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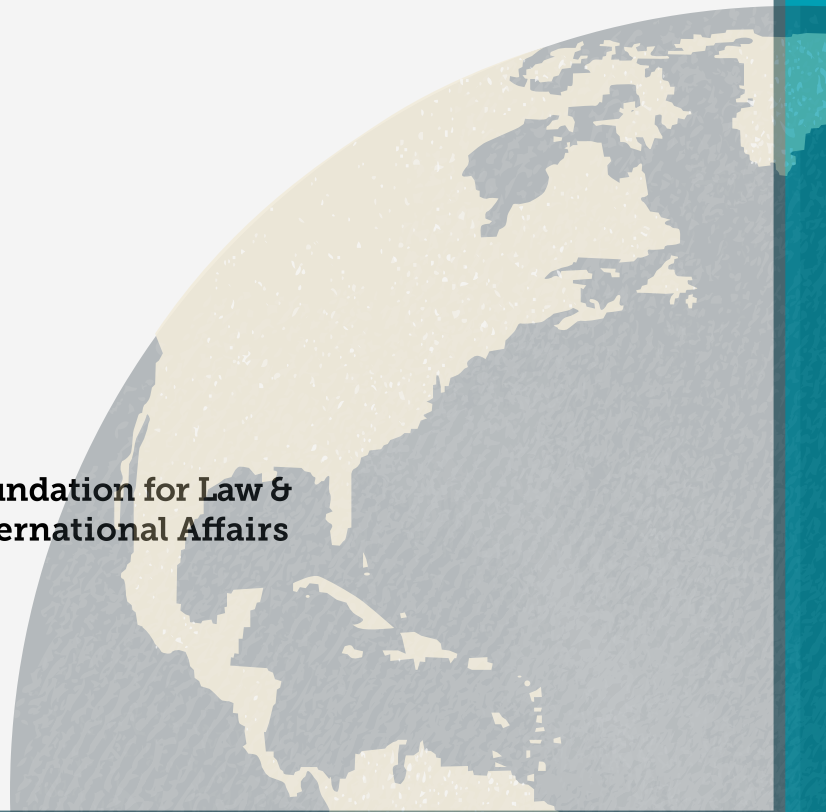
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Volume I, Issue 1

International Economic Law

Liang, Yong & Hou, Chu- chen	The Renovation of Investment-Related Environmental Clauses in USMCA and China's Stance	Pg. 1
------------------------------------	---	-------

International Institutions and Treaties

Li, Di	Restorative Justice, Impunity and Amnesty in International Criminal Law	Pg. 21
Chen, Bo	Controversy and Consensus: Does the UN Convention on the Rights of Persons with Disabilities Prohibit Mental Health Detention and Involuntary Treatment?	Pg. 39

Dispute Settlement

Yang, Li-yan	The Influence of ASEAN Community on the Integration of South China Sea Policy and China's Countermeasures	Pg. 65
Jing, Ming	Seeking an Appropriate Expression of "Historic Rights" in the Law of the Sea -- Investigating historic rights in the South China Sea	Pg. 84

International Business Law

Lu, Ying	Expanding the Res Judicata of a Public Interest Litigation Filed by Consumer Groups	Pg. 102
Wang, Yong & Hou, Guo- bin	Analysis on Salvage Contract by Employment -- Based on the Case of M.V. "Archangelos Gabriell" Salvage Reward	Pg. 113

Some Words Written in a Time of Crisis

As final edits were underway to the first issue of this new journal, the coronavirus pandemic's brutal assault has been deep, affecting and reshaping our world. The coronavirus pandemic has killed people, changed the ways we live, and presented more challenges to our governance and legal systems in unprecedented ways. In this time of crisis, we need to profoundly reflect on our entire governance system, not only on the economic, political and legal systems, but also on our health care, poverty relief and international cooperative schemes.

Unfortunately, while we are supposed to closely work together to defeat this coronavirus, our world is indeed falling apart because of this coronavirus. The international institutions such as the World Health Organization, the European Union and others do not play a predominant role in uniting and rescuing the people from the coronavirus pandemic. Rather, the countries of the world are more polarized, the world system is more fragmented, and the globe is more de-globalized. Unilateralism and populism appear to be becoming the mainstream ideology of our time after the progressive globalization of the past several decades. In addition, the countries and the people are in an information asymmetry, and transnational private litigations have been initiated intentionally, but not based on legal merits, to seek compensation for losses caused by the pandemic. This is evidence that demonstrates that populism dominates the public domain today.

In this first issue of this very new journal, we managed to have seven Chinese legal scholars present their views and analyses of relevant legal issues they have been working on. The topics covered in this issue range from trade treaty, regional cooperation, to territorial disputes and the functionality of the World Health Organization and International Criminal Court. These works reflect the voices of Chinese scholars looking at this world from their own perspectives. In the time of crisis, we need more patience than ever to appreciate and respect others' views and opinions. This can enrich our knowledge and broaden our vision. But the dialogue is not supposed to stop here. This journal is launched with the aim of bringing more voices into this much needed dialogue. Scholars are navigating some of the emotional currents that have become dominant in the world. Science, morality and rule of law shall be the key tone of our time.

Editorial Board
May 4, 2020

The Renovation of Investment-Related Environmental Clauses in USMCA and China's Stance

Liang Yong & Hou Chu-chen¹

Abstract: The US-Mexico-Canada Agreement (“USMCA”) concluded in 2018 has made a great renovation of investment-related environmental clauses (“IRE clauses”) to strengthen the environmental regulatory power of host states. Such renovation triggers important concerns from the three countries, represents the latest developments of IRE clauses, and also leads to great attention from other countries, including China. This article tries to examine the renovation of IRE clauses in USMCA, investigate the recent developments of China in IRE clauses, and analyze China's stands on the renovation. Whether China will transplant the IRE clauses in USMCA in the ongoing IIAs, and whether China will incorporate some Chinese features or characteristics into the IRE clauses are important not only for China, but also for the future of rebooting new generation investment rules. Finally, the article makes a conclusion on China's stance on the renovation of IRE clauses in USMCA.

The article is composed of four parts. The first part categorizes IRE clauses in USMCA into six types, makes brief introductions of each one and attempts to interpret the inherent coherence and relationship of the six types. The second part conducts an empirical analysis of Chinese IIAs over 40 years and pinpoints the problems to be renovated. The third part points out China's stance on IRE clauses in future IIAs and provide specific recommendations to achieve better-balanced IIAs between investment promotion and environmental protection. The fourth part is the conclusion which attempts to explore China's stance on the IRE clauses.

Key Words: IRE Clause; USMCA; China's Stance

1. Introduction

The North American Free Trade Agreement (“NAFTA”) signed in 1992 is one of the earliest agreements that incorporates environment provisions in trade and investment agreements² and was considered a watershed event, representing the first time policymakers explicitly sought to address the complex linkages between environmental protection and liberalized trade.³ It must be mentioned that NAFTA incorporated a strongly binding investor-state dispute settlement (“ISDS”) mechanism which authorizes foreign investors to bring investment disputes against host states to international arbitral tribunals to guarantee expectations of foreign investors. In 1993, in response to the doubts raised by domestic environmentalists, U.S., Canada and Mexico signed the North American Agreement on Environmental Cooperation (“NAAEC”) as a supplementary agreement to NAFTA.

Since its entry into force on January 1st, 1994, the doubt about whether NAFTA and NAAEC were capable of protecting the environment has never faded away over the 20 years

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² See JORGE E. VINUALES, *Foreign Investment and the Environment in International Law*, Cambridge University Press, p.283 (2012).

³ See Linda J. Allen, *The Environment and NAFTA Policy Debate Redux: Separating Rhetoric from Reality*, 42 WM. & MARY ENVTL. L. POL'Y REV. 965, 965 (2018).

of its course. The U.S. and the Canadian governments have been sued by the other party's investors in dozens of ISDS cases, and a big portion of those cases arose from environmental regulatory measures taken by host state governments. For instance, the U.S. has been sued in 16 ISDS cases, and all of them invoked NAFTA as the legal basis. Although, the U.S. has never failed in any ISDS case, with 10 cases favoring the U.S. government, 4 cases settled,⁴ and 2 cases discontinued, the U.S. government began noticing the potential risks and paid more attention to the environmental regulatory powers of host states. That's why the U.S. pragmatically changed its stance and added Article 12 (Investment and Environment) to the U.S. Model Bilateral Investment Treaty of 2004 ("2004 U.S. Model BIT") to rebalance the interests of host states and foreign investors in environmental matters. According to Article 12, any dispute arising from environmental matters shall be resolved by a joint committee between U.S. and the contracting state rather than be ruled by arbitral tribunals under ISDS. After that, 2012 U.S. Model BIT strengthened the obligations of host states in complying with environmental laws, and changed the "best effort clause" to "mandatory requirement".⁵

However, the U.S. wanted to go further. Soon after the Trump Administration took the position in 2017, the U.S. commenced NAFTA renegotiations in July 2017. In the Summary of Objectives for the NAFTA Renegotiations, the concern for environmental matters was one of the six critical objectives for NAFTA renegotiations.

On November 30th, 2018, the three countries signed the Agreement Among the United States of America, the United Mexican States and Canada ("USMCA")⁶ to replace NAFTA, and lots of modifications and additions have been made on IRE clauses. The U.S. House of Representatives passed the USMA on December 19th, 2019, bringing it that much closer to come into effect. What about are IRE clauses in USMCA? What kinds of potential changes will be led to by those IRE clauses? Will the IRE clauses cause a general trend in the international community to reconsider their positions on investment and environment? Where does China stand under such situations?

This article examines and summarizes the renovation that USMCA made on IRE clauses, and then analyzes China's stance on the renovation. The first part conducts a typological analysis of IRE clauses in USMCA, examining and summarizing the functions and characteristics of these clauses. The second part adopts an empirical approach to analyze IRE clauses in Chinese IIAs and pinpoints the problems of these clauses. The third part analyzes China's reformative objective for the newest generation of IIAs, and then gives a conclusion about China's stands on the renovation of IRE clauses in USMCA.

2. Typological Analysis of IRE Clauses in USMCA

This part categorizes important IRE clauses in USMCA into six types: preamble clauses, non-derogation clauses, general exception clauses, specific exception clauses, dispute settlement procedure clauses and private subject participation clauses. The functions and characteristics of each type are examined individually, and some NAFTA cases are discussed for a better understanding of relevant clauses. After that, we will explore the inherent connections among the six types of IRE clauses.

⁴ See United States of America, Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america/respondent> (accessed on December 13, 2019).

