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INDIA'S PERSONAL DATA PROTECTION BILL, 2019 NEEDS CLOSER ADHERENCE TO GLOBAL STANDARDS (SUBMISSION TO JOINT COMMITTEE, PARLIAMENT OF INDIA)

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How far can Convention 108+ 'globalise'?: Prospects for Asian accessions

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1. 'Globalisation' of Convention 108/108+

The 'modernisation' of data protection Convention 108 was completed, by the Council of Europe's Committee of Ministers to the existing Convention agreeing to a Protocol amending it, on 18 May 2018.[1] The new version (called '108+' to distinguish it) will not come into force for some years.[2] The standards required in the laws of acceding countries by 108+ are higher than those of Convention 108, and are arguably mid-way between 108 and those of the European Union's General Data Protection Regulation (GDPR).[3] Since it became open for signature on 10 October 2018, any new countries wishing to accede will have to accede to both Convention 108 and the amending Protocol (ie to 108+) .

There is growing international support for accession to Convention 108+ as a global data protection Convention. As with Convention 108, its key obligation (enforceable only by diplomatic means) is that parties to 108+ commit to allowing transfers ('free flow') of personal data to other Parties, provided those Parties implement and enforce the data protection standards of the Convention, in return for the same benefit of 'free flow' of personal data to their country[4]. Accession to Convention 108, or 108+, also has numerous other benefits.[5]

The UN Special Rapporteur on the Right to Privacy (SRP) has recommended that all UN member states should accede to Convention 108+ and implement its provisions in their domestic law, and where possible to implement additional GDPR principles, while leaving the door open to a broader international agreement at a later date.[6] The EU also endorses accession to Convention 108 by countries seeking a positive adequacy assessment under the GDPR (GDPR, recital 105).

Convention 108 has had reasonable success since its 'globalisation' started with the completion of Uruguay's accession in 2013. It now has 55 Parties, with three from Latin America (Argentina, Mexico and Uruguay), and five from Africa (Cape Verde, Mauritius, Morocco, Senegal, and Tunisia,). Burkina Faso remains eligible to accede to Convention 108.[7]

Convention 108+ accessions and Asia: Why assessment is desirable

However, Convention 108 has had a lack of success in Asia with no accessions as yet, although Japan, Korea, the Philippines and Indonesia are accredited as Observers to the Convention's

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[1] Technically, the non-CoE member states did not adopt the amending protocol.

[2] For details see G. Greenleaf (2018) 'Modernised' data protection Convention 108+ and the GDPR' 154 *Privacy Laws & Business International Report* 22-3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3279984>. This paper sets out 13 benefits that countries outside Europe can obtain from accession to Convention 108, under the headings: (i) realistic prospects; (ii) no realistic alternative; (iii) voluntary obligations; (iv) international 'best practice' recognition; (v) reciprocal data exports; (vi) moderate standards; (vii) minimum standards; (viii) a 'whitelist' substitute; (ix) 'adequacy' assistance; (x) development assistance; (xi) business benefits with exports and imports; (xii) individual benefits from minimum protections; and (xiii) assistance to international organisations. The significance of these potential benefits, or potential disadvantages, will vary between countries.

[3] G. Greenleaf 'Renewing Convention 108: The CoE's 'GDPR Lite' Initiatives' (2016) 142 *Privacy Laws & Business International Report*, 14-17 <https://ssrn.com/abstract=2892947>.

[4] There is an exception to the obligation of allow such transfers, allowing higher regional standards to also be required, such as adequacy under the EU GDPR. Another exception exists if "there is real and serious risk that the transfer would lead to circumventing the provisions of the Convention".

[5] G. Greenleaf 'Balancing Globalisation's Benefits and Commitments: Accession to Data Protection Convention 108 by Countries Outside Europe' UNSW Law Research Paper No. 16-52, June 23, 2016 <https://ssrn.com/abstract=2801054>.

[6] UN General Assembly, seventy-third session *Report of the Special Rapporteur on the right to privacy*, 17 October 2018, para. 117(e) <http://www.worldlii.org/int/other/UNSRPPub/2018/11.html>; further stated in UN Human Rights Council *2019 Annual Report of the UN Special Rapporteur on the right to privacy,* para. 28 <https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/AnnualReports.aspx>

[7] Greenleaf (2018) 'Modernised' data protection Convention 108+ and the GDPR'

Consultative Committee. The task of attracting accessions to Convention 108+ is likely to be more difficult because of the higher standards that acceding countries must meet, but this may be offset by more countries being attracted by the prospect of a global convention.

Countries must now (in effect) accede to Convention 108+ as well as Convention 108, because accessions to Convention 108 alone are closed.[8] This means that, if (for example) Costa Rica is the next country to complete these requirements,[9] it would become the 56th Party to 108, pending the entry into force of 108+ (in 2023 at the earliest[10]). So there can still be accessions to 108 in this transitional period (until entry into force of 108+) but with the condition that the Party also deposits for accession to 108+. During this period, potential accessions are examined according to the accession requirements of 108+.[11] This may now occur with Costa Rica's proposed request, or with Korea's announced intention to apply to accede. This has the desirable result that examples of how the 108+ accession process will work in practice will start to occur from now onward, but how soon is unknown.

It is often too diplomatically sensitive for representatives of countries or international organizations to publish assessments of which countries are likely to be able to accede to a Convention. The approach taken in this article is that it is necessary for independent or 'unofficial' analysts such as academics to make such assessments, otherwise there is an inadequate basis for public debate on the future prospects of such international agreements. Such analysis and debate is needed now, not delayed until 108+ comes into force, in case there are aspects of the process which will put unnecessary impediments in the way of countries acceding, which may then be able to be remedied by the Consultative Committee of Convention 108 as early as possible.

The main purpose of this article is therefore to assess the potential prospects for any of the 26 countries in Asia[12] to accede to Convention 108+, whether in the short, medium or long term.[13] In the space of one article, any assessment of the accession prospects of 26 countries can only be indicative (or superficial, whichever term is preferred), because of the number of factors that are likely to change, whether because of legislative or political developments, or because of changing interpretations.

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[8] Any new country desiring accession must comply with 108+ requirements but deposit accession instruments for both the original 108 and the amending Protocol CETS 223.

[9] The President of Costa Rica has announced 'Costa Rica's forthcoming accession to Council of Europe Convention 108' to the Ibero-American Data Protection Network (RIPD): *OEA/OAS Newsletter*, December 2018 < http://www.oas.org/en/sla/dil/newsletter_DDI_newsletter_Annual_Meeting_Data_Protection_Costa_Rica_December-2018.html>. Formal accession proceedings have not yet commenced, but see comments anticipating such in the minutes of a Consultative Committee meeting in 2019 (item 2.3): <https://rm.coe.int/t-pd-bur-2019-49th-meeting-report-en/16809948fc>.

