Current International Legal Issues: Malaysia

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1 Introduction

Malaysia is a democratic State in the Association of South-East Asian Nations. As an active member of the United Nations and a past non-permanent member in the Security Council,¹ Malaysia is a Council member of the International Maritime Organisation² and the International Civil Aviation Organisation.³

2 Air Law

a *Liability and Compensation under the Warsaw and Montreal Conventions*

Malaysia officially closed the search and rescue effort on a Malaysia Airlines flight, flight MH 370, an international scheduled passenger flight to Beijing with 239 passengers including 12 crew members, till further notice to start again. The investigation report was released in 2018. The flight departed the Kuala Lumpur International Airport at 0042 MYT on 8 March 2014. Less than 40 minutes after take-off, Air Traffic Controllers lost radar contact with the aircraft after passing

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1 Term ended on December 22, 2016. Ministry of Foreign Affairs of Malaysia, *Malaysia and the UN Security Council: End-of-Term Reception* (Dec. 23, 2016), <http://malaysiaunsc.kln.gov.my/index.php/component/k2/item/578-malaysia-and-the-un-security-council-end-of-term-reception-23-december-2016>. The cooperation rendered by all quarters had facilitated Malaysia's work on the Council. During the past two years (2015–2016), Malaysia saw the implementation of several important initiatives, including on the protection of children from abduction in situations of armed conflict, which Malaysia chaired at the Council; non-proliferation of weapons of mass destruction to non-state actors; the question of Palestine; peace building in post-conflict countries; and the multiplier effects of climate change on international peace and security. Malaysia is gratified that the initiatives received overwhelming support from everyone both within and outside the UN machinery.

2 Ministry of Transport Malaysia, *Council Member of the International Maritime Organization*, <http://www.mot.gov.my/en/maritime/international-affairs/council-member-of-the-imo> (last visited Jan. 17, 2019).

3 International Civil Aviation Organization, *Council States 2016–2019: Part III – States Ensuring Geographic Representation*, <https://www.icao.int/about-icao/Council/Pages/council-states-2016-2019.aspx> (last visited Jan. 17, 2019).

waypoint at IGARI. In accordance with Chapter 5 para 5.3 of Annex 13 to the Chicago Convention, Malaysia as the State of Registry of the aircraft is responsible for investigating the accident. This function may also be delegated to another State by mutual arrangement and consent. To investigate the loss, the Minister of Transport, Malaysia established an independent safety investigation team under Regulation 126 (1) of the Civil Aviation Regulations 1996 known as the “Malaysian ICAO Annex 13 Safety Investigation Team (‘the Team’) for MH 370.” The Report of the Team dated 2 July 2018 highlighted some regulatory weaknesses. However, the cause of the accident was unknown and the main wreckage was not found. The report stated that although the Civil Aviation Act 1969 required compliance with the ICAO Annexes and the airline had met the average safety standards of most international airlines, the Civil Aviation Act 1969 and 1996 Regulations may be outdated by present international regulatory standards and practices. The report anticipated that the future introduction of the Civil Aviation Safety Requirements, Acceptable Means of Compliance, and Guidance Materials would serve to streamline the Malaysian Regulatory framework, requirements and procedure, similar to the European Aviation Safety Agency Requirements. At present this lacuna is filled by issuing best practices and standards based on regulations of the U.S. and the European Union through notices, circulars, directives and information under Section 240 (Publication of Notices) of the Civil Aviation Act 1969.

Malaysia Airlines flight MH 17 was an international scheduled passenger flight from Amsterdam to Kuala Lumpur carrying 283 passengers and 15 crew members on board. It was shot down over Donetsk, Ukraine on 17 July 2014. Through a “soft” approach, the Prime Minister of Malaysia was able to negotiate the return of the black boxes of the plane with the non-State actors. A national prosecution to try the offenders is being organized in the Netherlands.

In *Wang Bao’ An & Ors v. Malaysian Airline System Bhd & Other Cases*, the High Court of Malaya at Kuala Lumpur considered the binding effect of the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (‘the 1999 Montreal Convention’)⁴ and the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (‘the 1929 Warsaw Convention’)⁵ arising out of the disappearance of flight MH 370, considered a legal accident, under the Conventions. The air carrier took on strict

4 Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature May 28, 1999, 2242 U.N.T.S. 309 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention].