⁵ Article 12 of 2012 U.S. Model BIT deleted the term of "strive to" in subparagraph 2 in 2004 U.S. Model BIT, which requires each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws.

⁶ See A New Canada - United States - Mexico Agreement, Government of Canada (Date Modified on April 3, 2020), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-a-ceum/index.aspx?lang=eng> (accessed on April 13, 2020).

(a) Preamble Clauses

Preamble clauses in USMCA regard host states' regulatory power to protect their environment as an inherent right, and therefore confirms that environmental regulation is within the host states' sovereignty. Preamble clauses also establish the goal to "promote high levels of environmental protection" and "further the aims of sustainable development" as its purpose. The former largely includes the effective enforcement of environmental laws and enhanced environmental cooperation.

Though preamble clauses are non-binding provisions, being acknowledgements in principle, paragraphs 1 and 2 of Article 31 in Vienna Convention on the Law of Treaties ("VCLT") state preamble clauses shall be referred to "for the purpose of the interpretation of a treaty". Therefore, preamble clauses are helpful and contribute in clarifying contracting states' genuine intentions to conclude an agreement, and in this way, preamble clauses of the USMCA shall work in interpreting the specific provisions of the USMCA when disputes arise.

(b) Non-Derogation Clauses

Article 24.4.3 in USMCA provides that the parties "recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws" and "shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from...", which is a typical non-derogation clause preventing the derogation of environmental protection standards in investment promotion and absorbing capital inflows competition. The article is transplanted from the 2012 U.S. Model BIT, and there is no substantial developments and innovations in this context except upgrading from a bilateral treaty to regional agreements. The "Investment and Environment" clause may be contributable for each member state to make more effective policy for harmonious development between investment promotion and environmental protection.

(c) General Exception Clauses

General exception clauses derive from Article XX of GATT1994,⁷ which is an exception clause aiming to protect the public interests of contracting parties. In this sense, general exception clauses do not have a unified expression or meaning, and therefore point to no single established or explicit concept in the context of investment agreements.⁸ By invoking general exceptions, host states mainly attempt to justify disputed measures that deviated from their obligations because those measures are in compliance with the public purposes to be protected in general exceptions.

Although there is no explicit clause named "general exceptions" in the Investment Chapter (Chapter 14), nor does any IRE clause exist in Exceptions and General Provisions (Chapter 32), USMCA incorporates general principles in Article 14.16 and Article 24.4.2.

⁷ Article XX of GATT1994 provides that "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures" before stating 10 subparagraphs.

⁸ See Zhang Qing-lin et al., *New Developments of International Investment Agreements in Perspective of Public Interests*, China Social Sciences Press, p.75 (2014).

The structure of Article 14.16⁹ is definitely similar to Article XX of GATT1994. Both of them take the structure “nothing... shall be construed to prevent...” to exempt states that are breaching a treaty obligation. However, Article 14.16 goes further than Article XX of GATT1994 in adopting the phrase “it considers”, giving this clause a self-judging character. Self-judging clauses are “provisions in international legal instruments by means of which states retain their right to escape or derogate from an international obligation based on unilateral considerations and based on their subjective appreciation of whether to make use of and invoke the clause vis-à-vis other states or international organizations.”¹⁰ When examining a large number of IIAs, it can be seen that incorporating self-judging clauses are an important trend in the development of international investment law.¹¹ Since self-judging clauses are originally used for security exception matters, giving Article 14.16 in USMCA a self-judging character shows member states have shifted their attentions on environmental regulatory power from public policy concerns to the mixed field of general exception concerns and security exception concerns.

If Article 14.16 only operates as a general exception clause in the investment field, Article 24.4.2 in the environment chapter grants a stronger environmental regulatory power to host states. Article 24.4.1 provides that host states shall not “enforce its environmental laws...in a manner affecting trade or investment”, but the following Article 24.4.2 gives host states a broad range of discretion.¹²

Article 24.4.2 uses general and abstract criteria such as “reasonable” and “bona fide”, granting less restraints for host states to enforce their environmental laws, granting them restrictively broad discretion concerning environmental matters.

(d) Non-Conforming Clauses (Tantamount to Specific Exceptions Clauses)

(i) Explanatory clauses to national treatment and most-favored-nation treatment

The first step to decide whether a measure in dispute has violated national treatment or most-favored-nation treatment (“MFN Treatment”) is to consider the element of “like circumstances”. Article 1102 (national treatment) and Article 1103 (MFN treatment) in NAFTA do not give any explanation of “like circumstances”. But in *S. D. Myers v. Canada* arising from NAFTA, the tribunal considered that the interpretation of the phrase ‘like circumstances’ in Article 1102 must take into account the general principles that emerge from the legal context of NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns.¹³

⁹ Article 14.16 of USMCA provides that: “Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.”

¹⁰ See Stephan Schill & Robyn Brieze, *If the State Considers: Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N.L. 61, 68 (2009).

¹¹ See Han Xiu-li, *Study on Self-Judging Clauses in Bilateral Investment Agreements – Inspired by Sempra Energy International v. The Argentine Republic*, 28 Studies in Law and Business 17, 18 (2011).

¹² Article 24.4.2 provides that: “The Parties recognize that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory, and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 1 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.”

¹³ See *S. D. Myers Inc. v. Government of Canada*, NAFTA Arb. 2000, Partial Award, para. 250 (Nov.12, 2000), 40 I.L.M 1408 (2001).

The tribunal of *William Ralph Clayton et.al. v. Canada* believed that “in addition to giving the reasonably broad language of Article 1102 its due, a Tribunal must also take into account the objects of NAFTA”.¹⁴ These two cases show that although NATFA doesn’t give explanation to “like circumstances” when interpreting this element, tribunals tend to take general principles and objectives of NAFTA into consideration.

Such approach is confirmed by Article 14.4 and Article 14.5 of USMCA.¹⁵ since USMCA recognizes environmental protection as one of the legitimate public welfare objectives,¹⁶ it allows for host states’ differential treatment to investors and investment based on the consideration of environmental protection.

(ii) Indirect expropriation exception clauses

In *Metalclad v. Mexico*, the tribunal considered whether Mexico municipality’s denial of construction permit constituted an indirect expropriation.¹⁷ What’s more, the tribunal decided that “the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.”¹⁸ The tribunal didn’t pay much attention to environmental concerns neither when determining the nature of measures in dispute, nor when evaluating the compensation amounts.

However, as time went by, tribunals started to pay more attention to environmental concerns when identifying indirect expropriation measures. In *Methanex v. US*, the tribunal considered that: “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”¹⁹ Based on this view, the tribunal finally concluded that the government’s ban on the sale and use of the gasoline additive known as “MTBE” didn’t constitute expropriation.²⁰

In *Chemtura v. Canada*, the tribunal also considered whether the Canadian government’s suspensions of lindane registration were “motivated by the increasing awareness of the dangers presented by lindane for human health and the environment” and were taken in a non-discriminatory manner. Such measures were a valid exercise of police powers and therefore did not constitute an expropriation.²¹

The two cases of *Methanex v. US* and *Chemtura v. Canada* both considered the elements of public purpose and non-discrimination when identifying indirect expropriation measures. *Methanex v. US* also mentioned the principles of due process and legitimate expectation. Furthermore, the principle of proportionality may also be considered in indirect expropriation

¹⁴ See *William Ralph Clayton et al., Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, para.692 (Mar.17, 2015).

¹⁵ Article 14.4 and Article 14.5 of USMCA both provide that: “For greater certainty, whether treatment is accorded in “like circumstances” under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.”

¹⁶ For example, the Preamble and Article 3(b) of Annex 14-B in USMCA both regard environmental protection as one of the legitimate public welfare objectives.

¹⁷ See *Metalclad Corporation. v. The United Mexican States*, ICSID Case No. ARB (AF) /97/1, Award, paras.106-107 (Aug.30, 2000), 40 I.L.M. 36 (2001).

¹⁸ *Ibid.*

¹⁹ See *Methanex Corporation v. United States of America*, NAFTA Arb. 2005, Final Award of the Tribunal on Jurisdiction and Merits, para 7, Part IV, Chapter D (Aug. 3, 2005), 5 *Asper Rev. Int’l Bus. & Trade L.* 341 (2005).

²⁰ *Ibid.*

²¹ See *Chemtura Corporation v. Government of Canada*, Ad Hoc NAFTA Arb. 2010, Award, para.266 (Aug.2, 2010).

cases, such as Non-NAFTA case *Tecmed v. Mexico*, which also involves environmental protection issues.²²

Following the practices, Article 3(b) of Annex 14-B in USMCA adds an indirect expropriation exception clause, which shows the confirmation of environmental regulation power of host states: “Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.”

However, Article 3(b) only requires non-discrimination for environmental protection measures. According to the aforesaid cases, principles of due process, proportionality or legitimate expectations may also be used to decide whether a measure constitutes indirect expropriation.

(iii) Exception clause concerning prohibition clause on performance requirements

Article 14.10 of USMCA is similar to Article 1106 of NAFTA, and both of them regard measures “necessary to protect human, animal or plant life or health”, or “related to the conservation of living or non-living exhaustible natural resources” as exceptions to the prohibition on performance requirements. Additionally, they both require if any environmental measure is qualified with an exception, it shall not be arbitrary or unjustifiable, or constitute a disguised restriction on investment, which includes the similar statement of the chapeau of Article XX of GATT1994.

By now, there is no case with respect to this type that has been registered under NAFTA. As for the prohibition clauses on performance requirements, though it is helpful for the liberalization of investment, it hampers host states to take certain measures to boost domestic economic and social development. Up to now, only a small number of IIAs contain prohibition clauses on performance requirements, such as USMCA, NAFTA and IIAs signed by few countries as the US, Canada and Japan. The vast majority of existing IIAs make no reference to prohibition on performance requirements.²³

(e) Dispute Settlement Procedure Clauses

In addition to the Commission for Environmental Cooperation (“CEC”) established under NAAEC, USMCA establishes a new Environment Committee composed of senior government representatives or their designees.²⁴ The Environment Committee and CEC operate under their own agreements, while the Environment Committee shall periodically inform CEC regarding the implementation of the environment chapter of the USMCA.²⁵

One of the important roles of the Environment Committee is to conduct inter-governmental consultations on handle environmental disputes.²⁶ According to the environment chapter of USMCA, if any environmental dispute occurs, disputing states shall first complete the three levels of consultation procedures before requesting the establishment of a panel. The

²² “There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.” *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSD Case No. ARB (AF)/00/2, Award, para.22 (May 29, 2003), 43 I.L.M. 133 (2004).