[10] Greenleaf (2018) 'Modernised' data protection Convention 108+ and the GDPR'

[11] Convention 108 Consultative Committee *draft Evaluation and Follow-up Mechanism* (November 2019)

[12] East to West, from Japan to Afghanistan; north to south from China to Timor Leste. Papua New Guinea and Mongolia are not included.

[13] For an earlier article on this theme, concerning Convention 108 (not 108+) see G. Greenleaf 'Data protection Convention 108 accession eligibility: 80 Parties now possible' (2017) 148 *Privacy Laws & Business International Report*, 12-16

Methodology: Seven impediments to accessions

Fifteen of the 26 Asian countries already have data privacy laws, and two others have official Bills for such laws. A number of surveys of these laws and Bills to mid-2019 are available.[14] This leaves nine Asian countries without such laws or known plans to enact them.[15]

The approach taken in this article is that an analysis of the current potential for accession to Convention 108+ by all 26 countries countries in Asia can be undertaken efficiently by considering in order the following grounds which may be impediments to accession:

(i) Jurisdictions which are not States;

(ii) States which are not democratic;

(iii) Laws of inadequate scope;

(iv) Laws lacking an independent data protection authority;

(v) Laws with substantive provisions falling short of 108+ 'accession standards';

(vi) States with proposed Bills only;

(vii) States with no relevant laws or proposed Bills.

There are at least three limits to this analysis. First, each of grounds (i) to (vii) may change over time in relation to a country, through legal or political developments, so this is only an analysis of the current position, although it does include some speculation about likely short-term changes.

Second, although a jurisdiction may be ineligible for accession on one of earlier grounds, it may also be ineligible on one or more of the later grounds. This paper does not provide an exhaustive examination of every ground that might prevent a country from acceding.

Third, it is easy to state 'laws requiring substantive assessment of compliance with 108+ provisions' as the fifth ground. It is much more complex to state which of the remaining countries with laws satisfy that element. Each of the twelve clauses from 4 to 15 (except 13) plus 18 in Convention 108+ (most with sub-clauses) must be evaluated in relation to the law and practice of the country applying to accede. Where there are shortcomings, amendments to laws or practices may occur before ratification. Such substantive evaluation is a complex process in relation to a single country (discussed in part 6 below), and cannot be attempted for multiple countries in one brief article. This analysis therefore, only attempts to indicate for which countries in Asia such a detailed substantive assessment is justifiable. In some cases obvious major issues for such an assessment will be noted.

Each of the seven grounds is now considered. The 26 jurisdictions are numbered 1-26, and indicated in bold, the first time a conclusion is reached about their prospects for accession. Each may be mentioned later in relation to further impediments to accession.

[14] G. Greenleaf, 'Asia's Data Privacy Dilemmas 2014–19: National Divergences, Cross-Border Gridlock' (2019) No 4, *Revista Uruguaya de Protección de Datos Personales* (Revista PDP), August 2019, 49-73; <https://ssrn.com/abstract=3483794>. This survey is an update of developments from 2014-19 of G. Greenleaf *Asian Data Privacy Laws* (OUP, 2014)

[15] Afghanistan; Bangladesh; Myanmar; Brunei; Cambodia; Laos; Maldives; North Korea and Timor Leste.

2. Laws in jurisdictions which are not a State

A party to Convention 108+ must be a State,[16] which is interpreted according to UN practice concerning eligibility for UN membership.[17] Taiwan is ineligible on this basis, and would also be ineligible because it does not have an independent supervisory body (or any DPA at all). Bhutan was not previously a UN member, but is now, so the question is no longer relevant to it.

Position of self-governing territories

Some 'self-governing' territories have their own data privacy laws. If the country of which they are a territory is a Party to Convention 108+, and has responsibility for the territory's external relations, then it can declare under art. 28 that the Convention 108+ applies to the territory,[18] as has already occurred with some territories of European states under Convention 108.[19] However, this assumes that the country of which the territories are part is itself acceding to the Convention.

The Hong Kong and Macau SARs (Special Administrative Regions) of the Peoples Republic of China (China) could be considered under this category, but this faces the immediate obstacle that China is not likely to accede to Convention 108+ (or be able to, as argued later). However, there are special provisions in the Basic Laws of the two SARs which must be considered. Both Hong Kong and Macau have the capacity, under the Basic Law ('mini constitution') of each to enter agreements such as Convention 108+.[20] But this internal capacity of the two SARs cannot overcome the requirement in Convention 108+ article 27(1) that only States may accede to the Convention.

Hong Kong SAR is ineligible because it is not a State, and art. 28 would first require China to accede. It would also have difficulty establishing that it has a sufficient degree of democracy.

Macau SAR is ineligible because it is not a State, and art. 28 would first require China to accede. It would also have difficulty establishing that it has a sufficient degree of democracy, and (unlike Hong Kong) it may lack a 'completely independent supervisory body', because its DPA has not yet been formally established by a law, despite plans for some years to do so.

1 **Taiwan** – ineligible - not a State, by UN practice.

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[16] Only States can accede to Convention 108+, according to art. 27(1) ('Accession by non-member States or international Organisations'): 'After the entry into force of this convention, the Committee of Ministers of the Council of Europe may … invite any State not a member of the Council of Europe … to accede to this convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the committee.' For completeness, Convention 108+ also allows accessions by International organisations, but this is not relevant to this analysis.

[17] 'States' would be interpreted according to international law, following UN practice, and equates to entitlement to be a UN member State (Vienna Convention on the Law of Treaties, 1969; see generally Jorg Polakiewicz *Treaty Making in the Council of Europe*, Council of Europe Publishing, 1999).

[18] Convention 108+, art. 28(1) 'Any State …may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.'

[19] The UK has made such declarations for Jersey, Guernsey, the Isle of Man and Gibraltar (for Gibraltar, as recent as 8 July 2019). The Netherlands has made complex declarations to the effect that Convention 108 does apply to Aruba, Curaçao, St Maartens and the BES Islands. For details see 'Netherlands' in <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/declarations?p_auth=K7Xt2elr>.

[20] Hong Kong Basic Law, art. 151: 'The Hong Kong Special Administrative Region may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.' Article 136 of Macau's Basic Law has the same effect <https://www.um.edu.mo/basiclaw/english/ch7.html>.

2 **Hong Kong** SAR – ineligible - not a State, but a SAR of the PRC.

3 **Macau** SAR – ineligible - is in the same position as Hong Kong.

3. Laws in states which are not democratic

A candidate for accession must have a basic level of democracy to accede to Convention 108+. This is not stated explicitly, but is implied in various places where both Convention 108,[21] and now Convention 108+,[22] assume that the countries the Convention addresses, as Parties, are 'democratic societies'.

