2019 ILA-ASIL ASIA-PACIFIC RESEARCH FORUM

International Law and Emerging Powers: New Policy Challenges in the Asia-Pacific

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Welcome!

Dear Colleagues,

We warmly welcome you to the 2019 International Law Association (ILA) – American Society of International (ASIL) Asia-Pacific Research Forum in Taipei, Taiwan, Republic of China. The theme of the Research Forum is "International Law and Emerging Powers: New Policy Challenges in the Asia-Pacific."

This Research Forum provides an opportunity for international law stakeholders to explore the full range of international and transnational legal issues concerning the Asia-Pacific region. We hope you will enjoy the intellectual discussions with the distinguished guests and scholars from all over the world. Research Forum papers are available at the official website: http://csil.org.tw/2019-Research-Forum/.

Best Regards,

2019 ILA-ASIL Asia-Pacific Research Forum Organizing Committee

Summary of the Program

Friday, May 17	
08:40-12:00	**Registration** Conference Room, 14F
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10:20-12:00	**Panel 1:** *Indo-Pacific Strategy: Implications for Trade and Investment Law in Asia* Conference Room, 14F
12:00-13:20	**Lunch (by invitation only)** Conference Room, 14F
13:20-15:00	**Panel 2:** *International Dispute Settlement* Conference Room, 14F
15:00-15:20	**Coffee Break**
15:20-17:00	**Panel 3:** *India, ASEAN and the EU: Challenges to New Economic Agreements* Conference Room, 14F
18:30-20:30	**Dinner (by invitation only)** Shanghai Pavilion, Shangri-La's Far Eastern Plaza Hotel
Saturday, May 18	
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10:40-11:10	**Coffee Break**
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Program

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International Law and Emerging Powers:
New Policy Challenges in the Asia-Pacific

May 17-18, 2019

Howard Civil Service International House, Taipei, Taiwan, Republic of China
(公務人力發展學院福華國際文教會館)

Hosted by:
Chinese (Taiwan) Society of International Law –
Chinese (Taiwan) Branch of the International Law Association
(中華民國國際法學會) &
American Society of International Law – Law in the Pacific Rim Region Interest Group

Co-sponsored by:
Taiwanese Society of International Law (台灣國際法學會)
Research Center for International Legal Studies, National Chengchi University
(國立政治大學國際事務學院國際法學研究中心) &
Center for International Law, National Taipei University
(國立臺北大學法律學院國際法研究中心)

Friday, May 17

08:40-09:00: Registration (與會者報到及領取資料), **Conference Room, 14F**

09:00-09:50: Opening Ceremony, Conference Room, 14F

- **Professor Nigel N. T. Li** (李念祖教授), President, Chinese (Taiwan) Society of International Law
- **Dr. Christopher Ward SC**, President, ILA
- **Professor Torsten Stein**, Treasurer, ILA & President, ILA-German Branch
- **Professor Gu Weixia**, Co-Chair, ASIL Law in the Pacific Rim Region Interest Group

Special Address:

- **President Ying-jeou Ma** (馬英九前總統), Former President of the Republic of China; Editor-in-Chief, Chinese (Taiwan) Yearbook of International Law and Affairs

Hungdah Chiu Lecture (丘宏達教授國際法講座)**:**

- **Dr. Christopher Ward SC**, President, ILA – The Common Language of International Law: Reflections from the Bar Table

09:50-10:20: Coffee Break

10:20-12:00: Panel 1 – Indo-Pacific Strategy: Implications for Trade and Investment Law in Asia, Conference Room, 14F

- **Karsten Nowrot & Emily Sipiorski**, University of Hamburg – (De-)Constitutionalization of International Investment Law?: Assessing Narratives from the Asia-Pacific
- **Jin Sheng**, National University of Singapore – Indo-Pacific Strategy vs. Belt and Road Initiative: Evolution of Development Finance and Competing Development Strategies

- **Chien-Huei Wu** (吳建輝教授), Academia Sinica, Taiwan – Economic Cooperation in Troubled Relationships
- **Soo-hyun Lee**, The Asan Institute for Policy Studies, South Korea – Fair and Equitable Treatment in the International Investment Regime of the Democratic People's Republic of Korea
- Moderator: **Jacques deLisle**, University of Pennsylvania

12:00-13:20: Lunch (by invitation only), Conference Room, 14F

13:20-15:00: Panel 2 – International Dispute Settlement, Conference Room, 14F

- **Brad R. Roth**, Wayne State University – International Legal Personality without Recognition of Statehood: Establishing Taiwan's Status in the Face of China's Continuing Rise
- **Peter Tzeng**, Foley Hoag LLP – Fisheries Review Panels: Lessons from Ecuador v. Commission (2018) and Russian Federation v. Commission (2013)
- **Chie Sato**, Meiji University – Effective Protection of Marine Living Resources in Asia Pacific Region – What Can We Learn from the EU Experience?
- **Richard L. Kilpatrick, Jr.**, Northeastern Illinois University – Sanctions Busting: North Korea's Deceptive Maritime Practices
- Moderator: **Chun-i Chen** (陳純一教授), National Chengchi University

15:20-17:00: Panel 3 – India, ASEAN and the EU: Challenges to New Economic Agreements, Conference Room, 14F

- **S.R. Subramanian**, Indian Institute of Technology – Investment Treaty Shopping in Asia: Recourse to Taiwan-India Bilateral Investment Agreement by Chinese Investors

- **Jerzy Menkes & Andżelika Kuźnar**, Warsaw School of Economics – EU-Japan Agreements: Content, Context and Implications
- **Gabriele Gagliani**, Bocconi University – The European Union and ASEAN Countries Trade Relations: "Building Blocks" or "Breaking Blocks"?
- **Intan Soeparna**, Airlangga University – ASEAN Investor-State Dispute Settlement: A New Challenge to ASEAN Dispute Settlement Mechanism
- Moderator: **Gu Weixia**, University of Hong Kong

18:30-20:30: Dinner (by invitation only)

Shanghai Pavilion, Shangri-La's Far Eastern Plaza Hotel

(臺北香格里拉遠東國際大飯店上海醉月樓)

Saturday, May 18

(Parallel Sessions)

09:00-10:40: Panel 4A – South China Sea and Marine Resource Protection, Conference Room, 14F

- **Lan Ngoc Nguyen**, Utrecht University – Coastal States' Enforcement Power over Foreign Fishing Vessels in the South China Sea: Where Is the Line under International Law?
- **John Abrahamso**n, Sheltons-SITTI – Joint Development of Offshore Oil and Gas Resources in the South China Sea: The New Context to Resolve Broader Disputes following the South China Sea Arbitration
- **Pei-Lun Tsai** (蔡沛倫教授), National Taiwan Ocean University – Combating Environmental Crimes in the South China Sea

- **Agnes Chong**, University of Hong Kong – Environmental Protection of Areas Beyond National Jurisdiction (ABNJ) in the South China Sea
- Moderator: **Yann-huei Song** (宋燕輝教授), Academia Sinica, Taiwan

