*Territorial Dispute*').

⁶⁰ Colter Paulson, 'Compliance With Final Judgments of the International Court of Justice Since 1987' (2004) 98(3) *American Journal of International Law* 434, 451.

⁶¹ Timothy Meyer, 'How Compliance Understates Effectiveness' in Erin Lovall (ed), *Proceedings of the 112th Annual Meeting (American Society of International Law) Vol. 108, The Effectiveness of International Law* (Cambridge University Press, 2014) 169.

⁶² *Ibid.*

⁶³ Eric Rosand, 'The Security Council as 'Global legislator': Ultra vires or Ultra Innovative?' (2004) 28(1) *Fordham International Law Journal* 542, 575-576. See also Andrew T. Guzman, 'Against Consent' (2012) 52(4) *Virginia Journal of International Law* 747, 751.

⁶⁴ Meyer (n 61) 169.

⁶⁵ Joan E. Donoghue, 'The Effectiveness of the International Court of Justice' in Erin Lovall (ed), *Proceedings of the 112th Annual Meeting (American Society of International Law) Vol. 108, The Effectiveness of International Law* (Cambridge University Press, 2014) 115.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014) 181; Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', (2012) 106(2) *The American Journal of International Law* 225, 229 ('Goal-Based Approach').

goal-based approach, Judge Donoghue and Professor Shany argue that it is difficult to establish a baseline effectiveness measurement for *all* international courts because different courts have different statutes/mandates from which effectiveness ought to be measured.⁶⁹ From the ICJ Statute, Judge Donoghue identifies four objectives: 1) the lawful and peaceful settlement of interstate disputes; 2) contribution to the UN framework through advisory opinions; 3) the development of international law and 4) 'shaping State behavior'.⁷⁰

A State's conduct is influenced by multiple variable. Decisively declaring that awards/judgments are the sole reason a State changed its conduct poses a serious methodological challenge.⁷¹ International tribunals typically do not track the aftermath of their rulings, and the Parties' thought processes are not easily discerned from public sources.⁷² The effectiveness of a tribunal's ruling, therefore, must be evaluated on an individual basis. By using changes in State parties' conduct as the determinant variable, Constanze Schulte's study into the effectiveness of the ICJ presents a more positive outcome: between 1986 and 2003, 27 ICJ cases had a 'generally satisfactory compliance record for judgments'.⁷³ Colter Paulson's study from 1987 to 2003 yielded similar results, albeit noting that five cases 'have met with less compliance than others'.⁷⁴ As of 2022, the five cases discussed in Paulson's study have largely been resolved,⁷⁵ though the application of *Avena* (in conjunction with its predecessor, *LaGrand*) in domestic courts is still inconsistent due to the resistance of American state governments to the federal government's policies.⁷⁶ Schulte, Paulson, and Llamzon unanimously agree that there is only one instance of *open defiance* in the ICJ's almost eighty years of existence: *Nicaragua*,⁷⁷ which will be discussed in the next section.

C. CASE STUDIES

Having established the parameters of 'effectiveness' in the previous section, this section puts the construct to the test by applying it to two previously mentioned cases: *Nicaragua* and the *Arctic Sunrise*. This section aims to establish that an award/judgment could still be *effective* in changing a State's conduct despite initial nonparticipation and noncompliance.

a. *Nicaragua*

Discussion on *Nicaragua* often only focuses on the defiance of the Reagan administration and omits subsequent developments *within* the

⁶⁹ Donoghue (n 65); Shany, 'Goal-Based Approach' (n 55) 269.

⁷⁰ *Ibid* 115.

⁷¹ *Ibid*.

⁷² *Ibid* 117.

⁷³ Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004) 403.

⁷⁴ Paulson (n 60) 436. See *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351; *Territorial Dispute* (n 59); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Judgment)* [2002] ICJ 303; *Avena* (n 56).

⁷⁵ Llamzon (n 16) 848.

⁷⁶ *Ibid* 843.

⁷⁷ *Nicaragua* (n 15) 16 [3].

US. Paul Reichler notes that the judgment 'set off a chain reaction that helped convince Congress to cut off funding for the contras',⁷⁸ giving Nicaragua the reprieve to turn the tide against the insurgents decisively. Representative Boland frequently referenced the ICJ's proceeding and Reagan's flagrant flouting of international law as the reason to withhold support to the contras,⁷⁹ a proposal supported by Republicans and Democrats alike in the face of mounting public outrage.⁸⁰ More importantly, the Reagan administration was forced to discreetly procure funding for the Contras, culminating in the 'Irangate' scandal and ending Reagan's interventionist policy in South America.⁸¹ This inadvertently constitutes a partial fulfillment of Order (12) of the ICJ's judgment: 'a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations'.⁸² *Nicaragua* is a reminder that awards/judgments affect not only the executive branch but are also considered by other branches of the government and society, which may mount pressure against the executive branch to alter a State's conduct.⁸³ Subsequent developments post-*Nicaragua* ironically mimicked that of the *Tehran Hostage* case,⁸⁴ the judgment applied significant pressure on Iran and paved the way for the signing of the Algiers Accords.⁸⁵ Referencing parameters previously advocated by Judge Donoghue and Professor Shany, an ICJ judgment is effective *vis-à-vis* the ICJ Statute when it succeeds *politically* in reducing tensions and *legally* addressing the dispute.⁸⁶ *Nicaragua* demonstrates that even in the face of open defiance, international law still finds a way to break through and 'force' positive change in actions.

Scholarships on international tribunals frequently discuss *Nicaragua* due to its importance in international law jurisprudence. The importance of *Nicaragua* is threefold: 1) the ICJ's affirmation that the obligation to peacefully resolve disputes has attained the status of customary international law *vis-à-vis* the prohibition on the use of force;⁸⁷ 2) the beginning of the United States' withdrawal from treaties/optional protocols prescribing compulsory jurisdiction;⁸⁸ and 3) the supposed turning point wherein States, mainly developed ones in Western Europe and North America, have 'stopped using the ICJ

⁷⁸ Paul Reichler, 'Holding America to its Own Best Standards: Abe Chayes and Nicaragua in the World Court' (2001) 42 *Harvard International Law Journal* 15, 23.

⁷⁹ Report for Congress: Legislative Histories of Statutory Restrictions on Funding for Covert Assistance for Military or Paramilitary Operations in Nicaragua, FY 1983-FY 1986 (Report, 133 Cong. Rec. 16075-80, 1987).

⁸⁰ Andrea Onate-Madrado, 'The World Court and the Iran-Contra Scandal: Nicaragua, the International Court of Justice, Public Opinion, and the Origins of Iran-Contra' (2022) 2(1) *Histories* 504, 512.

⁸¹ Coleman (n 35) 39-40.

⁸² *Nicaragua* (n 15) 149.

⁸³ Coleman (n 35) 41.

⁸⁴ *Tehran Hostages* (n 13).

⁸⁵ Coleman (n 35) 41.

⁸⁶ Llamzon (n 16) 823.

⁸⁷ *Nicaragua* (n 15) 145 [290].

⁸⁸ Lori Fisler Damrosch, 'The Impact of the Nicaragua Case on the Court and Its Role: Harmful, Helpful, or In Between?' (2012) 25(1) *Leiden Journal of International Law* 135, 147.

largely because the judges did not apply the law impartially'.⁸⁹ (3) is primarily contested; critics have not considered developed States' recent usage of the ICJ (and other international tribunals),⁹⁰ e.g. *Jurisdictional Immunities*,⁹¹ *San Padre Pio*⁹² and *Antarctic Whaling*.⁹³ The number and variety of caseloads of the ICJ have likewise been steadily increasing over the years, affirming States' belief in the ICJ's justiciability and capacity to resolve their dispute. Professor Guzman criticises the application of usage rate to measure States' trust in an international tribunal. The decision to 'use' a tribunal is a strategic choice because other preferred approaches (including armed conflicts in some cases) have failed, an extraordinary affair that is never meant to be the norm or widespread.⁹⁴ The doomsaying that *Nicaragua* would inspire 'a loss of respect' and 'a cascade of noncompliance' from other States, as discussed in the first section of this paper, remains unfounded.⁹⁵ The US attacks on the ICJ's legitimacy strengthened its position among the 'preponderance of member nation states', particularly the 'weaker nation-states'.⁹⁶ *Nicaragua* is indeed a turning point, not of its downfall, but wherein the ICJ proved its legitimacy, impartiality, and undeniable significance to world affairs.

b. Arctic Sunrise

Examining three documents is necessary to grasp the importance of the Arctic Sunrise: the award on merits⁹⁷ and the award on compensation⁹⁸ from the Annex VII Arbitral Tribunal (administered by the PCA), and the Order of 22 November 2013 from ITLOS.⁹⁹ As previously discussed, Russia refused to participate in the proceeding and rejected the PCA's Awards and ITLOS' Provisional Measures. Curiously, despite its repeated refusals, Russia's subsequent actions inadvertently complied with the Awards and Provisional Measures, albeit in an unorthodox manner. On 18 December 2013, the Russian state of Duma abruptly amended an amnesty bill to include the *Arctic*

⁸⁹ Eric Posner, 'The Decline of the International Court of Justice' in Max Albert, Dieter Schmidtchen and Stefan Voigt (eds), *International Conflict Resolution* (Tubingen: Mohr Siebeck, 2006) 111.

⁹⁰ Damrosch (n 88) 142.

⁹¹ *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* ICJ Rep 99.

⁹² *The M/T "San Padre Pio" (Switzerland v Nigeria) (Order)* (International Tribunal for the Law of the Sea, Case No 27, 6 July 2019).

⁹³ *Whaling in the Antarctic (Australia v Japan) (Judgment)* [2014] ICJ Rep 226.

⁹⁴ Andrew T. Guzman, 'International Tribunals: A Rational Choice Analysis' (2008) 157(1) *University of Pennsylvania Law Review* 171, 188.

⁹⁵ Damrosch (n 88) 147.

⁹⁶ Coleman (n 35) 46. See also Paul Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order' (2000) 1 *Chicago Journal of International Law* 1, 1.

⁹⁷ *Merits: Arctic Sunrise* (n 14).

⁹⁸ *The Arctic Sunrise Arbitration (Netherlands v. Russia) (Award on Compensation)* (Permanent Court of Arbitration, Case No 2014-02, 10 July 2017) ('Compensation: Arctic Sunrise').

⁹⁹ *The "Arctic Sunrise" Case (Kingdom of the Netherlands v Russian Federation) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 22, 22 November 2013).

Sunrise's crew.¹⁰⁰ On 6 June 2014, the vessel departed the Russian port of Murmansk and returned to the Netherlands.¹⁰¹ In its awards on merits on 14 August 2015, the PCA ruled that the Netherlands was entitled to compensation for material damage to the Arctic *Sunrise*.¹⁰² The PCA determined compensation amounting to €5.4 million in compensation awards on 10 July 2017.¹⁰³ Russia's response to the award on compensation is notable. Whereas it strongly communicated its refusal to participate and comply with the award on merits, its reaction to the award on compensation was somewhat subdued.¹⁰⁴ Russia reiterated that the award 'had ignored and encouraged purposeful illegal actions in the EEZ of the coastal states and their continental shelf',¹⁰⁵ but made no reference to its position against the legitimacy of the proceeding and awards.¹⁰⁶

In an unexpected turn of events, on 17 May 2019, the Netherlands and Russia announced a joint statement on the 'cooperation in the Arctic zone of the Russian Federation and dispute settlement',¹⁰⁷ wherein Russia agreed to pay €2.7 million to the Netherlands, half the amount decided by the PCA.¹⁰⁸ The joint statement highlights one important development: clarifying the 'right of protest actions at sea' by international law,¹⁰⁹ a matter the Dutch considered to be of great importance, one that strained the Russian-Dutch bilateral relations.¹¹⁰ News on this development has been scarce as further negotiations are classified. Neither the Netherlands nor Russia has disclosed any document/statement about the matter (the joint statement has been removed from the Dutch website). Given the bilateral tension between

¹⁰⁰ 'Greenpeace Arctic Sunrise: Russia 'frees protest ship'', *BBC* (online, 6 June 2014) <<https://www.bbc.com/news/world-europe-27736927>>.

¹⁰¹ John Vidal, 'Arctic 30: Russia releases Greenpeace ship', *The Guardian* (online, 6 June 2014) <<https://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship>>.

¹⁰² *Merits: Arctic Sunrise* (n 14) 97 [395].

¹⁰³ *Compensation: Arctic Sunrise* (n 87).

¹⁰⁴ Hao Duy Phan, 'International Courts and State Compliance: An Investigation of the Law of the Sea Cases' (2019) 50(1) *Ocean Development and International Law* 70, 79.

¹⁰⁵ *Ibid*; 'Briefing by Deputy Director of the Information and Press Department Artyom Kozhin, Moscow', *The Ministry of Foreign Affairs of the Russian Federation* (Web Page, 20 July 2017) <www.mid.ru/en/main_en/-/asset_publisher/G51jNfMMNKX/content/id/2818579#7>.

¹⁰⁶ Phan (n 93) 79.

¹⁰⁷ 'Joint statement by the Russian Federation and the Kingdom of the Netherlands on cooperation in the Arctic zone of the Russian Federation and dispute settlement', *The Ministry of Foreign Affairs of the Russian Federation* (Web Page, 19 May 2019) <https://archive.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3651941> ('Joint Statement').

¹⁰⁸ 'Miljoenschikking Nederland en Rusland over enteren Greenpeace-schip Arctic Sunrise', *RTL Nieuws* (online, 17 May 2019) <<https://www.rtinieuws.nl/nieuws/nederland/artikel/4715476/rusland-greenpeace-schip-arctic-sunrise-schikking-enteren>>.

¹⁰⁹ Joint Statement (n 107). See also Alex Oude Elferink, 'Settlement of the Dispute concerning the Arctic Sunrise – A belated recognition of the relevance of the award on the merits in the Arctic Sunrise case?', *Norwegian Centre for Law of the Sea Blog* (Web Page, 7 August 2019) <<https://site.uit.no/nclos/2019/07/08/settlement-of-the-dispute-concerning-the-arctic-sunrise-a-belated-recognition-of-the-relevance-of-the-award-on-the-merits-in-the-arctic-sunrise-case/>> ('Relevance').

¹¹⁰ Elferink, *Relevance* (n 109).

the two States, particularly regarding the downing of Malaysian Airlines MH17 and Russia's aggression in Ukraine,¹¹¹ it is unclear why Russia and the Netherlands opted to settle *Arctic Sunrise* in such a manner. *Arctic Sunrise* is one of the methodological nightmares Judge Donoghue and Professor Shany mention:¹¹² in the absence of official records, one can only speculate the actual reasoning behind Russia's actions during and after the ITLOS/PCA proceeding.¹¹³ Given the subject matter, it is undeniable that the awards have had a significant impact on altering Russia's conduct. It is not uncommon for awards/judgments to open the pathway to a 'true' resolution of disputes, with awards/judgments acting as a 'common ground' upon which involved Parties could clarify their positions and negotiate further in good faith.¹¹⁴ Like *Nicaragua*, the *Arctic Sunrise* demonstrates that litigation's effectiveness is not always as clear-cut or immediate: nonparticipation could still result in positive *future* changes in behaviour.

D. INTERNATIONAL LITIGATION VIS-À-VIS DIPLOMACY

Comparing the effectiveness of litigation and diplomatic means of dispute settlement in empirical terms is challenging. This study encounters the same methodological issue: it is difficult to attribute a State's change of conduct to a particular dispute settlement process. The challenge is more prevalent for diplomacy: diplomatic channels, even with third parties' involvement, typically are confidential, making it challenging for outsiders to gauge the influence of diplomacy on dispute settlement.¹¹⁵ Further muddying the waters is the variability of diplomatic approaches compared to litigation's formal and institutionalised structure. Consider contrasting trade negotiations with territorial disputes. On average, it takes 18 months to negotiate a free trade agreement with the US.¹¹⁶ Regional trade agreements typically are concluded in 28 months.¹¹⁷ In comparison, territorial disputes carry much higher stakes, difficulty (if not outright impossibility) of compromises, and regularly result in armed conflicts more so than other types of international dispute.¹¹⁸ Given the

¹¹¹ Jennifer Rankin, 'Three men found guilty of murdering 298 people in shooting down of MH17', *The Guardian* (online, 18 November 2022) <<https://www.theguardian.com/world/2022/nov/17/three-men-found-guilty-of-murdering-298-people-in-flight-mh17-bombing>>.

¹¹² Donoghue (n 65) 115.

¹¹³ Alex G. Oude Elferink, 'The Arctic Sunrise Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29(2) *The International Journal of Marine and Coastal Law* 244, 289.

¹¹⁴ Llamzon (n 16) 828.

¹¹⁵ Julia Gray and Philip Potter, 'Diplomacy and the Settlement of International Trade Disputes' (2020) 64(7-8) *Journal of Conflict Resolution* 1199, 1200.

¹¹⁶ Caroline Freund, 'How Long Does It Take to Conclude a Trade Agreement With the US?', *Peter Institute for International Economics* (Web Page, 21 July 2016) <<https://www.piie.com/blogs/trade-and-investment-policy-watch/how-long-does-it-take-conclude-trade-agreement-us>>.

¹¹⁷ Christoph Moser and Andrew K. Rose, 'Why Do Trade Negotiations Take So Long?' (2012) 27(2) *Journal of Economic Integration* 280, 284.

¹¹⁸ John A. Vasquez, *The War Puzzle Revisited* (Cambridge University Press, 2009) 136.

significant difference in priority and importance to sovereign nations, it would not be appropriate to hold the resolution of territorial disputes on the same threshold of success and effectiveness as trade disputes.¹¹⁹

This author notes that all dispute settlement methods face the same fundamental challenge: they are 'operative only upon the consent of the particular states'.¹²⁰ Diplomatic approaches will either not start at all or end early if the parties cannot envision a win-win scenario.¹²¹ Mediation, in particular, would not be effective if 'any solution would require one side to abandon its main objective and receive little in return'.¹²² On the other hand, litigation could – and has been effective in – make the Parties accept a win-lose scenario, a common occurrence in trade and investment disputes.¹²³ One advantage of litigation is that it brings the conflict to public light. According to Reichler, litigation 'enables the international community to see who has acted in the more appropriate manner and gained the so-called 'moral high ground''.¹²⁴ The significance of being 'right' cannot be understated. By 'flouting the institutions of international law and order established to promote peace in a dangerous world'¹²⁵ in the aftermath of *Nicaragua*, the US incurred the ire and distrust of its European allies that almost led to NATO's collapse.¹²⁶ So significant is the concern of being found to be in the wrong and judged by its peers that the threat of litigation alone could compel States to change their position.¹²⁷ In part due to the cases filed to the ICJ, France stopped conducting atmospheric tests in Polynesia in the early 1970s.¹²⁸ The *Trial of Pakistani Prisoners of War*¹²⁹ stalled because India refused to participate, however, the threat of exposure paved the way for the Agreement on Bilateral Relations of 1974.¹³⁰ Even if international peer pressure is not adequate, for example, against a great power, the highly publicised nature of litigation could compel compliance through domestic upheaval. Pressure against the

¹¹⁹ Jorge Mestre-Jorda, 'Are there formulas for successful diplomatic agreements?' (2016) 15 *European View* 335, 343.

¹²⁰ Malcolm Shaw, *International Law* (Cambridge University Press, 2003) 916.

¹²¹ Frank R. Pfetsch, 'Power in International Negotiations: Symmetry and Asymmetry' (2011) 2(16) *Négociations* 39, 43; John G. Merrills, *International Dispute Settlement* (Cambridge University Press, 2011) 39, 82.

¹²² Merrills (n 121) 82.

¹²³ 'Chronological list of disputes cases', *World Trade Organization* (Web Page, 16 December 2022) <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>; Gabriele Spilker, 'Swiss National Centre for Competence in Research, Compliance with WTO Dispute Rulings' (Working Paper No 2011/25, Swiss National Centre of Competence in Research, July 2012) 13.