Council of Europe general treaties practice does not set out any definite position concerning democracy, but does state that suspension or revocation of an invitation to accede to a Council of Europe treaty 'could only be justified if the candidate country departed from basic principles of democracy and human rights',[23] which does imply that non-democracies should not be invited to accede. For example, the Convention on Cybercrime (ETS No.185) is a Council of Europe Convention which has been ratified by 20 non-European countries, all of them accepted as democracies.[24] Also, because of its lack of democracy and human rights, Belarus is the only European State to have applied for, and been refused, membership of the Council of Europe itself.

In the work of the Consultative Committee of Convention 108 on the evaluation and follow-up mechanisms to apply to Convention 108+,[25] the current draft states that 'evaluation and follow-up criteria shall reflect the following aspects: [first bullet point] The general political and institutional context of the country, with particular attention to democracy, democratic institutions and the rule of law, and any effect these matters have on data protection'.

What measure of democracy must a country exhibit in order to be eligible to accede? It would seem reasonable to argue that the standard required should be no higher than that of current Parties to the Convention, which with Convention 108 would mean that countries such as Russia would be a comparator. It is possible that this criterion may be tested if Thailand applies to accede, because of the structure of its upper house, but in light of its 2019 elections it is given the benefit of the doubt for this analysis.

The Peoples Republic of China and Vietnam both have data privacy laws, but neither can be considered to be democracies, even on a very broad understanding of that term. Neither are

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[21] For example, in the previous Convention 108, see the requirement that derogations must only be 'a necessary measure in a democratic society' (Convention 108, art. 9), and in the statement that DPAs 'have become an essential component of the data protection supervisory system in a democratic society' (para. 5, explanatory report of the Additional Protocol). A requirement of democracy is also consistent with references to 'human rights and fundamental freedoms' (Convention 108 , art. 1).

[22] In Convention 108+, see references to a 'democratic society' in arts. 11(1), 11(3), 14(4)(c) and 14(4)(d). In the Explanatory Report, see paragraphs 73, 92, 95, 108, 113 and 117, as well as footnote 13.

[23] Polakiewicz *Treaty Making in the Council of Europe*, Council of Europe Press, 1995, p. 35: 'It should be noted that an invitation to accede to a Council of Europe treaty has so far never been suspended or revoked. The suspension or revocation could only be justified if the candidate country departed from basic principles of democracy and human rights.' Membership of the Council of Europe, not relevant to non-European countries, has similar requirements: 'Adherence to democracy, human rights and the rule of law are preconditions for membership in the Organisation (Article 3 of the Statute of the Council of Europe).' (ibid).

[24] Chart of signatures and ratifications of Treaty 185 Convention on Cybercrime <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures>.

[25] Consultative Committee, Convention 108 'Evaluation And Follow-Up Mechanism Under Convention 108+: Process And Rationale' T-PD(2018)21rev3, Strasbourg, 8 November 2019 <https://rm.coe.int/t-pd-2018-21rev3-information-en/168098c4ed> (hereinafter 'Evaluation And Follow-Up Mechanism', 2019)

likely to become democracies, at least in the short term, so it appears they could not become parties to Convention 108+. In addition, both China and Vietnam are ineligible because neither has a 'completely independent supervisory body' (or in fact any separate DPA at all). Nor does either county have laws that are comprehensive, in that they do not cover their public sectors.

4. **China (PRC)** – not a democracy;
5. **Vietnam** – not a democracy.

Longer-term, the requirement of democracy is a serious impediment to Asian accessions to Convention 108+ for quite a few countries that do not currently have data privacy laws, including at least Cambodia, Lao PDR, Brunei and North Korea, and perhaps Myanmar.

Gross human rights violations

Polakiewicz's reference to potential accession problems 'if the candidate country departed from basic principles of democracy and human rights' raises the question of whether a country which is a democracy, but was involved in gross violations of human rights, could accede. One of the clearest examples is genocide, allegations of which against Myanmar are currently being heard by the International Court of Justice, which has made an interim ruling that Myanmar must take all measures to prevent genocide against the country's minority Rohingya Muslim population.[26] A final ruling by an international tribunal might be sufficient grounds for refusing an invitation to accede, but this requires further analysis.

4. Countries with laws of inadequate scope

The EU GDPR allows a country to be declared to have laws providing 'adequate' protection only in relation to some but not all sectors (art. 45). In contrast, Convention 108+ requires laws applying 'in the public and private sectors,'[27] with no provision to recognize merely sectoral application. The Convention does not require one single law with comprehensive coverage: several laws covering the public and private sectors may suffice, provided the principles of the Convention do apply to processing in all sectors.

Asia is very unusual among regions of the world in having data privacy laws which do not cover their public sectors, a feature of seven of the fifteen current Asian laws. Of the 142 countries with data privacy laws by the end of 2019,[28] the only other laws solely covering the private sector are the laws of five middle-eastern jurisdictions.[29]

This impediment is significant for four Asian countries' current laws:

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[26] J. Massola ' "Do not commit acts of genocide": International court orders Myanmar' *Sydney Morning Herald* 24 January 2020 <http://www.smh.com.au/world/do-not-commit-acts-of-genocide-international-court-orders-myanmar-20200123-p53u7a.html?btis>

[27] A country's laws must cover both its public and private sectors, according to Convention 108+ art. 3(1): 'Each Party undertakes to apply this Convention to data processing subject to its jurisdiction in the public and private sectors.' Convention 108 art. 3(1) had the same effect, for this purpose, but slightly narrower wording: 'The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors.'

[28] See Greenleaf, G. 'Global Tables of Data Privacy Laws and Bills (6th Ed January 2019)' (2019) Supplement to 157 *Privacy Laws & Business International Report* (PLBIR) 16 pgs <https://ssrn.com/abstract=3380794> for details of 132 laws as at the start of 2019; to these must be added Barbados, Botswana, Congo-Brazzaville, Kenya, Nigeria, Tajikistan Togo; Turkmenistan, Uganda and Uzbekistan. See G. Greenleaf and B. Cottier '2020 ends a decade of 62 new data privacy laws' (2020) 163 *Privacy Laws & Business International Report* xx-xx

[29] Private sector only laws: Abu Dhabi Global Market; Bahrain; Dubai International Finance Centre (IFC); Qatar; and Qatar International Finance Centre (IFC). See Greenleaf, 'Global Table' 2019.

6. **Singapore** – ineligible - current law only covers private sector;
7. **Malaysia** – ineligible - current law only covers private sector;
8. **India** – ineligible - current law only covers private sector.
9. **Indonesia** – ineligible - current law only covers private sector.

India and Indonesia are both proposing new laws to replace their existing very limited laws, including coverage of the public sector, as discussed in part 7.