Concurrent with

09:00-10:40: Panel 4B – Global Trade Governance and the CPTPP, Room 101, 1F

- **Roberto Reyes Barrera**, Vrije Universiteit Brussel – The Strategic Trade Alliances within the Pacific Rim: The CPTPP and Other Trade Agreements between Asia-Pacific and the Americas
- **Kai-Chih Chang** (張愷致教授), Soochow University – Enforcing Anti-Corruption Regulations through Trade Agreement? The Anti-Corruption Chapter under CPTPP and USMCA
- **Eirini Kikarea**, University of Cambridge – Regulating State Capitalism in International Law
- **Chieh Lo** (羅傑律師), Chinese Arbitration Association, Taipei - Rethinking Investor-State Disputes: The Implications of the Surfeit Case for Taiwan's Accession to CPTPP
- Moderator: **Blake C.Y. Wang** (王震宇教授), National Taipei University

11:10-12:00: Keynote Speech, Conference Room, 14F

- **Introduction: Professor Torsten Stein**, Treasurer, ILA & President, ILA-German Branch
- **Justice Chang-Fa Lo** (羅昌發大法官), Justice, Constitutional Court of the Republic of China – Increasing Desirability of Creating a Regional Permanent Mediation Organization for Asia-Pacific Disputes: A New Approach

Closing Remarks & Discussion:

- **Professor Bernard Y. Kao** (高玉泉教授), Secretary-General, Chinese (Taiwan) Society of International Law
- **Professor Chen-Ju Chen** (陳貞如教授), Associate Professor, National Chengchi University & Overseer, Taiwanese Society of International Law
- **Dr. Emily Sipiorski**, University of Hamburg – Good Faith in International Investment Arbitration (Oxford University Press 2019)
- **Professor Pasha L. Hsieh** (謝笠天教授), Associate Professor, Singapore Management University & Co-Chair, ASIL Law in the Pacific Rim Region Interest Group – ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms (P Hsieh & B Mercurio eds., Cambridge University Press 2019)

Panel Abstracts

Panel 1

10:20-12:00: Indo-Pacific Strategy: Implications for Trade and Investment Law in Asia

Moderator: *Jacques deLisle*

(De-)Constitutionalization of International Investment Law?: Assessing Narratives from the Asia-Pacific – *Karsten Nowrot & Emily Sipiorski*

The international normative framework governing the protection of foreign investments has—for a variety of reasons—emerged more recently as a central normative "battleground" for competing narratives of global constitutionalization. The various actors within the international investment regime have begun to recognize the value in listening to available narratives and creating new ones employing the language of constitutionalism. Constructive understanding of these narratives requires listening to and understanding a balanced global perspective of constitutionalism—including voices from the Asia-Pacific on the regional and sub-regional scale.

Against this background and in an attempt to assess these phenomena, the proposed paper intends to discuss and test the benefits of applying an empirical approach based on a narrative perspective to the multi-faceted issue of constitutionalization in the realm of international investment law. Thereby, it is guided by the assumption that global constitutional law is created through the relevant actors' social practices as observed in the presentation of related narratives and/or subscription to certain narrations.

Adopting a narrative approach, in particular relying on the configurational and thus constitutive dimension of storytelling, can assist in the necessary search for an appropriate solution to address and overcome the main challenges that the idea and concept of a constitutionalization of international law is currently faced with. This perspective eliminates the desirability of developing a predefined,

abstract, and theoretical concept of global constitutionalism—as a broader consensus is difficult to identify in the scientific community. Rather, by initially relying on the identification and assessment of constitutional vocabulary in relevant interactions, such as narratives of the relevant actors, a more integrative conception of the idea can emerge. In this regard, the Asia-Pacific narratives, including those told by emerging powers, expand the general conclusions and by themselves provide an indication of the complexity of constitutionalization due to the diverse regional approaches towards international investment law.

Taking recourse to the configurational and constitutive dimension of narrations, the paper argues that "constitutionalization" should be considered as describing legal processes in the real world of law constituted, and thus initiated and sustained, by social practices such as narratives and discourses of the relevant actors. Moreover, we argue that the empirical approach based on a narrative perspective can be regarded as an objective method to distinguish between possible constitutional law and norms of a non-constitutional character in the international legal order. Thus, it also offers a suitable solution to address the fundamental rule of recognition problem of global constitutionalism.

In addition to introducing this general analytical framework and novel research approach towards the constitutionalization of international law in the first part, the paper – recognizing and reflecting the role played by the Asia-Pacific region in the shaping of international law – also intends in the second part to present and assess the empirical findings generated in connection with a respective questionnaire sent to representatives of various categories of actors interested in the progressive evolution of the international investment regime in the Asia-Pacific.

Indo-Pacific Strategy vs. Belt and Road Initiative: Evolution of Development Finance and Competing Development Strategies – *Jin Sheng*

Geopolitically, China is becoming a superpower and the Belt and Road Initiative fuels its ambitious investment program connecting over sixty countries. Besides, China is the largest trade partner of many BRI countries and the world's largest trade country. However, as many observers have noticed, the BRI is China-centred. It is criticized as

“checkbook diplomacy” or “debt trap”. A research report published by the Centre for Global Development in April 2018 indicated that 23 countries, of which 8 countries - Pakistan, Djibouti, Kyrgyzstan, Mongolia, Tajikistan, Maldives, Montenegro and Laos - already in trouble due to increased BRI lending, were “at risk of ‘debt distress today’”. In addition, the “Achilles' Heel” of the Belt and Road Initiative is not lack of funds – there are tremendous amount of public and private funds to be invested in infrastructure projects – but lack of bankable projects. So far, the BRI has not produced substantial employment or other business opportunities as the recipient countries expected and the OBOR initiator advocated; neither has the latter earned a decent return from infrastructure projects in developing countries. Even in China, massive infrastructure investments lead to heavy debt load and financial risks due to high leverage ratio, liquidity risk, credit risk, cross-sector and cross-market shadow banking.

As the “Economic Iron Curtain” looms, the “Grand Chess” game is between China and the United States. The United States has proposed the "Indo-Pacific Strategy", which advocates for free, fair and reciprocal trade, as a countermeasure against the BRI. The Build Act of 2019 and the USIDFC are committed to promoting private investment in regional infrastructure and assisting economic development especially in less developed countries. On the other hand, China’s financial market have accumulated tremendous financial risks. This situation has undermined China’s sustainability in financing ongoing and subsequent BRI investments, especially after the trade war with the United States. Although President Trump and President Xi reached a “ceasefire” on mitigating trade conflicts at the G20 Summit, it is likely the competition of two superpowers goes beyond the trade war - an “Economic Cold War”.