²³ See Suzy H. Nikiéma, *Performance Requirements in Investment Treaties*, International Institute for Sustainable Development (December 2014), <https://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf> (accessed on April 13, 2020)

²⁴ See USMCA, Article 24.26.2.

²⁵ See USMCA, Article 24.26.3.

²⁶ *Ibid.*

three levels of consultations are general consultation, senior representative consultation involving the Environmental Committee, and ministerial consultation. Only after all three levels of negotiations fail can the disputing parties initiate the dispute settlement procedures provided in Chapter 31, which regulates state-state dispute settlement (“SSDS”) procedures on general matters.

(f) Private Subject Participation Clauses

(i) Interested person remedy clauses

USMCA incorporates the relevant clauses in NAAEC which strengthen the procedure guaranty for environmentally interested persons to seek remedies. According to Article 24.6, interested persons “may request that the Party’s competent authorities investigate alleged violations of its environmental laws”. States also shall provide appropriate administrative, quasi-judicial or judicial remedies to injured persons as well as impose appropriate sanctions on violators of environmental laws.

(ii) Corporate social responsibility clauses

Article 14.17 in the investment chapter and Article 24.13 in the environment chapter both call for the encouragement of corporate social responsibility. According to these two articles, states shall encourage enterprises established or operating in their territories to voluntarily adopt and implement the best practices of corporate social responsibility that are related to the environment. Such clauses do not impose mandatory obligations upon states or enterprises within their territory, acting more like initiatives for a better balance between investment promotion and environmental protection.

2. Development Process and Features of IRE clauses in Chinese IIAs

According to OECD Working Papers, IIAs can be divided into BITs and other international agreements which contain investment chapters – mainly free trade agreements (“FTAs”).²⁷ Based on this classification, this article also categorizes Chinese IIAs into BITs and FTAs and conducts empirical analyses respectively. Since the 2012 Trilateral Investment Agreement among China, Japan and Korea (“China–Japan–Korea Investment Agreement”)²⁸ is a de facto investment treaty, with the exception of having three member states rather than two members in a typical BIT, it will be analyzed together with BITs.

(a) IRE Clauses in Chinese BITs

According to the statistics published by UNCTAD Investment Policy Hub²⁹ and

²⁷ See Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey 14 18*, (OECD Working Papers on International Investment, No. 01, OECD Library (Jun. 1, 2011), <https://www.oecd-ilibrary.org/docserver/5kg9mq7scrjh-en.pdf?expires=1586765578&id=id&accname=guest&checksum=8AE0E58D2325209EF7757F8D080E6875>). This OECD Working Papers cites many clauses of this type from a lots of BITs, 5.

²⁸ The full name of China – Japan – Korea Investment Agreement is “Agreement among the Government of the People’s Republic of China, the Government of Japan and the Government of the Republic of Korea for the Promotion, Facilitation and Protection of Investment”.

²⁹ See China, Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (accessed on February 29, 2020).

Department of Treaty and Law of Ministry of Commerce of China³⁰ by February 2020, China signed BITs with 130 countries including the China-Japan-Korea Investment Agreement. Among of them, only 17 agreements contain IRE clauses, accounting for only 13.0%. The basic information of these 17 agreements is listed in Table 1 below.

Table 1: Basic information of Chinese BITs that contain IRE clauses
(According to the date of signature, from the earliest to latest)

No.	Agreement	Date of Signature	Main Types of IRE Clauses
1	China – Singapore BIT	November 1985	General exception clause
2	China – Sri Lanka BIT	March 1986	General exception clause
3	China – New Zealand BIT	November 1988	General exception clause
4	China – Mauritius BIT	May 1996	General exception clause
5	China – Trinidad and Tobago BIT	July 2002	Preamble
6	China – Guyana BIT	March 2003	Preamble
7	China – Germany BIT	December 2003	Explanatory clauses to national treatment and MFN treatment
8	China – Madagascar BIT	November 2005	Exception clause to fair and equitable treatment
9	China – Portugal BIT	December 2005	Explanatory clauses to national treatment and MFN treatment
10	China – India BIT	November 2006	Indirect expropriation exception clause
11	China – Columbia BIT	November 2008	Indirect expropriation exception clause
12	China – Chad BIT	April 2010	Preamble, Indirect expropriation exception clause
13	China – Uzbekistan BIT	April 2011	Preamble, Indirect expropriation exception clause
14	China – Democratic Republic of the Congo BIT	August 2011	Preamble, Indirect expropriation exception clause
15	China – Japan – Korea Investment Agreement	May 2012	Preamble, Non-derogation clause, Indirect expropriation exception clause
16	China – Canada BIT	September 2012	Preamble, Non-derogation clause, General exception clause, Indirect expropriation exception clause
17	China –Tanzania BIT	March 2013	Preamble, Non-derogation clause, General exception

³⁰ Bilateral Investment Treaty, Ministry of Commerce of the People's Republic of China, Department of Treaty and Law (Dec.12, 2016), <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml> (accessed on February 29, 2020).

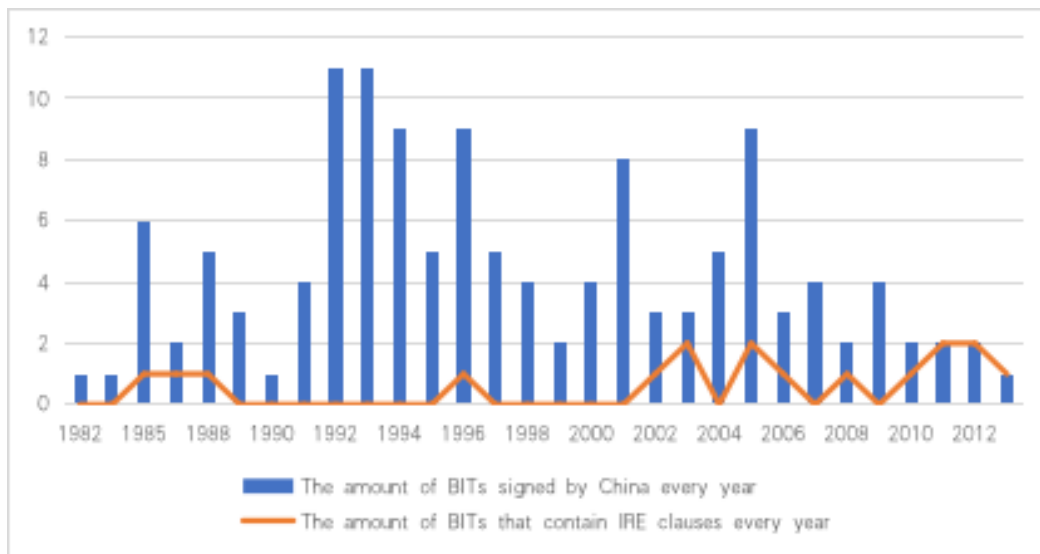
			clause, Indirect expropriation exception clause
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Among the 17 BITs, the *1985 China – Singapore BIT* is the first Chinese BIT that incorporates an IRE provision. What’s more, according to OECD Working Papers, it is also the first one among 1,623 IIAs investigated by OECD.³¹ Article 11 of 1985 China – Singapore BIT provides that: “The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.”

Although this article is named “prohibitions and restrictions”, the nature of it is more like a combination of a security exception clause and general exception clause.

If examined by year, the development process of IRE clauses in Chinese BITs can be showed in Figure 1 as below.

Figure 1: The Development Process of IRE clauses in Chinese BITs



It can be seen from figure 1 that the development process of Chinese BITs can be divided into three phases. The first phase is from 1982 to 2001. Among all the 91 BITs that occurred during this phase, only 4 BITs contain IRE clauses. It might be speculated that IRE clauses were accidents during this phase or upon the other party’s request. And by combing Table 1, it can be seen that all IRE clauses in the first phase are general exception clauses. The second phase is from 2002 to 2010. There are 8 BITs that contain IRE clauses among the total 35 BITs during the second period, which demonstrates that the frequency of appearance of IRE clauses have increased. Additionally, according to Table 1, new types of IRE clauses are incorporated during the second phase, including preamble clauses, explanatory clauses to national treatment and MFN treatment, and indirect expropriation exception clauses. However, in terms of the number of IRE clauses, all BITs in this phase only have one or two IRE clauses; and in terms

³¹ See Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey 14 18*, (OECD Working Papers on International Investment, No. 01), OECD iLibrary (Jun.1, 2011), <https://www.oecd-ilibrary.org/docserver/5kg9mq7scrjh-en.pdf?expires=1586765578&id=id&accname=guest&checksum=8AE0E58D2325209EF7757F8D080E6875>. This OECD Working Papers cites many clauses of this type from a lot of BITs, 5.

of the type, general exception clauses are replaced by specific exception clauses, or even preamble clauses which are not binding. To some extent, the environmental regulatory power of host states in the first two phases were not respected and still strictly restricted.

But since 2011, which is the third period, IRE clauses appear in all the BITs that China has signed, and the number and type of IRE clauses have gradually increased. It can be concluded that since 2011, the importance of IRE clauses is getting more and more attention. All the 5 BITs that were signed between 2011 and 2013 have preamble clauses and indirect expropriation exception clauses, and 3 BITs have non-derogation clauses. Besides, general exception clauses come back and appear in the latest 2012 China – Canada BIT and 2013 China – Tanzania BIT.

(b) IRE Clauses in Chinese FTAs

According to the data published by the Ministry of Commerce of China, China has already signed 17 FTAs which involves 25 countries and regions.³² To find out about the development process of IRE clauses in Chinese FTAs, this article examines all the FTAs that China signed with foreign countries and whose texts have been officially published. The basic information of these agreements is listed in Table 2 as below.

Table 2: Basic Information of Chinese FTAs with respect to IRE Clauses

Counter Party	Agreement	Date of Signature	Main Types of IRE Clauses
ASEAN	Framework Agreement	November 2002	General exception clause
	Investment Agreement of the Framework Agreement	August 2009	Preamble clause, General exception clause
	Protocol to Amend the Framework Agreement ³³	November 2015	No IRE clause
Chile	China- Chile FTA	November 2005	Preamble clause, General exception clause
	Supplementary Agreement on Investment of China- Chile FTA	September 2012	Indirect expropriation exception clause
	Protocol to Amend China- Chile FTA	November 2017	Preamble clause, Environment chapter (including Non-derogation clause, SSDS exclusion clause)
Pakistan ³⁴	China – Pakistan	November 2006	Preamble clause

³² See Signed FTA & Involved Countries/Regions, China Free Trade Zone Service Website (Zhong Guo Zi You Mao Yi Qu Fu Wu Wang), <http://fta.mofcom.gov.cn/index.shtml> (accessed on February 29, 2020).