5 Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature Oct. 12, 1929, 261 U.N.T.S. 423 (entered into force Feb. 13, 1933) [hereinafter Warsaw Convention].

liability under the international conventions in exchange for limited compensation, an arrangement meant to work well for both the victim and the defendant. The High Court held that the Convention provided exclusive causes of action against a carrier and consequently excluded all other common law causes of action arising under contract, tort and other legal proceedings such as arbitration. The plaintiffs had filed two different sets of suits that were consolidated before the High Court in the instant case.⁶ The Malaysian Airline System Berhad, was a common defendant in all cases. The two conventions were applicable in the two different suits. The question was whether the exclusivity principle in Article 29 of the Montreal Convention, the precursor to Article 24 of the Warsaw Convention applied in Malaysia.⁷ The exclusivity principle only permits liability and compensation for the international carriage by air under the respective Convention and excludes all other forms of compensation under tort, contract, and other laws. The High Court held that the exclusivity principle applies with equal force under the Montreal Convention as a matter of Malaysian law. In the instant case, the High Court referred to, and followed the decisions in *Sidhu v. British Airways plc* (1929 Warsaw Convention) [1997] AC 431, *Ong Joshua v. Malaysian Airline System* (amended Warsaw Convention) [2008] 3 HKC 26, *All Nippon Airways Co Ltd v. Tokai Marine & Trading Co Ltd* (Warsaw Convention) [2012] 9 CLJ 429 [CA], the UK Supreme Court in *Stott v. Thomas Cook* (Montreal Convention) [2014] UKSC 15, the United States Supreme Court in *El Al Israel Airlines Ltd v. Tsui Yuan Tseng* (Warsaw Convention) 119 S. Ct. 662 (1999) by Ginsburg, J. who applied the rationale of the House of Lords in *Sidhu* and upheld the exclusivity of the Warsaw Convention, and the Canadian apex court decision in *Thibodeau v. Air Canada*

6 Presided by Azizul Azmi Adnan J. The two suits were WA-21NCVC-20-03-2016 and WA-21NCVC-33-03-2016. In respect of suit WA-21NCVC-33-03-2016, the applicable treaty is the Warsaw Convention. Similar questions were posed in that case relating to the scope of the Warsaw Convention. Mr. Ganesan Nethi was counsel for the plaintiffs in case WA-21NCVC-20-03-2016, and Ms. Sangeet Kaur Deo was counsel for the plaintiffs in eight other cases.

7 Articles 17.1 and 29 of the Montreal Convention are as follows:

Article 17. Death and Injury of Passengers – Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 29. Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable. Montreal Convention, *supra* note 4, at 355, 360.

(Montreal Convention) [2015] 4 LRC 324 that, where the objective of a treaty is to achieve international conformity, the Canadian courts should not depart from any strong international consensus that has developed in relation to the interpretation of such treaty. The High Court also considered the U.S. decision *Zicherman v. Korean Air Lines* (Warsaw Convention) 516 U.S. 217 (1996) by Scalia, J. that upheld the exclusivity principle. However, the identity of potential claimants and the appropriate measure of damages are matters to be determined by reference to Malaysian domestic laws.

In the instant case, the High Court held that:

- (a) each of the Warsaw and Montreal Conventions provides for exclusive causes of action in international air transportation, where the claims arise out of international carriage of passengers, baggage or cargo by air;
- (b) where a passenger dies or suffers bodily injuries, the carrier will be liable without proof of fault under art. 17 of the Warsaw Convention or of the Montreal Convention (as applicable) if the plaintiff can prove that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking; and
- (c) where art. 17 of either Convention does not apply, either because there were no bodily injuries (*Tseng, Stott and Thibodeau*) or because the accident occurred outside the time between embarkation and disembarkation (*Ong Joshua and Sidhu*), then no claim exists against the carrier, whether at common law or otherwise.