Arguments on competing visions of development strategies start from the Washington Consensus, which was proposed in 1989 towards market-based approach and neoliberalism as the "standard" reform package for developing countries, and the Beijing Consensus, which was proposed in 2004 as an alternative development strategy - the “China Model”. The “Chinese Model of Development” is coined as state-dominated, investment-driven and export-oriented state capitalism. In contrast to the U.S. and Japan’s official development assistance, China planned the

"Going Global" policy in the 1980s, which eventually evolved into the Belt and Road Initiative.

This paper will address a few critical issues concerning the evolution of development strategies in Asia-Pacific region, the ongoing trade war between China and the United States, as well as its implications to Asia's regional development strategies: First, Indo-Pacific Strategy vs Belt and Road Initiative - competing development investment strategies and parallel development financing approaches; Second, Official Development Assistance (ODA) vs "Go Global" policy; Third, Washington Consensus vs Beijing Consensus.

Economic Cooperation in Troubled Relationships – *Chien-Huei Wu*

In the aftermath of World War II, trade and investment have been considered as one of the effective tools to avoid armed conflicts. Led by the United States and its allies, the Bretton Woods system marked the preeminence of multilateralism in dealing with economic cooperation across borders. As the World Trade Organization has matured into a full-fledged regime, countries have shifted towards bilateral or regional levels to deepen their economic relationship due to a myriad of reasons. Depending on economic, social, and political endowments, bilateral economic arrangements are designed in varied fashions. For some, the design of arrangements turns on comparative advantages, domestic public policies, and interest groups configurations. For others, the motivation is more a strategic and geopolitical one, driven by agendas of regional peace and long-term security. A closely related yet often overlooked scenario is how countries/entities approach economic cooperation in the face of vexing political concerns. While trade and investment negotiations may at times have political implications, concluding economic integration arrangements between certain countries/entities may be extremely politically sensitive. This is particularly salient in cases involving certain countries/entities in what we call a "troubled relationship." In this paper, the term "troubled relationship" refers to two countries/political entities that have sovereignty claims over each other and/or have long disputed about State/government recognition, which makes economic cooperation exceptionally strenuous.

Our first case study concerns the China-Taiwan economic relation, which has improved since the early 1990s. While a closer economic partnership would harness military hostility between the two, such ties can serve China's agenda of ultimate unification. Still, mixed opportunities led Taiwan to institutionalize economic exchanges with China by concluding the 2010 Cross-Strait Economic Cooperation Framework Agreement. Yet, the growing concerns about China's taking-over resulted in a deadlock of negotiation and integration since 2014. Our second case study deals with the Korean peninsula. Despite a high level of political sensitivity and potential armed conflicts, South Korea in mid-2017 declared to pursue trilateral economic cooperation with North Korea and Russia. While Seoul-Pyongyang talks remain arduous, North Korea soon signaled an interest in such economic cooperation but condemned South Korea's hidden political agenda. Equally troubling is North-South Cyprus relationship, our third case study. The 1974 Cypriot coup d'état which invited Turkey's invasion led to the division of Greek and Turkish Cypriots. Trade between North and South Cyprus was prohibited and products originating from North Cyprus were not allowed to enter into the market of the European Union (EU). This was changed after the 2004 United Nations-sponsored referendum and the adoption of the EC 886/2004 Direct Trade Regulation which enables trade between North and South Cyprus.

The three case studies offer a valuable premise to examine concerns and strategies that countries/entities in a troubled relationship employ when engaging in economic cooperation. This paper goes beyond country-specific contexts to identify the models and key variables in shaping economic ties between countries/entities in a troubled relationship, which may shed light on the roles of international economic law in harnessing geopolitical frictions. Section I begins by illustrating the role various international economic institutions have played in stabilizing the world order in the post-WWII era. The dynamics between trade, investment, and potential armed conflicts lead us in Section III to focus on the abovementioned three sets of countries/entities in a troubled relationship in approaching closer economic interactions. Section IV further seeks to generalize by distilling models and variables as well as their broader normative implications under a refined conceptual framework. Section V concludes.

Fair and Equitable Treatment in the International Investment Regime of the Democratic People's Republic of Korea – *Soo-hyun Lee*

By analyzing the laws of the Democratic People's Republic of Korea (DPRK) related to foreign direct investment (FDI), its existing international investment treaty obligations and anecdotal evidence, this paper provides an overview of fair and equitable treatment (FET) as it applies to the pariah state. In doing so, it finds that the body of laws of the DPRK and the treaty provisions it is party to are both modern and comprehensive yet expansive. However, there remain at least three aspects of FET that constrain investor confidence and pose significant regulatory chill: procedural propriety, legitimate expectations and arbitrary treatment. In approaching this subject through each of these aspects, this paper identifies in which respects the administrative processes of the DPRK fail to evoke reasonable confidence.

The lack of precedence to understand how the North Korean judicial system operates and no record of arbitral practice involving the DPRK make it difficult to anticipate how the state may behave when engaging the regulatory instruments of international investment. However, through the analysis of available information involving the DPRK as well as relevant decisions in international investment arbitration, this paper draws reasoned estimations on how the behaviour of the DPRK conflict with FET as it has developed as a customary standard.

Based on these results, this report identifies that the joint interpretation of treaties is an appropriate means of maximizing investor confidence in the DPRK. The willingness that the DPRK exhibits to create a regulatory climate that is conducive to the admission and hosting of foreign investment makes clear that this is a sensible solution. Numerous facts demonstrate this willingness. The first is that the DPRK was willing to amend its legal system, even Socialist Constitution, to create a habitable environment for foreign investment. The second is that the DPRK showed a clear willingness to enter into international investment agreements, as seen by the at least 24 BITs to which the DPRK is party. The third is that the DPRK is not unwilling to harmonize with standard practice in international investment law, which can be seen by the laws that administer its special economic zones. The fourth is that the DPRK has shown an openness to settle commercial and investment disputes

through an institutional arbitration centre, which in turn can act as a conduit for future harmonization with the standards of international investment law. Based on these reasons, this report argues that entering into treaty-based agreements on the harmonized interpretation of treaties represents a diplomatically flexible yet effectually robust means to strengthen confidence in the foreign investment regulatory climate of the DPRK.

Panel 2

13:20-15:00: International Dispute Settlement

Moderator: *Chun-i Chen*

International Legal Personality without Recognition of Statehood: Establishing Taiwan's Status in the Face of China's Continuing Rise – *Brad R. Roth*

Taipei's waning diplomatic profile raises new doubts about its ability to navigate the international political and legal order. Withdrawals of diplomatic relations and increased difficulties in participating in the work of international organizations portend greater threats to the future of Taiwan's self-government, as China assumes an ever-more aggressive posture, both in cross-Strait relations and in the South China Sea dispute.

Moreover, the previous Taipei administration of President Ma Ying-jeou weakened Taiwan's rhetorical position, advancing a theory of "mutual non-recognition and mutual non-denial" that, even while affirming "the sovereignty and dignity of the Republic of China on Taiwan," improvidently conceded that "international law is not directly applicable to cross-Strait relations." This move recklessly signaled to allies an acquiescence in the "one China" framework, whereas 68.7% of polled Taiwan residents reject Beijing's demand for acceptance of the proposition that "the two sides belong to one China." The current Tsai Ing-wen administration is thus tasked with retrieving lost ground on multiple fronts.