The newly-appointed Minister responsible for data protection in Malaysia has stated that Malaysia's law will be revised in 2020, so there will be an opportunity for the government to reconsider public sector coverage, as well as other substantive changes that would be required before Malaysia could realistically hope to accede. The scope of Malaysia's proposed 2020 review is uncertain.[30]

Singapore is considering various changes to its data privacy legislation, but despite a critical review of the effectiveness of data protection in its public sector, is not proposing to extend the coverage of the legislation to the public sector. Instead, it is only proposing that currently secret guidelines to the public sector will be made public, and that third parties handling government data (but not the government itself) should be made subject to the legislation.[31]

This impediment also applies to Vietnam and China, discussed earlier.

5. Laws must include an independent Data Protection Authority

Convention 108+ requires a country to have one or more authorities responsible for ensuring compliance with the Convention's provisions, commonly called Data Protection Authorities (DPAs). These supervisory authorities must be completely independent,[32] able to investigate, hear claims, ensure cases come before judicial authorities, allow appeals from their decisions to the courts, and satisfy various other requirements for a DPA (art 15). There are many possibilities for flexibility in interpretation of these requirements, but it is clear that a law lacking any DPA, or including a DPA without a credible claim to independence, will result in ineligibility to accede to the Convention. A DPA need not have a 'separate' existence, it can be part of an independent regulator which also has other functions, such as overseeing freedom of information / right to information (FOI/RTI) laws, as is often the case with 'Information Commissions'. The test is one of independence, not separateness.

The evaluation criteria for accession include the Convention Committee considering '[t]he supervisory authority (or authorities) and the practice it has developed (including the availability of appropriate resources, the exercising of investigative powers and imposing of sanctions)', as well as 'Effective remedies available to the data subject'.[33]

Where a country has a DPA requirement in its law, but has never actually appointed one, it is possible (but not certain) that an accession request would not be accepted until such

[30] Greenleaf, 'Asia's Data Privacy Dilemmas 2014–19', p.46.

[31] Low Youjin 'Personal data protection in public sector set for overhaul; 3 in 4 agencies found non-compliant with Govt standards' Today, 27 November 2019, < https://www.todayonline.com/singapore/personal-data-protection-public-sector-set-overhaul-after-high-powered-committee-finds-3-4>

[32] Convention 108+art. 15(5) requires that 'The supervisory authorities shall act with complete independence and impartiality in performing their duties and exercising their powers and in doing so shall neither seek nor accept instructions.'

[33] 'Evaluation And Follow-Up Mechanism', 2019, heading 7, bullets 5 and 6.

appointments were in fact made. Even if such a country was invited to apply to accede, it is very likely that the approval of the invitation to accede, if issued, would be made subject to the effective functioning of the DPA (as art. 15(5) allows). Article 4.2 of Convention 108+ foresees that compliance should be ensured 'by the time of accession' to the Convention.

Few Asian countries have independent DPAs

Among Asian countries with data privacy laws, the requirement of an independent data protection authority are not met in 11 of the fifteen current laws. It is only met in Hong Kong, the Philippines, (arguably) Thailand, and very probably South Korea.[34]

Outside Asia, there are only 5 of the 140 countries with data privacy laws that do not provide for a separate DPA.[35] Of the approximately 90% of countries which do have a separate DPA, no estimate has been made of how many could legitimately claim to be 'completely independent'. However, it seems that Asia as a region is unusually resistant to the creation of genuinely independent DPAs. This is explained in part by the other unusual feature of Asian data privacy laws, that six current laws only regulate the private sector.[36] There is usually no requirement for, say, consumer law or food safety law to have a regulator independent of government. When an area of regulation, such as data privacy, discrimination, or right to information, has government agencies within its scope, that there is a very strong argument for an independent regulator.

In three cases, Asian countries without an independent DPA are countries not yet considered ineligible for 108+ accession on other grounds. Bhutan does not have a separate data protection authority, but does administer its law through one government authority, the Bhutan Infocomm and Media Authority, which is not fully independent.[37] Nepal administers its law dealing with the private sector solely through the courts,[38] though it does have a law dealing with the public sector which is administered by an independent Right to Information authority.[39]

Japan would be ineligible to accede because of the requirement of completely independent supervisory bodies. Japan's Personal Information Protection Commission (PIPC) does have statutory independence, but it is the DPA for the private sector only. The supervisory body for the public sector remains the Ministry of Internal Affairs and Communications (MIC), and is thus not independent of the government. This was not a significant problem with the EU's adequacy assessment of Japan, because that was only an assessment of Japan's private sector (for which the PIPC is the supervisory body), and guarantees concerning public sector access to private sector records were regarded by the EU as acceptable.

10. **Bhutan** – ineligible – no DPA, Act is enforced through a non-independent government authority.

11. **Nepal** – ineligible – no DPA, Act is enforced through the courts.

12. **Japan** – ineligible – has an independent DPA, but only for the private sector; under a public sector law, a Ministry (MIC) is DPA for the public sector.

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[34] Due to enactment of amending laws in January 2020 – see later.

[35] Data privacy laws with no DPAs: Kyrgyz Republic; Lebanon; Paraguay; St Vincent & Grenadines; and Azerbaijan.

[36] Laws regulating only the private sector: China; Vietnam; Singapore; Malaysia; India; Indonesia.

[37] Greenleaf, 'Asia's Data Privacy Dilemmas 2014–19', p. 66.

[38] Greenleaf, G 'Advances in South Asian DP laws: Sri Lanka, Pakistan and Nepal' (2019) 162 *Privacy Laws & Business International Report* 22-25, section 'Nepal's idiosyncratic privacy law'.

[39] Greenleaf *Asian Data Privacy Laws* (OUP, 2014), pp. 436-445.

Other countries already considered above also fail to meet this requirement. Singapore's DPA (PIPC) is not completely independent,[40] because it is part of the Info-communications Media Development Authority (IMDA), which is itself not independent of government. The PIPC's separate existence is only a convenient fiction, although it is in practice an active and apparently impartial regulator, so it is in fact part of a non-independent regulator. Malaysia's DPA is not completely independent: among other deficiencies, the Minister 'may give the Commissioner directions of a general character consistent with the provisions of the Act'.[41] China, Vietnam and Taiwan do not have separate supervisory bodies, but enforce their laws through a range of government agencies. Macau does have a separate and independent DPA, but it has not been established by its own legislation, and is still considered to be a 'project' of a Ministry and thus not independent.[42]

In the view of the European Commission, Korea's Personal Information Protection Commission (PIPC) did not qualify as an independent supervisory body because the necessary powers to enforce its decisions were, in key respects, held by other bodies, including a Ministry. New legislation enacted in January 2020 has transferred the necessary powers to the PIPC,[43] and seems to have removed this as an impediment in relation to Korea.