b   *Chicago Convention*

Flight paths under the 1944 Chicago Convention⁸ also received attention in December 2018, in Malaysia-Singapore bilateral relations. It concerns Singapore's mandatory use of the Instrument Landing System (ILS) for Seletar Airport, a recently renovated airport in Singapore, about 2 kms away from Pasir Gudang, an industrial port town in Malaysia. Singapore had issued new ILS procedures for Seletar Airport, which was scheduled to be enforced on 3 January 2019. This raises a problem for Malaysia because the flight path required for the ILS instrument involves aircraft descending over the airspace above Pasir Gudang in Malaysia, a town scheduled for further development. Malaysia sent a protest note to Singapore over the country's intention to use the airspace above Pasir Gudang as a flight path for aircraft landing at Seletar Airport. Malaysia pointed out that there was a limitation on the airspace in Pasir Gudang as the Singapore procedure would affect development in the industrial town,

⁸ Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947).

as a building height restriction would have to be imposed. The two States are scheduled to discuss the problem in January 2019.

3 Refugees

Malaysia has not ratified the 1951 Convention relating to the Status of Refugees and its related 1967 Protocol,⁹ the 1954 Convention Relating to the Status of Stateless Persons,¹⁰ and the 1961 Convention on the Reduction of Statelessness.¹¹ Malaysia felt that initiatives under the New York Declaration on Refugees and Migrants, adopted unanimously on 19 September 2016 by the United Nations General Assembly, should not bind non-signatory States to the relevant international instruments, placing them in a position inconsistent with the provisions of the Vienna Convention on the Law of Treaties 1969,¹² which Malaysia acceded to, on 27 July 1994. The Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 has been widened to include labour exploitation in line with Agenda 2030 for Sustainable Development.¹³

4 Law of the Sea: Warships in the EEZ to Act Peacefully and with Due Regard

The third paragraph of the Malaysian declaration to the 1982 Law of the Sea Convention (1982 Convention)¹⁴ states: "The Malaysian Government also

9 Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); 1967 Protocol – Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

10 Convention Relating to the Status of Stateless Persons, opened for signature Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960).

11 Convention on the Reduction of Statelessness, opened for signature Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

12 Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

13 Malaysia is also a State Party to several treaties on narcotic drugs and psychotropic substances, such as followings:

1. Single Convention on Narcotic Drugs, opened for signature Mar. 30, 1961, 520 U.N.T.S. 151 (entered into force Dec. 13, 1964).

2. Protocol Amending the Single Convention on Narcotic Drugs, opened for signature Mar. 25, 1972, 976 U.N.T.S. 3 (entered into force Aug. 8, 1975).

3. Convention on Psychotropic Substances, opened for signature Feb. 21, 1971, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976).

14 THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE U.N. CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE

understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State.” This paragraph highlights the interpretation of the Malaysian Government on the conduct of warships in the exclusive economic zone. The understanding is that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State. Section 7 of the 1982 Convention deals principally with safeguards and powers of enforcement in Article 224 exercisable by officials, or by warships, military aircraft or any other ship or aircraft marked and identified as being on government service and authorised to that effect. Strait States do not have a right to take prevention and enforcement measures against ships and aircraft entitled to sovereign immunity as enumerated in Article 236 including warships, naval auxiliary, and other vessels or aircraft owned or operated by a state and used, for the time being, on government non-commercial service.

The term “peaceful” is subject to two interpretations. First, the term excludes aggression and secondly, it includes a peaceful display of aggression as stated in Article 39 of the 1982 Convention. According to Article 39(1)(c), in distress situations or situations where *force majeure* applies, ships and aircraft may delay, threaten or actually use force against strait States and carry out any activity outside their mode of transit. Activities outside their normal mode of transit could be interpreted in many different ways, such as an engagement in armed warfare at sea, or illegal fishing, to deliberate and wilful discharge of oil and other pollutants at sea. This is one interpretation of Article 39(1)(c). These situations of distress are not mentioned in the 1982 Convention. *Force majeure* may be given its ordinary legal meaning according to Article 31 of the Vienna Convention on the Law of Treaties. It is interpreted as an act of God. This interpretation of Article 39(1)(c) conflicts with the UN Charter and seems to override it. The other interpretation of Article 39(1)(c) is that it should not override the United Nations (UN) Charter as it would defeat the spirit and intention of the 1982 Convention and that of the UN Charter. The first interpretation of Article 39(1)(c) of the 1982 Convention would result in the 1982 Convention being *ultra vires* the UN Charter. The problem here lies with the drafting of Article 39(1)(c). Article 103 of the UN Charter is paramount and the provisions of the 1982 Convention must fall within the scope of the UN Charter. Malaysia’s

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IMPLEMENTATION OF PART XI OF THE U.N. CONVENTION ON THE LAW OF THE SEA, MALAYSIA, ¶13, U.N. Sales No. E.97.V.3 [hereinafter DECLARATION TO THE UNCLOS].

interpretation of the term “peaceful” in the third paragraph accords with a non-aggressive stance.