In these dangerous times, strategizing on behalf of Taiwan's sovereign rights requires revisiting the determinants of international legal

personality. As is familiar, the archetypical state possesses a generally delimited territory, a relatively stable permanent population, a government exercising long-term effective control over all or most of the territory and population, and a capacity for foreign relations that is not subordinated to any other state – all characteristics that Taiwan unequivocally possesses. Yet statehood is not an empirical fact, but rather a legal status. Although recognition in the formal sense is not the determinant of international legal personality, the fruits of membership in the international legal order effectively derive only from decisions by those actors with the effective capacity to make them real.

A constitutive theory of statehood, properly construed, identifies as constitutive not the diplomatic posturing of foreign governments, but rather the manifestations of *opinio juris* implicit in their interactions with the entity in question. Tacit acknowledgment of an entity's possession of the package of rights, obligations, powers, and immunities unique to statehood, rather than formal declarations of recognition, is what gives substance to an entity's claim of international legal personality.

The challenge for Taiwan is to get foreign governments on record – before it is too late – that, diplomatic niceties aside, they are not prepared to accept Beijing's incursions on Taiwan's selfgovernment. This challenge calls for a new set of diplomatic strategies, conceding non-essential points while extracting at least implicit affirmations of the inadmissibility of Beijing's threats of force.

Fisheries Review Panels: Lessons from Ecuador v. Commission (2018) and Russian Federation v. Commission (2013) – *Peter Tzeng*

In June 2018, the Review Panel in *Ecuador v. Commission* rendered its final decision on Ecuador's objection to the South Pacific Regional Fisheries Management Organisation (SPRFMO) Commission's CMM 01-2018. This was only the second case in history where proceedings were instituted under the Review Panel mechanism. The first case was *Russian Federation v. Commission*, one of the few cases in public international law where Taiwan participated in the proceedings. In light of the novelty of this mechanism, this Article evaluates the problems and prospects of this form of dispute settlement, particularly by comparing it to traditional methods of dispute settlement such as conciliation,

arbitration, and judicial settlement. To this end, the Article makes a descriptive and a normative argument.

On the descriptive level, the Article argues that the Review Panel mechanism is unique in many ways. First, it is unique *ratione personae* in that it allows a State to effectively sue an international organization in a public international dispute settlement proceeding. Second, it is unique *ratione materiae* in that the Review Panel may only render non-binding "recommendations", but these "recommendations" are binding upon the relevant State unless the State institutes binding dispute settlement proceedings to override them. Third, it is unique *ratione temporis* in that the Review Panel must be established in a short period of time (30 days after the end of the objection period), and that it must deliver its decision within another short period of time (45 days after its establishment). This is very quick, especially relative to the time periods in which arbitral tribunals in inter-State disputes must be established and must deliver their decisions. All these factors, among others, create a *sui generis* dispute settlement mechanism that has, at least in the first two cases, produced efficient results.

On the normative level, the Article argues that lessons can be learned from the Review Panel mechanism and the two cases instituted thereunder for inter-State dispute settlement more generally. On the level of *ratione personae*, the mechanism shows how international organizations can participate in dispute settlement, and how the decisions of international organizations may be subject to proper review. On the level of *ratione materiae*, the mechanism represents an ideal middle-ground between non-binding conciliation and binding arbitration, in terms of assuring compliance with the decision of the Review Panel. On the level of *ratione temporis*, the two cases exemplify how a complex inter-State dispute may be settled in an efficient manner, without lengthy written and oral pleadings.

For these reasons, the Article ultimately argues that the Review Panels' decisions in *Ecuador v. Commission* and *Russian Federation v. Commission* should be studied by public international scholars as a promising example of a novel and creative approach to international dispute settlement.

Effective Protection of Marine Living Resources in Asia Pacific Region – What Can We Learn from the EU Experience? – *Chie Sato*

Although various organizations have been established for the management and conservation of fisheries – for example, International Commission for the Conservation of Atlantic Tunas (ICCAT) or the North Pacific Fisheries Commission (NPFC) – and these have contributed to the establishment of common regulations pertaining to the management of fisheries on a global or regional level, and although the United Nations Convention for the Law of the Sea, the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Management and conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks and the FAO Code of Conduct for Responsible Fisheries could serve as international rules for sustainable fisheries, current measures for the management and conservation of fish resources do not appear to be very effective. This situation reflects complexity of international society composed of sovereign states with different interests (economic and political interests).

However, the EU whose Member States have also different interests and sometimes confront with difficulties to reach compromise between them (Among the EU Member States there are Member States for which fishery plays very important role in their economy and States which emphasis on the importance of sustainability and limit total catch amount for fish resources) has introduced Common Fishery Policy in order to realize sustainable fisheries since 1983. Additionally, in order to protect and conserve other marine living resources the EU has adopted law and regulations which EU Member States should implement. Since 2008 when the EU adopted Marine Strategic Framework Directive for protection of the marine environment in general, the EU promotes cooperation even with neighboring states to protect marine environment. Through such cooperation, the EU law and policy for protection of marine environment including sustainable fisheries and protection of marine living resources have influenced over non-EU Member States.

In my paper I try to clarify what kinds of legal (and/or policy) might be necessary for the Asia-Pacific region to protect effectively marine living resources including management of fisheries and marine biodiversity. For

that purpose, I explain briefly the EU practice regarding protection of fish resources and other marine living resources (including its influence over non-EU Member States). Then, I try to find the key elements which serve as a motor to promote cooperation for effective protection on marine living resources. Here I would like to emphasize the importance of role of precautionary approach (principle) and its legal status in the EU legal framework. Lastly, based on the experience of the EU I would like to list up some legal (or policy making) elements which will be necessary for effective protection of marine living resources in the Asia-Pacific Regions.

Sanctions Busting: North Korea's Deceptive Maritime Practices – *Richard L. Kilpatrick, Jr.*

During the last decade, the United Nations Security Council has imposed multiple rounds of economic sanctions against North Korea in response to its weapons programs. These measures, paired with additional sanctions adopted by the European Union, the United Kingdom, the United States of America, and other actors, have increasingly focused on commercial maritime activity. Sanctions tactics have included blacklisting vessels, port operators, and shipping companies, restricting certain cargo transactions, barring bunkering services and insurance coverage, and extending jurisdiction for vessel inspections and interdiction. In response to these measures, North Korean vessels have engaged in deceptive maritime practices designed to circumvent the economic sanctions. These strategies include re-naming and re-registering vessels, utilizing fraudulent cargo documentation, disabling vessel-tracking Automatic Identification Systems (AIS), engaging in ship-to-ship transfers at sea, and other activities designed to conceal the nature of illicit transactions.