³³ The Protocol to Amend the Framework Agreement came into effect as from Nov.23, 2019 to all of contracting parties, http://fta.mofcom.gov.cn/dongmeng_phase2/annex/hwmy (accessed on February 29, 2020).

³⁴ Protocol to Amend China – Pakistan FTA were signed on April 2019 and came into force as from Dec.1, 2019, http://fta.mofcom.gov.cn/pakistan/xieyi/xdyds_cn.pdf, Article 7 of the Protocol mentioned that both parties shall

	FTA		
Singapore	China – Singapore FTA	October 2008	No IRE clause
	Protocol to Upgrade China – Singapore FTA	November 2018	Indirect expropriation exception clause, General exception clause, Environment chapter (including Non-derogation clause, SSDS exclusion clause)
New Zealand	China – Zealand FTA	April 2008	Preamble clause, General exception clause, Indirect expropriation clause
Peru	China – Peru FTA	April 2009	Preamble clause, Indirect expropriation clause
Costa Rica	China – Costa Rica FTA ³⁵	April 2010	Preamble clause, General exception clause
Iceland	China – Iceland FTA ³⁶	April 2013	Preamble clause
Switzerland	China – Switzerland FTA	July 2013	Preamble clause, Environment chapter (including Non-derogation clause), SSDS exclusion clause
Korea	China – Korea FTA	June 2015	Preamble clause, Indirect expropriation clause, Non-derogation clause, Environment chapter (including SSDS exclusion clause)
Australia	China – Australia FTA	June 2015	Preamble clause, General exception clause, ISDS exclusion clause
Georgia	China – Georgia FTA	May 2017	Preamble clause, Environment chapter (including Non-derogation clause, SSDS exclusion clause)

As shown by the Table 2 above, compared to BITs, most FTAs have already incorporated IRE clauses. As time goes by, the types of IRE clauses have increased. The common types of IRE clauses include preamble clauses, general exception clauses, and later, indirect expropriation exception clauses and non-derogation clauses. Between 2015 and 2018, FTAs and their protocols that China signed with Switzerland, Korea, Georgia, Peru and Singapore incorporate independent environment chapters, and exclude environmental disputes from

focus to establish the stable, transparent and predictable investment environment, however, there is no explicit and specific provision on how to establish the stable, transparent and predictable investment environment.

³⁵ See The investment chapter of China – Costa Rica FTA incorporates the 2007 China – Costa Rica BIT.

³⁶ See The investment chapter of China – Iceland FTA incorporates the 1994 China – Iceland BIT.

SSDS mechanism. It is also noteworthy that in the *2015 China – Australia FTA*, non-discriminatory measures for the purpose of environmental protection are excluded from the investor-state dispute settlement (“ISDS”) mechanism.³⁷

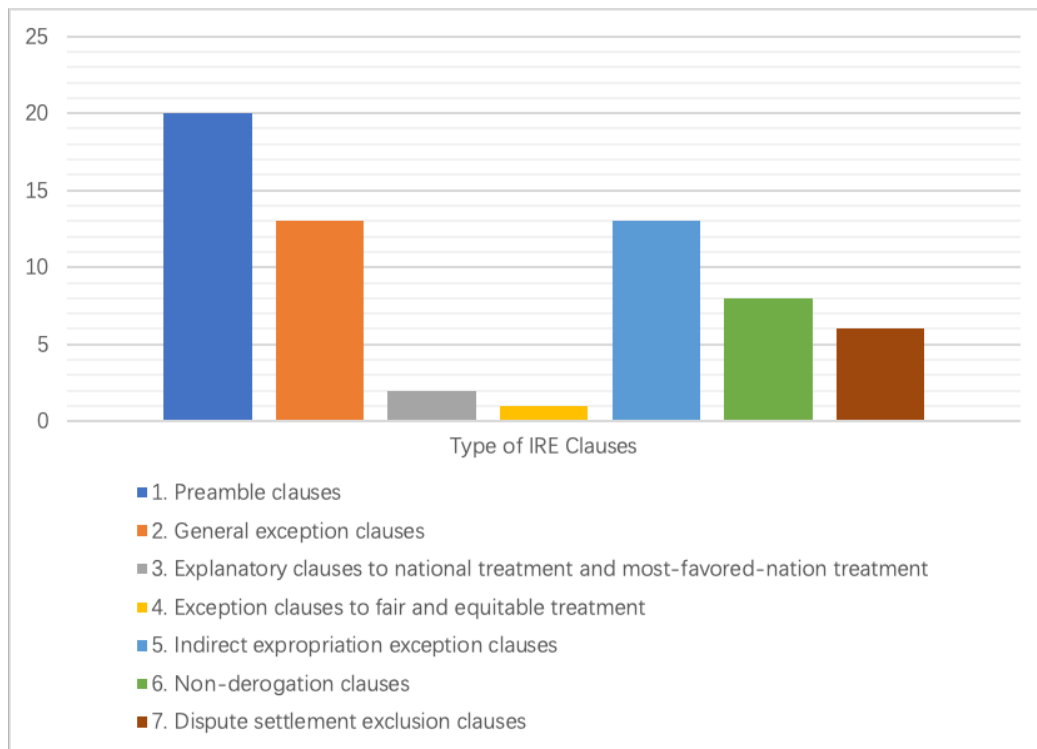
(c) Problems of IRE Clauses in Chinese IIAs

Through a thorough empirical examination of Chinese BITs and FTAs, problems of IRE clauses in Chinese IIAs can be summarized as below:

(i) The adoption of different types of IRE clauses lacks comprehensive consideration

The Figure 2 below is an exhibition of appearance number of each type of IRE clauses in Chinese BITs and FTAs.

Figure 2: The Appearance Number of Each Type of IRE Clauses in Chinese IIAs



As shown by Figure 2, preamble clauses appear most frequently in Chinese IIAs, while the appearance frequencies of general exception clauses, indirect expropriation exception clauses, non-derogation clauses and dispute settlement exclusion clauses are relatively low. Explanatory clauses to national treatment and MFN treatment and exception clauses to fair and equitable treatment only appear once or twice. Such imbalance of the adoption of different types of IRE clauses is partly due to the considerations of different functions of IRE clauses and various situations of contracting parties, but also due to a lack of systematic arrangement of IRE clauses.

Generally speaking, preamble clauses, non-derogation clauses and specific clauses have

³⁷ See Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China Article 11.4, Chapter Nine, AUS – China, (Jun.17, 2015).

less adverse influences on foreign investors than general exception clauses and dispute settlement procedure clauses do. Taking exception clauses as an example, if a country intends to strengthen its environmental regulatory power, it can incorporate both the general exception clauses and specific exception clauses; while if a country wants to keep its environmental regulatory power in a relatively low level, it can only incorporate specific exception clauses. Therefore, the incorporation of specific exception clauses is generally more frequent than general exception clauses. However, Chinese IIAs shows an opposite picture.

In addition, the adoption of IRE clauses in different IIAs also lacks consideration. For example, 2013 China – Iceland FTA only has a preamble clause, and 1994 China – Iceland BIT doesn't have any environmental clause, while 2013 China – Tanzania BIT has incorporated four types of IRE clauses including a general exception clause, in spite of the higher environmental risks Chinese investors may encounter in Tanzania.

(ii) The expressions of IRE clauses are not unified

In its preamble clauses, 2012 China – Canada BIT and 2013 China – Tanzania BIT only mention “sustainable development” to include environmental protection, and China – Australia FTA only mentions “public welfare”. However, 2012 China – Japan – Korea Investment Agreement and 2013 China – Switzerland FTA both explicitly refer to “environment”. Another example are indirect expropriation exception clauses. 2015 China – Korea FTA and 2006 China – India BIT provide that non-discriminatory measures adopted for “legitimate public welfare” or “public interest” do not constitute indirect expropriation, including no specific terms concerning “environment”, “environmental protection” or similar expressions. But in other Chinese IIAs, “environment” has been generally referred to in indirect expropriation exception clauses. The diversified expressions of IRE clauses indicate that China has no stable or consistent consideration on IRE clauses, which is far away from the establishment of public policy.

(iii) The application requirements of IRE clauses are not consistent

Taking indirect expropriation exception clauses as an example, the 2011 China – Uzbekistan BIT requires that the application of indirect expropriation exception shall be in compliance with the proportionality principle and non-discrimination principle.³⁸ One year later, the 2012 China – Canada BIT added the principle of good faith.³⁹ However, the 2013 China – Tanzania BIT removed the principle of good faith.⁴⁰ Whether such difference is made unintentionally or accidentally, or based on particular arrangements or considerations is unknown. This still needs further study on the necessity and effects of setting different requirements in applying the same IRE clause.

(iv) The structure arrangements of IRE clauses are not consistent or stable

The 2012 China – Canada BIT put the non-derogation clause under the Article 18 named “Consultations”, and set a separate article for the general exception clause. In contrast, China – Tanzania BIT set Article 10 named “Health, Safety and Environmental Measures” to include

³⁸ See Agreement between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments Article 6.2, CHN – UZB (2011).

³⁹ See Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments Article 3, Annex B.10, expropriation, CAN – CHN (2012).

⁴⁰ See Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Promotion of Investment Article 6, CHN – TAN (2013).

the aforesaid two clauses. Such inconsistent arrangements reflect a lack of systematic considerations of IRE clauses.

In a word, China has paid more attention to IRE clauses in the recent years, and there are more detailed and comprehensive IRE clauses in the recently concluded BITs and FTAs. However, China's stance on IRE clauses are still far from predictable for diversified provisions in different IIAs, which may lead to more uncertainties in practice.

3. China's Stance on the Renovation of IRE Clauses in USMCA

When playing the role of a host state, the increase of IRE clauses is related to the reduction of potential negative impacts of foreign investment on China's environment, as well as the maintenance of legitimate regulatory power of China on environmental matters and rebalance between investment promotion and environmental protection. China is also one of the largest capital-exporting countries, with the foreign direct investment outflows of China ranking second in the world in 2018, and has investments covering 188 countries and regions.⁴¹ Accompanied with more and more interests in outbound investment, Chinese investors may encounter more challenges and risks arising from IRE clauses. In fact, Chinese enterprises have already encountered some conflicts caused by environmental issues. For example, Chinese mining enterprises were fined by Peruvian local governments for violating local environmental regulations.⁴² It seems that China has been stuck in the paradox: higher environmental protection standards and less restraints on host states' governments invoking IRE clauses to deviate its obligations under investment agreements or contracts favoring host states' governments, while having lower environmental protection standards and more restraints on host states' governments when it favors Chinese investors. However, the paradox may not exist in sustainable investment. Until now, there is no singular definition for sustainable investment, but it is widely accepted that such investment shall be harmonious between interests of foreign investors and interests of host states' governments.