The third paragraph of the Malaysian declaration is also consistent with the principle of “due regard” highlighted in the 1982 Convention. The principle of “due regard” is mentioned in several provisions, for example, submarine cables and pipelines on the continental shelf in Article 79(5), in Part XI in Articles 162(2)(d) and 163(2), fishing in Articles 60(3) and 66(3)(a), on the development and transfer of marine technology, the protection of legitimate interests of parties in Article 267, on navigation in Articles 27(4), 39(3)(a) and 234, rights and duties of States in Articles 56(2), 58(3) and in Article 87(2). Other provisions on due regard are found in geographical representation in Articles 167(2), A 2/2(1), A 4/5(1) and A 4/7(3), interests of States in Articles 87(2), 142(1), 148 and A4/5(2) and rotation of membership in Article 161(4).

The phrase “due regard” is not defined in the 1982 Convention. The principle of “due regard” was not applied in the *Nuclear Tests* case 1974 (I.C.J. Reports 1974, p. 253) but applied in the *Chagos Marine Protected Area* (MPA) case (Mauritius v. UK, PCA 2015) and in the *South China Sea* case (Philippines v. China, PCA Case 2013–19). In the *Chagos* MPA case, the Tribunal held that the principle comprised a component of inter-State consultation. In the *South China Sea* case, the Philippines argued that China had failed to prevent its vessels and nationals from exploiting the living resources in the EEZ of the Philippines, hence China had breached its “due regard” duty under Article 58(3). The Tribunal ruled in favour of the Philippines and concluded that China was in breach of its obligation of “due regard.”

5 Environment: the Lynas Advanced Materials Plant Issue and Removal of Nuclear Waste from Malaysia

The Lynas rare earth refinery is an Australian company set up in the coastal town of Kuantan along the east coast of Malaysia bordering the South China Sea in 2012 with an annual operating licence. The current site enables the plant to be run at a lower cost than originally approved in Western Australia. The raw material for the plant, a type of rare earth mineral, is imported from Australia.¹⁵

¹⁵ Rare earths are chemical elements with unique magnetic, luminescent, and electrochemical properties often used in modern consumer technologies, amongst others. Examples of rare earths are: Scandium or Sc (21) Scandium, a silvery-white metal, which is a non-lanthanide rare earth; Yttrium or Y (39); Lanthanum or La (57); Cerium or Ce (58); Praseodymium or Pr (59); Neodymium or Nd (60); Promethium or Pm (61); and Samarium or Sm (62). Former tin mining operations in Malaysia have precipitated rare earth minerals.

It is not classified as a nuclear plant. Lynas produces two (2) forms of gypsum as by-products of its rare earth refining activities and a waste known as water leach purification residue (WLP) which contains very low-level naturally occurring radioactivity. Unfortunately, one of the three types of wastes generated by the plant is radioactive and the problem arises in the treatment and disposal of the nuclear waste product.

There is a view that the company should be allowed to grow by providing it with an appropriate and suitable ecosystem that meets the latest international standards on waste disposal. However, the controversial WLP residue has caused concern. The controversy is that its continued operations depend on the refinery disposing of its by-products from the country. The Ministry of Environment, Science, Technology and Climate Change is in charge of such plants. The Ministry has indicated that it would allow Lynas to renew its licence if it complied with the pre-condition of removing an accumulated 451,564 metric tonnes of radioactive WLP residue from Malaysia. While scheduled wastes are regulated by the Environmental Quality Regulations (Scheduled Waste) 2005, radioactive wastes fall under the jurisdiction of the Atomic Energy Licensing Board. The environmental risk management strategy for the nuclear waste has not been well worked out.