¹²⁴ Reichler (n 78) 23; Coleman (n 35) 41.

¹²⁵ Peter Kornbluh, *Nicaragua, the Price of Intervention: Reagan's Wars against the Sandinistas* (Institute for Policy Studies, 1987) 218.

¹²⁶ *Ibid.*

¹²⁷ Coleman (n 35) 42.

¹²⁸ Stephen M. Tokarz, 'A Golden Opportunity Dismissed: The New Zealand v. France Nuclear Case' (1998) 26(4) *Denver Journal of International Law and Policy* 745, 745.

¹²⁹ *Pakistani Prisoners of War* (n 10).

¹³⁰ Coleman (n 35) 42.

Reagan administration was made possible due to the high publicity and shaming¹³¹ generated by *Nicaragua* that closed-door and confidential diplomacy lacks.

International litigation is not without its limitations. In cases of nonparticipation/noncompliance discussed in this paper, other factors motivated eventual compliance: Iran's bid to reacquire assets seized by the US¹³² and Dutch support for Russia's Arctic explorations.¹³³ Congress and the American public put an end to Reagan's Nicaraguan policies.¹³⁴ These factors are noticeably absent in the *South China Sea*. China benefits more from the status quo than any rule-based solutions in the South China Sea.¹³⁵ China considers control and power projection over the South China Sea more critical than its relations with its neighbours.¹³⁶ Likewise, the one-party system of the Chinese government makes domestic opposition highly unlikely.¹³⁷ The Philippines' stance (and ASEAN in general) on the award has been lukewarm, owing to significant economic ties between China and the region.¹³⁸ The award is also inconspicuously missing from the negotiated Sino-ASEAN Code of Conduct.¹³⁹ Given China's absolute refusal to compromise on the issue and the world's inability so far to mount an effective international pressure, the *South China Sea* may be the first true instance of *successful* open defiance towards litigation. The author is nevertheless optimistic, because all awards/judgments discussed in this paper have long-term ramifications. Tara Davenport comments that the award nevertheless strongly influences bilateral negotiations between China and the Philippines and emboldened its ASEAN neighbours to assert their legal rights,¹⁴⁰ opening the possibility for future compliance and a 'true' settlement of the dispute.¹⁴¹

E. CONCLUSION

The landscape of international relations has changed significantly since the Treaty of Westphalia was signed in 1648. Interstate disputes have become more complex, necessitating the usage of various approaches to settle disputes.

¹³¹ Interview with Carlos Arguello (Andrea Onate-Madrado, The Hague Netherlands, 13 January 2012). See also Onate-Madrado (n 80) 509.

¹³² Mahvash Alerassool, *Freezing Assets: The USA and the Most Effective Economic Sanction* (St. Martin's Press, 1993) 3.

¹³³ Clingendael Institute, *The future of Arctic security* (Report, April 2020) 51.

¹³⁴ Onate-Madrado (n 80) 512.

¹³⁵ Suisheng Zhao, 'China and the South China Sea Arbitration: Geopolitics Versus International Law' (2018) 27(109) *Journal of Contemporary China* 1, 8.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Tara Davenport, 'Why the South China Sea Arbitration Case Matters (Even if China Ignores It)', *The Diplomat* (online, 8 July 2016) <<https://thediplomat.com/2016/07/why-the-south-china-sea-arbitration-case-matters-even-if-china-ignores-it/>>.

¹³⁹ Raul Pedrozo, 'Is a South China Sea Code of Conduct Viable?' (2021) 97 *International Law Studies* 938, 950.

¹⁴⁰ Ankit Panda, 'Indonesia Cites 2016 South China Sea Arbitral Tribunal Award at UN. Is That a Big Deal?', *The Diplomat* (online, 3 June 2020) <<https://thediplomat.com/2020/06/indonesia-cites-2016-south-china-sea-arbitral-tribunal-award-at-un-is-that-a-big-deal/>>.

¹⁴¹ Davenport (n 138).

International litigation offers the following benefits compared to other IDR mechanisms: 1) effective in altering States' conducts, directly through the State's political will or indirectly through reputational harm and international pressure, 2) breaking deadlocks and establishing common grounds upon which States could determine their rights and obligations, and 3) significantly contributing to international jurisprudence by clarifying/defining legal principles/obligations of the States. Even if a State does not participate and is noncompliant, awards/judgements could still change a State's behaviour. The impact thereof should not be taken at face value, but in a more comprehensive and multidimensional scope that results in a State's changed behaviours. At the same time, litigation has its own limitations: 'forcing' compliance from recalcitrant States requires measures beyond what happened within the tribunal's chambers. International tribunals cannot stand alone. The consent-based framework of the international legal system means its instruments need the international community's support to function effectively. Expectations of coercive, autonomous enforcement from tribunals are misplaced because the international legal system was never designed to accommodate such demands.

It is important to remember that litigation is simply one of many steps in resolving disputes instead of getting too caught up in figuring out which IDR method is 'better'. Litigation begins with negotiations, and, in most cases, continues with more negotiations. Diplomacy and negotiation will continue to be the primary means of resolving disputes among States, rather than tribunals and judges applying international law to determine a State's rights and obligations as well as condemning morally repugnant behaviour. Not all disputes will make their way to (or are suitable for) litigation. What is certain is that when deadlock happens, and all else has failed, litigation will play its part as a limited, but significant and *effective* method for resolving international disputes. Likewise, as with other IDR mechanisms, litigation is merely a tool at States' disposal. Its effectiveness is, therefore, dependent on how the tool is used.

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ASSESSING THE SIGNIFICANCE OF ASEAN MARITIME OUTLOOK IN THE IMPLEMENTATION OF INTERNATIONAL LAW AND RESPONSE TO EMERGING MARITIME ISSUES

oleh:
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ABSTRACT

9 out of 10 Association of Southeast Asian Nations (ASEAN) Member States are directly connected to the ocean, making the ocean a strategic importance to the region. In addition, 9 out of 10 ASEAN Member States are States Parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the constitution of the ocean. Ocean has been incorporated in ASEAN's blueprints and discussed in its forums, taking into account the intersectoral nature of maritime issues. In addition to the existing forums, ASEAN Member States adopted the ASEAN Maritime Outlook in 2023. The question arises on the significance of ASEAN Maritime Outlook in light of existing maritime frameworks and forums, and whether those measures have been effective in implementing UNCLOS and other relevant international laws considering emerging maritime issues. In this regard, this paper will provide overview of the ASEAN Maritime Outlook in relation to the existing maritime framework and forums in ASEAN, and provide analysis of its significance in light of the challenges and opportunities in maritime sector for ASEAN. This paper ends with recommendations on how ASEAN Maritime Outlook can be used in advancing the implementation of UNCLOS and other relevant international laws in facing emerging maritime issues in the region.

Keywords: *ASEAN, Maritime, Challenges, Law of the Sea, Ocean Governance*

A. INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) comprised of 10 Member States, 9 of which are directly connected to the sea. ASEAN holds a strategic position as it is located in the middle of major sea trade routes, including the Straits of Malacca and Singapore, and it is also surrounded by rich marine biodiversity. With seas covering 80 percent of Southeast Asia's geographical landscape, the ocean has become critical to ASEAN Member States' development and security.¹ The significance of the ocean for ASEAN has been acknowledged in ASEAN's documents, including the ASEAN Political-Security Community (APSC), ASEAN Economic Community (AEC), and ASEAN Socio-Cultural Community (ASCC) blueprints, as well as various meetings and forums. ASEAN-led mechanisms to address maritime issues have been established, such as the ASEAN Regional Forum (ARF), ASEAN Maritime Forum (AMF), and Expanded ASEAN Maritime Forum (EAMF), which also include non-ASEAN countries.

¹ Nguyen Hung Son, "ASEAN-Japan Strategic Partnership in Southeast Asia: Maritime Security and Cooperation," in *ASEAN-Japan Strategic Partnership in Southeast Asia Beyond 2015* (n.d.). Accessed from https://www.jcie.org/japan/j/pdf/pub/publst/1451/12_nguyen.pdf

Currently, 9 of 10 ASEAN Member States are States Parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS 1982). The establishment of UNCLOS to create a “legal order for the seas and oceans”² as envisaged in the Preamble of UNCLOS, puts UNCLOS as the foundation of the global ocean governance, making it the “Constitution of the Ocean.” However, its implementation will depend on the States Parties which carry out their roles and responsibilities.

In addition to assigning obligations to States Parties, UNCLOS acknowledged the role of regional, subregional, and bilateral cooperation in various levels, such as in disseminating marine technological knowledge,³ transfer of marine technology with emphasis on new fields and funding for ocean research and development,⁴ the establishment of regional marine scientific and technological research centres to foster marine scientific research,⁵ conservation and management measures for the living resources,⁶ search and rescue service,⁷ formulation and elaboration of international rules, standards and recommended practices and procedures with

² Pp. 5: “Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”

³ Article 268:

States, directly or through competent international organizations, shall promote:

(e) international cooperation at all levels, particularly at the regional, subregional and bilateral levels.

⁴ Article 270 of UNCLOS:

International cooperation for the development and transfer of marine technology shall be carried out, where feasible and appropriate, through existing bilateral, regional or multilateral programmes, and also through expanded and new programmes in order to facilitate marine scientific research, the transfer of marine technology, particularly in new fields, and appropriate international funding for ocean research and development.

Article 272:

In the field of transfer of marine technology, States shall endeavour to ensure that competent international organizations coordinate their activities, including any regional or global programmes, taking into account the interests and needs of developing States, particularly land-locked and geographically disadvantaged States.

⁵ Article 276:

1. States, in coordination with the competent international organizations, the Authority and national marine scientific and technological research institutions, shall promote the establishment of regional marine scientific and technological research centres, particularly in developing States, in order to stimulate and advance the conduct of marine scientific research by developing States and foster the transfer of marine technology.

2. All States of a region shall cooperate with the regional centres therein to ensure the more effective achievement of their objectives.

⁶ Article 61 para. (2) of UNCLOS:

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

⁷ Article 98 of UNCLOS:

Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

UNCLOS for the protection of the marine environment,⁸ and adoption of policies in the regional level to prevent, reduce, and control pollution.⁹

States Parties to UNCLOS, including ASEAN Member States, are now faced with emerging challenges to the ocean space, which include climate change and its impacts, Illegal, Unreported, and Unregulated (IUU) Fishing and other threats to the marine environment, and the development of new technology and its impacts to the safety and security of navigation, among others. These challenges are acknowledged in the ASEAN Maritime Outlook, adopted in 2022, which was aimed to expand more cooperation with partners beyond the security perspective,¹⁰ and to push for practical and concrete cooperation between ASEAN and its dialogue partners.¹¹

The adoption of ASEAN Maritime Outlook, alongside existing ASEAN frameworks and initiatives related to the ocean, raises question on its effectiveness, particularly in light of the emerging challenges as mentioned above. The next chapters will outline existing frameworks and initiatives related to maritime issues in ASEAN and among ASEAN Member States and identify the specific challenges and opportunities on maritime sector in ASEAN. This paper will provide a list of recommendations on how ASEAN Maritime Outlook can be used to address those challenges and opportunities in accordance with the 1982 UNCLOS.

B. CURRENT INITIATIVES ON MARITIME ISSUES IN ASEAN

The ASEAN Political Security Community (APSC) Blueprint cover the multifaceted elements of maritime security and cooperation in various contexts, such as within the work of the ASEAN Defence Ministers Meeting (ADMM) and ADMM-Plus, other ASEAN-led mechanisms, adoption of internationally accepted maritime conventions and principles, peaceful means of resolving territorial and jurisdictional disputes through consultations and negotiations, self-restraint principles, freedom of navigation and overflight, cooperative activities, and combating transnational crimes.¹²

Further, the Blueprint highlighted the specific forums on maritime issues, such as the ASEAN Maritime Forum (AMF) and Expanded AMF (EAMF). The Blueprint also encouraged the promotion of maritime cooperation in advancing maritime connectivity, maritime law enforcement cooperation, combating piracy and armed robbery, protection and preservation of the marine environment, combating

⁸ Article 197 of UNCLOS:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

⁹ Article 207, 208, 210, and 212 of UNCLOS, covering pollution from various sources, such as land-based, dumping, and from or through the atmosphere.

¹⁰ "25th ASEAN Political Security Council: Indonesia Dorong Pembentukan ASEAN Maritime Outlook," 10 November 2022. Accessed from <https://kemlu.go.id/portal/id/read/4129/berita/25th-asean-political-security-council-indonesia-dorong-pembentukan-asean-maritime-outlook>

¹¹ "Indonesia Pushes ASEAN Maritime Outlook at APSC Meeting," Antara News, 10 November 2022.

Accessed from <https://en.antaranews.com/news/259545/indonesia-pushes-asean-maritime-outlook-at-apsc-meeting>

¹² Para. 8 of the Blueprint mentioned that enhancing maritime security and cooperation serve as tools to build peaceful, secure, and stable region. <https://www.asean.org/wp-content/uploads/2012/05/ASEAN-APSC-Blueprint-2025.pdf>

transnational crime, enhancing maritime domain awareness, maritime safety and search and rescue, and capacity building.

The Blueprint also underlined the importance of ensuring peaceful, safe, free and unimpeded international navigation and overflight, such as through hotline and communications for incidents and emergency situations at sea, supporting effective implementation of the 1982 UNCLOS, conducting workshops, seminars, and exchanging best practices, enhancing dialogue with relevant international organizations, enhancing implementation of the MoU on ASEAN Cooperation Mechanism for Joint Oil Spill Preparedness.

The issues identified above are actively discussed in various forums established under ASEAN, such as the Inter-Sessional Meeting on Maritime Security (ISM on MS) under the ASEAN Regional Forum (ARF). The ISM on MS was established in 2009 under the guidance of the ARF Work Plan on Maritime Security.¹³ The focus of the Inter-Sessional Meeting was mainly on training, capacity building, information-sharing, and inter-agency coordination. One of the training programs successfully held was the Training Series on the International Ship and Port Facility Security Code (ISPS Code), working together with the International Maritime Organization (IMO) to implement the Convention on the Safety of Life at Sea (SOLAS).¹⁴ Other workshops on maritime security and law enforcement have also been conducted under the purview of ARF.¹⁵

The ARF has also issued statements containing commitment of cooperation on maritime sector, such as piracy, international terrorism, marine and aeronautical search and rescue, responses to oil spill incidents, marine environmental protection and conservation, cooperation among law enforcement agencies, and cooperation to combat Illegal, Unreported, and Unregulated (IUU Fishing).¹⁶

In responding to current issues on maritime security, the ASEAN Maritime Forum (AMF) was established in 2010 and designated as a forum for dialogue and coordination on maritime-related issues. The AMF uses the holistic approach in addressing maritime issues as it recognizes the multi-dimensional nature of maritime sector. The forum also includes the issues discussed under the ambit of the ARF, such as IUU Fishing, transnational crime, sea piracy, as well as other emerging issues, including marine plastic debris, cyber threats at sea, natural disasters, and climate change.¹⁷

Aside from the AMF, countries outside of ASEAN Member States are also involved in discussing current maritime issues in the region through the Expanded ASEAN Maritime Forum (EAMF), which consist of the 10 ASEAN Member States and

¹³ ASEAN Regional Forum, "ASEAN Regional Forum Work Plan for Maritime Security," 2019. Accessed from <https://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ARF-Maritime-Security-Work-Plan-2018-2020.pdf>

¹⁴ International Maritime Organization, "IMO hosts the first workshop on maritime security by ASEAN Regional Forum," 9 September 2022. Accessed from <https://www.imo.org/en/MediaCentre/Pages/WhatsNew-1747.aspx>

¹⁵ EEAS, "4th ASEAN Regional Forum Workshop on Enhancing Regional Maritime Law Enforcement Cooperation," 7 April 2022. Accessed from https://www.eeas.europa.eu/eeas/4th-asean-regional-forum-workshop-enhancing-regional-maritime-law-enforcement-cooperation_en?s=181

¹⁶ ASEAN Regional Forum, "Maritime Cooperation in ASEAN", 2019. Accessed from <https://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ANNEX-3-10th-ISM-on-MS.pdf>

¹⁷ *Ibid.*, p. 5

Australia, China, India, Japan, New Zealand, Republic of Korea, Russian Federation, and the United States.¹⁸

Maritime issues are also actively discussed in the East Asia Summit (EAS) meetings. The issues discussed include combating marine plastic debris¹⁹ and marine sustainability,²⁰ which highlights the issues of conservation and protection of the marine environment, fisheries management, small-scale fishers and sustainable fisheries production and livelihoods, conservation and sustainable use of fish stocks and other marine resources, and IUU Fishing.²¹

On the other hand, ASEAN Economy Community (AEC) Blueprint focused on the connectivity aspect of the maritime issues, as well as the aspects of maritime transport and safety through the implementation of the International Maritime Organization (IMO) Conventions. Further the AEC Blueprint also included the issue of maritime logistic corridors.²²

The abovementioned issues, scattered among the ASEAN political-security and economic communities, are encapsulated in the ASEAN Outlook on Indo-Pacific (AOIP), adopted in June 2019. AOIP highlighted the importance of the maritime domain and perspective in the Indo-Pacific, while emphasizing on the need to prioritize maritime cooperation and connectivity. In this regard, AOIP once again acknowledged various ASEAN-led forums on maritime issues, such as the AMF, ARF, EAS, ADMM-Plus, EAMF, and other ASEAN Plus One Mechanisms. The AOIP also covered general maritime issues, ranging from marine resources, pollution, maritime safety and security, and maritime connectivity, among others.²³

C. OVERVIEW OF THE ASEAN MARITIME OUTLOOK (AMO)

The ASEAN Maritime Outlook (AMO) was designed to be a practical reference document for ASEAN Member States. While focusing on existing practices, the AMO offers a valuable starting point for further discussions on strengthening maritime cooperation within ASEAN. The AMO does not propose a new commitment in maritime sector, the AMO provides detailed picture of current initiatives within ASEAN.²⁴

The contents of ASEAN Maritime Outlook mainly focus on the identification of maritime trends, opportunities, and challenges in the region, and identification of avenues for technical and financial assistance to strengthen maritime capacities of

¹⁸ Observer Research Foundation, "The Relevance of the Expanded ASEAN Maritime Forum," 8 November 2022. Accessed from <https://www.orfonline.org/expert-speak/the-relevance-of-the-expanded-asean-maritime-forum/>

¹⁹ 2015 East Asia Summit Statement on Enhancing Regional Maritime Cooperation and the 2018 East Asia Summit Statement on Combating Marine Plastic Debris

²⁰ In 2020, the Member States of EAS also adopted the EAS Leaders' Statement on Marine Sustainability

²¹ ASEAN, "East Asia Summit Leaders' Statement on Marine Sustainability," 31 September 2022. Accessed from <https://asean.org/wp-content/uploads/2021/09/31-EAS-Leaders-Statement-on-Marine-Sustainability-FINAL.pdf>

²² ASEAN, "ASEAN Economic Community Blueprint 2025," ASEAN Secretariat, November 2015. Accessed from https://asean.org/wp-content/uploads/2021/08/AECBP_2025r_FINAL.pdf, p. 22

²³ https://asean.org/asean2020/wp-content/uploads/2021/01/ASEAN-Outlook-on-the-Indo-Pacific_FINAL_22062019.pdf

²⁴ John Bradford, "The ASEAN Maritime Outlook: Looking in from the Outside," CSIS Commentaries, 16 October 2023. Accessed from https://s3-csis-web.s3.ap-southeast-1.amazonaws.com/doc/Commentaries_The_ASEAN_Maritim_Outlook.pdf?download=1

ASEAN Member States. The AMO also put emphasis on the Lead Sectoral Body (LSB) to serve as a central hub in bridging the gap in maritime coordination and overseeing cross-pillar and cross-sectoral issues. The LSB is ASEAN Senior Officials Meeting (SOM), while aiming to strengthen the role of ASEAN Maritime Forum (AMF).²⁵

The AMO has included the emerging maritime issues faced by ASEAN Member States, which include marine debris and pollution, environmental impacts of maritime transport, cyberattacks against ships and port facilities, irregular movement of persons, blue economy, illegal, unregulated, and unreported (IUU) fishing, offshore mining, and offshore renewable energy. The AMO also provides annexes highlighting the activities of each forum and the existing cooperation between ASEAN and its dialogue partners, which consist of Australia, Canada, China, European Union, India, Japan, New Zealand, Republic of Korea, Russian Federation, United Kingdom, United States, as well as ASEAN's sectoral partner and development partners.²⁶

In its objectives, the AMO has acknowledged the compliance with international law, especially UNCLOS 1982, in conducting maritime cooperation in various sectors. Further, the AMO states that:

*"The Outlook should complement relevant international mechanisms or processes under treaties and existing frameworks for cooperation, and include views or input from external parties to ensure its robustness."*²⁷

ASEAN Member States agreed that the AMO will have three-year update cycle, which creates a dynamic platform for ASEAN members to identify areas for stronger maritime cooperation. The Philippines' chairmanship in 2026, could provide a chance for further adjustment to the AMO.