6. Countries with laws complying with the Convention's provisions

The final step toward accession is the determination of whether the law and practice of a country meets the standards of Convention 108+ necessary for accession.

Assessing substantial implementation

Convention 108+ requires that 'Each Party shall take the necessary measures in its law to give effect to the provisions of this Convention and secure their effective application' (art. 4(1)). The law of the country applying to accede must be evaluated in relation to the provisions in each of the twelve clauses from 4 to 15 (omitting 13), plus 18, in Convention 108+ (most with sub-clauses). The law must also be evaluated to determine whether it can secure the effective application of those provisions, or in other words what enforcement and compliance measures it contains.

Unlike Convention 108, Convention 108+ goes beyond what is in the pages of the law. It requires that 'Each Party undertakes … to allow the Convention Committee provided for in Chapter VI to evaluate the effectiveness of the measures it has taken in its law to give effect to the provisions of this Convention' (art. 4(3)(a)) and 'to contribute actively to this evaluation process' (art. 4(3)(b)). Together with the requirement to secure the 'effective application' of the Convention's provisions (art. 4(1)), this makes it clear that accession to Convention 108+ is not based solely on 'the law on the books', but also requires sufficient demonstration of effective implementation of the Convention provisions in practice. How this will be achieved is set out in the 'Evaluation And Follow-Up Mechanism' (not yet finalised).

The accession process is as follows:

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[40] See Greenleaf *Asian Data Privacy Laws*, p. 309 for why this was so from 2012-16; from 2016, the PDPC simply became part of Singapore's Info-communications Media Development Authority (IMDA): G. Greenleaf 'The Asian Context of Singapore's Law', p491-2, in S. Chesterman (Ed.), *Data Protection Law in Singapore* (2nd Ed) Academy Publishing 2018.

[41] *Personal Data Protection Act 2010*(Malaysia), s. 59; see Greenleaf *Asian Data Privacy Laws*, p.331.

[42] Greenleaf *Asian Data Privacy Laws* (OUP, 2014), pp. 272-3.

[43] Kwang Hyun Ryoo, Juho Yoon, Tae Uk Kang and Jeong Eun Park 'Korea's data privacy laws amended, paving way for Big Data services' *Lexology* 19 January 2020 <https://www.lexology.com/library/detail.aspx?g=0b7bb83a-0b93-4f64-b3d0-552aedbf3c07>.

(i) The accession process is usually initiated by a non-European country making a request to accede, although in theory it is possible for the Committee of Ministers [of the Council of Europe] to initiate the process.[44]

(ii) The Convention Committee prepares 'an opinion for the Committee of Ministers relating to the level of personal data protection of the candidate for accession and, where necessary, recommend measures to take to reach compliance with the provisions of this Convention' (art. 23(e)). Such opinion must be adopted by a four-fifths majority of the Committee.[45]

(iii) The Convention Committee provides its opinion to the Treaty Office of the Council of Europe, which consults all member States of the Council of Europe, plus non-members who are parties to Convention 108+ (see art. 27(1)).

(iv) If no objection to the proposed accession is raised, the request and the opinion are examined by the Committee of Ministers' Rapporteur Group, and then by the Committee of Ministers.

(v) The Committee of Ministers, by the prescribed majority of its members,[46] including the unanimous vote of those members who have agreed to become Parties[47] to Convention 108+ by that time,[48] may then invite the country to accede (art. 27(1)).[49]

It is therefore up to the Committee of Ministers to decide, based on the Convention Committee's opinion, whether a country's laws and practice are close enough to what is required by Convention 108+ to justify inviting accession, or whether they should require changes to the laws prior to accession, or withhold such an invitation. Although the Convention Committee may have raised doubts or questions concerning some aspects of a proposed accession, it is ultimately a political decision by the Committee of Ministers whether to issue an invitation.

How close to the provisions of Convention 108+ must an acceding country's law be in order to satisfy the requirement that it 'give effect to the provisions of this Convention and secure their effective application' (art. 4(1))? We can call this the 'standard for accession'. Unlike some conventions, there is no 'safety valve' in the form of derogations, or reservations, prior to ratification, allowed from particular provisions of 108+.[50]

Neither the Convention itself, nor its Explanatory Report, nor the accession process, nor the draft 'Evaluation And Follow-Up Mechanism', give a clear idea of exactly what standard for

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[44] Polakiewicz *Treaty Making in the Council of Europe*, pp. 35-36.

[45] Convention 108+, Appendix to the Protocol**:** Elements for the Rules of Procedure of the Convention Committee, cl. 3

[46] 'The majority provided for in Article 20.d of the Statute of the Council of Europe' is 'a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee'.

[47] 'Contracting States' is the correct term, and is used in article 27 (1). According to the Vienna Convention on the Law of Treaties this means any States that have ratified the Convention, whether or not it has already entered into force for them (see the definitions of "Contracting State" and "Party" in article 1 paras (f) and (g) of the Vienna Convention). A Contracting State is not yet a Party during the 3 months following the deposit of its instrument of accession, but its consent is already required.

[48] Since new non-European accessions cannot occur until after the entry into force of Convention 108+ (art. 27(1)), there must be by that time at least 38 countries that have ratified the Convention: see Greenleaf, G, "'Modernised' Data Protection Convention 108 and the GDPR" (2018) 154 *Privacy Laws & Business International Report* 22-3 <https://ssrn.com/abstract=3279984>.

[49] Non-European States that are Parties to 108+ are not members of the Committee of Ministers, so do not vote.

[50] Convention 108+, art. 29: 'No reservation may be made in respect of the provisions of this Convention.'

accession must be met. Article 27 does not say anything about the standard for accession which the Committee of Ministers must be satisfied has been met. Article 23(e) only says that the Convention Committee must prepare an opinion and, if necessary, recommend measures to 'meet compliance'. The Explanatory Report only refers to 'an assessment of the level of data protection' and 'the level of compliance' in relation to art. 23, without saying what standard must be met. In relation to art. 27, the Report only refers to accession by States 'complying with its provisions'. The draft Evaluation and Follow-up Mechanism describes the purpose of the evaluation mechanism for countries wishing to accede as follows:

> 'the evaluation must take into account all elements necessary for achieving the objective of the Convention, namely: a comprehensive data protection legislation, providing for the general principles applicable to any sector, possibly supplemented by other special laws, including regarding transfer of data to a state non-party to the Convention and an independent supervisory authority (composition, statute, activities). Such requirement relates directly to the need of guaranteeing the effectiveness of the legislative measures in the field.'

None of these documents add much precision to what is the standard for accession. There are as yet no examples of opinions and decisions on accession requests to 108+ to draw on.

Practice under the previous Convention 108

Opinions and decisions on the previous Convention 108 are only of limited assistance, because the standards required by Convention 108+ are considerably higher. However, they do illustrate the degree of flexibility that has been evident in accession decisions under the Convention.