While the U.S. is focusing on renovating U.S.-dominated international investment agreements ("IIAs"), China also sped up its reformation process for a new generation of IIAs. Besides the BIT negotiations with EU and U.S. negotiations,⁴³ China also leads the Regional Cooperative Economic Partnership ("RCEP") negotiations and attempts to set up China's voice in the regional level. Compared to economy-oriented strategy, China has paid more and more attention to rule-oriented strategy and focused on the value of rules. In this regard, China-dominated IIAs are a set of tools to build the image of China and its voice in the world. A better-balanced BIT rebalancing investment promotion and environmental protection is sought to better fit in the two-way interests of a capital-importing and capital-exporting country. During this process, China is open and even eager to benefit from other countries' experiences, and the USMCA is undoubtedly an important parameter for China to analyze and refer to. Regarding the USMCA, the greatest significance of incorporating a number of IRE clauses into the USMCA is the strengthening of environmental regulatory power of host states. Under the background of the return of states' sovereignty, the integration and addition of a large number of IRE clauses in USMCA is not surprising. Other IIAs that echo the USMCA include Comprehensive and Progressive Agreement for Trans-Pacific Partnership of 2018 ("CPTPP")

⁴¹ See Ministry of Commerce and Other Authorities Issue the 2018 Statistical Bulletin of China's Outward Foreign Direct Investment (Sep.13, 2019), <http://www.mofcom.gov.cn/article/ae/ai/201909/20190902898777.shtml> (accessed on April 13, 2020).

⁴² See Xia Rui-rui, *How Big is the Trouble of Chinese Mining Enterprises in Peru*, Observer (Guan Cha Zhe) (Oct.8, 2015), https://www.guancha.cn/xiaruirui/2015_10_08_336704.shtml (accessed on April 13, 2020).

⁴³ China finished the 31st round China-U.S. BIT negotiations in November 2016, but the China-U.S. BIT negotiations have been suspended since then.

and Comprehensive Economic and Trade Agreement of 2016 (“CETA”). Though the US is not a member state of CPTPP, its influence on the Trans-Pacific Partnership has been felt in the CPTPP. The type and expression of IRE clauses in the CPTPP are quite similar to USMCA. With regard to CETA, though there are some differences between it and USMCA in terms of structure arrangement and expression of IRE clauses, the type of IRE clauses in it is similar to that in USMCA.

Therefore, USMCA can provide a helpful guidance and inspiration for the balance between investment promotion and environmental protection and will undoubtedly be used by China for reference during the reformation process of Chinese IIAs. However, as discussed in the following part, the steps that USMCA takes towards environmental regulatory power are too far in some respects and China may adopt a relatively conservative attitude toward these bold attempts rather than transplant the IRE clauses directly.

(a) Choice of Type of IRE Clauses in Chinese IIAs

When compared to IRE clauses in USMCA, Chinese IIAs have already incorporated preamble clauses, general exception clauses, indirect expropriation exception clauses, and non-derogation clauses. Some types of IRE clauses that USMCA has only appear by accident or have never appeared in Chinese IIAs, while clauses like SSDS and ISDS exclusion clauses in some Chinese FTAs do not exist in USMCA. During the reformation process of Chinese IIAs, the necessity and reasonableness of incorporating each type of the IRE clauses will be further considered by China.

(i) Adoption of clauses declaring and reserving environmental regulatory power of host states

Regarding preamble clauses, non-derogation clauses and other clauses that declare and reserve environmental regulatory power of host states, the contents and functions of these IRE clauses are diversified and all emphasize the inherent power of host states’ on environmental protection. These clauses are conducive to the justification of environmental regulatory measures that host states take. These clauses are relatively abstract and obscure in specific standards, making host states maintain enough discretion power. Also, compared to non-binding declarations, these clauses will help to show China’s support for sustainable investment or even sustainable development and establish more credible and responsible image of China, which might be helpful to decrease potential doubts from government or the public of host states. Therefore, it is predictable clauses listed above will be widely adopted by Chinese IIAs in the future.

(ii) Two-way attitudes towards exception clauses

In terms of the function of exception clauses, they are the most crucial clauses in regulating the relationship between investors and host states.

First, with regard to the explanatory clauses to national and MFN treatment and indirect expropriation exception clauses, since they are most likely to trigger investment disputes and even lead to “regulatory chill”, the corresponding exception clauses shall be added for the purpose of reserving the environmental regulatory power of host states. Such addition is also consistent with the practice of the newest IIAs like USMCA, CETA and CPTPP.

Secondly, regarding exception clauses to the prohibition on performance requirements, though USMCA, CPTPP and CETA all include this type of clauses, China may not follow the practice. Among all the BITs and FTAs that China has done, only a few of them contain the prohibition on performance requirements clauses. Therefore, it is not urgent for China to add

the corresponding exception clauses. Also, there is a lack of relevant cases which can show the pros and cons of this type of clause. In the future, China may adopt a flexible attitude towards this type of clause depending on the different negotiation situations.

Finally, as for general exception clauses, this type of clauses provides powerful support to host states' regulatory power, and whether to incorporate it or not is closely related to the degree to which host states place emphasis on environmental regulatory power. As discussed above, USMCA adds general exception clauses with loose application standards both into the investment chapter and the environment chapter, though there is no clause directly named "general exceptions". In contrast, CETA restricts the application of its general exception clause. In CETA, the general exception clause is put under Chapter 28 of "exceptions", and the expression of it follows Article XX of GATT1994, meaning that there are certain requirements set for host states before they invoke an exception. What's more, the application scope of the general exception clause in CETA is limited to Section B (Establishment of investment) and C (Non-discriminatory treatment) of the investment chapter.⁴⁴ In other words, exceptions only apply to some kinds of investment protection treatments, such as national treatment and MFN treatment, while other protection treatments, like fair and equitable treatment prohibiting expropriation, will not be covered by the general exception clause.

Practices of USMCA and CETA show that the newest IIAs adopt different attitudes towards general exception clauses. China also varies on this type of clause in the latest IIAs. For example, the 2012 China – Japan – Korea Investment Agreement does not put environmental issues into its general exception clause. While during the same time period, the 2012 China – Canada BIT and the 2015 China – Australia FTA do. However, the 2017 China – Georgia FTA follows the practice of 2012 China – Japan – Korea Investment Agreement. Considering the strong effects of general exception clauses, China may remain indecisive about whether to adopt general exception clauses or not.

(iii) Further observation of dispute settlement procedure clauses

Dispute settlement procedure clauses are another type of an IRE clause that are regarded as very important. This type of clause mainly includes ISDS exclusion clauses and SSDS exclusion clauses. Other clauses that may attract the attention of China are amicus curiae opinion clauses and inter-governmental consultation clauses.

USMCA does not contain ISDS or SSDS exclusion clauses, but it does limit the application scope of the two dispute settlement mechanisms and create a set of fragmented ISDS mechanisms. Though ISDS mechanism shall be applied in investment disputes between U.S. and Mexico,⁴⁵ the coverage of application shall be limited to national treatment, MFN treatment and direct expropriation after the establishment or acquisition of an investment. Disputes with respect to indirect expropriation are excluded from ISDS mechanisms,⁴⁶ while environmental regulatory measures are usually considered as indirect expropriation.

Similar to the practice of USMCA, CETA also excludes disputes relating to certain matters from ISDS mechanisms. For example, according to Article 8.2.4, "Claims under Section C [non-discriminatory treatment] with respect to the establishment or acquisition of a covered investment are excluded from the scope of Section F [resolution of investment disputes between investors and states]." Therefore, to some extent, the limitations on the scope of application of ISDS mechanisms are becoming a new trend of IIAs.

Regarding SSDS mechanism, USMCA also set particular requirements for environmental disputes. As discussed above, disputing states shall complete three levels of inter-governmental consultations before requesting for the establishment of a panel.

⁴⁴ See CETA Article 28.3.1, EU – CAN (Oct.30, 2016).

⁴⁵ ISDS mechanism shall not be applied to any investment dispute involving a Canadian party in the future unless the investment dispute arising from existing investment within 3 years after USMCA comes into effect.

⁴⁶ See USMCA Article 14.

With the return of states' sovereignty in the investment field, the role of ISDS mechanisms are being reconsidered, and inter-governmental consultations, which are not binding, are regaining attention. As for China, it already has tried the exclusion of ISDS mechanisms. Article 9.11.4 of the 2015 China – Australia FTA provides that:

“Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section [investor-state dispute settlement].”

According to this clause, non-discriminatory environmental measures are excluded from ISDS mechanisms.

The China – Australia FTA is the only agreement that contains an ISDS exclusion clause among all the Chinese IIAs. The attitude of China towards these types of clauses is still cautious. Since protection of investors and their investment remains the core aim of IIAs, and China nowadays has a vast number of investments in foreign countries, excluding environmental issues from the ISDS mechanism seems too radical for China. It not only goes against the interests of Chinese investors, but also discourages foreign direct investment. Therefore, instead of incorporating ISDS exclusion clauses, it is more likely for China to limit the application scope of ISDS mechanism to certain investment protection treatments.

With respect to SSDS mechanisms, it can be seen that most of the recent Chinese FTAs have excluded the environmental issues from this mechanism. However, it doesn't mean that all Chinese IIAs in the future will follow the present practice. As provided by USMCA, setting up mandatory consultation procedures before allowing disputing states to request for a binding award may also be a good choice. By inter-governmental consultations, tensions between states are likely to be eased, while the final legal remedy is still reserved. Therefore, based on various negotiation situations, China may have different options.

Another type of dispute settlement procedure clause to be emphasized is the *amicus curiae* clause. These types of IRE clauses may appear in many IIAs, but given that non-profit environmental organizations in China are currently not well established, China may not be willing to incorporate these types of clauses in Chinese IIAs.