D. ANALYSIS

1. Emerging Maritime Issues in the ASEAN Maritime Outlook

The AMO has provided a list of emerging maritime issues that need to be further considered by ASEAN Member States. However, there are some aspects on maritime issues that have yet to be included in the AMO, and the AMO did not provide clear explanation on how these issues should be addressed by utilizing the role of LSB and existing forums in ASEAN for maritime issues, including the AMF. The AMO has yet to elaborate on the purposes of filtering the emerging maritime issues in the region in the AMO, whether it was designed to be the focus of the existing forums in ASEAN or as the priority for bilateral and regional cooperation with other countries.

The first issue requiring special attention is climate change and its harmful impacts to the marine environment, which includes sea level rise, ocean acidification, and ocean warming. Reports by the Intergovernmental Panel on Climate Change (IPCC) stated that impacts of climate change, especially ocean warming, causes a decrease in maximum catch potential, as well as biodiversity, ecosystem functioning

²⁵ ASEAN Maritime Outlook, August 2023. Accessed from <https://asean.org/wp-content/uploads/2023/08/AMO-1.pdf>

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 10

in form of catches, economic benefits and livelihoods of communities.²⁸ In Southeast Asia, the impacts of climate change can cause the following issues²⁹:

- a. Populations of reef-dwelling species are likely to decline;
- b. Fish redistribution, making it possible for fishers to travel further to fish their target species or faced with declining catch. The adaptation to this pattern will have a more significant impact to small-scale fishers;
- c. The temperature increase also triggers the growth of harmful algal blooms, reducing quality of water, building-up toxin in fish;
- d. Reduction of season predictability which affects the projects of aquaculture and reduction in harvests;
- e. Temperature change causes coral bleaching, and ocean acidification made it even more difficult for coral to recover from bleaching.

ASEAN, working together with the Institute for Global Environmental Strategies (IGES), published the ASEAN State of Climate Change Report. In the 2021 Report, 6 out of 10 ASEAN Member States identified that coastal and marine sector as the key sector that will be significantly impacted by climate change. In the Report, ASEAN Member States highlighted the following impacts³⁰:

- a. Viet Nam stated that climate change threatens fish production, both inland and the ocean, with projected loss of VND 855 billion by 2050. Further, climate change is likely to spread infectious diseases and food-related diseases from polluted fisheries, which will affect the food security and health of people;
- b. Sea level rise as the impact of climate change is estimated to cause loss of 25% to the present fishery values per hectare, and caused the loss of fishing zones;
- c. Malaysia also noted that fish habitats and catches are affected by sea surface temperature (SST) increase;
- d. Myanmar noted that the fishery type, population, and fish catches are likely to be affected by SST increase;
- e. Philippines put special emphasis on the impact of climate change to the surge of storm that will affect coastal populations and coastal infrastructures, as well as coastal erosion.

Despite the looming impacts of climate change, the efforts to utilize and manage marine living resources are still ongoing. Based on the 2021 policy brief by the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (IOC UNESCO), maritime activities

²⁸ Christina Voigt, "Oceans, IUU Fishing, and Climate Change: Implications for International Law," *International Community Law Review*, 22(3-4), (2020). 377-388. doi: <https://doi.org/10.1163/18719732-12341436>, p.380

²⁹ Kay S, Avillanosa AL, Cheung VV, Dao HN, Gonzales BJ, Palla HP, Praptiwi RA, Queirós AM, Sailley SF, Sumeldan JDC, Syazwan WM, Then AY-H and Wee HB (2023) Projected effects of climate change on marine ecosystems in Southeast Asian seas. *Front. Mar. Sci.* 10:1082170. doi: <https://www.frontiersin.org/articles/10.3389/fmars.2023.1082170/full>

³⁰ ASEAN, "ASEAN State of Climate Change Report: Current Status and Outlook of the ASEAN Region toward the ASEAN Climate Vision 2050," ASEAN Secretariat, October 2021. Accessed from https://asean.org/wp-content/uploads/2021/10/ASCCR-e-publication-Correction_8-June.pdf

will be largely affected by the change in ocean conditions, including the redistribution of marine ecosystem services, which further influence societal value chains. Climate change also contributes to the cumulative impacts to the marine environment alongside existing activities and its impacts in the ocean space, such as overexploitation and pollution.³¹

The concentrations of greenhouse gas emissions also contribute to ocean acidification and deoxygenation, which destabilizes aquatic ecosystems. The decline of fish stock and changes to the habitat of fish to feed, spawn, and migrate became a factor to the IUU Fishing trends.³² The research conducted by Lauren Young, Cathy Haenlein, and Grace Evans identified that ocean warming pushes a global fish redistribution, where fish leave warm waters and move to the poleward direction. This change requires adjustment in the governance and enforcement efforts, especially in anticipating the decreasing fish catch potential in Southeast Asia. There will also be an impact to the global fisheries supply chain due to the redistribution of fish and displacement of fish stocks.³³ This research also underlined the impact of disputed maritime zones between neighbouring States and the fish redistribution which may also worsen the trend of IUU Fishing.³⁴

Another challenge to the ocean space is the development of new technology. The AMO has acknowledged the risk of cybersecurity in the maritime sector, however, one of the current developments in the maritime sector is the development of the Maritime Autonomous Surface Ships (MASS). The International Maritime Organization (IMO) through its Joint Working Group (JWG) between the Legal Committee (LEG), Maritime Security Committee (MSC), and the Facilitation Committee (FAL) on MASS (JWG-MASS) is currently mandated to discuss the MASS Code following the Regulatory Scoping Exercise (RSE) conducted by the three committees.³⁵ The RSE has identified relevant IMO conventions and instruments to be further assessed in developing the MASS Code, such as the International Convention for the Safety of Life at Sea (SOLAS), the International Regulations for the Prevention of Collisions at Sea (COLREG), and the Standards for Training and Certification of Watchkeepers (STCW), among others.³⁶ Other regulations and conventions that may require further assessments are the relation with UNCLOS, Maritime Labour Convention (MLC) under the ambit of ILO, and the International Safety Management (ISM) Code.³⁷

³¹ Vassiliki Vassilopoulou, "Climate Change and Marine Spatial Planning: Policy Brief," *UNESCO* (2021). Accessed from <https://unesdoc.unesco.org/ark:/48223/pf0000375721>

³² Lauren Young, Cathy Haenlein, Grace Evans, "Future Illegal, Unreported and Unregulated Fishing Trends in a Warming World: A Global Horizon Scan," *Royal United Services Institute for Defence and Security Studies* <https://static.rusi.org/future-iuu-fishing-in-a-warming-world-a-global-horizon-scan.pdf>, p. 14

³³ *Ibid.*, pp. 17-21

³⁴ *Ibid.*, p. 22

³⁵ International Maritime Organization, "Joint MSC-LEG-FAL Working Group on Maritime Autonomous Surface Ships (MASS)." Accessed from <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/Joint-MSC-LEG-FAL-Working-Group-on-MASS.aspx>

³⁶ Mohamad Issa, Adrian Ilinca, Hussein Ibrahim, and Patrick Rizk, "Maritime Autonomous Surface Ships: Problems and Challenges Facing the Regulatory Process" *Sustainability* 14, no. 23: 15630, 2022. Accessed from

<https://www.mdpi.com/2071-1050/14/23/15630>

³⁷ *Ibid.*

The MSC organized MASS into 4 (four) degrees of autonomy, as follows³⁸:

- a. Degree One: Seafarers are still on board to operate and control systems and functions on board of the ship, but there will be automations at some operations.
- b. Degree Two: The control of the ship is held remotely, not on board of the ship. However, seafarers are still present to take control and operate the systems.
- c. Degree Three: No seafarers on board, and the ship is controlled and operated from another location.
- d. Degree Four: Control and decisions are made by the operating system itself.

Current issues in the discussion of MASS are the definition and responsibilities of MASS Master and crew, the skills and competencies required by MASS, and the role and responsibilities of remote operator. Another concern relating to the operations of MASS is its impact to the safety of navigation, especially for the fourth degree of MASS where there is no human control. Further, a question on how coastal State and port State can exercise its jurisdiction and law enforcement towards MASS still needs to be addressed in the IMO, since it is regulated under UNCLOS. A significant part of the safety of navigation in MASS operation also relates to the search and rescue operations, which is the obligation of the Coastal State, as well as the Flag State in ensuring that the shipmaster flying its flags shall render assistance during distress situations at sea, according to Article 98 of UNCLOS.

2. Implementation of UNCLOS and International Law in light of Emerging Maritime Issues

As previously reflected, the maritime challenges faced by ASEAN Member States have grown to be increasingly complex and multisectoral. This involves the consideration of the obligations of States within existing instruments and frameworks, especially UNCLOS. It will be helpful to analyze such obligations by using UNCLOS' attribution of rights and jurisdictions of States Parties into 3 (three) incarnations of the State; as a coastal State, port State, and flag State.³⁹ As a coastal State, UNCLOS provisions looked at the zonal approach of the internal waters, territorial seas, contiguous zone, the exclusive economic zone, the continental shelf, and the high seas. As a flag State, UNCLOS provisions attributed the enforcement powers to flag States based on the ship nationality and registration, while as a port State, UNCLOS regulated the jurisdiction to national ports authorities.⁴⁰

³⁸ Outcome of the Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS) MSC.1/Circ. 1638, 3 June 2021, [https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/MSC.1-Circ.1638%20-%20Outcome%20of%20The%20Regulatory%20Scoping%20ExerciseFor%20The%20Use%20of%20Maritime%20Autonomous%20Surface%20Ships...%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/MSC.1-Circ.1638%20-%20Outcome%20of%20The%20Regulatory%20Scoping%20ExerciseFor%20The%20Use%20of%20Maritime%20Autonomous%20Surface%20Ships...%20(Secretariat).pdf)

³⁹ Emmanuel Kofi Mbiah. (2020). Coastal, Flag and Port State Jurisdictions: Powers and Other Considerations Under UNCLOS. In: Mukherjee, P.K., Mejia, M.Q., Xu, J. (eds) Maritime Law in Motion. WMU Studies in Maritime Affairs, vol 8. Springer, Cham. https://doi.org/10.1007/978-3-030-31749-2_23 P. 495

⁴⁰ *Ibid.*, p. 517

In certain issues, however, it is worth noting that UNCLOS has also acknowledged the role of competent international organizations in carrying out the obligations set forth in UNCLOS. Its examples include the duty of Coastal State to cooperate with competent international organizations to ensure proper conservation and management measures of living resources in the EEZ;⁴¹ cooperation between States through competent international organizations in the norm-shaping process for protection and preservation of the marine environment;⁴² cooperation between States to eliminate effects of pollution and minimize the damage;⁴³ cooperation through competent international organization on setting the norms for prevention, reduction, and control of the pollution from vessels and minimizing the threats from accidents;⁴⁴ and other obligations of States concerning dumping, seabed activities, pollution from land-based sources. Such acknowledgment demonstrates that other relevant instruments or frameworks established by competent authorities possess instrumental role in implementing the obligations under UNCLOS.

Considering that most emerging maritime issues are related to the marine environment, it is necessary to look at the interpretation of Article 237 of UNCLOS, which analyzes the relationship between the obligations under UNCLOS, especially its Part XII and other conventions. There are many layers of interpretation to Article 237 of UNCLOS, but referring to *the South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, the Tribunal highlighted those specific obligations from other international agreements, regardless of timing, could be relevant to Part XII of UNCLOS. Traditionally, Article 237 of UNCLOS is seen as a tool to resolve conflicts between treaties. It's often interpreted as allowing future compatible agreements, with UNCLOS obligations overriding conflicting ones. They interpreted Article 237 as actively connecting the general goals of Part XII of UNCLOS with specific obligations from other related agreements, regardless of when they were signed. By referencing Article 237, the Tribunal signaled their openness to a more integrated approach to interpreting UNCLOS, considering relevant principles from other agreements.⁴⁵ Article 237 of UNCLOS has also been used by the IMO in establishing regulations to designate Particularly Sensitive Sea Areas (PSSAs), which is also used to preserve and protect the marine environment.⁴⁶

In this regard, it is imperative to look at various obligations under UNCLOS and relevant international law concerning the abovementioned issues. For the issue of climate change, the main instruments regulating States obligations are the UN

⁴¹ Article 61 of UNCLOS

⁴² Article 197 of UNCLOS

⁴³ Article 199 of UNCLOS

⁴⁴ Article 207 of UNCLOS

⁴⁵ Chie Kojima, "South China Sea Arbitration and the Protection of the Marine Environment: Evolution of unclos Part xii Through Interpretation and the Duty to Cooperate". In Asian Yearbook of International Law, (Leiden, The Netherlands: Brill | Nijhoff, 2017) doi: https://doi.org/10.1163/9789004344556_010 accessed from https://brill.com/display/book/edcoll/9789004344556/B9789004344556_010.xml?language=en Richard Barnes, "An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?" Ocean Development & International Law 53 (2–3): 180–213 (2022). Accessed from <https://www.tandfonline.com/doi/full/10.1080/00908320.2022.2106329>.

⁴⁶ Vonintsoa Rafaly, "The Law of the Sea in the Age of Building an Appropriate Arctic Ocean Governance Addressing Climate Change Issues", The Yearbook of Polar Law Online 13, 1 (2022): 233-251 accessed from https://brill.com/view/journals/yplo/13/1/article-p233_11.xml?language=en

Framework Convention for Climate Change (UNFCCC) and Paris Agreement. UNCLOS does not specifically consider climate change in its provisions, however, its provisions are still applicable. Based on the *South China Sea Arbitration*, the term “protection” of the marine environment entails the obligation to protect the marine environment from future damage, while “preservation” entails the obligation to maintain or improve the present condition of the marine environment. In addition, States are obliged to take measures to protect and preserve the marine environment, and refrain from degrading the marine environment.⁴⁷

With regard to the issue of marine plastic pollution, which has been included in the AMO, the general obligations under UNCLOS still apply. London Convention and Protocol on the Prevention of Marine Pollution by Dumping and Other Matters, as well as the MARPOL Convention, also complement UNCLOS obligations. Based on these instruments, Coastal States are obliged to set rules to prevent, reduce, and control plastic pollution from land-based sources, while Flag States are required to ensure that the ships flying their flags did not discharge plastic waste to the seas, and that they have garbage management plans and garbage record book. Lastly, Port States are obliged to possess adequate port reception facilities for plastic waste from vessels and have the rights to conduct inspections in their ports.

On the issue of oil spill, countries are bound by the obligations to enact laws and regulations to reduce, prevent, and control pollution from vessels, as provided in UNCLOS. Specifically, the laws and regulations of Coastal States shall focus on the enforcement measures for vessels violating international rules and standards regarding pollution from ships.⁴⁸ On the other hand, UNCLOS obliges the laws and regulations of Port States to focus on measures taken for pollution from vessels, including administrative measures, investigations, and proceedings,⁴⁹ which includes the inspection by officers on oil pollution emergency plan⁵⁰ and other operational requirements.⁵¹ Flag States are also required by UNCLOS to ensure effective enforcement for prevention, reduction, and control of ship-source pollution⁵², one of which is by ensuring the availability of shipboard oil pollution emergency plan on

⁴⁷ Para. 941 of the *South China Sea Award*: “Article 192 of the Convention provides that “States have the obligation to protect and preserve the marine environment.” Although phrased in general terms, the Tribunal considers it well established that Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This “general obligation” extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment. The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.” Thus States have a positive “duty to prevent, or at least mitigate” significant harm to the environment when pursuing large-scale construction activities.” The Tribunal considers this duty informs the scope of the general obligation in Article 192.

⁴⁸ Article 211 and 220 of UNCLOS

⁴⁹ Article 218 and 219 of UNCLOS

⁵⁰ Article 3 (1) of OPRC

⁵¹ Article 5 of MARPOL and Chapter 2 Annex I of MARPOL

⁵² Article 217 of UNCLOS

ships,⁵³ and conducting surveys to check the ships' facilities to comply with international standards.⁵⁴

On safety of navigation in the midst of the development of science and technology, including in the context of MASS, Coastal States, Port States, and Flag States shall adjust their national laws and regulations in accordance with the standards on the safety of navigation of MASS developed under IMO, while at the same time ensuring their passage rights according to UNCLOS.

E. RECOMMENDATION

The abovementioned explanations have demonstrated that the basic obligations of ASEAN Member States on existing maritime issues, including those mentioned in the AMO, have been regulated under international law. In addressing these issues, the program and measures taken by ASEAN Member States, should be used to strengthen the implementation of relevant conventions, agreements, or regulations to which they are the States Parties. In addition, it is necessary for AMF to factor in these considerations in giving recommendations to the ASEAN SOM as the lead sectoral body for maritime issues in ASEAN.

Due to the ongoing development of international law concerning maritime issues, especially the increased attention to the protection of the marine environment, it is necessary for the AMF and ASEAN SOM to also discuss such developments in their respective meetings and outcome documents, as it will also help defining the interests of ASEAN Member States and further course of action.

Another factor to be considered in the AMO is integrating the vision of maritime issues contained in the Blueprints of each ASEAN Community, so that the programs and agenda of the AMF and its recommendations to the ASEAN SOM can be aimed at achieving those maritime visions.

The next ASEAN chairmanship can consider the following categorization of maritime issues and the measures to be further discussed in the AMF and ASEAN SOM as follows:

On marine plastic pollution:

- a. Cooperation and dialogue to share best practices for effective management of plastic waste from land-based sources, to prevent, reduce, and control marine pollution, including in regulatory aspects;
- b. Dialogue or regular meetings to assess and build the capacity of each State in conducting inspections for foreign-flagged vessels in their ports as well as the existence and quality of port reception facilities as required under MARPOL;
- c. Information-sharing on methods or means to ensure that vessels flying their flags did not discharge the plastic waste into the ocean and have their garbage record book or garbage management plan on board of their vessels;
- d. Capacity-building programs to ensure that each ASEAN Member State can carry out their obligations in preventing, reducing, and controlling plastic pollution according to relevant international laws.

⁵³ Articles 3(1) and 4(1) of OPRC

⁵⁴ Regulation 7 Annex I of MARPOL

On climate change:

- a. The need for further research and study on the impacts of climate change towards marine ecosystem and marine environment in Southeast Asia, including in its individual ASEAN Member State;
- b. Assistance on the establishment of national marine spatial planning that includes consideration of climate change towards the marine ecosystem;
- c. Mechanisms to monitor the impact of climate change towards marine environment in Southeast Asia, especially to the fish stocks and its corresponding trend of IUU Fishing in the region;
- d. Incorporate current development at the IMO for MASS, the ongoing study conducted by the International Law Commission (ILC) concerning Sea-Level Rise, and its discussions in the United Nations meetings, among others.