Malaysia acceded to the International Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on 8 October 1993 and the convention entered into force for Malaysia on 6 January 1994.¹⁶ Malaysia is also a State Party to the 1995 Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on 26 October 2001.¹⁷ In contrast, Malaysia is not a State Party to the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal of 10 December 1999.¹⁸ These Conventions do not regulate the movement

16 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Mar. 22, 1989, 1673 U.N.T.S. 57 (entered into force May 5, 1992) [hereinafter Basel Convention]. The Basel Convention now has 187 States Parties.

17 Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Sept. 22, 1995 (not yet in force).

18 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Dec. 10, 1999 (not yet in force) [hereinafter Basel Protocol].

of the radioactive WLP residue from Malaysia to Australia. The Malaysian Government needs to draw up an environmental management plan for the safe disposal of the WLP residue generated by Lynas that has better checks and balances, perhaps drawing upon the Australian experience. The transportation of nuclear materials is regulated by the conventions of the International Maritime Organisation.

6 Malaysia-Singapore Relations in the Straits of Johore

Following the cession of Singapore, relations with the Republic have been volatile as there are tensions regarding the supply of water, railway land, construction of bridges, international dispute settlement of maritime features, delimitation of the *thalweg* in the Straits of Johore following intense coastal expansion efforts, sovereignty over airspace, Instrument Landing System (ILS) and landing rights, and interpretation of Malaysia's declaration to the 1982 Law of the Sea Convention.¹⁹ The issue of the *thalweg* is highlighted here.

a *Delimitation of the Thalweg in the Straits of Johore*

In December 2018, Malaysia-Singapore relations in the Straits of Johore faced a set-back in territorial seas delimitation in the Straits of Johore as Malaysian expansion of port limits and Singapore's land reclamation activities have perhaps altered the original territorial sea delimitation of both States based on the *thalweg* median line. Consequently, it is uncertain how the *thalweg* has changed. This stretch of water was originally referred to as territorial waters in the Straits Settlements and Johore Territorial Waters Agreement 1927. Subsequently the two States have adopted a boundary agreement in 1995 based on the 1927 Agreement in the Straits of Johore. Article II of the 1927 Agreement states that the waters ceded by Their Highnesses the Sultan and Tumungong of Johore under Treaty of 1824 which are within three nautical miles of the mainland of the State and Territory of Johore measured from the low water mark shall be deemed to be within the territorial waters of the State and Territory of Johore. Article III provides that:

All islets lying within the Territorial waters of the State and Territory of Johore, as defined in Articles I and II hereof, which immediately prior to this Agreement formed part of His Britannic Majesty's dominions, are

19 DECLARATION TO THE UNCLOS, *supra* note 14.

hereby ceded in full sovereignty and property to His Highness the Sultan of the State and Territory of Johore, his heirs and successors forever.²⁰

Singapore has a revised 1985 edition of this Treaty as an Act to approve an Agreement concluded between His Majesty and the Sultan of the State and Territory of Johore that entered into force on 30 March 1987.

Both States are now parties to the 1982 Law of the Sea Convention. In the absence of a rule for delimitation of straits between States with opposite or adjacent coasts, Article 15 provides for the delimitation of the territorial sea between States with opposite and adjacent seas. The imprimatur in Article 15 is that States must agree between them if they wish to extend the territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The Article goes on to provide that this provision does not apply where the territorial seas because of historic title or other special circumstance require a different method of delimitation. The cause of action needs to be ascertained by the two neighbouring States. Malaysian ships on government service have been told to leave Singapore's 'territorial sea' as their locus is no longer Malaysian. Singapore claims this zone of the sea falls within its jurisdiction. Talks were scheduled to be held in January 2019 but they did not come to pass. The issue concerns the unilateral action of States that perhaps shifted the original *thalweg* median maritime boundary line in the Straits, without prior consultation, by port limits expansion and land reclamation activities, that goes against the spirit of good neighbourliness and the

20 When the Straits Settlements and Johore Territorial Waters (Agreement) Bill was presented at the House of Lords, the Parliamentary Under Secretary of State for Dominion Affairs (Lord Lovat) said:

My Lords, in asking you to give a Second Reading to this Bill I should like to say that it aims at sanctioning an agreement which has been come to between Sir Hugh Clifford, as Governor of Singapore, and the Sultan of Johore. As your Lordships are aware, when the island of Singapore was ceded to the East India Company in 1824, the islands, straits, and seas were ceded at the same time. It has been found inconvenient by the Sultan of Johore and his Government that the rights of the British should run absolutely up to the shores of Johore. It is thought that it would be better in the interests of both parties if the division ran along the centre of the water between the two States, as is almost the universal custom in other parts of the world. It is more convenient for Customs, it is also more convenient for the general administration of Johore. The Sultan of Johore is a Sovereign Prince. He is directly under the protection of His Majesty, and the relations are most excellent between the State of Johore and this country. The Bill really only makes a slightly altered boundary inside the Empire. I beg to move.

70 Parl Deb HL (5th ser.) (1928) cc. 647-8 (UK).

time-honoured “due regard” principle entrenched in the *Chagos* MPA²¹ and the *South China Sea Arbitration* cases.²²

7 Legislation

Malaysia ratified the Maritime Labour Convention, 2006, as amended (MLC, 2006)²³ to upgrade the standards of employment of the seafarer on 20 August 2013 in accordance with Standard A4.5 paragraphs (2) and (10). The Government has specified the applicability of the following branches of social security: medical care; sickness benefit and employment injury benefit to the seafarer. In addition, Malaysia has also accepted the amendments of 2014 to the MLC, 2006. It entered into force on 18 January 2017. Malaysia also adopted the amendments of 2016 to the MLC, 2006 that entered into force on 8 January 2019. However, it has not accepted amendments of 2018 to the MLC, 2006. The amendments are expected to enter into force on 20 December 2020.²⁴ To implement these provisions, Malaysia has adopted an amendment to the principal shipping legislation, Act A 1519, Merchant Shipping Ordinance (Amendment) Act 2016.

On the domestic implementation of this Convention, on examining the Malaysian legislation for incorporation of international standards in the MLC, the Committee of the ILO noted that the Government of Malaysia had not provided information on the measures taken with a view to ensuring that seafarers ordinarily resident in Malaysia and, to the extent provided for in its national law, their dependants, have access to social security protection. Furthermore, the Government had not provided information on its obligation, under *Standard A4.5, paragraph 6*, to give consideration to the various ways in which comparable benefits will, in accordance with national law and practice, be provided

21 Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03 (Perm. Ct. Arb. 2011).

22 The South China Sea Arbitration (Phil. v. China), Case No. 2013-19 (Perm. Ct. Arb. 2016).

23 Maritime Labour Convention, opened for signature Feb. 23, 2006, 45 I.L.M. 792 (entered into force Aug. 20, 2013).

24 The Ministry of Transport has also adopted other legislation such as: Ocean Cargo Transport Act 1950 [Act 532]; Federal Light Dues Act 1953 [Act 240]; Penang Port Commission Act 1955 [Act 138]; Port Authorities Act 1963 [Act 487]; Bintulu Port Authority Act 1981 [Act 240]; Ports (Privatisation) Act 1990 [Act 422]; International Yacht Registration Act Langkawi 2003 [Act 630]; and Merchant Shipping Ordinance 1952 [Ord. 70/1952].

to seafarers on board ships that fly its flag, in the absence of adequate social security coverage.

The International Labour Organisation has asked the Government of Malaysia to reply by 2019 to several comments the Committee raised²⁵ based on the Government of Malaysia's first report on the application of the Convention that was received before the MLC amendments were received. The 2014 amended MLC introduced the new *Standard A2.5.2* and replaced *Standard A4.2* by *Standards A4.2.1* and *A4.2.2* that entered into force for Malaysia on 18 January 2017. The ILO raised about 37 comments to the Government of Malaysia of which a few are reproduced here as follows:

1. Indicate how it gives effect to the Convention's requirements regarding consultations with shipowners' and seafarers' organizations.
2. Indicate whether the determination concerning the list of categories of persons not to be regarded as seafarers has been made after consultations with the shipowners' and seafarers' organizations concerned, as required by Article 11, paragraphs 3 and 7 of the Convention. Section 3(d) of the Merchant Shipping Ordinance (Amendment) Act 2016 (the Act of 2016), while reproducing the definition of seafarer contained in the Convention, excludes from its scope of application a list of categories of persons.
3. Indicate on which grounds these categories of persons were excluded from the definition of "seafarer," taking into account the above mentioned resolution.
4. Adopt the necessary measures to ensure that all persons falling within the definition of seafarer contained in Article 11, paragraph (1)(f) benefit from the protection of the Convention.
5. Indicate whether any additional determination has been made on the basis of this provision, and if so, to provide information on whether these determinations referred to specific persons or specific categories of person and if they were made after consultations with the shipowners' and seafarers' organizations. The Committee further requests the Government to ensure that any determination is made on a horizontal basis and applies to the whole sector and not to individual shipowners.

25 Int'l Labour Org. [ILO], *Direct Request (CEACR)*, International Labour Conference, 107th Session (2018), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:80031:0::NO::P80031_COMMENT_ID:3417497.

8 International Dispute Settlement

Before the 14th General Elections (GE 14), Malaysia submitted two cases to the International Court of Justice (ICJ) concerning the Application and the Interpretation of the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Malaysia v. Singapore).²⁶ After a change of government following GE 14, the cases were discontinued at the ICJ. The first case on Interpretation concerned an Application on 2 February 2017 for revision of the *Pedra Branca* Judgment of 23 May 2008 under Article 61 of the Statute of the Court. In the earlier Judgment, the Court declared that (1) sovereignty over Pedra Branca/Pulau Batu Puteh belonged to Singapore; (2) sovereignty over Middle Rocks belonged to Malaysia; and (3) sovereignty over South Ledge belonged to the State in the territorial waters of which it was located. In the application for revision, Malaysia contended that there was a new fact that was a decisive factor within the meaning of Article 61 of the Statute of the Court. Malaysia referred to “three documents discovered in the National Archives of the United Kingdom during the period from 4 August 2016 to 30 January 2017, namely internal correspondence of the Singapore colonial authorities in 1958, an incident report filed in 1958 by a British naval officer and an annotated map of naval operations from the 1960s.” Two other documents were filed under “Extra Facts.” Of these, one was a 1937 map of the “Territorial waters of Johore” and associated documents. The map was addressed to Sultan Sir Ibrahim of Johore, the great great grandfather of the present Sultan Ibrahim. This map clearly shows Pedra Branca as part of Johore.

A similar fate befell the Request for Interpretation of the Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* filed on 30 June 2017. Malaysia sought a revision of the Court’s finding concerning sovereignty over Pedra Branca/Pulau Batu Puteh. Malaysia’s argument was that states parties that established a Joint Technical Committee to delimit the maritime boundaries between the territorial waters of both countries had reached an impasse in November 2013 attempting to implement the 2008 Judgment

26 Application for Revision of the Judgment of 23 May 2008 in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.) (Feb. 2, 2017), <https://www.icj-cij.org/files/case-related/167/167-20170202-APP-01-00-EN.pdf>; Request for Interpretation of the Judgment of 23 May 2008 in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.) (June 30, 2017), <https://www.icj-cij.org/files/case-related/170/170-20170630-APP-01-00-EN.pdf>.

through co-operative processes. This was because the parties were unable to agree over the meaning of the 2008 Judgment as it concerns South Ledge and the waters surrounding Pedra Branca/Pulau Batu Puteh on two points, that:

- (1) sovereignty over Pedra Branca/Pulau Batu Puteh belonged to Singapore; and
- (2) sovereignty over South Ledge belonged to the State in the territorial waters of which it is located.

On 28 May 2018, the Co-Agent of Malaysia notified the Court of the agreement of the Parties to discontinue the proceedings. This was communicated to the Government of Singapore. On 29 May 2018 the Government of Singapore communicated its agreement to the discontinuance of the proceedings. The Court made an order for discontinuance on 29 May 2018 and directed the removal of the case from the ICJ's List. The merits of the 1937 Map and associated documents were not aired before the ICJ. It might augur well for the future of bilateral relations between the two States to settle the issue of Pedra Branca through bilateral negotiations.