The Consultative Committee ('T-PD') has often recommended that accession be approved while noting inadequacies in a country's compliance with Convention provisions. The clearest example is where T-PD recommended an invitation to accede, but also invited 'the Government of Mauritius to engage in the future to put in line with the provisions of Convention 108 the issues raised in this opinion, particularly those of paragraphs 2.a, 8, 9 and 12' (which referred to the need for 'identifiability' to be more clear in the definition of 'personal data', a list of weaknesses in subject rights, ambiguities concerning national security exemptions, and ambiguities about the DPA receiving instructions).[51] In relation to Mexico, T-PD recommended an invitation, while considering that Mexico's law 'generally complies with the principles of Convention 108 …[but] notes that some adjustments to the legal provisions, in line with the comments of the present opinion, would be welcome'.[52]

Sometimes, even if T-PD only recommends a conditional invitation, the Committee of Ministers will exercise its prerogative to make an unconditional invitation. Concerning Tunisia, T-PD considered that 'the Tunisian Data Protection Act generally heads towards the principles giving effect to Convention 108 and its Additional Protocol, although several modifications are necessary to bring it into full conformity, and recommends that the Committee of Ministers invites the Republic of Tunisia to accede to both instruments, once it has complied with the observations set out above'.[53] However, a few weeks later the Committee of Ministers issued an unconditional invitation.[54]

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[51] T-PD 'Opinion on the Request for Accession of the Government of Mauritius' T-PD(2014)10, 18 December 2014.

[52] T-PD 'Opinion on the Request for Accession by the United Mexican States' T-PD(2017)17, 16 October 2017.

[53] T-PD 'Opinion on the Request for Accession by Tunisia' T-PD(2015)14, 15 October 2015.

[54] Minutes of Meeting of Ministers Deputies, 1242nd meeting – 1-2 December 2015 *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) – Request by Tunisia to be invited to accede* GR-J(2015)17, item 10.3.

While these examples of practice under Convention 108 are useful, they are few. While making it clear that the '108 access standard' was flexible, they do not give clear guidance on where flexibility could and could not be expected.

The higher standards of Convention 108+

The standards required by the previous Convention 108 (including those added by its Additional Protocol of 2001) were already higher than the minimum standards required for a law to count as a data privacy law, such as are found in the 1980 OECD Guidelines.[55] These included additional requirements for sensitive information, for destruction or anonymisation of personal data after a period, for an independent DPA, for remedies provided by courts, and for data export restrictions. Convention 108+ has added considerably more requirements. The twenty most important requirements (in my opinion[56]) that go beyond the minimum requirements for a data privacy law are summarised in the Table following. The seven provisions marked with an asterisk (*) were already found in the previous Convention 108, but are listed here because they continue as significant compliance requirements for Convention 108+.

Table: Requirements of Convention 108+ going beyond minimum standards, and their occurrence in the laws of Korea, Thailand and the Philippines

108+	Subject matter of provision	KR, TH, PH
5(1), 10(4)	*Proportionality required* in all aspects of processing	–
5(2)	*Legitimate bases for processing defined*	*KR, PH, PH*
5(2)	*Stronger consent requirements* – including 'unambiguous'; special conditions for children's consent	*KR, TH*
5(4)(c)*	*Minimum collection* necessary for the purpose ('not excessive') (data minimisation)[57]	*KR, TH*
5(4)(e)*	*Destruction or anonymisation of personal data after purpose completed*	*KR, TH, PH*
6(1)	*Biometric and genetic data require extra protections*	*TH*
6*	*Additional protections for sensitive data* in defined categories	*KR, TH, PH*
7(1), 10(1)	*Direct liability for processors* as well as controllers	*TH*
7(2)	*Data breach notification to DPA* for serious breaches	*KR, TH, PH*
9(1)(a), (c)	*Limits on automated decision-making* (incl. right to know processing logic)	*PH*
9(1)(d)	*To object to processing on grounds relating to his/her situation, unless controller demonstrates legitimate grounds*	*KR, TH*
9(1)(d),(e)*	*Right to erasure,* including 'to be forgotten' [58]	*KR, TH*
10(1)	*Demonstrable accountability* by controllers	–
10(2)	*Prior examination before processing commences, of impact on rights and freedoms*	*KR*

[55] These ten minimum standards are limited collection, data quality, purpose specification, notice, secondary uses and disclosures limited to where compatible, rights of access and correction, security standards and accountability.

[56] This is a question of judgment of what is most important, and also what attributes are amendable to national comparisons. The lawfulness and necessity/proportionality requirements for derogations and exceptions in 108+ is omitted for this reason.

[57] Convention 108+ art. 5(c) retains 'not excessive' but the Explanatory Report [52] states this means only processing necessary for purpose, and anonymity should be achieved where possible.

[58] Although the 'right to be forgotten' (including de-linking) was held by the CJEU to be implied by the Directive, in the Google Spain case, it (and the broader concept of erasure) has a much longer history in EU data protection law: see Erdos and Garstka 'The 'Right to be Forgotten' Online within G20 Statutory Data Protection Frameworks'.

10(2)-(4)	*Data protection by design and by default*	–
12	*DPAs to make decisions and issue administrative sanctions* incl. fines	*KR, TH*
12, 15(9)*	*Recourse to the courts* to enforce data privacy rights (incl. compensation, and appeals from decisions of DPAs)	*KR, TH, PH*
14*	*Restricted data exports to non-Parties required,* based on data protection provided by recipient country ('adequate'), or alternative guarantees	*KR, TH*
15*	*Independent Data Protection Authority(-ies)* (DPA)	*KR, TH, PH*
16-21	*DPAs must cooperate with other DPAs of Parties in resolving complaints with international elements*	–

Most of these provisions are expressed in rather general wording in Convention 108+, leaving open considerable flexibility of interpretation concerning what types of statutory (or other) provisions in national laws will satisfy them. Nevertheless, there are at least the 20 requirements of 108+, listed in the above Table, which exceed the minimum standards for a data privacy law. This increases the importance of the question 'what is the Convention 108+ standard for accession?' It is reasonable to assume that clear compliance with some of these provisions will be more important than others to obtaining a favourable opinion from the Convention Committee. But there is at present no guidance (nor examples) concerning which of the twenty provisions are more important. Before considering this further, it is useful to consider the position of Asian countries currently most likely to request to accede.

Asian countries with potential to meet 108+ the standard for accession

The preceding analysis leaves, from the 15 Asian countries with data privacy laws, only the current laws (as at end-2019) of Thailand, Korea and the Philippines as possible candidates for 108+ accessions, if their governments were so disposed.