For oil spill:

- a. The work of law enforcement authorities in responding to oil pollution incidents occurring in the region, including its cooperation with other countries;
- b. Assessment of ASEAN Member States' capacities to respond to oil pollution incidents, and the discussions on challenges faced by each ASEAN Member State in implementing existing national plans on oil spill preparedness and response;
- c. Monitoring mechanism of data collection on oil spill incidents and compiling best practices of oil spill preparedness and responses, including in its law enforcement measures and protection of the marine environment, as well as best practices in the implementation of national action plans for oil spill preparedness and responses;
- d. Communication and cooperation between ASEAN Member States in dispatching advisory or technical assistance for oil spill preparedness and response, including in emergency situations. In this regard, further procedure on communication procedures during emergency situations of oil spill incidents which require time-bound responses is still needed, along with identification of responsible stakeholders;
- e. Following the development of discussions on global oil spill preparedness and response in international forums, including in the International Maritime Organization (IMO).

In determining a specific forum to carry out the abovementioned strategies, ASEAN Member States shall consider evaluating the current forum of discussing oil spill incidents in ASEAN. While ASEAN Transport Ministers Meeting is currently the designated forum, oil spill incidents also require cooperation and coordination among law enforcement authorities in each State with regard to the enforcement measures, as well as the cooperation and coordination among relevant authorities in each ASEAN Member State in assessing the likely environmental impacts of the oil spill and chemicals used to disperse the oil. Therefore, AMO shall acknowledge the various stakeholders involved in responding to the oil spill incidents, and strengthen the capacity of those relevant stakeholders.

With regards to maritime safety, the periodic assessment and evaluation to the current search and rescue operation situation in the region. With regards to MASS, ASEAN Member States shall start addressing the common ASEAN position on MASS to be further discussed in the AMF and ASEAN SOM, especially on the rights to take law enforcement measures conducted by Coastal States and Port States. In consolidating the position, ASEAN Member States shall consider the following issues:

- a. The role and responsibilities of MASS Master, especially with regards to pollution and measures to preserve and protect marine environment as well as the search and rescue operation (in rendering assistance for vessels or persons in distress at sea);
- b. The important elements of seaworthiness criteria of MASS, and the inspection capacity of port state authorities;
- c. Ensuring the fulfilment of passage rights under international law while at the same time ensuring the security of ASEAN Member State.

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ITLOS ADVISORY OPINION ON CLIMATE CHANGE: ITS IMPLICATIONS TO THE INTERPRETATION AND IMPLEMENTATION OF PART XII OF UNCLOS

By :
Dominique Virgil

ABSTRACT

On 21 May 2024, the International Tribunal of the Law of the Sea (ITLOS) has adopted its Advisory Opinion on the relationship between anthropogenic greenhouse gas (GHG) emissions and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Advisory Opinion clarifies the obligations of State Parties under UNCLOS to address climate change impacts on the oceans, including the inclusion of anthropogenic GHG emissions as a form of marine pollution under UNCLOS, and its implications to the obligations of States Parties under UNCLOS. Currently, States Parties of UNCLOS have been bound by the general obligations, especially those under Part XII, to preserve and protect the marine environment. The issue of climate change itself has been extensively discussed under the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement, including its impacts to the ocean. Existing instruments, frameworks, and bodies have also recognized the issues of climate change, including the current work of the International Law Commission (ILC) on Sea-Level Rise as one of the impacts caused by climate change. The paper will discuss the Advisory Opinion and its implications to the interpretation of Part XII of UNCLOS and the general principles of international environmental law, and its relation to existing instruments, frameworks, and bodies on climate change.

Keywords: *Climate Change, Ocean, Greenhouse Gas Emissions, Environment, International Law*

A. INTRODUCTION

On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS) submitted a request for an Advisory Opinion to the International Tribunal of the Law of the Sea (ITLOS). The request consists of the following legal questions¹:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (UNCLOS), including under Part XII:

- (a) *To prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, ocean acidification, which are*

¹ Commission of Small Island States on Climate Change and International Law (COSIS), "Request for Advisory Opinion." Accessed from https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf

- caused by anthropogenic greenhouse gas emissions in the atmosphere?*
- (b) *To protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.*

In its own written comment to ITLOS submitted on 16 June 2023, COSIS bases the jurisdiction of ITLOS to confer an Advisory Opinion from Article 21 of the Statute of the Tribunal, emphasizing on an authorizing agreement to submit a request for an Advisory Opinion, also based on the existing interpretation in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*.² The written comment proceeded to also describe the anthropogenic greenhouse gas (GHG) emissions as the drivers of climate change. Further, the written comment also underlined that the ability of ocean and marine cryosphere to absorb excess heat caused significant harm, such as ocean warming, melting of the marine cryosphere, sea-level rise, changes to ocean and air currents, and ocean stratification and deoxygenation.³ COSIS highlights that Small Island States are disproportionately affected by climate change due to their vulnerability, limited resources, and minimal contributions to global GHG emissions.⁴

The COSIS written statement highlights the followings⁵:

- a. COSIS argues that human-caused greenhouse gas (GHG) emissions pollute the ocean by adding heat and extra carbon, as defined by UNCLOS Article 1(1)(4). They analyze both direct and indirect ways these emissions impact the marine environment.
- b. COSIS emphasizes that countries (State Parties) have duties under UNCLOS Article 194(1) and (2) to prevent, reduce, and control marine pollution caused by human-caused GHG emissions linked to climate change. They discuss measures for land-based sources, vessels, and air pollution.
- c. COSIS goes further, arguing that countries have an obligation under UNCLOS Part XII, including Article 192, to act with due diligence to prevent, reduce, and control human-caused GHG emissions that pollute the ocean. They identify specific actions countries should take based on current science and international standards:
 - Countries have a primary duty to take necessary measures to prevent, reduce, and control marine pollution caused by human-caused GHG emissions and climate change. This includes enacting laws and regulations, implementing effective monitoring, promoting international cooperation, conducting environmental assessments, and taking other appropriate steps.

² Commission of Small Island States on Climate Change and International Law (COSIS), "Written Statement of the Commission of Small Island States on Climate Change and International Law," 16 June 2023.

Accessed from https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-4-COSIS.pdf

³ *Ibid.*, p. 26

⁴ *Ibid.*, p. 26

⁵ *Ibid.*

- Countries are obligated to take all necessary measures to ensure activities under their control are conducted in a way that doesn't harm other countries and their environment through pollution.
- Countries must take steps to ensure that pollution from incidents or activities under their control doesn't spread beyond areas where they have sovereign rights as defined by UNCLOS.

ITLOS has received written comments from 33 States Parties, the European Union, and 9 (nine) Intergovernmental Organizations. ITLOS adopted its Advisory Opinion on 21 May 2024.

B. OBLIGATION TO PROTECT AND PRESERVE THE MARINE ENVIRONMENT UNDER UNCLOS

The obligation to protect and preserve the marine environment under UNCLOS is specifically regulated in Part XII of UNCLOS. Article 192 of UNCLOS provides a general obligation for States Parties to preserve and protect the marine environment. Further, Article 194 of UNCLOS provides a more specific obligation for States to enact laws and regulations regarding prevention, reduction, control of marine pollution, and measures necessary to prevent the harmful effects to be transferred to the environment of other States. UNCLOS also regulate the obligations of States Parties for specific sources of pollution, such as land-based sources, pollution from or through the atmosphere, ships, dumping, activities in the Area, pollution from seabed activities, and their enforcement measures. UNCLOS also incorporate the obligations to cooperate in the protection and preservation of the marine environment.

The increasing risk to the marine environment has raised questions on whether the obligation to preserve and protect the marine environment, especially in Part XII of UNCLOS, can be applied to emerging challenges. *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* has provided further interpretation on the relationship between UNCLOS and climate change. The Tribunal highlighted that the provisions of Part XII to protect and preserve the marine environment are informed by other applicable rules of international law.⁶ Furthermore,

⁶ Para. 941 *The South China Sea Arbitration (The Republic of Philippines v. the People's Republic of China)* Award:

"Article 192 of the Convention provides that 'States have the obligation to protect and preserve the marine environment.' Although phrased in general terms, the Tribunal considers it well established that Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This 'general obligation' extends both to 'protection' of the marine environment from future damage and 'preservation' in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment. The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States 'ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.' Thus States have a positive 'duty to prevent, or at least mitigate' significant harm to the environment when pursuing large-scale construction activities." *The Tribunal considers this duty informs the scope of the general obligation in Article 192.*"

the Tribunal stated that the obligation to protect and preserve the marine environment under Article 192 of UNCLOS emphasizes the prevention of future harm and actively improving the state of the marine environment.⁷

C. ANALYSIS OF ITLOS ADVISORY OPINION AND RELEVANT PRINCIPLES AND OBLIGATIONS UNDER INTERNATIONAL LAW

This paper will analyze the elements of ITLOS Advisory Opinion and its correlation with relevant principles and obligations under international law, as follows:

1. The inclusion of anthropogenic Greenhouse Gas (GHG) Emissions as pollution to the marine environment and the specific obligations arising from UNCLOS for its States Parties;
2. Relationship between UNCLOS and other international instruments and frameworks;
3. Due Diligence Principle;
4. Duty to Prevent Transboundary Harm;
5. Duty to Cooperate.

1. Anthropogenic Greenhouse Gas (GHG) Emissions as Pollution of the Marine Environment and Specific Obligations of States Parties to UNCLOS

In line with the vast majority of written submissions, ITLOS determined that anthropogenic greenhouse gas (GHG) emissions into the atmosphere constitute "pollution of the marine environment" within the meaning of Article 1(1)(4) of the United Nations Convention on the Law of the Sea (UNCLOS). ITLOS, in reaching this conclusion, noted that the definition of "marine pollution" under UNCLOS encompasses three elements: (1) a substance or energy introduced, (2) by humans, and (3) causing harm. ITLOS found GHG emissions satisfy all three criteria, as they introduce CO₂ and heat into the ocean, leading to downstream effects like climate change and acidification, which clearly meet the definition of "deleterious effects."⁸

As a result, ITLOS determined a list of specific obligations arising from UNCLOS, as follows:

- a. Under Article 194 para. (1) of UNCLOS, States are required to undertake "all necessary measures" to reduce their GHG emissions.⁹ These measures must be informed by the best available scientific knowledge and aim for the most significant possible reduction, all within the framework of UNCLOS and other relevant international legal obligations.¹⁰ ITLOS further assesses that Article 194 para. (1) of UNCLOS specifically prescribed obligations for States Parties to take all necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions.¹¹
- b. As prescribed by Article 194 para. (2) of UNCLOS, States Parties are also

⁷ *Ibid.*

⁸ Paras 177-179 of the ITLOS Advisory Opinion on Case No. 31: the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)

⁹ Para. 197, 205 of ITLOS Advisory Opinion

¹⁰ Para. 199 of ITLOS Advisory Opinion

¹¹ Para. 243 of ITLOS Advisory Opinion

bound by the obligations to ensure that GHG emissions from activities under their jurisdiction or control do not cause harm to other States and their environments, and that such pollution doesn't spread beyond their areas of sovereign rights.¹²

- c. ITLOS considered anthropogenic GHG emissions are sourced from land-based sources, vessels and aircraft under Articles 207, 211, and 212 of UNCLOS respectively. In this regard, the specific obligations are centred around the reduction of GHG emissions from those sources, as well as reduction of marine pollution from GHG emissions. Such objective shall be implemented through adoption of national laws and regulations, conducting necessary measures, harmonization of policies, and involvement in establishing global and regional rules, standards, and practices.¹³ The Tribunal took into account other instruments which have regulated the obligations of States in this matter, including Chicago Convention, MARPOL.
- d. Under Article 213 and 222 on the enforcement relating to the pollution from land-based sources and pollution from or through the atmosphere, respectively, ITLOS emphasized the duty of States Parties to UNCLOS to enact laws and regulations, to put into effect the rules and standards established in climate change treaties and other relevant instruments. If a State Party, already bound by these rules and standards, fails to take such measures, they could be held internationally responsible for breaching their obligations under Articles 213 or 222.¹⁴
- e. The obligation to cooperate in a global and regional level, as an obligation of conduct, which is also interpreted as a continual involvement of States Parties in formulating international rules and standards, albeit the adoption of the UNFCCC and the Paris Agreement.¹⁵ In addition, States Parties are also bound by the obligation to cooperate in information and data exchange, participation in the forums established by climate change treaties to establish scientific criteria.¹⁶ This duty to cooperate also entails the cooperation in a form of assistance for developing countries in tackling marine pollution caused by anthropogenic GHG emissions.¹⁷
- f. ITLOS also stated that States Parties to UNCLOS have the obligations to carry out monitoring risks and effects of marine pollution caused by GHG emissions, publishing reports on such monitoring, and conducting environmental impact assessments which considers GHG emissions as part of the cumulative impacts of an activity that could cause marine pollution.¹⁸

¹² Para. 258 of ITLOS Advisory Opinion

¹³ For GHG emission resulting from land-based sources: Paras. 267-273 of ITLOS Advisory Opinion; For GHG emissions in the atmosphere: Para. 274-277 of ITLOS Advisory Opinion; For GHG emission from vessels: Para. 278-280 of ITLOS Advisory Opinion

¹⁴ Para. 286 of the ITLOS Advisory Opinion

¹⁵ Para. 311 of the ITLOS Advisory Opinion

¹⁶ Para. 321 of the ITLOS Advisory Opinion

¹⁷ Para. 329-330 of the ITLOS Advisory Opinion

¹⁸ Para. 367 of the ITLOS Advisory Opinion

2. Relationship between UNCLOS and other international instruments and frameworks

The Advisory Opinion used the interpretation of the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement to define the adverse effects of climate change, which was then translated to determine the “deleterious effects” within the context of the definition of the pollution to the marine environment under UNCLOS.¹⁹ ITLOS also referred to Article 4 (1) of the Paris Agreement on the long-term temperature goal to be achieved through the measures to reduce the GHG emissions.²⁰ The States Parties also had differing views on determining whether the UNFCCC and Paris Agreement are considered as *lex specialis* to UNCLOS, implying that fulfilling the obligations under the two instruments have satisfied the ‘necessary measures’ as required in Article 194 of UNCLOS.

ITLOS further clarified the UNFCCC and the Paris Agreement as “the main instruments for addressing the global problems of climate change,”²¹ and further underlined that UNCLOS is a separate agreement with the UNFCCC and Paris Agreement, entailing different obligations. Consequently, UNCLOS does not supersede the obligations under the UNFCCC and Paris Agreement, and that UNCLOS provisions are not modified or limited by the provisions of UNFCCC and Paris Agreement.²² Other instruments that were taken into account by ITLOS include the Chicago Convention, Kyoto Protocol, MARPOL, Convention on Biological Diversity (CBD), the Montreal Protocol, including the Kigali Amendment.

ITLOS has previously incorporated other existing international frameworks in interpreting UNCLOS. In the Advisory Opinion of the Seabed Disputes Chamber in the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, ITLOS mentioned Article 293 of UNCLOS which allows ITLOS to consider international law beyond UNCLOS itself when resolving disputes. While not explicitly stating it as the sole basis, the Chamber looked beyond UNCLOS to understand the obligations of sponsoring states. For example, they referenced Principle 15 of the Rio Declaration to clarify the application of the precautionary principle.²³

Assessing the relationship between UNCLOS and other instruments or frameworks will require further analysis of Article 237 of UNCLOS. In the *South China Sea Arbitration*, the Arbitral Tribunal emphasized that the content of Article 192 of UNCLOS is not only informed by other provisions within Part XII, such as Article 194, but also by “other applicable rules of international law.”²⁴ The Tribunal referred to Article 237 of UNCLOS in defining the content of Article 192 of UNCLOS. The

¹⁹ Para. 177-178 of the ITLOS Advisory Opinion

²⁰ Para. 200 of the ITLOS Advisory Opinion

²¹ Para. 222 of the ITLOS Advisory Opinion

²² Para. 223-224 of the ITLOS Advisory Opinion

²³ Lan Ngoc Nguyen, “Jurisdiction and Applicable Law in the Settlement of Marine Environmental Disputes under UNCLOS,” *The Korean Journal of International and Comparative Law* (7 December 2021), P. 340. Accessed from https://brill.com/view/journals/kjic/9/2/article-p337_10.xml?language=en

²⁴ Para. 941 of South China Sea Arbitration Award

Chie Kojima, “South China Sea Arbitration and the Protection of the Marine Environment: Evolution of UNCLOS Part XII Through Interpretation and the Duty to Cooperate,” *Asian Yearbook of International Law* Vol. 21 (2015), p. 171. Accessed from https://brill.com/display/book/edcoll/9789004344556/B9789004344556_010.xml?language=en

Tribunal suggested that specific environmental obligations from other international agreements, entering into force before or after UNCLOS, could also be considered under Article 192 and the broader Part XII. Article 237 is typically seen as a way to manage conflicts between treaties, similar to Article 30 of the Vienna Convention. A common interpretation of Article 237 holds that subsequent agreements compatible with UNCLOS are permitted, and in cases of incompatibility, UNCLOS obligations take precedence. However, the tribunal seems to go further, suggesting Article 237 actively connects general UNCLOS environmental duties (Part XII) with specific obligations from other environmental agreements, regardless of timing.²⁵

In this Advisory Opinion, there are significant overlaps on the application of UNCLOS obligations in the context of anthropogenic GHG emissions. In interpreting Article 194 para. (1) and the climate change treaties, ITLOS stated that the obligation of States under Article 194 para. (1) will not be satisfied only by complying with obligations to reduce GHG emissions under the Paris Agreement.²⁶ However, ITLOS then explained Articles 213 and 222 of UNCLOS can be interpreted as requiring countries to adopt laws and regulations. These laws and regulations should enforce existing rules and standards established in climate change treaties and other relevant international agreements. If a country that has signed both the Convention and relevant climate change agreements fails to take these necessary measures, it could be held internationally responsible for breaching its obligations under Articles 213 or 222 of the Convention.²⁷

In the context of the reduction of GHG emissions, the enforcement mechanism of the Paris Agreement is not regulated, as countries are not legally obligated to comply with their Nationally Determined Contributions (NDCs), which outline their plans for reducing GHG emissions. Enforcement relies primarily on countries' report submission and the review from other countries on these reports.²⁸ ITLOS did not provide further explanation on what the interpretation of Articles 213 and 222 entail, especially in relation to the obligation under Paris Agreement, including how the existing rules and standards may be enforced. As an alternative, this Article may be interpreted in line with the obligation arising from Article 194 of UNCLOS, especially in relation with the activities of private sectors under their jurisdiction or control and how they can contribute to reduce the GHG emission, in line with the international commitment of States Parties.

3. Due Diligence Principle

In its Advisory Opinion, ITLOS has stated that Article 194 of UNCLOS regulates that States are not obliged to completely eliminate marine pollution under this provision. Instead, they must make their best efforts to prevent, reduce, and control it, such as through adopting a legislation, administrative procedures, and an enforcement mechanism. This is similar to an "obligation of conduct" rather than an "obligation of result." The focus is on a state's actions, such as deploying appropriate

²⁵*Ibid.*, p. 172

²⁶ Para. 223 of the ITLOS Advisory Opinion

²⁷ Para. 286 of ITLOS Advisory Opinion

²⁸ Sandrine Maljean-Dubois, Imad Antoine Ibrahim, Jessica Owley. THE PARIS AGREEMENT COMPLIANCE MECHANISM: BEYOND COP 26. *The Wake Forest Law Review*, In press. Accessed from <https://shs.hal.science/halshs-03494258/document>

resources and taking all feasible measures, rather than solely on the achieved outcome.²⁹ In this regard, the States Parties of UNCLOS are obliged to take necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions.³⁰

ITLOS also considered the issue of measuring the measures that are considered 'necessary' to reduce GHG emission. ITLOS acknowledged that science, especially the need to limit average temperature rise to 1.5°C above pre-industrial levels, may be utilized in assessing the necessity of measures taken by States Parties. ITLOS further emphasized the application of precautionary approach, that the lack of scientific certainty should not hamper States Parties to take necessary measures to reduce and control GHG emissions.

Aside from due diligence in reducing anthropogenic GHG emissions, ITLOS also highlighted that this duty of due diligence also applies in taking necessary measures in preventing, controlling, and reducing marine pollution caused by GHG emissions. Moreover, the duty of due diligence is also applicable to the enforcement measures taken by States Parties to prevent, reduce, and control marine pollution caused by anthropogenic GHG emissions.