9 International Security in the South China Sea

The South China Sea region has been a very heavily contested region. In summary, the conflicting claims relate to islands and overlapping maritime claims as many States exerted and made known their 200 nautical miles (M) exclusive economic zone (EEZ) and continental shelf claims around various islands in the South China sea such as the Spratlys, since their participation in the negotiations of the Third United Nations Conference on the Law of the Sea (UNCLOS III negotiations, 1974–1982). With the entry into force of the 1982 Law of the Sea Convention, the South China Sea States can claim extended maritime zones, including outer continental shelves up to 350 nautical miles. Forced to meet the demands of nation-building, the clamour for natural resources brought many South-East Asian nations into conflict such as Brunei, the People's Republic of China (PRC), Republic of China (Taiwan), Malaysia, the Philippines, and Vietnam. Malaysia, like other responsible South China Sea States, has a duty to restore destroyed and degraded marine ecosystems and loss of species due to land reclamation, and artificial island construction. As there is heightened military presence with threats of nuclear power, but not closure of vital sea lines of communication, it is incumbent on Malaysia and the other States to de-escalate the tensions. The new Prime Minister of Malaysia, Tun Mahathir has repeatedly called for warships to leave the contested zones. Malaysia claims some maritime features in the Spratly archipelago of the South

China Sea that fall within its EEZ jurisdiction and 200 nautical-mile continental shelf. Malaysia published this data on a map claiming its continental shelf in December 1979. The publication drew protests from China, Indonesia (responding to China), Vietnam and the Philippines.²⁷

Captain Ashley Roach identifies Malaysia's claims as:

1. Seven islands or rocks in the Spratly group, namely, Swallow Reef, Amboyna Cay (Vietnam occupied), Barque Canada Reef (Vietnam occupied), rocks forming Erica Reef, Investigator Shoal, and Mariveles Reef. Commodore Reef/Rizal Reef (Philippine occupied). Malaysia occupies the remaining four and has displayed sovereignty there.
2. Two low-tide elevations.
3. Three totally submerged reefs on its continental shelf.
4. Low-tide elevations lying more than 12 miles from an island or mainland or submerged at low tide.

a *Malaysia's Position on Maritime Claims by Foreign States*

The Malaysian Declaration to the 1982 Law of the Sea Convention (1982 Convention) stated that the Malaysian Government was not bound by any domestic legislation or by any declaration issued by other States upon signature or ratification of this Convention. Malaysia reserved the right to state its position concerning all such legislations or declarations at the appropriate time. In particular, Malaysia's ratification of the Convention in no way constituted recognition of the maritime claims of any other State having signed or ratified the Convention, where such claims were inconsistent with the relevant principles of international law and the provisions of the 1982 Convention that were prejudicial to the sovereign rights and jurisdiction of Malaysia in its maritime areas.

During the recent visit of the Malaysian Prime Minister Tun Mahathir Mohamad to China (Friday, 17 August 2018), both States agreed to:

- maintain peace, security and stability, as well as safety and freedom of navigation in the South China Sea;
- resolve their differences between sovereign States directly concerned by peaceful means through friendly consultations and negotiations, in accordance with universally recognized principles of international law, including the 1982 Convention;

²⁷ J. Ashley Roach, *A CNA Occasional Paper – Malaysia and Brunei: An Analysis of Their Claims in the South China Sea*, CNA ANALYSIS & SOLUTIONS ii (2014), https://www.cna.org/cna_files/pdf/iop-2014-u-008434.pdf.

- exercise self-restraint in the conduct of activities, and to avoid actions that would complicate or escalate tensions in the South China Sea; and
- work with the ASEAN Member States “for the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) and encourage maritime cooperation, as well as actively push forward consultations on a Code of Conduct (COC) to see the early conclusion of an effective COC.”²⁸

10 Conclusion

Malaysia is a peaceful and law-abiding member of the UN and ASEAN using international law rules to uplift standards both nationally and internationally and uplift the rule of international law in all its international relationships. Enforcement through an evidence-based mechanism to assess compliance with international standards is well-worth the effort to ensure that international standards reach the people.

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²⁸ Li Keqiang, Premier of the State Council of the People's Republic of China, Mahathir Bin Mohamad, Prime Minister of Malaysia, Joint Statement between the Government of the People's Republic of China and the Government of Malaysia (Aug. 20, 2018).