The three amending Acts enacted by the Korean legislature in January 2020[59] will improve its position in relation to 108+ accession as well as EU adequacy. Korea had announced that it intends to commence accession proceedings once the legislation is enacted.[60] Whether Thailand is interested in 108+ accession is not known, although the government has expressed interest in EU adequacy. The junta-appointed upper house in Thailand also raises issues in relation to democracy.[61] The Philippines DPA participates as an Observer at Convention 108 meetings, and has expressed interest in accession.[62] However, the Duterte government's antipathy to international institutions like the International Criminal Court make an accession request from the Philippines government seem unlikely in the short term.[63]

In the above Table, the right-hand column indicates whether the laws of these three countries arguably implement each of the 20 provisions, listed as KR (Korea), TH (Thailand) or PH (Philippines). This informal assessment indicated that Korea's laws complied with approximately 13 of the 20 requirements, Thailand's also with 13, and the Philippines only with 7. 'Approximately' is appropriate, as these are matters of interpretation of statutes.

[59] 'Korea's data privacy laws amended' (cited previously)

[60] Korean government representatives, as Observers at the November 2019 Plenary meeting of the Convention 108 Consultative Committee, announced this.

[61] G. Greenleaf, and A. Suriyawongkul, 'Thailand – Asia's Strong New Data Protection Law' (2019). 160 *Privacy Laws and Business International Report* 1, 3-6 <https://ssrn.com/abstract=3502671>

[62] Conference "Convention 108+: better protecting us in the digital era" Strasbourg, 12 June 2019, intervention as Observer by Ivy Grace Villasoto, representing the Philippines National Privacy Commission.

[63] L. Hunt 'Does Duterte's War on the International Criminal Court Really Matter?' *The Diplomat* 5 April 2018.

Arguments can be made that these scores should be somewhat higher or lower, but it is clear that they are some distance short of 20/20. This means that, unless there is a perhaps excessive amount of flexibility shown in the interpretation of 108+ requirements, there could be no accessions in Asia based on current laws, if it is assumed that all requirements of 108+ must be complied with for accession. It would then be necessary for each of these countries to consider making substantial amendments to their laws in order to be invited to accede, particularly the Philippines.

13. **South Korea** – compliant with approx. 13/20 requirements of 108+, following 2020 enactment of amending laws.

14. **Thailand** – compliant with approx. 13/20 requirements of 108+ – this is the first post-GDPR Asian law.

15. **The Philippines** – compliant with only approx. 7/20 requirements of 108+ – would require much more substantial amendments.

However, if it was made clear that some of the 20 requirements were more important than others, and that some of the requirements of lesser importance could be met by countries undertaking to enact reforms to meet them before their compliance with 108+ was next assessed, this would create both clarity and a path to full compliance.

Countries where current and proposed reform Bills may enable accession

Indonesia and India are ineligible to accede on their current limited laws, but may not be if their new Bills are enacted, subject to the question of whether these laws would meet the higher standards of 108+, and perhaps to the question of independence of the new DPAs that are proposed to be created. As the two most populous Asian countries other than China, and democracies, accession by either would be a great success for 108+.

India's current law is very limited, covering only the private sector, and with no DPA. An application to the EU for an adequacy assessment based on that law failed in 2013. The Modi government in December 2019 introduced the *Personal Data Protection Bill 2019* to the Lok Sabha (lower house). It is based in part on the Bill recommended by the Srikrishna Committee, but with many differences.[64] The 'Srikrishna Bill' contained most key features of the GDPR and Convention 108+, but with significant differences such as some obligations only applying to 'significant' controllers.[65] The differences in the government Bill are wider. The Bill is now being considered by a joint parliamentary Committee, which is calling for submissions. India is not an Observer on Convention 108's Consultative Committee.

Indonesia's current law is also very limited, covering only the private sector, and with no DPA. On 28 January 2020 the Indonesian government introduced a comprehensive draft *Law on the Protection of Personal Data* to the Indonesian legislature. The draft includes a DPA, and many 'GDPR-like' elements,[66] so it is possible that a new Indonesian law might meet the standards required by 108+. Indonesia is an Observer on the Convention 108 Consultative Committee.

Japan's PIPC is proposing reforms to its Act in 2020 (as it is required to do by that Act), but whether those reforms will address the non-independence of its public sector regulator, or

55 For analysis of differences, see Dvara Research *Initial Comments of Dvara Research dated 16 January 2020 on the Personal Data Protection Bill 2019 introduced in the Lok Sabha on 11 December 2019,* 17 January 2020 https://www.dvara.com/research/wp-content/uploads/2020/01/Initial-Comments-on-the-Personal-Data-Protection-Bill-2019.pdf.

65 Greenleaf, 'Asia's Data Privacy Dilemmas 2014–19', pp. 60-62.

66 [REFERENCES TO BE ADDED, ONCE ENGLISH VERSION IS AVAILABLE]

any other matters relevant to 108+, is not known.[67] Also, Japan no longer needs accession to Convention 108+ to assist its EU adequacy case on the basis of GDPR Recital 105, so its interest in 108+ accession may have diminished. Japan's position in relation to 108+ is also complicated by its 'Osaka Track' 'free flow with trust' proposals,[68] and with being a party to the CPTPP free trade agreement.[69] The consistency of each of these with 108+ is too early to assess. The possibility of accession by Japan should not, however, be discounted completely: other countries already considered adequate by the EU have acceded to Convention 108 to obtain its other benefits (eg Argentina).

7. Countries with proposed Bills for new laws

Two Asian countries with no data privacy laws, Sri Lanka and Pakistan, have official Bills proposed.[70] The Sri Lankan government published a 'final' *Personal Data Protection Bill* in 2019, with comprehensive coverage of all sectors and strong GDPR-influenced features, and therefore including many of the requirements of 108+. Among its limitations are a lack of clarity concerning the DPA to be created, lack of provision for compensation to data subjects, extensive discretionary powers in the government, and lack of sufficient rights to reasons and to object to processing.[71] Pakistan's *Personal Data Protection Bill, 2018* is limited to the private sector, and contains relatively few of the principles required by 108+, but it does include a DPA with statutory independence.[72]

16. **Sri Lanka** – ineligible – no existing law, but 2019 Bill might required only modest amendments;

17. **Pakistan –** ineligible – no existing law, and 2018 Bill does not cover public sector, nor meet many substantive requirements.

8. Countries with no relevant laws or Bills

Finally, a further nine states in Asia have neither existing data privacy laws nor proposed Bills. They fall into three categories.

Three are democratic States, and thus could accede if appropriate legislation was enacted, but there have been no significant developments since 2014.[73]

18. **Bangladesh** – ineligible – no current law;

19. **Timor Leste** – ineligible – no current law, but constitution guarantees data protection;

20. **Maldives** – ineligible – no current law, but currently considering drafting one.