In the jurisprudence of international tribunals, the *South China Sea Arbitration*³¹ reaffirms the decisions of the ICJ in the *Pulp Mills on the River Uruguay* case and the Advisory Opinion of the Seabed Disputes Chamber of ITLOS in the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* that the obligation to "ensure" requires the translation to specific actions or active measures, not only adopting regulations, but also carrying out administrative control, consistent enforcement, and corrective actions for non-compliance, if necessary.

In the *Trail Smelter Case*, the Tribunal did not specifically mention the due diligence obligation. However, the Tribunal ruled that Canada, by not taking sufficient measures to control the emissions from the Trail Smelter located within its territory, was responsible for the damage caused in the State of Washington (US). Canada was then requested to pay for the damage.³² This decision has become an integral part in the duty of due diligence of States to take sufficient measures to prevent pollution.

Specifically, in the *Pulp Mills on the River Uruguay* case, the Court highlights the relationship between the duty to prevent transboundary harm as part of the due diligence obligation to enact measures to preserve the river's ecology.³³ In this regard, both Argentina and Uruguay had to take necessary measures, which include cooperation and adoption of regulatory measures, with the objective of preventing transboundary harm in mind. The Court also explained the concept of a domestic regulatory due diligence, which means that both Argentina and Uruguay must not only establish regulations to protect the river, but also actively enforce them. The

²⁹ Para. 233-236 of ITLOS Advisory Opinion

³⁰ Para. 243 UNCLOS

³¹ Para. 944 *South China Sea Award*

³² Russell A. Miller, "Pandemic as Transboundary Harm: Lessons from the *Trail Smelter Arbitration*," *International Law and Politics* (Vol. 55, 2023). Accessed from <https://www.nyujilp.org/wp-content/uploads/2023/05/Article1.pdf>

³³ *Ibid.*, p. 278

Court emphasized that governments need to be vigilant in enforcing these regulations and overseeing both public and private entities operating within their jurisdiction.³⁴

An important element in the duty of due diligence, as stated by the Seabed Dispute Chamber in its Advisory Opinion, is that the measures taken by States Parties should be "reasonably appropriate" to achieve the desired outcome. The assessment of "reasonableness" is influenced by the inherent flexibility of due diligence obligations and their content, which can adapt and change due to new scientific discoveries, technological advancements, and the specific risks associated with an activity.³⁵ Further, another element contained in the duty of due diligence is that States should ensure that private activities and private actors comply with international standards.³⁶

In addition to this, other international frameworks have also encapsulated the flexible nature of the duty of due diligence, such as Article 2 of the 1972 London Dumping Convention, Principle 23 of the Stockholm Declaration, in Principles 6, 7, and 11 of the Rio Declaration, and in the Ozone Protocol and the Conventions on Climate Change and Biological Diversity. The wording of 'best practicable means at their disposal' means that limitations in technology and regulatory capacity shouldn't prevent them from complying with their obligations. To summarize, those frameworks have considered the different capabilities between developing and developed countries in carrying out their due diligence obligation. While due diligence acknowledges limitations, it shouldn't become an excuse for developing countries to pollute the marine environment, especially the marine environment of other States.³⁷

In its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the ILC stated the following:

*"From a legal point of view, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent harm."*³⁸

Further, the ILC also provided more extensive interpretation that a state makes a reasonable effort to understand the potential consequences of its actions or planned activities. This includes both the factual details and any relevant laws or regulations. Once a state is informed, it has a legal obligation to take timely and appropriate steps to address any foreseeable risks. The ILC put emphasis on the minimization of risks of harm to the marine environment through the development of policies and regulations and their enforcement.³⁹

Although the Advisory Opinion of ITLOS clarified the duty of due diligence in carrying out the specific obligations, there is a repeated emphasis in the temperature

³⁴ *Ibid.*, p. 279

³⁵ Irini Papanicolopulu, "Due Diligence in the Law of the Sea", in *Due Diligence in the International Legal Orders* (Ed. Heike Krieger, Anne Peters, and Leonhard Kreuzer), 2020: Oxford, United Kingdom, p. 152-153

³⁶ *Ibid.*, p. 154

³⁷ Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment*, 3rd Edition (Oxford: Oxford University Press, 2009), p. 149

³⁸ https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf

³⁹ *Ibid.*, p. 154

goal set by the Paris Agreement and the urgency of States Parties to achieve the global temperature goal.⁴⁰ This demonstrates that States Parties of UNCLOS should take into account this objective while taking measures to prevent, reduce, and control marine pollution caused by GHG emissions as prescribed under UNCLOS.

Taking into account the flexible nature of the content and extent of the duty of due diligence, ITLOS has yet to emphasize on the impediment that States Parties are currently facing in reaching the global temperature goals set by the Paris Agreement, which requires adjustment to the due diligence duty of States in taking necessary measures to prevent, reduce, and control marine pollution caused by GHG emission. These impediments include the increasing activities conducted by States which cause GHG emission, and any new technologies that may be harmful to the marine environment. In the context of Article 194 of UNCLOS, ITLOS only provided the implication of due diligence obligation in a form of challenges faced by developing States in reducing anthropogenic GHG emissions, thus requiring assistance from developed states. Despite its importance, there are other developments which may provide more extensive and comprehensive interpretation to this obligation.

One of the issues is the “specific risks associated with an activity.” The Commentary by the International Law Commission (ILC) in its Report GAOR A/55/10 has indicated that the level of due diligence that should be carried out by States Parties corresponds with the specific situation and the potential for harm to the marine environment. Highly hazardous activities require stricter regulations and more vigorous enforcement. Furthermore, several factors come into play when determining the required level of due diligence in each case, which include the size of the operation, its location, environmental conditions, materials used, and the reasonableness of conclusions drawn based on these factors.⁴¹ In the context of GHG emission, certain land-based activities, or aircraft, and vessels that may emit higher GHG should be subject to more stringent due diligence by States. Moreover, there is currently an increasing acknowledgment of the cumulative impact from the activities, added with the GHG emission, which may worsen the impacts to the marine environment. In this case, in the context of carrying out their due diligence obligation, it is necessary for States not to consider anthropogenic GHG emission in silo, without considering other activities and their impacts. The possibility of cumulative impacts that may negatively affect the marine environment should also require a more stringent due diligence obligation among States Parties.

Looking at the ILC Commentary as mentioned above, the degree of knowledge of States in assessing the rate of GHG emissions should inform the States on the measures they should take to minimize the risk of harm to the marine environment. It is impossible then for States to be informed if States do not possess the abilities to assess the accumulation of GHG emissions in the atmosphere, its gradual impacts to the marine environment, and the cumulative impacts it caused combined with other activities to inform decision-making. However, in the current case, ITLOS did not further consider the accumulation of GHG emissions and the cumulative impacts in providing interpretation of the due diligence obligation under UNCLOS.

⁴⁰ Para. 211, 216 of ITLOS Advisory Opinion

⁴¹ Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment*, 3rd Edition (Oxford: Oxford University Press, 2009), p. 147-148

4. Duty to Prevent Transboundary Harm

This principle has been discussed in the previous part, constituting a part of the principle of due diligence. In the Advisory Opinion, ITLOS acknowledged the challenges in pinpointing how specific GHG emissions from one country directly cause damage in other countries, as climate change is caused by a combination of emissions from many sources around the world, making it difficult to isolate the impact of a single nation. However, ITLOS asserted that this difficulty in establishing a direct cause-and-effect relationship shouldn't prevent the application of Article 194(2) to marine pollution from human-caused GHG emissions.⁴²

In this regard, it is necessary to look at the development of international law in interpreting the obligations emanating from the duty to prevent transboundary harm. In the *Trail Smelter* case, it is reaffirmed that part of the due diligence obligation is that countries can't just avoid causing harm themselves; they also need to take steps to stop private companies or individuals within their borders from causing environmental damage in other countries.⁴³

Certain obligations arising from duty to prevent transboundary harm depend on whether the risk of harm to the marine environment is foreseeable. If the risk is foreseeable, countries have to take steps to prevent or minimize the risk of serious harm, which may involve the duty to conduct an environmental impact assessment (EIA), monitoring, responding to the impacts to the marine environment, and mitigating the damage that occurred. However, when the risk is not foreseeable or difficult to predict, countries are required to take action when the science is not certain about potential risks, covered under the precautionary approach.⁴⁴

In this regard, the Advisory Opinion has yet to incorporate more comprehensive interpretation of this principle in relation to the relevant obligations under UNCLOS, especially Article 194 para. (2). As indicated by the development of international law, the duty to prevent transboundary harm is inter-related with the due diligence principle and the precautionary approach, depending on whether or not countries are able to predict the certainty of the risks. In the context of climate change, the accumulation of GHG emissions have started to cause harmful impacts to the marine environment. Obliging States Parties to reduce their GHG emissions will require additional measures. In incorporating precautionary approach, there is still little certainty for science to predict the exact impact of certain activities to the marine environment, however, countries have started to acknowledge the cumulative impacts where GHG emission may worsen the impacts of certain activities to the marine environment. Therefore, countries will be required to conduct due diligence through carrying out measures to take into account these cumulative impacts in formulating their national or domestic regulations or policies, and other necessary measures according to international law.

⁴² Para. 252 of ITLOS Advisory Opinion

⁴³ Ellen Campbell, Elizabeth Dominic, Snezhana Stadnik, and Yuanzhou Wu, "Due Diligence Obligations of International Organizations under International Law," *International Law and Politics* (Vol. 50, 2018), P. 562-565. Accessed from <https://www.nyujilp.org/wp-content/uploads/2018/07/NYI204.pdf>

⁴⁴ *Ibid.*

5. Duty to Cooperate

Another important element in the protection of the marine environment is the duty to cooperate. In *the South China Sea Arbitration*, the Arbitral Tribunal recalled the provisional measures order adopted by ITLOS in the *MOX Plant*, emphasizing that the duty to cooperate is a fundamental principle in carrying out the obligation to protect the marine environment.⁴⁵ This has also been asserted by ITLOS in the current Advisory Opinion, in relation with the duty of cooperation under climate change treaties.⁴⁶ Further, ITLOS reaffirmed the obligations under UNCLOS to cooperate in formulating rules, standards, and practices; in exchanging information and data for a standardized scientific basis to formulate policies and take measures to address marine pollution caused by anthropogenic GHG emission.⁴⁷

The duty to cooperate in international environmental law has the roots in Principle 24 of the Stockholm Declaration⁴⁸ and Principle 7 of the Rio Declaration which states that nations should collaborate in a global partnership to preserve Earth's ecosystems.⁴⁹ The basic idea of the duty to cooperate is that the obligation of countries to consider the concerns of other countries and the global community as a whole, or as Justice Rüdiger Wolfrum emphasizes that duty to cooperate balance state's sovereignty by ensuring that the interests of the broader international community are considered alongside individual state interests.⁵⁰

The development of international environmental law has provided various interpretation of the duty to cooperate. In the *Pulp Mills* case, the Court asserted that the duty to cooperate is also manifested through the obligation to inform in cases of any risk of harm to the marine environment, whose objective is to foster more cooperation to prevent the harm.⁵¹ This was also reaffirmed in the Resolution on Development and Environment and the Resolution on Cooperation Between States in the Field of the Environment which emphasized that the exploitation of resources must be done considering potential harm to other countries, and that countries must avoid causing significant environmental damage in areas beyond their national borders.⁵²

The duty to cooperate also include sharing information, communication in a form of prior notification, consultation, and informed consent, cooperation in emergency response, and also the efforts taken to investigate, identify and prevent environmental harms. Further, international courts and tribunals have established that cooperation can involve consulting with environmental organizations, sharing information, or even conducting joint environmental impact assessments for specific activities.⁵³

⁴⁵ Para. 946 *South China Sea Arbitration Award*

⁴⁶ Para. 296 of the ITLOS Advisory Opinion

⁴⁷ Para. 294-321 of the ITLOS Advisory Opinion

⁴⁸ Neil Craik, "The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect," *Yearbook of International Environmental Law* (2020), p.2

⁴⁹ Kojima, "South China Sea Arbitration and the Protection of the Marine Environment," p. 178. n

⁵⁰ Craik, "The Duty to Cooperate in International Environmental Law," p. 2

⁵¹ Para. 102 *Pulp Mills*

⁵² Andrea Laura Mackiello, "Core Rules of International Environmental Law," *ILSA Journal of International and Comparative Law* (Vol 16:1, 2009), P. 264. Accessed from <https://core.ac.uk/download/pdf/80037733.pdf>

⁵³ Jason Rudall, "The Obligation to Cooperate in the Fight against Climate Change," *International Community Law Review* 23 (2021), p. 188

Another reference on the scope of the duty to cooperate is the Judgment of the International Court of Justice (ICJ) in the *Whaling* case, which demonstrates that for countries that agreed to the International Convention for the Regulation of Whaling (ICRW), the court said cooperation meant more than just following the rules. In this case, Japan belonged to the International Whaling Commission (IWC) which sets guidelines for whaling practices, including the use of non-lethal methods. The court ruled that even though these guidelines weren't legally binding on Japan, the country still had a responsibility to consider them seriously.⁵⁴

This duty to cooperate is recognized in both climate change treaties and UNCLOS. In Paris Agreement, States Parties can voluntarily cooperate through trading emission reductions for countries to meet their emission reduction targets, adopting crediting mechanisms for emission reduction, and other non-market approaches, including capacity building and transfer of marine technology for developing countries.⁵⁵ However, in terms of marine environmental protection, the duty to cooperate in UNCLOS focus on the development of international rules, standards, and practices; as well as for the research and exchange of information and data.

Based on the abovementioned development under international environmental law, the duty to cooperate in international law goes beyond just making treaties. It also plays a role in preventing future environmental damage.⁵⁶ In this regard, cooperation under Article 194 para. (2) to prevent transboundary harm is also important, which has yet to be considered by ITLOS in its Advisory Opinion. As ITLOS has already recognized the necessity of collective actions and commitment as entailed in the spirit of various climate change treaties, and reaffirmed the applicability of the obligation of States Parties under Article 194 para (2) in the context of GHG emission reduction, the cooperation in preventing transboundary harm should be further explained in the Advisory Opinion.

In addition to this, there are possibilities that various climate change forums and other international forums concerning the GHG emission reduction will adopt certain standards, guidance, as well as recommendations or recommended practices to protect the marine environment from the impacts of climate change. In this regard, ITLOS should also emphasize the importance for States Parties of UNCLOS to take into account these ongoing development in other relevant forums and consider incorporating those guidelines in the domestic policies. This, according to the development of international environmental law, can be considered as the implementation of the duty to cooperate.

D. CONCLUSION

The ITLOS Advisory Opinion on Climate Change demonstrated the increasing attention of the international community towards the issue of climate change and its

⁵⁴ Margaret A. Young and Sebastian Rioseco Sullivan, "Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice," *Melbourne Journal of International Law* (Vol 16, 2015). P. 28. Accessed from <https://www8.austlii.edu.au/au/journals/MelbJIL/2015/12.pdf>

⁵⁵ Michael A. Mehling, "Advancing International Cooperation under the Paris Agreement: Issues and Options for Article 6," *Working Paper Series, Massachusetts Institute of Technology* (2021), Accessed from <https://ceep.mit.edu/wp-content/uploads/2021/11/2021-016.pdf>

⁵⁶ Kojima, "South China Sea Arbitration," p. 179

impacts to the ocean. The Advisory Opinion reaffirmed that UNCLOS shall not be interpreted in a vacuum, and it remained relevant as a framework for States Parties in facing new challenges to the marine environment. Despite its limited applicability only to the proposer, the Advisory Opinion also contributed to the current discourses on the relationship between UNCLOS and other environmental agreements or treaties, including climate change treaties. ITLOS has also made reference to the general obligations and principle under international environmental law in adopting the Advisory Opinion.

Despite having explained the relationship between UNCLOS and other climate change treaties (especially the UNFCCC and Paris Agreement), the Advisory Opinion has yet to consider and comprehensively explain the interrelation between relevant principles under international environmental law in interpreting the obligations of States Parties under UNCLOS. This includes the relationship between the duty of due diligence with precautionary principle, and its correlation with the obligation of States Parties under Article 194 para (2) of UNCLOS on the duty to prevent transboundary harm. In addition, the development in international environmental law concerning the obligations arising from the duty to cooperate has yet to be considered by ITLOS in rendering its Advisory Opinion, while it holds significant importance to emphasize the obligation of States Parties to cooperate through existing climate change forums and other forums relating to the marine environment.

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**TOWARDS THE NEW DEVELOPMENT OF THE RIGHT TO STRIKE:
ANTICIPATING ICJ'S RESPONSE TO ILO'S REQUEST FOR ADVISORY
OPINION ON THE RIGHT TO STRIKE UNDER CONVENTION NO. 87**

Oleh :

Yustisia Pratiwi Pramesti

ABSTRAK

Organisasi Perburuhan Internasional/ILO telah mengajukan permohonan *Advisory Opinion* ke Mahkamah Internasional berkaitan dengan perlindungan hak mogok dalam konvensi ILO no. 87. Permohonan ini diajukan atas inisiasi *Governing Body* ILO pada tahun 2023, setelah dialog sosial antara kelompok pekerja, kelompok pengusaha, dan pemerintah dianggap tidak berhasil menyelesaikan perselisihan terkait interpretasi hak mogok dalam konvensi ILO no. 87. Bagi Mahkamah Internasional untuk dapat memberikan pendapatnya, perlu dipenuhi persyaratan, di antaranya adanya hak dari pihak yang mengajukan permohonan (ILO) dan wewenang dari Mahkamah Internasional untuk menjawab pertanyaan yang diajukan. Terhadap permohonan ini, respon dari Mahkamah Internasional sangat menarik untuk dinantikan. Artikel ini akan membahas mengenai hak dari ILO mengajukan permohonan *Advisory Opinion* dan wewenang Mahkamah Internasional untuk menjawab pertanyaan, termasuk diskresi untuk tidak mengeluarkan pendapat; berbagai mekanisme penyelesaian perselisihan yang dapat dilakukan oleh ILO; danantisipasi respon Mahkamah Internasional terhadap permohonan yang diajukan oleh ILO.

Kata kunci: ILO, *Advisory Opinion*, Mahkamah Internasional, Hak Mogok, Konvensi ILO no. 87

I. INTRODUCTION

The Governing Body of ILO ("GB") adopted a resolution at its 349th *bis* (special) session on the 10th of November 2023, where it was decided that a request is to be made to the International Court of Justice ("the Court") to render an advisory opinion on the issue of 'the right to strike under ILO Convention No. 87'.¹ After such a request was formally put forward by ILO, the Court welcomed the request by issuing an order on the 16th November of 2023, wherein it called upon the concerned stakeholders to furnish it with the information related to the matter in question.²

The concerned stakeholders that are invited by the Court include the State parties to the Freedom of Association and Protection of the Right to Organise Convention (No. 87) ("Convention No. 87"), organisations that are given general consultative status by the GB such as the International Organisation of Employers, the International Trade Union Confederation, the World Federation of Trade Unions, the International Cooperative Alliance, the Organisation of African Trade Union Unity and Business Africa, as well as ILO as the requesting party.³ The Court

¹ ILO Governing Body, 349th session, ILO Doc GB.349bis/INS/1 ('ILO Doc GB.349bis/INS/1').

² International Court of Justice (*Order on Request for Advisory Opinion by ILO*).

³ *Ibid*.

acknowledged that it is important to invite stakeholders from different groups as they would be able to represent the tripartite structure within ILO which is comprised of the representatives of Governments, employers, and workers.⁴ It would only be fair to hear from the parties involved in the 'dispute' that happened to be the background of the ILO's request for the advisory opinion.