This paper examines these deceptive shipping practices employed by North Korean vessels to evade economic sanctions. First, it explores multilateral efforts to pressure North Korea to abandon its weapons programs by utilizing coercive techniques in the maritime sector. It then discusses North Korean attempts to evade the sanctions. Finally, it discusses the commercial consequences of sanctions enforcement efforts, which create enhanced risk for shipping industry participants attempting to engage in legitimate trade around the Korean peninsula.

Panel 3

15:20-17:00: India, ASEAN and the EU: Challenges to New Economic Agreements

Moderator: *Gu Weixia*

Investment Treaty Shopping in Asia: Recourse to Taiwan-India Bilateral Investment Agreement by Chinese Investors – *S.R. Subramanian*

Though India had one of the robust investment treaty regimes with around 83 International Investment Agreements, the unfavourable decision in the case of White Industries (Australia) v India, the first publicly-known investment dispute against India, was a major setback to its investment initiatives. India responded to this in the form of an internal review and brought out changes in its policies concerning investment treaty protection, culminating in the adoption of revised Model BIT, 2015. Later, the government had also issued notices to 58 countries under various BITs expressing its intention to terminate them on the ground that they have completed their initial duration and also that they are not in accordance with its new policy.

The China-India BIT of 2006 is one of the 58 BITs which are terminated by the Indian government. Also, the two countries are not currently engaged in any time-bound negotiations for the conclusion of any BIT between them. While China is very much interested in signing a BIT with India to adequately protect its investments in India, India is not very keen to expedite the BIT negotiations. Consequently, Chinese investors investing in India are left with no option for accessing the investor-state arbitration. Even the terms of denounced China-India BIT, which is otherwise legally effective for a further period of fifteen years for investments which are already made ("sunset clause"), was not very practicable in matters of investor-state dispute settlement system. It provides that disputes between the investor and the contracting party shall be resolved in accordance with the ICSID Convention or under the ICSID Additional Facility, only if both parties agree to it. However, as India is not a party to the ICSID Convention, the only method which is

available to settle the dispute is the constitution of an ad hoc arbitral tribunal under the latest UNCITRAL Arbitration Rules.

On the other hand, India regards its commercial and economic relationship with Taiwan as vital and mutually beneficial. The recognition of bilateral trade complementarities in trade structures has led to the conclusion of the Taiwan-India Bilateral Investment Agreement (BIA) in 2002 (revised in 2018 but yet to be signed). The Agreement provides for either an ad hoc arbitral tribunal under the UNCITRAL Arbitration Rules or where it could not commence within the specified time, through institutionalised ICC Court of Arbitration. Since the Taiwan-India BIA is a better formulation, in so far as the dispute settlement provision is concerned, it is natural that the Chinese investors investing in India might be tempted to use the Taiwanese instrument.

In such a scenario, question arises as to whether the Chinese investors in their quest to obtain (better) investment protection, can access Taiwan-India BIA, especially, its dispute settlement provision. As an answer to this question depends on what constitutes as "investment", who is an "investor" and the availability of such other flexibilities necessary for use of treaty shopping under the BIA, this study will analyse BIA and attempt to find answers to these questions in the light of existing investment treaty jurisprudence.

EU-Japan Agreements: Content, Context and Implications – *Jerzy Menkes & Andżelika Kuźnar*

The subject of the analysis is the legal, economic and political framework of UE-Japan relations. It is an interdisciplinary study: legal and economic.

We analyze agreements which were signed: Economic Partnership Agreement (EPA), Strategic Partnership Agreement (SPA) and one that is negotiated: Investment Protection Agreement (IPA). EPA liberalizes trade in goods and services. By setting the legal framework for a strategic partnership, SPA facilitates cooperation against common challenges. IPA will regulate standards for investment protection and disputes resolution. Agreements confirm the community of values on which they are embedded and create conditions for strengthening these values. The subject scope of the analysis consists of: – content of the agreements; –

the process of their creation; – the significance of agreements; – the EU's competences to conclude agreements.

The importance of agreements is co-decided by:

- endogenous factors, resulting from economic and political potentials of the Parties;
- exogenous factors, in the form of external determinants of cooperation. These factors include turbulence in US politics.

The agreements open the way to co-creating the EU's security community with "democratic diamonds" in the Asia–Pacific region. Thus, it protects against the emergence of a safety vacuum. The agreements additionally activate Japan, which ceases to be a „big mute in world politics".

The thesis of the study is the statement that in a world where instability is increasing and security is reduced, the Parties are fulfilling their, as real great powers, obligation to bear special responsibility for the implementation of the values represented. We find that the agreements are a tool for the defence of international order against threats. Cooperation between parties proves the spill-over effects.

The political context of the agreements is determined by US policy in relation to regions and problems, which is in contradiction with long-term strategy of the US. This is a source of instability, particularly dangerous for the strategic actions of the rivals of the "West", challenging the international order. US, rejecting the paradigm of free and fair trade and collective self-defence of the free world, put the Allies in a safety vacuum and made them unable to face threats. In addition, it happened under Trump's neo-isolationism policy and under the conditions of undermining US obligations. Agreements secure regions before the creation of a safety vacuum.

When deciding to create Agreements, the Parties were guided by the assessment of their overall economic effect, which we will access.

The agreements do not create a rigid legal framework for cooperation. It may be subject to both deepening and widening. Asia and Pacific

countries and the EU, when confronted with the threat (above all the American neo-isolationism), show the ability to independently take up the challenge. This cooperation, leading to the construction of a transpacific bridge, may become – after the return of the US to traditional policy – a pillar of the cooperation of the states of the Atlantic and Pacific Oceans.

The European Union and ASEAN Countries Trade Relations: "Building Blocks" or "Breaking Blocks"? – *Gabriele Gagliani*

The European Union (E.U.) and the Association of South East Asian Nations (ASEAN) started negotiating a free trade agreement (FTA) in 2007 but halted in 2009. The objective was for the E.U. and single ASEAN countries to be able to negotiate bilaterally with the resulting FTAs being "building blocks" for a future, possible regional E.U. – ASEAN trade agreement. This paper assesses whether the FTAs the E.U. has concluded or is currently negotiating with ASEAN countries are truly "building blocks" or risk becoming "breaking blocks." Indeed, the differences of the economies involved and the, at times, competing goals between ASEAN countries may lead to conflicting results. This paper analyzes the negotiating history and disciplines contained in the bilateral FTAs already concluded by the E.U. with ASEAN countries (namely, Singapore and Vietnam) or currently under negotiation (with Malaysia, Thailand, Philippines, Indonesia and Myanmar). The strategy negotiating parties have adopted is to use already-concluded trade agreements as models for current negotiations and future agreements. Nonetheless, differences exist. As a case in hand, FTAs between the E.U. and Vietnam and the E.U. and Singapore have been the explicit basis for the FTA currently negotiated with Indonesia. However, for obvious reasons (and obvious differences existing among the economies involved), the E.U.-Indonesia FTA proposal, differently from FTAs with Singapore and Vietnam, specifically refers to small and medium-sized enterprises and digital trade. In a similar fashion, in the field of energy, while FTAs with Singapore and Vietnam only address non-tariff barriers to trade and investment in renewable energy generation, negotiations between the E.U. and Indonesia extend also to discussions on energy and raw materials. In addition, even where similar chapters are included in all FTAs with ASEAN countries, such as the chapter on rules of origin, convergence towards similar provisions is not to be taken for granted. Establishing