(iv) Exclusion of interested person remedy clauses and adoption of corporate social responsibility clauses

Regarding interested person remedy clauses, given that Chinese outbound foreign direct investment is increasing, Chinese investors may encounter more protests from local communities or local residents when investing in environmentally high-risk industries. In general, mining, chemical, infrastructure, papermaking, pharmaceutical and others might be added to the list of environmentally high-risk industries. However, the interested persons' participation may lead to distortions. Whether an interested persons' participation is in good faith, represent the genuine thoughts of local communities or residents, or whether there are critical conflicts among the different groups of interested persons will affect the fairness of an interested persons' participation. That is why we think that incorporating this type of clause is not a good choice for Chinese investors or for Chinese government. The next step China will do is to improve Chinese investors' awareness of environmental protection through various ways and adopting corporate social responsibility clauses into Chinese IIAs may be an acceptable one. Up to now, the Chinese government has already made many efforts to lead Chinese investors to observe host states' environmental regulations, such as launching Guidance for Environmental Protection during Outbound Investment and Cooperation.⁴⁷

⁴⁷ See Interpretation of Guidance for Environmental Protection during Outbound Investment and Cooperation, Ministry of Commerce of the People's Republic of China (Feb.28, 2013), <http://www.mofcom.gov.cn/article/zhe/ngcejid/bq/201302/20130200039938.shtml> (accessed on April 13, 2020).

(b) Determination of Application Standards of IRE Clauses in Chinese IIAs

The newest IIAs represented by USMCA has strengthened host states' regulatory power to a large extent. However, by trying hard to restore balance between investors' protection and host states' regulatory power, it may lead to another kind of imbalance. Though regulatory power is an inherent power of states to protect public interests, it should not be an absolutely self-judging right of host state. Otherwise host states may invoke IRE clauses for excessive regulation which may distort the reliance of foreign investors on an investment treaty.⁴⁸ With the incorporation of IRE clauses, especially exception clauses, what is of equal importance is the imposition of appropriate restrictions on potential abuse of power by host states.

USMCA imposes some restrictions on specific exception clauses. For example, with respect to exception clauses' prohibition on performance requirements, USMCA requires that measures which constitute exceptions shall not be "applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment". This is similar to the chapter of Article XX of the GATT1994 and can restrict the discretion of host states in invoking IRE clauses to justify its measures in compliance with its obligations under the USMCA.

Another example is the indirect expropriation exception clause. According to Article 3(b) of Annex 14-B in USMCA, if measures are to be regarded as an indirect expropriation exception, they shall be non-discriminatory and be out of public purpose. The expression of "except in rare circumstances" in this clause shows that there are some other requirements for the establishment of an indirect expropriation exception. By referring to Article 3(a) of Annex 14-B, these extra requirements may relate to the good faith principle and legitimate expectation principle.⁴⁹ When examining the newly signed Chinese IIAs, requirement similar to the USMCA can be easily found.

However, regarding general exception clauses in USMCA, there is no restraints in Article 14.16, and the invoking requirements of Article 24.4.2 are quite low. Such loose restrictions will make it possible for host states to abuse regulatory power under the pretext of environmental protection. The first four Chinese IIAs⁵⁰ that contain general exception clauses also lack necessary restrictions, but the latest 2012 China – Canada BIT and 2013 China – Tanzania BIT adopt the expression of Article XX of GATT1994, which raises the necessary requirements for the application of general exception clauses.

With the progress of the Belt and Road Initiative ("B&R"), there is a large quantity of Chinese investment flowing into other developing countries, and it is thus important to restrict the potential abuse of power by host states. The application standards of Article 14.16 and Article 24.4.2 in USMCA will be too radical for China. Instead, it is predictable that in the future, accompanying with the increase of IRE clauses, some flexible principles which can regulate to the use of power will be incorporated into Chinese IIAs, such as principles of good faith, proportionality, due process and legitimate expectations.

(c) Other Refinement of IRE Clauses in Chinese IIAs

In addition to the choice of type and determination of application standards, Chinese IIAs

⁴⁸ See Zhang Qing-lin et al., *New Developments of International Investment Agreements in Perspective of Public Interests*, China Social Sciences Press, p.22 (2014).

⁴⁹ "(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action, including its object, context, and intent." USMCA Article 3 (a) (ii) - (iii), Annex 14-B, expropriation.

⁵⁰ They are 1985 China – Singapore BIT, 1986 China – Sri Lanka BIT, 1988 China – New Zealand BIT and 1996 China – Mauritius BIT.

will also work on the refinement of structure arrangements and expressions of IRE clauses.

The structure arrangement of IRE clauses in USMCA has some notable characteristics. In the investment chapter, exception clauses form the major part of IRE clauses. Compared to clauses in the environment chapter, IRE clauses in the investment chapter are more targeted and practical, which are helpful for the settlement of investment disputes involving environmental issues. While in the environment chapter IRE clauses, which declare the environmental regulation power of host states in an abstract level, account for a higher percentage. In addition, a large part of IRE clauses in the environment chapter are those that regulate specific environmental matters, such as ozone and marine environmental protection.

The reformation trend of Chinese IIAs is consistent with the structure arrangement of USMCA. However, as pointed out in the second part, Chinese IIAs have not yet formed a relatively stable structure of IRE clauses and matters regulated by them in environment chapters are quite limited. This is partly because China does not have a comprehensive and stable model IIA yet. In this regard, the U.S. has set a reference for China. U.S. has a model BIT and revises it periodically for guiding BIT negotiations in the following period to keep the relative stability of U.S. BITs. Therefore, during the design of a Chinese Model BIT, China may get some inspiration from USMCA with regard to the structure arrangement of IRE clauses. Also, with the development of a Chinese Model BIT, expressions of IRE clauses in Chinese IIAs will also be further refined by referring to USMCA.

4. Conclusion

This article analyzes the IRE clauses in USMCA and discusses China's stance on such issues. With the return of host states' sovereignty to the international investment field, the newest IIAs represented by USMCA start to put more attention on the environmental regulation power of host states, and many IRE clauses have thus been incorporated. The important IRE clauses in USMCA can be categorized into six types, including preamble clauses, non-derogation clauses, general exception clauses, specific exception clauses, dispute settlement procedure clauses and private subject participation clauses. While some IRE clauses like preamble clauses and non-derogation clauses are mainly used for the interpretation of IIAs with respect to the balance between investment promotion and environmental protection, clauses like exception clauses and dispute settlement procedure clauses actually have strong effects on the interests of foreign investors. But they all serve a common purpose – reserving or even leaving more space for the environmental regulatory power of host states.

China is also under the reformation process of its own IIAs. As a capital exporting and importing country at the same time, China will on the one hand, try to reserve its environmental regulatory power to protect domestic environment, while on the other hand, restrict the abuse of regulatory power by foreign countries to protect interests of Chinese investors. When examining Chinese IIAs, it can be found that IRE clauses in Chinese IIAs have experienced a remarkable development process, from zero to a variety, from being restrictive to being advocative. However, there are still many problems that need to be solved, which mainly include lack of consideration on IRE clauses adoption, diversification of expressions and inconsistency of application standards, and structure arrangements of IRE clauses.

To some extent, USMCA represents the newest development trend of IRE clauses, and many IRE clauses in it conform to the reformation aim of Chinese IIAs. These clauses include but are not limited to: (1) preamble clauses, non-derogation clauses, and other clauses that declare and reserve the environmental regulatory power of host states in an abstract level; (2) some specific exception clauses, including explanatory clauses to national treatment and MFN treatment, and indirect expropriation exception clauses; (3) inter-governmental consultations clauses; and (4) corporate social responsibility clauses. However, clauses like general

exception clauses, ISDS and SSDS exclusion clauses, and amicus curiae opinion clauses will be further studied before being adopted into Chinese IIAs.

Regarding the application standards of IRE clauses in USMCA, it seems that some of them are too loose to restrict the abuse of regulatory power, such as Article 14.16 and Article 24.4.2. In the future, China may adopt more flexible principles to operate as restrictions on the abuse of power by host states. Also, during the development of China's Model BIT, China will be open to various inspirations from USMCA with regard to the structural arrangements and expressions of IRE clauses.

Restorative Justice, Impunity and Amnesty in International Criminal Law

Li Di¹

Abstract: The idea of restoration and the special form of justice-restorative justice are viewed by many scholars as a “teething problem” for the young International Criminal Court (the ICC). Aiming at bringing peace, restorative justice has been argued as the opposite side of the current legal framework at the ICC, which is often referred as “peace versus justice”. The article goes deep to the real meaning of restorative justice, and differentiates restorative justice from transitional justice. Based on such differentiation, it proves that the logic behind “peace versus justice” is not completely correct, because the non-impunity principle in international law does not necessarily exclude amnesty. Restorative justice provides international criminal justice a new lens to the form of punishment that the convicted persons should contribute to the local community rather than simply serving the sentences in prison. Also, restorative justice supports the policy of “zero tolerance to crime” and complies with the non-impunity principle in international law.

Key Words: Restorative Justice; Impunity; Punishment

The International Criminal Court when trying to bring more than justice and legalism into its legal framework needs to overcome many difficulties. One of them being the “peace versus justice” dilemma has already caused serious and prolonged debates in the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). The dilemma often involves how international criminal justice balances the principle of impunity and the spirit of justice.

Restorative justice, often practiced in the form of national reconciliation and rehabilitation, has become very popular in studying international crimes. The call for using restorative justice at the ICC was an enthusiastic initiative and over the years, different studies have made the voice of supporting the idea of restoration and restorative justice in the ICC calmer and more rational. As more disputes are reaching the Hague, people realise that the dilemma of “peace versus justice” always exists, particularly in the on-going armed conflicts, and restorative justice has not prepared the ICC well enough. But it does not mean that the ICC should withhold such an idea, because the ultimate aim of the ICC is to end the most imaginable atrocities in the interests of all humanity. For the victims who survived the atrocities but have to live with them every day, peace may be even more urgent than justice. Although restorative justice does not completely solve the problems, it may be the closet answer we humans have found. Hence, it is necessary to clarify the real meaning of restorative justice in the context of international crimes, and analyse whether restorative justice is simply a wrong path or has it been utilised or implemented incorrectly.

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1. The Meaning of Restorative Justice

In many countries, restorative justice has emerged in judicial practices as a means to address criminal justice issues involving indigenous peoples.² It was utilised to address the internal problems of a country, and was mutually influenced with crime victims' movements.³ It differs from the adversarial model of criminal justice in which prosecutorial actions are subjected to restriction. Sometimes it is linked to ideas in civil rights litigation, such as compensation. It is a criminal procedure that includes alternative dispute resolutions.