The so-called 'dispute' has been acknowledged by ILO and through the GB's resolution at its 349th *bis* (special) session, it held, "...that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87".⁵ As far as ILO is concerned, this internal dispute between the group of Workers and the group of Employers has been long-standing for decades and it pertains to two subject matters: (i) the interpretation of Convention No. 87 with regards to the right to strike and (ii) the authority of Committee of Experts to interpret ILO's conventions.⁶

Having been dealing with such a seemingly endless dispute as both groups stay firm in their clashing positions and wary of the implications this dispute could have on the functioning of ILO, the GB initiated to resort to the Court by submitting a question that appears to be the very subject matter of the dispute as it claimed that there had been protracted attempts to resolve the dispute within the organisation, however, no consensus was reached.⁷

By observing the provided situation, this article attempts to identify three issues in connection with the request for an advisory opinion by the GB, specifically (i) the authority of the GB to request an advisory opinion to the Court; (ii) the necessity to refer the dispute to the Court; and (iii) anticipation of the Court's response to the request.

II. THE AUTHORITY OF THE GOVERNING BODY TO REQUEST ADVISORY OPINION TO THE COURT

The advisory jurisdiction of the Court was established since the Charter of the United Nations allows the General Assembly, Security Council, as well as other organs and specialised agencies of the United Nations (upon authorisation by the General Assembly) to request advisory opinion to the Court.⁸ Further, the statute of the Court provides that the Court may give an advisory opinion at the request of 'whatever body may be authorised'.⁹

In connection with the subject that can request advisory opinion to the Court, the GB, which has successfully landed on its submission before the Court, appears to fulfil the qualification as the 'whatever body may be authorised' to request an advisory opinion to the Court. The GB has long obtained authorisation through Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions adopted at the 32nd Session of ILC, in Geneva, on the 27th of June

⁴ Ibid.

⁵ ILO Governing Body Res, 349th session, (10 November 2023).

⁶ ILO Governing Body, 'ILO Doc GB.349bis/INS/1' (n 1).

⁷ Ibid.

⁸ *Charter of the United Nations* art 96.

⁹ *Statute of the International Court of Justice* art 65(1) ('ICJ Statute').

1949.¹⁰ The Resolution specifies that “the request for an advisory opinion may be addressed to the Court by the Conference or by the Governing Body acting in pursuance of an authorisation by the Conference”.¹¹ This authorisation serves as a perpetual *carte blanche* for the GB and the General Conference of ILO (“General Conference”) to request an advisory opinion and should remain valid until further repeal.

However, there might be a concern as to whether it is acceptable if, the GB acts on behalf of the whole constituents of ILO. Unlike the General Conference that gathers all members of ILO¹², the GB consists of ‘only’ 56 titular members.¹³ Meanwhile, as of 2024, ILO has no less than 187 member states, more than three times of the total of the GB members. This discrepancy underscores the disproportionate representation of GB members relative to the entire ILO membership.

In addition to such an unrepresentative character of the GB structure, it must also be taken into account the binding nature of the Court’s opinion to ILO as an exception to the general norm of advisory opinion’s non-binding character.¹⁴ ILO, guided by Article 37(1) of its Constitution and practical application, has established the binding nature of the Court’s advisory opinion to it.¹⁵ Consequently, the request that was made on behalf of ILO, either submitted by the GB or the General Conference will have the same binding power to ILO regardless of the huge difference on the number of the GB’s members and the General Conference’s members. These circumstances insinuate that the decision taken by less than one-third of the ILO members can affect the whole ILO constituents.

Legally speaking, the mechanism that is exercised by the GB is justifiable, however, the disproportionality of the GB could be an issue, especially when the decision that is adopted by the GB may have greater impact to ILO as a whole.

III. THE NECESSITY TO REFER THE DISPUTE TO THE COURT

The ILO constitution sets out the mechanisms to resolve the dispute on the interpretation of the constitution or any subsequent ILO conventions under Article 37 that reads as follows:

- (1) *Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice*

¹⁰ ILC Official Bulletin, vol. XXXII, (1949) 339.

¹¹ ILO General Conference Res, 32nd Session, (27 June 1949).

¹² ILO Constitution art 2.1(a).

¹³ Ibid art 7.

¹⁴ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Rep 65, 71 (‘Peace Treaties’).

¹⁵ ILO Governing Body, 347th session, ILO Doc GB.347/PV(Rev.) (22 June 2023). See also ILO Doc GB.344/INS/5 P.8. Interpretation of the Convention of 1919 concerning Employment of Women during the Night.

- (2) *Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.*

Despite the existence of a long-standing dispute regarding the interpretation of Convention No. 87, up until 2023, none of the mechanisms provided for in Article 37(1) and Article 37(2) has been successfully activated to resolve the dispute. Social dialogue among ILO constituents has been the main method to address the disagreement within ILO. Nearing the end of 2023, through the Resolution of the GB at its 349th bis (special) session, ILO expressed that the tripartite dialogue within ILO has failed to reach a consensus throughout the protracted attempts.¹⁶ Such a Resolution then marked the initiation to activate Article 37(1) of the ILO Constitution.

Among the three options that are available for ILO constituents to resolve their dispute, each mechanism has its own implications which could affect the interest of ILO constituents. Since ILO has started to exercise the mechanisms under Article 37(1) of its constitution, therefore, two out of three avenues for dispute settlement have been unlocked. This section will explore the facets of each mechanism as follows:

A. Social Dialogue

Social dialogue is the core value upheld by the tripartite structure of ILO. Through ILO's Declaration on Social Justice adopted in the General Conference in 2008, the organisation held that:

*"Social dialogue and tripartism are the most appropriate methods for, inter alia, 'translating economic development into social progress, and social progress into economic development; facilitating consensus building on relevant national and international policies that impact on employment and decent work strategies and programmes; and making labour law and institutions effective ...' "*¹⁷

Social dialogue is exercised through all types of negotiation, consultation, or simply exchange of information between the representatives of

¹⁶ ILO Governing Body, 'ILO Doc GB.349bis/INS/1' (n 1).

¹⁷ Claire La Hovary, 'A Challenging Menage a Trois? Tripartism in the International Labour Organization' (2015) 12 *International Organization Law Review*, 235.

governments, employers and workers.¹⁸ This mechanism can give flexibility to the concerned stakeholders to put their interests on the table of negotiation. ILO constituents have been exercising this method which produces countless compromises on the formulation of labour standards that are generally accepted today.

One of the instances where social dialogue played a role in the case of disagreement among ILO constituents was when a proposal by the group of Workers to refer the dispute on the interpretation of Convention No. 87 to the Court was not adequately supported in 2014. Back then, the ILO constituents could reach a compromise through a new proposed Resolution¹⁹ which did not include the referral to the Court but accommodated the items which the Worker's group agreed to in exchange for the referral.²⁰ This shows that social dialogue maintains a balance approach for the parties concerned in which the interests of the constituents are equally considered.

Labelling that the social dialogue on the dispute over the interpretation of Convention No. 87 has been exhausted could be premature, given that there is no specified deadline for its completion. Additionally, it is widely accepted that negotiations are not bound by time constraints as long as the parties are committed to reaching a consensus. The dialogue among ILO constituents should then be viewed as a continual necessity, enabling them to assert their interests in advancing international labour standards and resolving disputes.

B. Referral to the Court

As previously mentioned, the referral to the Court in resolving the dispute within ILO is provided for in Article 37(1) of the ILO Constitution. The GB's endeavour to refer the dispute to the Court last year represented not its inaugural attempt to invoke Article 37(1) of the ILO Constitution. In 2014, the proposal to submit the matter to the Court was tabled but failed to garner sufficient support, notably from African, Asian, and the US governmental stakeholders.²¹ Nine years later, during the 349th *bis* (special) session of the GB, despite the dissent by 21 members, the referral was passed as it received a majority vote by the members of GB.²²

This referral to the Court will be effective if the Court finds its jurisdiction to render an opinion and the body submitting such request, in this case the GB, is authorised to put the question before the Court. By far, both the Court

¹⁸ Liv Torres, 'Social Dialogue as a Tool to Fight Inequality & Recover After a Pandemic' (Policy Paper, Pathfinders for Peaceful, Just and Inclusive Societies, NYU Center on International Cooperation, July 2021).

¹⁹ ILO Governing Body, 322nd Session, Decision on the fifth item on the agenda: The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards (November 2014).

²⁰ Jeffrey S Vogt, 'The Right to Strike and the International Labour Organisation (ILO)' (2016) *King's Law Journal* 110, 126.

²¹ *Ibid.*, 125.

²² ILO Governing Body, 349th session, ILO Doc GB.349bis/PV.

and GB seem to hold its jurisdiction and its authorisation respectively, based on the prevailing regulations²³. However, there is a possibility that the Court might exercise its discretion not to render an opinion if it found compelling reasons²⁴ to do so. If this scenario occurred, ILO might need to determine other alternatives to resolve the dispute.

On the other hand, if the Court were to issue an opinion, the follow up question would be whether or not such opinion would successfully address the dispute within ILO. If the Court were to answer the question directly with a "yes" or "no" regarding the protection of the right to strike under Convention No. 87, it would deviate from its intended advisory nature and assume a decisive role.²⁵ If the Court gave the more elaborative answer when interpreting the Convention No. 87 and let the organisation resolve the dispute itself, it would drive ILO to once again exercise the social dialogue mechanism to decide the future of the right to strike and the Convention No. 87. Such scenarios may or may not happen, but it is worth noting that the option to refer to the Court might not be the most effective approach to resolve this dispute.

C. In-house Tribunal

Even though the proceeding within the Court is currently underway as the implementation of Article 37(1) of the ILO constitution, it is important to still note that the mechanism outlined in Article 37(2) remains available and should be considered as an alternative for resolving the dispute within the ILO. The provision under Article 37(2) was introduced with the backdrop that the Court might not always be adequately suited to address the specific and rather technical labour-related questions.²⁶ Furthermore, this in-house tribunal could enhance the role of tripartism in matters of interpretation and serve as a crucial safeguard for ILO constituents concerning decisions that carry binding implications applicable to all Member States of ILO.²⁷

If the social dialogue reaches a stalemate and the Court's opinion does not effectively resolve the ongoing dispute, exploring referral to the in-house tribunal may become necessary. This mechanism will place tripartism within the GB as the driving force behind the establishment of the tribunal.²⁸ The ILO constituents will also be involved as Article 37(2) provides that 'any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be

²³See Article 96 (2) of the *Charter of the United Nations*, Article 65 of the *Statute of the International Court of Justice*, Article IX (2) of the Agreement between the United Nations and the ILO, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinion adopted by the General Conference on 27 June 1949.

²⁴Anthony Aust, 'Advisory Opinions' (2010) 1(1) *Journal of International Dispute Settlement*, 137.

²⁵*Status of Eastern Carelia, (Advisory Opinion)* [1923] PCIJ, 29 ('*Eastern Carelia*').

²⁶ILO General Conference, *Report IV (I), Matters Arising out of the Work of the Constitutional Committee: Part 1: The Relationship of the ILO to Other International Bodies*, 108.

²⁷ILO Governing Body, 344th session, ILO Doc GB.344/INS/5.

²⁸ILO *Constitution* art 37(2).

brought before the Conference'. In essence, this mechanism enables tripartite participation within the ILO and facilitates the judicial settlement of disputes within the organisation.

Based on the detailed analysis of each dispute resolution mechanism provided, the decision to submit the dispute to the Court may warrant a reassessment regarding whether it is necessary to refer the dispute to the Court or if there are other mechanisms that still need to be explored. It is fair to acknowledge that each option carries its own advantages and limitations. Furthermore, the decision to resolve the dispute is significantly influenced by the interests of the parties rather than solely by a strategic legal approach. Moving forward, since the proceedings before the Court are already underway, there is no turning back, and the only course of action is to anticipate the outcomes of the process.

IV. ANTICIPATION OF THE COURT'S RESPONSE TO THE REQUEST

According to the Court's order no. 191 dated 16th of November 2023, the Court has fixed the time limit when the concerned stakeholders can present written statements (16th of May 2024) and written comments (16th of September 2024) with regard to the question submitted for advisory opinion. The following procedures on this advisory proceeding are subject to further decision by the Court as stated in the Order.²⁹

At the time of this article's drafting, the proceedings await feedback from invited stakeholders, and the Court has yet to finalise its opinion. Numerous potential outcomes exist regarding the Court's forthcoming opinion. This article will attempt to anticipate the possible scenarios of the Court's response to the request on the matter of jurisdiction and merits of the case.

A. Jurisdiction

As hinted in the previous section, it seems that the Court will find its jurisdiction to render an opinion requested by the GB since the conditions under Article 96 (2) of the Charter of the United Nations *jo* Article 65 of the Court's Statute are satisfied. Moreover, the GB holds the authority to request a question based on Article IX (2) of the Agreement between the United Nations and the ILO, and the Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinion adopted by the General Conference on 27 June 1949.

However, the Court may choose not to provide an opinion, even though it has established its jurisdiction, if it finds compelling reasons to do so. Article 65 of the Court's Statute gives room for discretion for the Court not to render an opinion as the provision reads, "The Court may give an advisory opinion on any legal question..."³⁰ Such provision indicates that it is not imperative for the Court to give opinion as requested by the UN or any authorised agencies under UN.

²⁹ International Court of Justice (*Order on Request for Advisory Opinion by ILO*).

³⁰ICJ Statute art 65 (1) (n 9).

Through its jurisprudences, the Court established that 'compelling reasons' could lead it to refuse rendering an opinion.³¹ In the *Western Sahara* case, the Court underscored the significance of the principle of consent in advisory proceedings. The judges stated that the absence of consent of the interested party may render the giving of an advisory opinion incompatible with the Court's judicial character.³² The Court acknowledged that lack of consent might constitute a ground for declining to give an opinion requested³³ and that it shall ensure respect for the fundamental principle of consent to jurisdiction.³⁴

In line with the judges of the *Western Sahara*, in its opinion on *Chagos*, the Court expressed,

*"There would be a compelling reason for it to decline to give an advisory opinion when such a reply 'would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent'".*³⁵

From the *Western Sahara* and *Chagos* jurisprudence, the Court was of the view that the principle of consent is also crucial in the advisory proceeding.

In the opinion of the Court's predecessor, the presiding judges of the PCIJ on the *Eastern Carelia* case established a compelling reason to decline the request since the question put before it was of the main issue of an actual dispute. The judges held,

*"...Answering the question would be substantially equivalent to deciding dispute between the parties. The Court, being the Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."*³⁶

In the *Eastern Carelia* case, the PCIJ held that the advisory opinion it rendered should not possess a decisive character akin to its decisions in contentious cases. It perceived the essential rules that guide its activity as a court.

From the abovementioned regulation and jurisprudence, there could be two possibilities on how the Court would respond to the request in regard to the jurisdiction issue. If the Court determines that there is no breach of consent regarding the referral to the Court and finds the resemblance between the question and the actual dispute in the ILO unconvincing as

³¹Anthony Aust, 'Advisory Opinions' (2010) 1(1) *Journal of International Dispute Settlement*, 137.

³²*Western Sahara* (Advisory Opinion) [1975] ICJ Report 12, page 33 ('*Western Sahara*').

³³*Ibid.*, 32.

³⁴*Ibid.*, 33.

³⁵*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Report 95, 85 ('*Chagos*').

³⁶*Eastern Carelia* (n 25), 29.

grounds to decline the request, it is likely to affirm its jurisdiction to deliver an opinion and proceed to examine the merits of the case. Otherwise, if the Court determines that the circumstances of the dispute between the group of Workers and the group of Employers within the ILO are reflected in the question presented before it, and if it finds that there has been a breach of consent prior to the referral process, the Court may choose not to render an opinion at its discretion. Other than the provided scenarios, however, there is still a possibility that the Court may find other compelling reasons as the ground to decline giving an opinion.

B. Merits of the Case

The question that was submitted to the Court by ILO is formulated as, "Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)?"³⁷ Such question was forwarded to the Court pursuant to the provision under Article 37(1) of the ILO Constitution where it sets, "Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention [...] Constitution shall be referred for decision to the International Court of Justice".

ILO requested the advisory opinion with the hope that the Court would be able to resolve the long-standing dispute relating to the interpretation of Convention No. 87. This dispute originated in the 1950s when ILO Supervisory Bodies interpreted that the right to strike is a necessary corollary of the rights to organize and bargain collectively, which must be implemented by member States.³⁸ The Committee of Experts observed that the prohibition of strikes by workers was contrary to the norm under Article 8 paragraph 2 of the Convention No. 87.³⁹ The interpretation by the Committee of Experts elicited varied responses from the ILO constituents during the 58th session of the General Conference in 1973.

Broadly speaking, the Workers' group endorsed the Committee's interpretation, whereas the Employers' group opposed it. The group of Workers support the interpretation as they find that the terms of Convention No. 87 guarantee the right to organize must be understood in the context of the relevant provisions of the Preamble to the ILO Constitution and of the Declaration of Philadelphia and taking into account any subsequent practice.⁴⁰ On the other hand, the group of Employers argue that Convention No. 87 does not contain any provision implying the existence of the right to strike and that the preparatory work of the Convention No. 87 confirms that

³⁷ILO, *Request for Advisory Opinion to International Court of Justice* (13 November 2023).

³⁸Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29(2) *The International Journal of Comparative Labour Law and Industrial Relations*, 199-200.

³⁹ILO General Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 43rd session, Report III, 4th pt, (1959), 68.

⁴⁰ ILO Doc GB.349bis/INS/1 (n 1), 11.

the intention of the drafters was clearly not to include the right to strike within the scope of the Convention No. 87.⁴¹

Regarding the binary question submitted by ILO and the ongoing debate between the ILO constituents, it will not be easy to predict the outcomes by the Court. On several occasions, the Court answered the 'yes-no' questions directly that can be recapitulated⁴² as follows:

- In the advisory case of *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, the Court held that The United Nations Administrative Tribunal did not on two occasions fail to exercise its jurisdiction or err on a question of law.⁴³
- In the advisory case of *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court asserted that The United States was obliged to enter into an arbitration under the Headquarters Agreement with the United Nations concerning the Palestine Liberation Organisation Office in New York.⁴⁴
- In the *Privileges and Immunity* case, the Court went on to note that the Convention on the Privileges and Immunities of the United Nations was applicable to a particular person as an officer of the sub-Commission on the Prevention of Discrimination and Protection of Minorities.⁴⁵
- In the *Western Sahara* case, the Court determined that at the time of colonisation by Spain, the Western Sahara was not a territory belonging to no one.⁴⁶

In the more recent cases, the Court addressed the question with different approaches. In the case of *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, the Court addressed the question despite the fact that the question was not properly formulated.⁴⁷ As

⁴¹ Ibid.

⁴² Sir Kenneth Keith, 'The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections' (1996) *Australian Yearbook of International Law*, 48.

⁴³ *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep, 166 and *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal (Advisory Opinion)* [1987] ICJ Rep 18.

⁴⁴ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1988] ICJ Rep 12.

⁴⁵ *Privileges and Immunities (Advisory Opinion)* [1989] ICJ Rep 177.

⁴⁶ *Western Sahara* (n 32) 12.

⁴⁷ The Court went on to note that "such questions should be asked in neutral terms rather than assuming conclusions of law that are in dispute. They should not include reasoning or argument". See *Advisory Opinion on the Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development (Advisory Opinion)* [2019] ICJ Rep 62.

for the case of *Wall*, the Court extrapolated that Israel's construction of the wall in the Occupied Palestine goes against international law, however, it stressed that such inference must be considered in the broader context since all parties have taken illegal action throughout the conflict.⁴⁸ The Court also ever found a compelling reason to decline the request by WHO in the *Nuclear Weapon* case, citing that the question fell outside the scope of the requesting organisation's activities.⁴⁹

It is worth anticipating whether the Court will answer the binary question with a 'yes' or 'no'. If the Court acknowledges that the right to strike is protected under Convention No. 87, that will signify that the Court interpret the convention beyond what was intended by the drafters as provided in the *travaux préparatoires*. Conversely, if the Court determines that Convention No. 87 does not safeguard the right to strike, the opinion must also delineate which labour instrument does or shall protect this right, given that the right to strike is recognised as a fundamental right under the International Covenant on Economic, Social, and Cultural Rights.⁵⁰

In addition to the aforementioned possibilities, chances are the Court will neither affirmatively nor negatively respond to the question presented. As the principal judicial organ of the UN, the Court will maximise its competence to help interpret Convention No. 87 in particular and develop international law in general. The possibilities for the Court to reformulate the question is also wide open since it is not bound to adhere to the precise terms of the question presented before it.⁵¹ Whatever the outcomes of this proceeding may be, the Court's response will be important to the development of the right to strike saga.