common, region-to-region standards and rules at a later stage in a single, regional FTA for a group of such different countries as ASEAN Members may be extremely difficult. And this even more so since negotiating techniques and objectives pursued may vary significantly from country to country. While some ASEAN countries are qualified by the United Nations as Least-Developed Countries (such as Cambodia and Laos), others are steadily emerging as economic giants (e.g. Indonesia) or have already stable positions of internationally-established economic hubs (as a case in hand, Singapore). ASEAN countries' geopolitical priorities in their negotiations with the E.U. are in fact diverse and not necessarily aligned. On this point, a further substantive comparison with negotiations in the Pacific area with, and in the context of, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, New Zealand and the United States, detailed in the paper, is also enlightening. Finally, the assessment of E.U. – ASEAN countries trade relationship will allow to assess the viability of a wider, regional trade agreement, and on whether the current course of bilateral trade negotiations with the E.U. will deliver for ASEAN and the region as a whole.

ASEAN Investor-State Dispute Settlement: A New Challenge to ASEAN Dispute Settlement Mechanism – *Intan Soeparna*

The paper will address the 2004 Protocol on Enhanced Dispute Settlement Mechanism basically is a vehicle to enhance the establishment of the ASEAN Economic Community. It mirrors the provision of the WTO Understanding on Rules and Procedures Governing the Settlement of Dispute (WTO DSU). However, until today none of ASEAN Member Countries is using the mechanism to settle their economic disputes, because "the non-confrontational spirit" of ASEAN in its ASEAN way somehow prevents ASEAN Members States to resolve their potential trade dispute to formal dispute mechanism.

Nevertheless, the emerging of ASEAN investment regime perhaps will change this paradigm. The ASEAN Comprehensive Investment Agreement (ACIA) provides Investor-State Dispute Settlement (ISDS) to protect and reassure investor confidence. Therefore, it is possible when the case where the ISDS is unsuccessful, or when a state fails to comply with the award, the investors may turn to their home state for protection or to urge their home state to use state to state dispute mechanism

(ASEAN DSM) in order to induce the execution of arbitral award. The mechanism is that the ASEAN DSM applies to disputes on the interpretation or application of the treaty includes ACIA Article 41 (9) that "Each Member State shall provide for the enforcement of an award in its territory." The state to state DSM under the ACIA (Article 27) will not only be developed by ASEAN Members but also by individuals, especially when the arbitral award has significant impact to protect the investor.

Panel 4A

09:00-10:40: South China Sea and Marine Resource Protection

Moderator: *Yann-huei Song*

Coastal States' Enforcement Power over Foreign Fishing Vessels in the South China Sea: Where Is the Line under International Law? – *Lan Ngoc Nguyen*

Coastal States' exclusive sovereign rights to exploit and, simultaneously, obligations to conserve living resources lie at the heart of the regime regulating the exclusive economic (EEZ) under the law of the sea. In that framework, the United Nations Convention on the Law of the Sea (UNCLOS) authorises coastal States to take enforcement measures to ensure that foreign vessels comply with their fisheries laws. However, the scope of coastal States' enforcement power in the EEZ as stipulated under Article 73 UNCLOS is not clearly defined. Article 73 allows coastal States to take such measures as "necessary" to conserve and manage living resources in their EEZ and merely provides for a non-exhaustive list of permissible enforcement measures and further. Due to the ambiguous ambit of this important article, questions have arisen over the legality of various enforcement measures taken by coastal States vis-à-vis foreign vessels allegedly engaged in illegal fishing in the former's EEZ. Over the past years, this question has been particularly pertinent with regards to incidents in which forceful enforcement measures are employed on a more frequent basis such as shooting, ramming, sinking and blowing up fishing vessels.

Against this background, this article seeks to answer the following question: to what extent are forceful enforcement measures taken by coastal States in the EEZ permissible under international law? While certainly not limited to any region in the world, this issue has been one of the bones of contention among coastal States in the South China Sea. Thus, this article will focus on examining the use of forceful enforcement measures in the South China Sea region. In order to provide a comprehensive analysis of the issue, and taking into account the fact that the South China Sea is currently embroiled in different long-standing disputes, this article tackles the research question from two different perspectives: coastal States' enforcement power in non-disputed EEZs, and coastal States' enforcement power in disputed EEZs. Each issue is examined following a similar structure: first, the legal framework regulating the issue will be analysed, including Articles 56-59, 73 and 74(3) of UNCLOS. In addition, relevant case law touching upon the issue of coastal States' rights and obligations in disputed and non-disputed areas, for instance the Virginia G, Guyana v Suriname, South China Sea, Ghana v Côte d'Ivoire cases will be scrutinised to help shed light on the scope of enforcement power endowed upon States. Finally, State practice in the region, namely relevant domestic legislation, official and non-official statements and other reaction to incidents involving the use of forceful enforcement measures will be studied, with a view to understanding the extent to which State practice could be employed as interpretative tools to fill in the legal gaps found under UNCLOS.

Joint Development of Offshore Oil and Gas Resources in the South China Sea: The New Context to Resolve Broader Disputes following the South China Sea Arbitration – *John Abrahamson*

The establishment of joint development zones (JDZs) for the development of offshore oil and gas resources can facilitate international cooperation over resource development where there are competing claims. The majority of current JDZs are concerned with sharing access to offshore oil and gas resources. The South China Sea region, however, presents a unique opportunity for a JDZ agreement to promote regional cooperation and economic development:

- There is a developing consensus against the assertion of a maritime boundary based on the "nine-dash" boundary line, consistent with

the Award handed down by the Annex VII Arbitral Tribunal in the South China Sea Arbitration between China and the Philippines. This is combined, however, with recognition of the need to work in a realistic and cooperative way with regional neighbours. The particular advantage of the JDZ approach is that these agreements are made without prejudice to the sovereignty claims of coastal states. JDZs are also consistent with the United Nations Convention on the Law of the Sea (UNCLOS), which requires States with opposite or adjacent coasts to make every effort to enter into provisional arrangements of a practical nature pending an agreement on a final boundary delimitation.

- Successful examples of JDZ regimes contribute to the prospects for a new South China Sea JDZ. The Malaysia–Thailand Joint Development Area, in particular, is an example to promote more simple administrative and revenue sharing models. There is significant potential for a South China Sea Joint Development Authority (SCSJA), comprising representatives of the coastal states. Revenue sharing arrangements based on length of coastal state coastlines have been made in several proposals. The boundary of the JDZ may be based on the ocean region beyond 200 nautical miles, without effect to islands and reefs in the region, on a basis consistent with the South China Sea Arbitration.
- Developments in regional multilateral agreements include the Caspian Sea Agreement, with the potential to adopt other regional measures besides resource sharing to build multilateral regional cooperation. The South China Sea JDZ agreement could reflect the developing Code of Conduct in the South China Sea, and measures such as simultaneous reporting of air and sea movements to the coastal states.