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[67] Hiroyuki Tanaka 'Possible amendments to Japan's Act on the Protection of Personal Information in 2019' *Financier Worldwide*, July 2019 <https://www.financierworldwide.com/possible-amendments-to-japans-act-on-the-protection-of-personal-information-in-2019>

[68] Greenleaf, G 'G20 makes declaration on "Data Free Flow With Trust" (2019) 160 *Privacy Laws & Business International Report* 18-19 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3514407>.

[69] Comprehensive and Progressive Trans-Pacific Partnership (CPTPP); see Greenleaf, G 'Asia-Pacific Free Trade Deals Clash with GDPR and Convention 108' 2018) 156 *Privacy Laws & Business International Report* 22-24.

[70] Greenleaf, G 'Advances in South Asian DP laws: Sri Lanka, Pakistan and Nepal' (2019) 162 *Privacy Laws & Business International Report* 22-25.

[71] ibid

[72] ibid

[73] see Greenleaf *Asian Data Privacy Laws* (OUP, 2014), pp. 401-4 (Timor Leste); pp. 446-50 (Bangladesh); and pp. 460-462 (Maldives).

Three States have questionable democratic claims, but it is possible that sufficiently democratic institutions could evolve from existing structures.[74]

21. **Afghanistan –** ineligible **–** no proposed data privacy law known.

22. **Myanmar** – ineligible – there is a draft proposed data privacy law, details not known.

23. **Cambodia –** ineligible **–** no proposed data privacy law known.

Three States have no democratic claims. Unless they change their current constitutional structures, they could not accede to Convention 108+.[75]

24. **Brunei** – ineligible **–** absolute monarchy with 'rule of law' for some matters; no data privacy laws, only a Data Protection Policy for government;[76]

25. **Lao PDR –** ineligible **–** e-commerce law includes some elements of a data privacy law;[77]

26. **North Korea –** ineligible **–** 'surveillance state' and hereditary communist regime.

With this appropriate terminus for a tour d'horizon of data privacy in Asia**,** what has been learned?

9. Conclusions: Limited optimism, and the need for flexibility

We can draw some conclusions about the prospects for Convention 108+ in Asia, about how those prospects could be improved, and about whether similar analyses might be valuable for other regions.

The prospects for Asian accessions

In summary, Asia seems at present unlikely to be a major source of the continuing globalization of Convention 108+, less so than Africa or Latin America. Only the current laws in South Korea and Thailand offer strong prospects for accessions with only modest amendments necessary, and the Philippines with somewhat more extensive amendments, because they already have independent DPAs. However, proposed Bills could change this position in the short term, in India, Indonesia, Japan, Malaysia, Sri Lanka or Pakistan. Of countries with no laws or Bills, Bangladesh or Timor Leste may be feasible accessions in the longer term. The rate of change of data privacy laws in Asia means that there is no justification for long-term pessimism, though the need for democratic States as parties will put more of a limit on the percentage of countries ever likely to accede than is the case for most regions, and the need for completely independent DPAs will be a continuing issue.

The need for flexibility in the operation of Convention 108+

The globalisation of Convention 108+ in Asia is likely to be a very slow process unless the Consultative Committee (which will become the 108+ 'Convention Committee') makes it apparent that there is a reasonable degree of flexibility in its application of the requirements of 108+, and the Committee of Ministers supports such flexibility. There are clearly some requirements with little room for flexibility, such as the need for a State as a Party, for an

[74] see Greenleaf *Asian Data Privacy Laws* (OUP, 2014), pp. 465-70 (Afghanistan); pp. 397-400; pp. 392-95 (Cambodia).

[75] see Greenleaf *Asian Data Privacy Laws* (OUP, 2014), pp. 390-92 (Brunei), pp. 395-97 (Lao PDR); pp. 157-160 (North Korea).

[76] E-Government National Centre, Brunei *Data Protection Policy*, V2.2, 27 August 2015, see <http://www.information.gov.bn>

[77] Laos *Electronic Data Protection Law* (EDPL), 2017 <http://www.laoservicesportal.gov.la/index.php?r=site%2Fdisplaylegal&id=289>.

acceptable level of democracy, and for an independent DPA. As mentioned, derogations or reservations are not allowed.

Perhaps the point on which flexibility is most needed is in the requirement that 'supervisory authorities shall act with complete independence and impartiality in performing their duties and exercising their powers and in doing so shall neither seek nor accept instructions'. In Asia it is unusual for laws to explicitly state that administrative bodies such as DPAs have such independence, and they may indicate that governments can give such bodies 'general directions'. Nevertheless, it may be possible for a DPA to demonstrate that it does act with independence, even though its legislation does not explicitly guarantee this. If accession to 108+ can be based on the reality of such independence, and its continuance (as verified by the periodic 'follow-up' mechanisms), this may significantly increase the prospects of accessions in Asia.

The more general problem is that there is at present no guidance (nor examples) concerning which of what appear to be at least twenty requirements for accession to 108+ are more important than others. The future success of Convention 108+ as a global standard requires as much clarity as possible concerning its minimum requirements, but also some flexibility concerning matters of lesser importance. Examples may start to emerge as early as 2020 (in relation to, say, Costa Rica or Korea), but a policy document by the Consultative Committee which stressed the most important elements in accession might be even more helpful. If some of the requirements of lesser importance could, in practice, be satisfied by countries undertaking to enact reforms to more explicitly meet those requirements before their compliance with 108+ was next assessed, this would create both increased clarity and a path to full compliance.

'Globalisation' of a Convention is an ambitious goal. The rate of globalization of Convention 108, an average of one non-European accession per year since 2013, is too slow to make it obvious that a global instrument is inevitable. This is even more so when the higher standards of 108+ make accession seem a more distant goal, for most countries, than was the case with 108. To address this issue, the 108+ Convention Committee (the current Consultative Committee for 108) needs to maintain flexibility concerning the Convention's accession standard, as does the Committee of Ministers. It would be desirable if they could do so in ways which are based on a principled assessment of which substantive provisions of 108+ are most important, have greater predictability and transparency, and encourages more countries to apply to accede..

Generalisation of this methodology to other regions

This article has demonstrated that an assessment can be made, across a complex region of 26 jurisdictions (Asia), of the prospects for countries to accede to Convention 108+. The seven steps in the analysis taken in this article could be used to clarify the accession prospects in other regions such as Africa, Latin America, Central Asia, the Caribbean and the Australasian-Pacific region. Such assessments may prove valuable to a variety of parties: to the members of the Convention Committee, by giving them an overview of accession prospects, and indications of where flexibility would be most valuable; to governments and civil society in potential accession countries, by encouraging discussion and debate concerning the steps need for accession to 108+, and its advantages; and to academics and commentators to assist discussion of whether and how Convention 108+ can fully become the global data privacy agreement.