It is interesting to look forward to the implication of the Court's response to ILO's request as this is the first time ILO activate the mechanism under Article 37(1) of its constitution. We need to wait and see how ILO will navigate its internal mechanism after the result from the Court is out, and how the final policy concerning the right to strike will be adopted.

V. CONCLUSION

From the aforementioned analysis, several aspects of the request for advisory opinion by the GB have been identified. First, with regard to the authority of the GB to request an advisory opinion, it is undeniable that the GB is authorised to exercise

⁴⁸*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 162.

⁴⁹*Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 1996, 31.

⁵⁰International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8(1)d.

⁵¹Christopher Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice' in Giorgio Gaja and Jenny Grote Stoutenburg (ed), *Enhancing the Rule of Law through International Court of Justice* (Brill Nijhoff, 2014) 63, 65.

the mechanism under Article 37(1) of the ILO Constitution. However, the disproportionality issue of the GB members compared to the ILO membership might be a point of consideration as to whether it is appropriate for the GB to decide on the matter that may affect all members of ILO.

Second, referral to the Court might be necessary but not necessarily the most effective avenue to resolve the dispute since there is still uncertain implication from the Court's outcomes. Internal mechanism within ILO should be the primary mechanism to resolve the dispute within ILO.

Third, there are countless possibilities that can be anticipated from the Court's response to the request. From jurisdictional aspect, although the legal basis and authorisation give rise to the Court's jurisdiction, but the Court can still exercise its discretion not to render an opinion if it finds compelling reasons to do so. As for the merits of the case, the Court might answer the binary question as it is or modify the question and interpret the Convention No. 87 based on its expertise. Among the many possibilities of the outcomes, the Court's response will be important to the development of the right to strike saga.

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DIPLOMACY THROUGH ROVING AMBASSADORS: GENERAL OVERVIEW AND INDONESIA'S PRACTICE

By :

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ABSTRACT

The appointment of a roving ambassador of Indonesia is a practice recognized in Indonesia's foreign relations laws. A roving ambassador may be appointed by the President of the Republic of Indonesia in order to address a specific domain or task in the field of diplomatic assignments. In its practice, the appointment of a roving ambassador is one of several options available for the President to choose in relation to a specific handling of a certain issue within foreign relations and international law domains. The practice of such appointments in Indonesia has been found on several occasions. This article hopes to extensively elaborate the legal grounds for the establishment of roving ambassadors. By assessing past practices in Indonesia and comparing exercises in other countries, this article also attempts to provide an analytical review of the duties and responsibilities of roving ambassadors of Indonesia. Apart from an analysis on national laws regarding roving ambassadors, international law discourses on diplomatic law norms related to roving ambassadors are reviewed as well to add more depth to this article.

Key words: roving ambassador, foreign relations, diplomatic law, Indonesia

A. INTRODUCTION

Indonesia nationally recognizes the practice of appointing a roving ambassador within the realm of its foreign relations. Appointing an ambassador as practiced by a state is not a new policy. Sending representatives of a state to another state is a practice known since three thousand years before the current time.² Young identified this practice to be traceable towards the ancient practice of the Greek cities.³ Noting the centuries-long practice of appointing representatives by a state to another state, it can be noted that there is a special character as to how diplomatic laws work. Their norms have become prevalent and in certain cases authoritative for a particular situation.

In this case, diplomatic laws may primarily refer to the Vienna Convention on Diplomatic Relations ("VCDR"), apart from other sources. The norms in VCDR have become the law in the earlier years in which there were many cases of national courts

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² Eileen Young, "The development of the law of diplomatic relations." *British Yearbook of International Law* 40 (1964): 141.

³ *Ibid.*

referring to those norms so as to lay the legal foundation of their decisions.⁴ These practices occurred even when the states of those national courts themselves were not yet a Contracting Party to the convention.

The VCDR itself uses the ambassador term to refer to a head of mission, besides other class names for different contexts. "Head of the mission" is a term used in the VCDR and is defined as someone charged by the sending State with the duty of acting in that capacity.⁵ A head of the mission is also categorized as the members of the mission (further categorized into members of the diplomatic staff, the administrative and technical staff, and the service staff).⁶ A diplomatic staff is then defined as staff of the mission who are given diplomatic ranks, while a diplomatic agent is a term used to refer to both the head of the mission and the diplomatic staff.⁷ These varying uses of terms help grasp the structure of a mission recognized in diplomatic laws, which would then create a further elaboration on how a head of mission is understood.

The term 'mission' itself is not separately defined in the VCDR. As practices show, missions refer to the whole categorizations of aspects of a state's representative in another state. Thus, the VCDR puts a distinct definition for a mission's premises. These premises are "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission".⁸ With the VCDR putting a particular corridor on how to define a mission and its head, the case of roving ambassadors might be treated in a different application of diplomatic laws.

Further, since missions as understood in the VCDR have all the elements of members and premises with all of their rights and obligations, the context of a roving ambassador may not be fully based on diplomatic law norms as mentioned in the VCDR. The head of mission in the VCDR context, for instance, is divided into three different classes.⁹ The division is as follows.

No.	Class of Heads of Missions	Accreditation
1.	ambassadors or nuncios	Heads of State, and other heads of mission of equivalent rank
2.	envoys, ministers and internuncios	Heads of State
3.	<i>chargés d'affaires</i>	Ministers for Foreign Affairs

⁴ Eileen Denza, *Diplomatic law: commentary on the Vienna convention on diplomatic relations* (Oxford University Press, 2016), 5.

⁵ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), Art. 1(a).

⁶ *Ibid.*, Art. 1(b) and Art. 1(c).

⁷ *Ibid.*, Art. 1(d) and Art. 1(e).

⁸ *Ibid.*, Art. 1(i).

⁹ *Ibid.*, Art. 14.

By identifying the classifications above, this article hopes to locate the roles and duties of roving ambassadors, particularly those from Indonesia. Roving ambassadors are also sometimes called ambassadors-at-large, depending on which state practices an *ad hoc* diplomacy.¹⁰ It is differentiated from those of diplomacy conducted for permanent purposes, such as embassies as known in a more general setting. In addition, a roving ambassador may be defined as a special envoy with special tasks. These tasks include but are not limited to visiting a number of countries, usually not necessarily within the same region.¹¹

The reasoning of appointing roving ambassadors develops over time. Previously, a roving ambassador may be appointed by a new government of a state to explain its policies because of a suspicion of the incumbent resident ambassadors.¹² This was an action taken, despite whatever its political reasoning, to execute a particular task. Therefore, a particularity is an important aspect of roving ambassador contexts. This article will further elaborate more reasonings and characteristics of a roving ambassador as a person tasked with a special duty within diplomatic law realms. Furthermore, the case of Indonesia will be reviewed for identifying the practice of roving ambassador appointments in Indonesia.

B. AD-HOC DIPLOMACY AND ELEMENTS OF PARTICULARITY IN ROVING AMBASSADORS

In the 9th session of the International Law Commission held at the Palais des Nations, Geneva (23 April to 29 April 1957), a meeting was conducted to discuss, among others, the diplomatic intercourse and immunities in the United Nations ecosystem and the codification of such into a law.¹³ This meeting also mentioned a rising new practice of diplomatic activities since the First World War, that is roving or *ad hoc* diplomacy.¹⁴ This development started and later was regarded as a new form of diplomacy that met the demand at the time. A roving envoy, for such a case, might take visits to a series of states in turn.¹⁵

It is no surprise that a need to appoint roving ambassadors is probable for a state who is attempting to execute a special task. Dating back as far as 1911, a practice of appointing roving ambassadors can be seen by the French Government at the time. The French Government felt the need to negotiate with both the Ottomans and the Senoussi, thus commissioning M. Bonnel de Mezières, a senior French official, to contact the Senoussi Order. The appointment is considered as equivalent to those of

¹⁰ Ad hoc diplomacy can be defined as “ term which is sometimes used to refer to diplomacy conducted by intermittent or sporadic means, such as a roving ambassador or a special mission. It is therefore to be distinguished from the conduct of diplomacy through resident and permanent missions”. See further G. R. Berridge and Alan James, *A Dictionary of Diplomacy*, 2nd Edition (UK: Antony Rowe Ltd, Chippenham and Eastbourne, 2003), 3.

¹¹ *Ibid.*, 234.

¹² *Ibid.*

¹³ United Nations, *Yearbook of the International Law Commission: Summary records of the ninth session*, Vol. 1 (23 April–28 June 1957) (UN: New York, 1957), 2

¹⁴ *Ibid.*, 3.

¹⁵ *Ibid.*, 199.

roving ambassadors due to the existence of a special mandate given within foreign relations contexts.¹⁶

This article finds several key applications on how these ad-hoc and particularity elements of roving ambassadors are to be implemented by states. Roving ambassadors are authorized for diplomatic task purposes, not consular ones. This relates also to the classification of heads of consular posts as well as explained in the Vienna Convention on Consular Relations ("**VCCR**"). The VCCR categorizes heads of consular posts, unlike the VCDR, into four classes:¹⁷

No.	Class of Consular Posts
1.	consuls-general
2.	consuls
3.	vice-consuls
4.	consular agents

The VCCR does not put an ambassador-level class for consular post contexts. Further, it uses the term 'post' as opposed to 'missions' as mentioned in the VCDR. This article sees this differentiation as a result of the different exercise of functions held by diplomatic missions and consular posts, although consular functions are also exercised by diplomatic missions in accordance with the VCCR provisions.¹⁸ The context of roving ambassadors' practices, as practices show, rely on the diplomatic relations between states, not the consular ones.

Further, noting back to forms of diplomacy, even though the element of permanence necessarily is attached to the exchange of permanent diplomatic missions and agents and thus results in the ambassador-level appointments of representatives by a state, the practice of roving ambassadors is intricately linked to the other form of diplomacy, i.e., ad-hoc diplomacy or non-permanent diplomacy. In a different setting than those of roving ambassadors, which is in mission contexts, practices also show that a temporary mission as an example of this form may be established for political or technical purposes.¹⁹ Here, there is a particularity element attached to this non-permanent form of diplomacy. However, Hardy notes that this practice must be distinguished from official representatives of a state at an *ad hoc* conference as convened by a government and from state representation in international organizations.²⁰

¹⁶ International Court of Justice, *Verbatim record of public sitting in the case Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (22 June 1993).

¹⁷ Vienna Convention on Consular Relations (Vienna, 24 April 1963) Art. 9.

¹⁸ *Ibid.*, Art. 3.

¹⁹ Michael James Langley Hardy, *Modern diplomatic law*. Vol. 9 (Manchester University Press, 1968), 3.

²⁰ *Ibid.*

The appointment of roving ambassadors, therefore, refers to the sources of diplomatic law as the basis of implementation, especially in modern contexts. The very foundation of such a case dates back again the need of states in the promotion of friendly relations among nations, apart from the maintenance of international peace and security.²¹ The very core of promoting relations among states is mainly not to benefit individuals. It is done to ensure the efficient performance of the functions of diplomatic missions as representing states.²² Not giving a space for these diplomatic law rules simply breaks the pillars of relations among states.

The idea of diplomatic law, as a result, crystallizes and then comes into operation when a state agrees to accept another state's representative.²³ An exception may be made should a state consistently maintains a contrary practice.²⁴ Although the VCDR contains codifications of rules with an *erga omnes* character, other customary international law norms are not to be excluded in governing questions not expressly regulated in the VCDR.²⁵ For such, the notion of diplomatic relations in the VCDR context is the appointment of a permanent mission with the appointment of heads of missions. The practicality of roving ambassadors, therefore, is of a distinctive character.

C. PRACTICES OF ROVING AMBASSADORS

The basis for appointing roving ambassadors remains heavily in executive nature. The US, for instance, through its constitution set forth that the executive power shall be vested in the president.²⁶ The term ambassador at large²⁷ is also a widespread practice in the US. Ambassadors at large are, as defined by Turčinović, "highest profile diplomats" or a minister accredited to represent a country in the international community.²⁸ They are not appointed to special diplomatic positions, but are rather tasked with a special mission.²⁹ It also may refer to a minister of the highest rank that is not accredited to any particular foreign government or sovereign.³⁰ The primary reason for appointing roving ambassadors is to establish a distinct body of a specific institute of diplomatic law that is different from those governing resident diplomacy ambassadors.³¹

Practices show that ambassadors at large appointments rely on the specificities of foreign policy needs in a state. For example in the Netherlands Ministry of Foreign Affairs, ambassadors-at-large represent the public face of the Dutch foreign policy

²¹ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), Preamble.

²² *Ibid.*

²³ Michael James Langley Hardy, *Modern diplomatic law*. Vol. 9 (Manchester University Press, 1968), 4.

²⁴ *Ibid.*, 6.

²⁵ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), Preamble.

²⁶ United States of America, Constitution of the United States of America, Art. II, Section 1.

²⁷ A term used to refer to a high ranking official representing a state for special tasks, which this article describes as equivalent to those of roving ambassadors.

²⁸ Filip Turčinović, "Some Specificities of the Ambassador at Large Diplomatic Institute," *American International Journal of Social Science*. Vol. 5, No. 3 (2016), 42.

²⁹ *Ibid.*

³⁰ Merriam-Webster, "Ambassador-at-large," accessed on 30 June 2024, <https://www.merriam-webster.com/dictionary/ambassador-at-large>.

³¹ Filip Turčinović, "Some Specificities of the Ambassador at Large Diplomatic Institute," *American International Journal of Social Science*. Vol. 5, No. 3 (2016), 46.

works.³² They also take on the role for advisory purposes as well as advocacy roles.³³ Moreover, ambassadors-at-large are of high-level officials, though not embedded with decision-making authorities as directorates/units within the Dutch foreign affairs ministry will have more roles.³⁴ Due to the cross-issues nature of certain foreign policy priorities of the Dutch, it is possible to have the position of an ambassador-at-large with similar focus held by another department, although with different emphasis. This case can be seen with the appointment of the Dutch Ambassador-at-Large for Cyber Affairs pursuing an advocacy role in relation to the work of a cyber unit that possesses a decision-making role.³⁵ In the US, an appointment of a Coordinator for Counterterrorism can be made with the status and rank of an ambassador-at-large. This position is authorized to oversee issues on preventing and countering threats to civilian security, including terrorism, mass atrocities, and violations of human rights and the rule of law.³⁶

On a separate occasion, it is also worth noting that ambassadors in diplomatic missions, heads of diplomatic missions in virtue of their functions and without having to produce full powers are considered as representing their state.³⁷ That is the case if it is for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited.³⁸ Apart from that, representatives accredited by States to an international conference or to an international organization or one of its organs are also considered as representing their state in this context for the purpose of adopting the text of a treaty in that conference, organization or organ (also in virtue of their functions and without having to produce full powers).³⁹ In the case of treaties between States and international organizations or between international organizations, the following are considered as representing their State virtue of their functions and without having to produce full powers:⁴⁰

No.	Subjects considered as representing their State ⁴¹	Purpose
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³² Interview with the Netherlands Ministry of Foreign Affairs, a working visit by the author to the Netherlands Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*), in Rijnstraat, Den Haag during the author's tenure for the Non-Degree Diplomatic Training Programme for Junior Diplomats from Indonesia held by The Clingendael Institute in Den Haag, Netherlands, 29 May 2024.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Coordinator for Counterterrorism was once held by Ambassador Nathan Alexander Sales from August 10, 2017 – January 20, 2021. His profile provides insights on the work of an ambassador-at-large in the US, and is accessible here: United States Congress, "Ambassador Nathan A. Sales," accessed on 30 June 2024, <https://www.congress.gov/116/meeting/house/109863/witnesses/HHRG-116-FA13-Bio-SalesN-20190724.pdf>.

³⁷ Vienna Convention on the Law of Treaties, 23 May 1969, Art. 7(2)(c).

³⁸ *Ibid.*

³⁹ *Ibid.*, Art. 7(2)(c).

⁴⁰ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. 21 March 1986, Art. 7(2).

⁴¹ In the context of the case of treaties between States and international organizations or between international organizations.

1.	Heads of State, Heads of Government and Ministers for Foreign Affairs	performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations
2.	representatives accredited by States to an international conference	adopting the text of a treaty between States and international organizations
3.	representatives accredited by States to an international organization or one of its organs	adopting the text of a treaty in that organization or organ
4.	heads of permanent missions to an international organization	adopting the text of a treaty between the accrediting States and that organization

Looking at these virtues, it is essential to locate the role of an ambassador-at-large or a roving ambassador in executing its role: is it legally based for an ambassador-at-large or a roving ambassador to be considered representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ? May an ambassador-at-large or a roving ambassador tasked for a specific issue, and not that of an international conference or to an international organization or one of its organs, be considered as representing their state virtue of their functions and without having to produce full powers for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty? Although these questions are not a focus of this article, it is worth commenting that they may have affected how roving ambassadors execute their special tasks.

Hence, the appointments of an ambassador-at-large or roving ambassadors are for functionalistic purposes: it is executed as an approach to reach functional attainment within a state's foreign affairs priority. As a high-ranking official appointed for a special duty within specific domains and characters of international affairs, a roving ambassador may have less essential capacity, but is still equipped with high-level capacity to accomplish dynamism of diplomatic relations within the international community contexts.⁴² This article will further elaborate such a practice within Indonesia's contexts.

⁴² Filip Turčinović, "Some Specificities of the Ambassador at Large Diplomatic Institute," *American International Journal of Social Science*. Vol. 5, No. 3 (2016), 47.

D. ROVING AMBASSADORS IN INDONESIA

Indonesia enacted its Law Number 37 of 1999 on Foreign Relations on 14 September 1999 ("**Law 37/1999**") as the primary basis for all of its foreign relations practice areas.⁴³ This Law 37/1999 provides a central point of focus in which the Minister of Foreign Affairs executes a part of the general functions of government and development in the field of foreign relations and foreign policy.⁴⁴ Further, the Minister of Foreign Affairs coordinates the conduct of foreign relations and the implementation of foreign policy.⁴⁵ Such coordination for duties within the tasks borne by the Ministry of Foreign Affairs is recognized by Law 37/1999 as a means in ensuring unity in the administration of foreign relations and implementation of foreign policy.⁴⁶

Law 37/1999 is currently an 'umbrella' legislation for all issues related to foreign relations and foreign policy agenda as well as practices of Indonesia. Thus, it regulates quite extensively on the aspects of institutional elements, appointments of heads of missions and consular posts, and foreign relations administration. It also progressively regulates the appointment of high-ranking officials at ambassador level. Article 30 of Law 37/1999 rules that the President may appoint other officials at Ambassador level to perform diplomatic duties in special fields.⁴⁷ Appointed by a presidential decree⁴⁸, these ambassador-level officials are necessary to address certain issues in foreign relations.⁴⁹

Indonesia mimics this provision by reflecting from practices made by other countries. A roving ambassador, in this regard, is an example of ambassador-level officials, which means that Indonesia recognizes other types of ambassador-level officials so long as to perform diplomatic duties in special fields as appointed later by presidential decrees. The idea of roving ambassadors in Indonesia's case is to put an emphasized attention to the importance of the problem in question.