Restorative justice consists of multiple aspects that go beyond the slender principles of criminal law. It concentrates on reality and adjusts its concrete practices accordingly. From this standpoint, there is no unchangeable pattern for restorative justice as long as those practices are able to conclude the restoration process. Consequently, it is hard to draw a conclusion on the definition of restorative justice and narrow down to an exhaustive list of restorative justice practices. Some researchers turn to describe restorative justice in various manners.⁴ For example, Howard Zehr, one of the frontier scholars on restorative justice, tries to justify what restorative justice is not,⁵ rather than describing how it should be formulated. He further emphasises that "[r]estorative justice is a compass, not a map",⁶ indicating that there may not be a constant mode for approaching or practicing restorative justice.

Professor Kathleen Daly contests the idea that restorative justice cannot be clearly defined. Based on "purist" view, Professor Daly argued that restorative justice must be "defined concretely" as "a justice mechanism" for the purpose of satisfying the "empirical inquiry".⁷ After reviewing various theories relating to the definition and context of restorative justice, Professor Daly specifically pointed out that formal criminal justice, which is often regarded as "retributive justice", is not contrary to "restorative justice" because both retributive justice and restorative justice, "as a coherent system or type of justice, do not exist."⁸ Restorative justice, in Daly's opinion, shall be included in the concept of "innovative justice" which does not solely rely on legal processes but also other forms of participation and interaction.⁹ In other words, she believes that an ideal justice mechanism must focus on the forms it intends to include and shall extend its processes to solve real problems, and restorative justice, like formal criminal justice, is simply one part of such an "umbrella term".¹⁰ As a conclusion, Daly states that: "Restorative justice is a contemporary justice mechanism to address crime, disputes, and

² See Elmar G.M. Weitekamp, *The History of Restorative Justice*, in G. Bazamore & L. Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, Criminal Justice Press, pp.75-102 (1999); See Moana Jackson, *Maori and the Criminal Justice System: A New Perspective*, He Whaipaanga Hou, Policy and Research Division, Department of Justice (1987).

³ See Daniel W. Van Ness, *Crime and Its Victims: What We Can Do*, Inter Versity Press, pp.5-9 (1986). Marlene Young & John Stein, *The History of the Crime Victims' Movement in the United States*, National Criminal Justice Reference Service, US (2004), https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pdf/historyofcrime.pdf (accessed on February 2, 2015).

⁴ See Burt Galaway & Joe Hudson, *Restorative Justice: International Perspectives*, Willow Tree Press, pp.1-14 (1996). Daniel W. Van Ness & Karen H. Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th ed), Anderson Publishing, pp.23-25 (2015).

⁵ See Howard Zehr, *The Little Book of Restorative Justice*, Skyhorse Publishing, Inc., pp.3-11 (2015).

⁶ See Howard Zehr, *The Little Book of Restorative Justice*, Skyhorse Publishing, Inc., p.8 (2015).

⁷ See Kathleen Daly, *What is Restorative Justice? A Fresh Answer to a Vexed Question*, 11 Victims and Offenders 9, 11 (2016).

⁸ See Kathleen Daly, *What is Restorative Justice? A Fresh Answer to a Vexed Question*, 11 Victims and Offenders 9, 15 (2016).

⁹ See Kathleen Daly, *What is Restorative Justice? A Fresh Answer to a Vexed Question*, 11 Victims and Offenders 9, 18 (2016).

¹⁰ See Kathleen Daly, *What is Restorative Justice? A Fresh Answer to a Vexed Question*, 11 Victims and Offenders 9, 19 (2016).

bounded community conflict. The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process- prearrest, diversion from court, presentence, and postsentence- as well as for offending or conflicts not reported to the police. Specific practices will vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict.”¹¹

This study does not intend to develop a new definition of restorative justice, or challenge Professor Daly’s conclusion on the definition of restorative justice. Although her attempt in providing a concrete definition of restorative justice, the definition was not that “concrete” as there was no clear list of all the practices in restorative justice, or a guide about the timing to trigger restorative justice in formal criminal justice, or any specific rules which restorative justice must coordinate with. Nevertheless, Professor Daly’s intention was to highlight the importance of the effects of restorative justice which must be actually recorded and assessed, rather than being evaluated by the theoretical concept of “victims’ satisfaction”.¹² This statement suggests that her research on the definition of restorative justice aims to ensure the achievability of restoration in restorative justice. This idea in fact resonates the main theme of this study that international criminal justice must work for the people who were harmed by the crimes.

In comparison to Daly’s research, this study holds an opinion close to the “maximalist” view of restorative justice, because it primarily values that the core of restorative justice is “oriented toward doing justice by repairing the harm that has been caused by crime”¹³ and does not exclude necessary coercion and punishment given to criminal offenders, which needs to be accented in international criminal justice.

The “purist” view of restorative justice lacks adequate attention to the significance of “restoration”. There could be two reasons why the “purist” view of restorative justice does not intend to highlight the meaning of restoration in dealing criminal cases. Either, the “purist” view believes that “restoration” is not important; or, it insists that exercising the special practices will eventually achieve “restoration”. The former assumption ignores the fact that without the focus on “restoration”, criminal justice will detach itself from the stakeholders in a criminal case. The latter, on the other hand, has been proved wrong in some empirical studies.¹⁴ If certain practices are not carefully guided by the purpose to achieve restoration of victims, offenders, and other stakeholders, the participants of restorative justice may be wounded yet again. The risk is particularly high for victims when offenders do not show enough respect or refuse to recognise the consequences of the crime.

With regard to international crimes, the harm for victims and the community is often too colossal to be ignored. Many post-conflict States targeted on bringing restoration to local people for keeping peace and delivering the desired justice. However, because of the “purist” view, the function of repairing (or restoring) has been often misunderstood to be as effortless as organising some events in transitional programmes wherein victims are forced to accept reparation through “victim participation”. It is blindly believed that carrying out such a practise in the name of restorative justice will only exacerbate the injustice upon the victims. The spirit of restorative justice lies in the heart of achieving restoration, not mechanically duplicating

¹¹ See Kathleen Daly, *What is Restorative Justice? A Fresh Answer to a Vexed Question*, 11 Victims and Offenders 9, 21 (2016).

¹² See Kathleen Daly, *What is Restorative Justice? A Fresh Answer to a Vexed Question*, 11 Victims and Offenders 9, 2 (2016).

¹³ See Gordon Bazemore & Lode Walgrave, *Restorative juvenile justice: In search of fundamentals and an outline for systemic reform*, in G. Bazemore and L. Walgrave, eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, Lynne Rienner Publisher, p.45, p.48 (1999).

¹⁴ See Kathleen Daly, *Restorative Justice: The Real Story*, 4 Punishment and Society 55 (2002).

exercises used by other countries.

In short, restorative justice is very flexible and practical and it should not be confined to an unchangeable frame. Restorative justice may have often been observed in forms of practice or approach through which it is easier to understand and assess restorative justice. However, defining restorative as a combination of different practices, is putting the incidental before the fundamental. The core values of restorative justice- restoration- decide the form and the way of the practices and not the opposite. In other words, restorative justice shall be understood as a system where many approaches are guided by the idea of restoration. It shall be interpreted as an idea that must be practical in solving real-life problems. The form of restorative justice is less important than its core value.

2. Restorative Justice and Transitional Justice

The concept of restorative justice discussed above mainly focuses upon domestic practices. As a result, restorative justice is usually studied by researchers who work to improve the criminal justice system. However, restorative justice used in dealing with domestic cases may not be directly applicable to international crimes. In case of international crimes, the victims are groups of people, or even the majority population of a State. International crimes are also sometimes committed across territories of different States, causing jurisdictional conflicts between authorities. Achieving restoration in post-conflict States requires national or inter-state reconciliation programmes.

Restorative justice for international crimes is usually seen as one part of transitional justice.¹⁵ In certain situations, transitional justice and restorative justice are often misunderstood as the same. Transitional justice is used in countries that have experienced democratic transitions primarily following armed conflict, such as Latin American countries and former Soviet countries.¹⁶ A very early formulation of this term is found in the book *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*,¹⁷ published in 1995, describing the term as the transformation of the government and the political system as “transition”.¹⁸ However, the definition was not fully discussed in that book. On the website of the International Centre for Transitional Justice (ICTJ), transitional justice is defined as: “[T]he set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programmes, and various kinds of institutional reforms.”¹⁹

¹⁵ One example is the transition in Uganda. See International Center for Transitional Justice, *Confronting the Past: Truth Telling and Reconciliation in Uganda*, (2012). Michael Otim & Kasande Sarah Kihika, *On the Path to Vindicate Victims Rights in Uganda: Reflections on the Transitional Justice Process Since Juba*, ICTJ, pp.2-4 (2015). Joanna R. Quinn, *Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice*, 8 Human Rights Review 389 (2007). Jackee Budesta Batanda, *The Role of Civil Society in Advocating for Transitional Justice in Uganda*, Institute for Justice and Reconciliation, South Africa, pp.5-11, (2009). *Towards A Comprehensive and Holistic Transitional Justice Policy for Uganda: Exploring linkages between transitional justice mechanisms*, Avocats Sans Frontières (ASF) (2013).

¹⁶ See Norberto Bobbio, *The Future of Democracy: A Defence of the Rules of the Game*, University of Minnesota Press, pp.15-75 (1987). Also see Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, pp.110-121 (1991); Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 Human Rights Quarterly 321 (2009).

¹⁷ See Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, US Institute of Peace, p.xxix (1995).

¹⁸ See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harvard Human Rights Journal 69 (2003).

¹⁹ See ICTJ, *What is Transitional Justice?* (2013), <https://www.ictj.org/about/transitional-justice> (accessed on June 5, 2014).

In a 2004 report of the United Nations Secretary-General (UNSG), transitional justice is described as: “[T]he full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.²⁰

These two expressions, namely transitional justice and restorative justice, both underline the central point of redressing the “legacies of large-scale of human rights abuses”. It is not emphasised in the UNSG’s statement that transitional justice consists of both formal legal justice and alternative ways. Rather, the ultimate goals of transitional justice have been strongly linked with accountability, justice, and reconciliation. The definition given by the ICTJ awards equal importance to judicial and non-judicial measures, and specifically notes that transitional justice practices may vary according to the situations of different countries. Nevertheless, non-judicial measures are often included in transitional justice to achieve reconciliation, thus, being restorative is the outstanding characteristic of transitional justice.