The new context for promoting a JDZ and related measures in the South China Sea is based on recognising JDZ proposals less as arrangements for the allocation of offshore oil and gas resources in disputed maritime waters, as in current JDZs, and more as arrangements presenting a unique opportunity to promote a broader regime of regional cooperation and economic development.

Combating Environmental Crimes in the South China Sea – *Pei-Lun Tsai*

Environmental crimes have in recent years been recognized as part of transnational organized crimes, posing threats to not only the environment, but also peace, security and sustainable development. While much of the attention has been paid to crimes such as wildlife trafficking and illicit waste disposal and trade, crimes affecting the marine environment, such as illegal dumping, fisheries crimes, and violations of emission regulations. Such crimes are often not limited to one State's waters and create transboundary impact. Thus, international cooperation is necessary to prevent, suppress, and punish these acts. For instance, in October 2018, an international operation to combat marine environmental crimes, codenamed 30 Days at Sea and coordinated by INTERPOL, saw the global cooperation of more than 250 law enforcement and environmental agencies.

Although two awards were rendered in the South China Sea arbitration, the conflicting maritime claims by various parties and the relevant disputes remain. Moreover, as the July 2016 Award pointed out, illegal fishing activities in the region have severely damaged the coral reefs and the marine ecosystem. Yet, issues of marine environmental protection are often overshadowed by heated debates on sovereign claims. To better understand the premise of the challenges, the paper aims to first identify the most common environmental crimes in the South China Sea, as different crimes require varied forms of cooperation and law enforcement techniques and may relate to distinct international legal obligations. While each claimant State might have domestic rules regulating these activities, it is envisaged that maritime disputes contribute to the difficulties in enforcing such rules. The extent of the disputes' impact in this regard will be examined. The paper will next explore the options for international cooperation to combat environmental crimes in the South China Sea and the lessons to be learned from previous examples of joint efforts by States and international organizations (including the abovementioned 30 Days at Sea). Recent developments such as the ongoing negotiations to adopt a South China Sea Code of Conduct will also be considered to determine whether they can be helpful to achieve this goal.

Environmental Protection of Areas Beyond National Jurisdiction (ABNJ) in the South China Sea – *Agnes Chong*

As a global community we have been aware of the grave threats to marine biodiversity as well as the deterioration of the health and sustainability of our oceans since the Rio Conference in 2012. On December 23, 2015, the United Nations (UN) General Assembly adopted resolution 70/235 on "Oceans and the Law of the Sea" in which it approved the first global integrated marine assessment of the oceans. The scientific evidence revealed new, old and existing threats to the oceans and highlighted the need to deal with these threats to ensure long-term conservation and sustainable use of the oceans. Subsequently, the UN General Assembly decided on December 24, 2017 to convene an intergovernmental conference to negotiate a legally binding treaty on the environmental protection of Areas Beyond National Jurisdiction ("ABNJ"). ABNJ means the areas of the oceans beyond national jurisdiction, which cover the international seabed area and the high seas.

The current legal regime for the ABNJ in the South China Sea is governed by UNCLOS, which was signed in 1982. UNCLOS has not kept up with technological and scientific advancements of the 21st Century and as a result UNCLOS was expanded upon shortly after it was implemented. Two implementing agreements were created by way of the 1994 Implementation Agreement for the Area regulating deep seabed mining and the 1995 UN Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement. The proposed treaty protecting the ABNJ would constitute the third implementing agreement under UNCLOS to address gaps in the high seas governance and to consolidate the regime in the conservation and sustainable use of the ABNJ.

This paper analyzes the UNCLOS environmental protection regime in light of the proposed new ABNJ treaty as well as the South China Sea Arbitration decision to determine the rights and obligations to protect marine biodiversity in the South China Sea. The landmark decision South China Sea Arbitration reinforced the rights and obligations of coastal and non-coastal states by way of the tribunal's ruling on China's and the Philippines' claims over the maritime zones of the South China Sea, in particular, the territorial seas, the exclusive economic zones (EEZs) and continental shelf. It set an important precedent in the enforcement of

UNCLOS and is a promising sign of international tribunals paying attention to the challenges of ocean governance and the need to balance concurrent rights and obligations.

When the new ABNJ treaty comes into effect, there will be major legal ramifications for coastal and non-coastal states to comply with the environmental protection rights and obligations of UNCLOS. The new treaty will strengthen governance of the high seas while reinforcing the environmental protection regime of the South China Sea. This development, along with the South China Sea Arbitration decision, indicates future stricter enforcement against uses that cause environmental harm. Notwithstanding China's unilateral actions in the South China Sea particularly in relation to its extensive land reclamation activities, the strengthened regime cannot but directly deal with their legality in relation to their environmental effects in the ABNJ.

Panel 4B

09:00-10:40: Global Trade Governance and the CPTPP

Moderator: *Blake C.Y. Wang*

The Strategic Trade Alliances within the Pacific Rim: The CPTPP and Other Trade Agreements between Asia-Pacific and the Americas – *Roberto Reyes Barrera*

The paper will address the development and challenges for the International Economic Law arising from of the geo-political alliances with in the Pacific Rim, in particular the CPTPP and other trade agreements established across the Pacific Ocean between like-minded countries in Asia-Pacific and the Americas (notably the emerging economies in Latin-America) (including potential members of the CPTPP).

Enforcing Anti-Corruption Regulations through Trade Agreement? The Anti-Corruption Chapter under CPTPP and USMCA – *Kai-Chih Chang*

The past decades of efforts to promote and liberalize international trade focused on reducing tariff and restraining non-tariff barriers such as the use of TBT and SPS measures. Principles such as non-discrimination, the required use of scientific evidence, and risk assessment have been erected in trade agreements endeavoring to create a fair competition arena for all participants. However, corruption, which also has a significant distortive effect over fair competition and trade as it decays the decision-making process of the decision-maker, was rarely discussed as trade concerns. The existing international efforts to combat corruption such as the United Nations Convention against Corruption and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions were also for the purpose to safeguard the value of democracy and the rule of law instead of to prevent corruption's negative impacts over trade. The nexus between trade and anti-corruption realms remains missing not until that recent adopted FTAs incorporate anti-corruption provisions and brings this matter into attention.