The problems require a resolute official who addresses such problems in a particular setting. The legal reasoning behind this provision of putting ambassador-level officials is to facilitate relations with parties in other countries or in international organizations at the highest possible level.⁵⁰ Law 37/1999 puts forward several examples of these special duties borne by roving ambassadors, among other things, such as maritime sectors, the Non-Aligned Movement (NAM), and the Asia-Pacific Economic Cooperation (APEC).⁵¹

Do note that Law 37/1999 respectively mentions a specific issue (maritime sectors), a grouping of states (NAM), and an inter-governmental forum (APEC) as examples of sectors in which roving ambassadors can be assigned to. This shows that the practice of appointing roving ambassadors in Indonesia is not limited only to organizations, but also issues that may transcend beyond the duties borne by several ministries. This reflects the practice of the Dutch in which advisory-advocacy roles of

⁴³ Republic of Indonesia, Law No. 37 of 1999 on Foreign Relations, 14 September 1999.

⁴⁴ *Ibid.*, Art. 28(1).

⁴⁵ *Ibid.*, Art. 28(2).

⁴⁶ *Ibid.*, Elucidation of Art. 28(2).

⁴⁷ *Ibid.*, Art. 30(1).

⁴⁸ *Ibid.*, Art. 30(2).

⁴⁹ *Ibid.*, Elucidation of Art. 30.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

roving ambassadors go hand in hand with the decision-making roles of departments/units within the Ministry of Foreign Affairs.

Although expressly stated in its foreign relations law, Indonesia does not often utilize roving ambassadors as a means to address recurring issues. One practice variation is found dating as far as 1993. Soeharto, then-President of Indonesia, issues Presidential Decree No. 18 of 1993 on the Establishment of a Working Group to Assist the President in Implementing the Decisions of the 10th High Level Conference of the Non-Aligned Movement. The decree was issued on 23 February 1993.⁵² In this decree, the President forms a working group to help him, in his capacity as the Chair of the Non-Aligned Movement, consisting of a Steering Committee, Economic Experts, Executive Body of the Chair of the Non-Aligned Movement, and Roving Ambassadors.⁵³ The extensive description of each role of the working group members is as follows:

No.	Working Group Units	Members ⁵⁴	Duty
1.	Steering Committee	- President, as Chair; - Coordinating Minister for Economics, Finance, Industry and Development Supervision, as member; - Coordinating Minister for Industry and Trade Affairs, as member; - Minister of Foreign Affairs, as member; - Minister/State Secretary, as member; - Chair of the Expert Team Economics, as a member; - Head of the Executive	a. Describe the political instructions and direction given by the President as Chair of the Non-Aligned Movement; b. Submit suggestions to the President for implementing the decisions of the 10th High Level Conference of the Non-Aligned Movement.

⁵² Republic of Indonesia, Presidential Decree Number 18 of 1993 on the Establishment of a Working Group to Assist the President in Implementing the Decisions of the 10th High Level Conference of the Non-Aligned Movement. 23 February 1993.

⁵³ *Ibid.*, 1st *Dictum*.

⁵⁴ The composition of the members was later revised by the Presidential Decree Number 89 of 1993 on the Revision of Presidential Decree Number 18 of 1993 on the Establishment of a Working Group to Assist the President in Implementing the Decisions of the 10th High Level Conference of the Non-Aligned Movement, 1 October 1993. An additional member was added, that was the Coordinating Minister for Industry and Trade Affairs, as a result of the establishment of a new cabinet (*Kabinet Pembangunan VI*) as stated in Presidential Decree No. 96/M of 1993, 17 March 1993.

		Body, Chair of the Non-Aligned Movement, as a member.	
2.	Economic Expert	- The Economic Expert Team is led by a Chairman who is appointed and dismissed by Presidential Decree. - Membership of the Economic Expert Team is further determined by the Team Leader	formulating recommendations regarding the conception and steps that need to be taken in the field of economic cooperation in order to implement the decisions of the 10th High Level Conference of the Non-Aligned Movement.
3.	Executive Body of the Chair of the Non-Aligned Movement	- The Executive Body for the Chair of the Non-Aligned Movement is a functional work unit led by a Head and assisted by a Deputy Head of the Agency and a group of staff as needed. - The Head and Deputy Head of the Executive Body of the Chair of the Non-Aligned Movement are appointed and dismissed by Presidential Decree. - The staff group is appointed and dismissed by Decree of the Minister of Foreign Affairs. - Head of the Executive Body for the Chair of the Non-Aligned Movement is assisted by a Technical Committee.	- coordinating the implementation of all instructions, political direction and activities determined by the President as Chair of the Non-Aligned Movement in the context of implementing the decisions of the 10th High Level Conference of the Non-Aligned Movement. - Technical Committee is led by the Head of the Executive Body for the Chair of the Non-Aligned Movement and consists of Echelon I Officials and other High-ranking Officials from various relevant Government Departments and Agencies. 3. The formation of a Technical Committee is determined by a Decree of the Minister/State Secretary. The formation of a Technical Committee is determined by a Decree of the Minister/State Secretary.
4.	Roving Ambassadors	- Roving Ambassadors respectively for the regions of Africa, Asia including the Middle	- representing and implementing all policies outlined by the President as Chair of the Non-Aligned Movement.

		East, America including the Caribbean/Latin America, and Europe.	- In carrying out his duties, the Roving Ambassador shall pay attention to the technical instructions of the Minister of Foreign Affairs.
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From this practice, it can be noted that roving ambassadors consider not only the technical instructions of the Minister of Foreign Affairs, they also carry out their duties in the capacity as a member of the Working Group that must adhere to the work governance enacted by the Head of the Steering Committee.⁵⁵ As a result, though being a high-ranking official with an ambassadorial rank level that may represent Indonesia as a state, a roving ambassador in the context of this working group on the non-aligned movement must also apply the principles of coordination, integration and synchronization as best as possible.⁵⁶

Further, roving ambassadors in this practice case must also execute their duties based on other instructions given by the President as Chair of the Non-Aligned Movement.⁵⁷ This Indonesian practice of assigning roving ambassadors as a part of a working group displays the elements of particularity and *ad hoc* as known in other countries, in which once the tasks are completed, that is when Indonesia no longer serves as the chair in the case, roving ambassadors' role will surcease, and so will the whole working group. This, as this article elaborated previously, displays the *ad hoc* element of a roving ambassador.

Still in the case of the Presidential Decree Number 18 of 1993, the work budget of roving ambassadors, alongside the Executive Body, would be borne by the budget of the Ministry of Foreign Affairs.⁵⁸ Roving ambassadors in this working group would also be authorized for a specified time duration, that is between 1992–1995 as it is the duration in which the President acted as the chair.⁵⁹ Further, this decree is legally based on Indonesia's Constitution of its Article 4(1).⁶⁰ It means that the appointment of roving ambassadors in Indonesia is vested in the power of the executive, i.e. the governing powers of the president.⁶¹ The governing power is held by the president according to the Constitution.⁶²

As a consequence, Indonesia's roving ambassadors perform their duties within the corridors of the President's governing powers. Reflecting from the 10th High Level Conference of the Non-Aligned Movement case previously, roving ambassadors shall also consider the technical instructions of the Minister of Foreign Affairs. From the practice, it is to be noted too that the appointment of roving ambassadors for the

⁵⁵ *Ibid.*, 7th *Dictum*.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, 8th *Dictum*.

⁵⁹ *Ibid.*, Consideration letter a.

⁶⁰ Art. 4(1) rules that: "The President of the Republic of Indonesia shall hold the governing powers according to the Constitution." See further Republic of Indonesia, 1945 *Constitution of the Republic of Indonesia*, Original/Pre-Amendment, Art. 4(1).

⁶¹ *Ibid.*

⁶² *Ibid.*

preparation of the Non-Aligned Movement conference was done before the Presidential Decree No. 18 of 1993 itself was issued. On the date of 14 November 1992, President Soeharto appointed four Roving Ambassadors as well as a Senior Advisor to the Minister of Foreign Affairs. They were all given the task of assisting the President as Chair of the Non-Aligned Movement (NAM). The four traveling ambassadors are Alamsyah Ratu Perwiranegara who is in charge of Asia and the Middle East, Sayidiman Suryohadiprodo for Africa, Achmad Tahir for Europe, and Hasnan Habib for America. Meanwhile, Nana Sutrisna was appointed as Senior Advisor to the Minister of Foreign Affairs with the task of coordinating the implementation of all the President's policies as Chair of the Non-Aligned Movement for the next three years.⁶³ After the appointment, then Soeharto as the then-President issued the Presidential Decree No. 18 of 1993 to further categorize the works of the appointed roving ambassadors together under the governance of the Working Group to Assist the President in Implementing the Decisions of the 10th High Level Conference of the Non-Aligned Movement.⁶⁴

This practice shows that appointing roving ambassadors in Indonesia does not necessarily require a working group scheme with other ministries/institutions. Roving ambassadors may be appointed by the president to help any on-going special assignment that cannot only be supported by the current foreign service workforce. The case also displayed the practice occurred in Indonesia in which a roving ambassador may be appointed to a high-ranking official who currently does not have an ambassadorial-level rank. In the case of the 10th High Level Conference of the Non-Aligned Movement previously, it can be observed that several of the appointed roving ambassadors were former resident ambassadors.

In addition, a roving ambassador may also be appointed from an incumbent, currently on duty resident ambassador. This practice was done in early 2020, when the Minister of Foreign Affairs appointed a Roving Ambassador to the Pacific, H.E. Tantowi Yahya, who at the time was Indonesia's Ambassador to New Zealand.⁶⁵ This was aimed to make Indonesia's presence increasingly felt in the Pacific. Duties include strengthening links between economic, political, and people-to-people contacts among the regions. This move was also made as an approach to develop Indonesia's Indo-Pacific Outlook as well as the Pacific Elevation strategy.⁶⁶

Indonesia's practice of assigning an additional task to one of its active resident ambassadors can be traced back to the norms of diplomatic relations as regulated under the VCDR. A diplomatic mission, in this case the Indonesian embassy in Wellington, New Zealand (accredited to Samoa, the Kingdom of Tonga, The Cook Islands and Niue), must adhere to diplomatic laws applicable. Since the VCDR sets

⁶³ Nazaruddin Sjamsuddin (ed.), *Jejak Langkah Pak Harto 21 Maret 1988 – 11 Maret 1993* (Jakarta, PT Citra Kharisma Bunda Jakarta, 2003), 595.

⁶⁴ Republic of Indonesia, Presidential Decree Number 18 of 1993 on the Establishment of a Working Group to Assist the President in Implementing the Decisions of the 10th High Level Conference of the Non-Aligned Movement. 23 February 1993.

⁶⁵ Ministry of Foreign Affairs of the Republic of Indonesia, Annual Press Statement of the Minister for Foreign Affairs of the Republic of Indonesia, 2020, <https://kemlu.go.id/pretorid/news/4188/pernyataan-pers-tahunanmenteri-luar-negeri-tahun-2020>.

⁶⁶ RNZ Pacific, "Indonesia appoints new roving ambassador in the Pacific," 22 January 2020, accessed on 30 June 2024, <https://www.rnz.co.nz/international/pacific-news/407834/indonesia-appoints-new-roving-ambassador-in-the-pacific>.

forth that the receiving State shall accord full facilities for the performance of the functions of the mission⁶⁷, this article argues that the New Zealand government must also be notified of the additional role of Indonesia's ambassador to New Zealand as Indonesia's Roving Ambassador in the Pacific. This is due to the fact that the duty of Indonesia's Roving Ambassador in the Pacific is to strengthen relations with leaders of several countries in the Pacific region.⁶⁸ Although not expressly mentioned as to whether the scope of the work of a roving ambassador also refers to the provisions of the VCDR, it must be taken into consideration that Indonesia's Roving Ambassador in the Pacific performs its duties while also serving as the ambassador of Indonesia to New Zealand. Thus, there are cross-border aspects of the work of Indonesia's Roving Ambassador in the Pacific.

This also relates to the workload of the Indonesian embassy itself in Wellington that must also support the duty of the ambassador as Indonesia's Roving Ambassador in the Pacific. In accordance with the character of the Indonesian Embassy in Wellington's accreditation area, the priority of implementing the Indonesian Embassy in Wellington's diplomacy is focused on sovereignty and national diplomacy, and is supported by economic diplomacy, cultural diplomacy and protection diplomacy. This became a factor in the implementation of the Indonesian Embassy in Wellington's diplomacy, namely the appointment of the Indonesian Ambassador to New Zealand as a Roving Ambassador to the Pacific Region. The assignment as a Roving Ambassador is part of the Republic of Indonesia's foreign policy. in the Pacific region is entitled Pacific Elevation, and is intended as Indonesia's contribution to regional peace, as well as in an effort to protect Indonesia's territorial integrity.⁶⁹

This article is aware that the appointment of a roving ambassador is different from those of a resident ambassador who may be accredited as the case may be to more than one State, after it has given due notification to the receiving States concerned, unless there is express objection by any of the receiving States.⁷⁰ This article observes that the *ad hoc* and particularity as well as non-permanence elements of a roving ambassador appointment may not be fully based on the VCDR rules. However, it should be affirmed, as expressly stated in the VCDR, that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the VCDR itself.⁷¹ Since Indonesia, in this context, regulates the appointment of roving ambassadors based on its foreign relations law, i.e. Law 37/1999 that was also enacted based on the legal basis of the VCDR⁷², diplomatic law norms under the VCDR must be considered by Indonesia while

⁶⁷ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), Art. 25.

⁶⁸ Embassy of the Republic of Indonesia in Wellington, *Laporan Kinerja KBRI Wellington 2020*, <https://kemlu.go.id/download/L1NoYXJlZCUyMERvY3VtZW50cy9MS0olMjBlQlJlJTltwV2VsbGluZ3RvbiUyMDIwMjAucGRm>, 3.

⁶⁹ *Ibid.*, 1.

⁷⁰ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), Art. 5(1).

⁷¹ *Ibid.*, Preamble.

⁷² Indonesia ratifies the VCDR through the enactment of law. See further Republic of Indonesia, Law No. 1 of 1982 on the Ratification of the Vienna Convention on Diplomatic Relations and Optional Protocol to The Vienna Convention on Diplomatic Relations Concerning Acquisition of Nationality, 1961 and the Ratification of the Vienna Convention on Consular Relations and Optional Protocol to The Vienna Convention on Consular Relations Concerning Acquisition of Nationality, 1963.

appointing roving ambassadors. Further, since the context of Indonesia's Roving Ambassador in the Pacific duty was given to an active resident ambassador, this article sees a mixed form of diplomatic law norms regulated expressly under the VCDR and customary international law norms governing questions not regulated by the VCDR, which may be the case for roving ambassador appointments on active/incumbent resident ambassadors.

As such, appointing a roving ambassador in Indonesia is primarily to address certain issues in foreign relations, and not to clarify issues of foreign relations under the regime of permanent diplomatic missions (as regulated under the VCDR). In the context of Indonesia's Roving Ambassador in the Pacific, this article believes that there must be a hybrid approach taken to address the problems that may arise from such an appointment.⁷³ This practice must adhere to the notion of the VCDR preamble, that is to ensure efficient performance of the functions of diplomatic missions as representing States while also contributing to the development of friendly relations among nations, irrespective of their differing constitutional and social systems.⁷⁴

This article would also like to refer to another case of Indonesia's roving ambassador appointment practice, i.e., the appointment of H.E. Dr. Hasjim Djalal as the Ambassador-at-large for the Law of the Sea and Maritime Affairs between 1994–2000⁷⁵ during the administrations of President Soeharto and President Habibie. This is a practice of appointing a roving ambassador for a specific cause or issue. Further, this article finds that Indonesia's practice of appointing roving ambassadors dates back to the President Soekarno administration, in which H.E. Supeni Pudjobuntoro was appointed as a roving ambassador for several regions.

In her article, Wulandari explained that Supeni became one of President Soekarno's trusted people and one of the positions that is synonymous with her is the Indonesian Roving Ambassador or *ad hoc* diplomat⁷⁶, whose job is to travel around or visit destination countries for foreign political purposes.⁷⁷ Previously, Supeni's appointment as Extraordinary and Plenipotentiary Ambassador of the Republic of Indonesia to the US was marked by the issuance of Presidential Decree

⁷³ This is due especially since this practice cannot also be based on the Convention on Special Missions of 8 December 1969 that Indonesia has also ratified through Law No. 2 of 1982 on the Ratification of the Convention on Special Missions, New York, 1969. It can also be observed that both the VCDR and VCCR were ratified under a jointly approach in the same law, while the Convention on Special Missions was ratified in a separate different law, thus it may indicate the different elements of both categories (permanent diplomatic missions *vis-à-vis* non-permanent diplomacy practice). This Convention defines a "special mission" as a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.

⁷⁴ Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), Preamble.

⁷⁵ Hasjim Djalal, "25 years since the adoption of UNCLOS: Reflecting on the past and the way forward," *United Nations University*, accessed on 30 June 2024, https://www.un.org/depts/los/convention_agreements/convention_25years/08doalos_unu_2007.pdf.

⁷⁶ Ayu Wulandari, "Menjadi Istri Diplomat: Hurustiati Soebandrio Dalam Membentuk Citra Indonesia Di Inggris 1947-1954," *Handep: Jurnal Sejarah dan Budaya* 5, no. 1 (2021): 1-25.

⁷⁷ Ananda Putri Salsa Bella and Arif Subekti, "Kiprah Supeni Pudjobuntoro di Bidang Politik Tahun 1945–1963 sebagai Narasim Perempuan dalam Pembelajaran Sejarah," *Jurnal Pendidikan Sejarah Indonesia*, Vol. 6 No. 2 (2023): 419–436.

Number 553/M/1960⁷⁸, she was officially assigned starting September 18 1960. Not yet at her post, the United States had parties who were trying to thwart Supeni's departure as ambassador.⁷⁹ In the end, she submitted a request to resign to avoid other problems arising.⁸⁰ President Soekarno did not immediately grant this request for four months, then the President again offered him the position of Indonesian Roving Ambassador. This marked the beginning of Supeni's career as Indonesian Ambassador with a term of service starting from September 18, 1960, replacing the date of his failed assignment as Ambassador to the US.⁸¹

Here, it can be noted that a roving ambassador position may be given to a high-ranking officer for several regions (not having to be necessarily expressly defined). The Indonesian practices of appointing roving ambassadors are made according to the needs at the time, as well as to the international dynamics at the time. Therefore, appointing roving ambassadors may be quite a last resort for addressing several key foreign relations/foreign policy issues, though it may be taken as an action to complement already existing mechanisms under the Ministry of Foreign Affairs governance.

E. CONCLUSION

Article 30 of Indonesia's Law 37/1999 rules that the President may appoint officials at ambassador level to perform diplomatic duties in special tasks or assignments. The appointment of a roving ambassador of Indonesia is a practice recognized in Indonesia's foreign relations laws. A roving ambassador may be appointed by the President of the Republic of Indonesia in order to address a specific domain or task in the field of diplomatic assignments. In its practice, the appointment of a roving ambassador is one of several options available for the President to choose in relation to a specific handling of a certain issue within foreign relations and international law domains.

The Indonesian case shows the practices of appointing roving ambassadors in a form of several categories: (a) a working group for a specific, expressly time-limited cause; (b) an active resident ambassador holding an additional task as a roving ambassador; (c) a roving ambassador appointment for a specific cause or issue not in a form of a working group with other institutions; and (d) a roving ambassador without expressly stated region/country designation areas.

As a result, this article concludes that there are several key applications on how ad-hoc and particularity elements of roving ambassadors are to be implemented by states. First, roving ambassadors are authorized for diplomatic task purposes, not consular ones. Second, the appointment of roving ambassadors refers to the sources of diplomatic law as the basis of implementation, especially in modern contexts. The very foundation also refers to the need of states in the promotion of friendly relations among nations in ensuring efficient performance of the functions of diplomatic missions as representing states, Third, the *ad hoc* and particularity as well as non-

⁷⁸ *Ibid.*

⁷⁹ BBC, "#TrenSosial: Dari KAA 1955, Supeni sukses jadi diplomat andalan Soekarno," 23 April 2025, accessed on 30 June 2024,

https://www.bbc.com/indonesia/majalah/2015/04/150422_trensosial_supeni_kaa.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

permanence elements of a roving ambassador appointment may not be fully based on the VCDR rules. However, it should be affirmed, as expressly stated in the VCDR, that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the VCDR itself.

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