Focusing on the USMCA and CPTPP Anti-Corruption Chapters, this paper assesses the purpose and possible impacts of incorporating anti-corruption provisions into trade agreements. In five parts, this paper demonstrates the importance of incorporating anti-corruption rules into the FTAs and the possible difficulties of enforcing the anti-corruption obligations within the trade regime. Part one provides an introduction on how anti-corruption transformed from a criminal law matters into a trade issue. Part two provides an overview of the existing international efforts and regulatory frameworks over anti-corruption practices. By highlighting the limits of the existing regulatory frameworks, this paper explores the possible reasons and motives for states to incorporate anti-corruption provisions into trade agreements. Taking the CPTPP and USMCA anti-corruption chapters as examples, part three of this paper assesses how modern FTAs address anti-corruption concerns and the mechanisms used to ensure its enforcement. Part four evaluates the effectiveness of the anti-corruption provisions under the FTA with particular attention over how the FTA dispute settlement mechanisms may strengthen the anti-corruption regulatory regime's weakness in enforcing its rules. This part shall address how the anti-corruption chapter facilitates the harmonization of domestic criminal law among the parties and stipulates the development of transnational criminal law. Part five provides the concluding remarks.

While this paper recognizes that incorporating anti-corruption rules into the FTAs would mutually benefits the trade and anti-corruption regulatory regimes as it protects not only social values and the rule of law notion but also eliminates unfair practices and provides fair competition environment, this paper also warns the possible incompatible problems that may arise when emerging the criminal law and trade systems. Noticing that there is only scarce research in this area, this paper aims to be one of the pioneers studying the nexus between trade and anti-corruption regulations.

Regulating State Capitalism in International Law – *Eirini Kikarea*

State capitalism has undergone a dramatic revival, posing a challenge to international law. It constitutes an alternative system of economic governance increasingly adopted by developing states. Broadly speaking, state capitalism is the label applied to state-led economies and refers to "countries whose government has an ownership stake in or significant influence over more than 1/3 of the 500 largest companies, by revenue, in that country".

Henceforth, the protagonists of state capitalism are state-owned and/or controlled enterprises (both referred to here as "SOEs"), the presence of which has grown exponentially in recent years. They feature prominently among the world's largest and most influential enterprises and they are increasingly expanding to foreign markets. As noted by the OECD in 2016, 22% of the world's largest firms are under state control, the highest percentage in decades. The global leaders in oil and gas—China National Petroleum, Gazprom, National Iranian Oil Company, Petrobras, Petróleos de Venezuela, Petronas, and Saudi Aramco—are all SOEs. In 2017, three out of the top ten Global500 companies were SOEs, and based on UNCTAD's studies there are approximately 1,500 multinational SOEs with more than 86,000 foreign affiliates globally. Another stark reminder of their growth as global competitors is China's ambitious "Belt and Road Initiative", a multi-billion investment project that will be implemented through SOEs.

Despite there being legitimate reasons for maintaining SOEs, there are also great concerns. States may use SOEs as vehicles for the implementation of protectionist measures but also for other non-

commercial policies. State capitalism is closely related to the notion of geo-economics, both concepts constituting two interrelated facets of a new global reality. The fragile relationship between SOEs, trade, and security manifests itself in the ongoing trade war between the United States (US) and China. This "economic warfare" was sparked due to their differences in ideology and disparate economic systems, the rise of China as global competitor, as well as China's alleged unfair market practices, particularly the favouring of Chinese SOEs and misuse thereof for security purposes (see Huawei crisis).

In light of these developments, it is crucial to examine how international law applies to state capitalists and, in particular, SOEs. As the law currently stands, there exist several tests for determining under which circumstances an SOE is equated with the state in different sub-fields of international law, specifically in the field of attribution in the law of state responsibility, sovereign immunity, and WTO subsidies rules. These tests are complex, inconsistent, and often abstract. It is essential to develop a theory bridging these different approaches and/or explaining the disparities and underlying assumptions thereof. Such examination will enable ascertaining whether the law was designed to accommodate both non state-led and non state-led economies, and will provide invaluable insight for the reform of the global trade system in the broader context of shift of economic power from the West to Asia.

Rethinking Investor-State Disputes: The Implications of the Surfeit Case for Taiwan's Accession to CPTPP – *Chieh Lo*

Being an important player in international trade, Taiwan has been endeavoring to overcome various obstacles to participate in regional economic integration instruments. Against this background, the Trans-Pacific Partnership Agreement (TPP) and its successor for the time being, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) becomes the priority objective which Taiwan's government eagers to take part in.

Yet, most of the domestic discussions about the accession to TPP or CPTPP focus more on the potential benefit in terms of international trade. The unfamiliar "dark side" – the potential challenges that may come

along with the investor-state dispute settlement (ISDS) mechanism attracts a narrower audience.

The ISDS mechanism most commonly used today, is the investor-state arbitration, where an investor from one contracting party may bring a claim against another contracting party in front of an international adjudicative body. It is a rather recent invention, and once praised as a welcome development that will depoliticize international investment dispute. Yet, after the explosive growth of the regime through the 90s and the 2000s, the challenge to sovereignty imposed by the ISDS force the stakeholders and general public to take a second thought about it.

For better or for worse, so far Taiwan has very limited experience in the ISDS. It has only recently become the respondent for the first time, and its business sector very rarely utilizes this mechanism.

This presentation assesses the unfamiliar risk to Taiwan associated with the ISDS. It goes through the Surfeit v. Taiwan case which was initiated under the ISDS of the Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership (ASTEP), pointing the salient feature of the case and the ISDS provisions of ASTEP.

It then compares the difference in the procedural safeguards provided by ASTEP, bilateral investment agreements ("BIA") entered by Taiwan and other states, and finally TPP/CPTPP. The presentation wishes to point out that as the result of more expansive investor protection offered by TPP/CPTPP, there will likely be more restraint to Taiwan's exercise of regulatory power.

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Guidelines for Submissions to the Chinese (Taiwan) Yearbook of International Law and Affairs

The *Chinese (Taiwan) Yearbook of International Law and Affairs* commenced publication in 1981 under the auspices of the Chinese (Taiwan) Society of International Law. The Yearbook publishes on multi-disciplinary topics with a focus on international and comparative law issues regarding Taiwan, Mainland China and the Asia-Pacific. The Yearbook invites submissions of unsolicited articles, comments, case analyses and book reviews.

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We accept submissions via e-mail and ExpressO. For those submitting via emails, please send an electronic version of your manuscript by e-mail to the Editorial Board, at: yearbook@nccu.edu.tw. The attachment should contain the manuscript, a cover letter and a resume. While electronic submissions are strongly preferred, submissions may be made by post alternatively. In such cases, please send one hard copy of your manuscript along with a disk or CD copy to: Chinese (Taiwan) Society of International Law, P.O. Box 171 Wenshan Zhinan, Taipei City 11699, Taiwan (ROC).

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Submissions should be typewritten in Microsoft Word format. The maximum length of manuscripts is not limited. The Yearbook encourages submissions of manuscripts under 25,000 words, the equivalent of 50 journal pages, texts and footnotes included. We prefer manuscripts with

double-spaced text and footnotes in 12-point Times New Roman font. The *Pinyin* system of translation should be used in reference to publications in Chinese.

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