Transitional justice and restorative justice share two similarities. They both accept the goal of restoration, emphasising the significance of inclusive and non-adversarial frameworks which seek to prevent past acts from being recommitted.²¹ The other similarity is that they both agree that multiple-dimensional measures, rather than pure legal procedure, are essential for achieving the goals. Compared with formal criminal justice, transitional justice and restorative justice accept non-conflictive dialogues between victims and the perpetrators, which is not included in a punitive punishment-allocating exercise.²²

Since both judicial approaches and non-judicial methods are available to transitional justice, restorative justice can be deemed as one component of transitional justice. In transitional justice, approaches like truth-telling, reconciliation of victims and perpetrators as well as reparations, are practices featuring “restorative justice”; institutional reformation and rebuilding of law are methods to recover the authority of the state; indictment and prosecution (including both domestic prosecution and international prosecution) of criminals are the processes of formal criminal justice. The paradigm of transitional justice also consists of historical justice, reparatory justice, administrative justice, and constitutional justice.²³

Transitional justice also carefully handles the root causes of the conflicts and takes human rights into account.²⁴ The realities that transitional justice faces are usually very complicated, because it has to disperse the scattering dark clouds of the past before making a blueprint for the future. In this sense, restorative programmes are needed to solve the problems that legal justice cannot handle.

Furthermore, this can also explain why restorative justice is often confused with transitional justice. To most people, formal legal justice is more familiar than restorative justice and transitional justice. When speaking of justice, the common impression among people is that criminal cases shall go through a system which consists of police, prosecutorial procedure, and criminal trial. It seems as if only restorative justice represents the core of transitional justice because it differentiates itself from formal criminal justice. And because formal criminal justice is so well known to the public, the restorative feature of transitional justice turns out to be more noticeable for its uncommonness. This common recognition about criminal justice leads to

²⁰ See UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, p.4 (Aug.23 2004).

²¹ See Rodrigo Uprimny & Maria Saffon, *Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case*, National University of Colombia, pp.3-6 (2006).

²² See Ruti G. Teitel, *Transitional Historical Justice*, in Lukas H. Meyer, eds., *Justice in Time: Responding to Historical Injustice*, Nomos Verlagsgesellschaft, Baden-Baden, p.80 (2004).

²³ See Ruti G. Teitel, *Transitional Justice*, Oxford University Press, pp.213-220 (2000).

²⁴ See UN Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed on February 11, 2015).

confusion between transitional justice and restorative justice.

As a result, it must be pointed out that restorative justice is similar to, but different from, transitional justice. For in restorative justice, the goal is to achieve restoration at the centre whereas in transitional justice, restoration is one of the many goals that transitional justice aims at. The pivotal goal of transitional justice is to address “legacies of large-scale human rights abuses”. Transitional justice requests that restorative approaches must be contributory to this goal. It means that if restoration is deemed as an obstacle to the goal of transitional justice, albeit it is not observed yet in many cases, then in principle it has to be changed or even rejected. Restorative justice can play a vital role in helping countries in the transitional period if all the necessary conditions have been provided. But it is also possible that restorative justice may have a negative impact on the transition process. For example, there is a voice against the Truth and Reconciliation Commission in South Africa. It argues that the TRC in South Africa did not achieve genuine forgiveness and restoration because the restorative process therein was only used as the “method” to complete something, rather than the “purpose” to be safeguarded.²⁵

Restorative justice and transitional justice also have different scopes. Restorative justice pursues holistic harmony for order and relationship between individuals inside the community. It contributes to re-build the social bond between people within a certain area, where common values and ideas are shared. But its impact may not be as effective amongst the people whose core social values are significantly different. Consequently, restorative justice may not always work to ensure a just settlement of the disputes. And this is where formal criminal justice plays a better role. The truth is, for many academicians, restorative justice is a substitute for formal criminal justice system when formal criminal justice is unfruitful, but not a trigger of reformation or reconstruction of the entire criminal justice.²⁶

Transitional justice is used to redress the conflicts between different political factions, cultural and religious groups, and even States. In many examples, such as South Africa, Rwanda, Uganda, Democratic Republic of the Congo, where transitional justice is required or is being applied in reality, the approaches of restorative justice function as a part of the transitional justice process. When being used to solve nation-wide issues, restorative justice is not generally operated outside the context of transitional justice in post-conflict situations. In contrast, restorative justice, along with other judicial proceedings, contributes to transitional justice. Therefore, transitional justice is often characterised with restoration but does not appear to be a pure restorative justice forum. From this standpoint, restorative justice is associated with transitional justice but the two are not the same.

The other difference between restorative justice and transitional justice lies in the influence it casts upon the people involved. Restorative justice focuses largely on individual accountability of all offenders. Only when the required number of offenders is involved, will the efforts to despite the whole scenario of the crime be meaningful. Offenders, together with

²⁵ See Deborah Posel, *The TRC Report: What Kind of History? What Kind of Truth?*, University of Witwatersrand, pp.4-9 (1999). Jennifer J. Llewellyn, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 *The University of Toronto Law Journal* 355 (1999). Paul Van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 *Journal of International Affairs* 647 (1999). Debra Kaminer et al., *The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses*, 197 *The British Journal of Psychiatry* 373 (2001). Milmo Jamnes & Linda Van De Vijer, *After the TRC: Reflections on Truth and Reconciliation in South Africa*, Ohio University Press, pp.37-54 (2001). Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 *Diacritics* 33 (2002). Audrey R. Chapman and Hugo Van Der Merwe(eds.), *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, University of Pennsylvania, pp.22-45 (2008).

²⁶ See Thomas Trenzck, *Within or outside the System? Restorative Justice Attempts and the Penal System*, in Elmar G. M. Weitekamp and Hans-Jurgen Kerner, eds, *Restorative Justice in Context: International practice and Directions*, Willian Publishing, pp.272-284 (2003).

victims, express their feelings from different angles. Words from both sides can be crucial at achieving the goal of restoration through revealing the truth and together revisiting the stories of the past.²⁷ It is important for all the parties to understand the holistic view of the committed crime, before they start to communicate with each other. And only when all participants enjoy the same status in the process, will such communication reach a positive result.

However, for transitional justice, getting all offenders involved may not be realistic. It is uneasy and unrealistic to expect the powerful perpetrators to participate in a transition process in the same way as other normal persons. As a result, there may not be equalised positions for all the participants in the transitional justice process. In countries that have experienced democratic transition, the primary phase of transitional justice is not to discover the whole situation of human rights violations in the past, but to reform the national institutions and to make sure that transitional justice is able to continue.²⁸ The power and social influence of those international crime perpetrators may be needed to contribute to the success of national transition.

For example, in Argentina, after the returning to democracy in 1983, the former military leaders still remained in power, making it very difficult to hold personal accountabilities of them and their minions. In such circumstances, getting involved in the processes of transitional justice with the powerful people of a country would not be a safe choice. In short, transitional justice depends upon political changes, so there may not be productive if ordinary citizens and political leaders participate in transitional justice. Whereas, on the other hand, restorative justice requires equal conversations between all participants, regardless of the person's political and standing in the society.

It is also argued that the meaning and value of restorative justice is not identical to transitional justice.²⁹ Restorative justice is not limited to mass-scale conflicts between groups of people. Instead, in respect of conflict, it focuses more on the nature and causes of the conflicts. Transitional justice process usually pays attention to bigger issues that involve group interests, collective remedies, and political transition of a state, in which case both, victims and offenders, get involved in the process on the behalf of their group. In restorative justice, the personal feelings and the chance to express themselves by participating in the process, is pivotal. In transitional justice, the role of individual feeling and participation can sometimes be shadowed by decisions made by the group in lieu of political interests. Hence, despite the fact that restorative justice is one component in the whole transitional justice of a state, it can still achieve something beyond the scope of transitional justice, particularly the sense of restoration at individual level. Where the participants of transitional justice may have to take the collective reparation without a chance to express personal feelings, restorative justice can function as a supplemental part as it concentrates on individual feelings. In contrast, transitional

²⁷ See Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 New York University Journal of International Law and Politics 485 (1995-1996). The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Human Rights Violations*, UN Doc E/CN.4/Sub.2/1997/20/Rev.1, Civil and Political (Oct.2, 1997). The UN Human Rights Council, *Right to Truth*, UN Doc A/HRC/RES 9/11, p.4 (Sept.28, 2008). Eduardo González and Howard Varney (eds), *Truth Seeking: Elements of Creating An Effective Truth Commission*, ICTJ, p.4 (2013).

²⁸ There appears a diversity in transitional justice of different countries. But the process of institutionalisation is usually the first mission. See Elin Skaar et al., *After Violence: Transitional Justice, Peace and Democracy*, Routledge, p.199 (2015).

²⁹ See Charles Villa-Vicencio, *Transitional Justice, Restoration and Prosecution*, in Dennis Sullivan and Larry Tifft, eds., *Handbook of Restorative Justice*, Routledge, p.369 (2006); Rodrigo Uprimny & Maria Paula Saffon, *Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case*, "Coming to Terms" with Reconciliation - Working Paper Library, National University of Colombia, p.8, (2006). Kerry Clamp & Jonathan Doak, *More than Words: Restorative Justice Concepts in Transitional Justice Settings*, 12 International Criminal Law Review 339 (2012).

justice highlights the importance of social stability. This means that transitional justice involves more forms of practices, and restorative justice applies to more occasions.

Influenced by the fact that restorative justice is often misunderstood as identical to transitional justice, restorative justice is deemed as representing “peace”, and then placed to the opposite side of formal criminal justice proceedings which are asserted as “justice”. The frequently asked question is: Whether restorative justice will be an excuse to legalise impunity and then constitute a violation of the ICC’s fundamental principles? The fight against impunity is the main task for all international criminal tribunals, but it is very difficult to find any occasion where peace or peaceful solutions to conflicts have been achieved without any form of impunity.³⁰ However, almost all discussions relating to peace and justice on the impact of restorative justice are dependent on the view of formal criminal justice. As it has been analysed above, restorative justice is not contradictory to formal criminal justice. Instead, it expends the spirit of peace and the meaning of justice in the ICC’s rules so that “peace” or “peaceful justice” is not unachievable. In formal criminal justice, if the criminal perpetrators are not prosecuted or punished in the ways stipulated in criminal law, it is argued that such persons have been granted impunity or amnesty. So, the task of solving a criminal case is overwhelmingly defined by giving the perpetrators what they deserve. Restorative justice, as the comparison, views punishments and solutions of criminal cases from a different angle by encouraging offenders and victims as well as the affected society to move forward to the point where the damaged social bond can be restored. Prosecution and punishment of criminal perpetrators are able to reach beyond the ideology that criminal justice is a fight against offenders, which normally ends up with certain forms of deprivation of freedom and property. Thus, impunity or amnesty can be achieved under the restorative justice even if there is no traditional punishment given to the perpetrators.

3. Impunity and Amnesty in International Law

The impunity issue in international law is often referred to the freedom from being criminally charged by one state’s diplomatic officials in another state. However, in international criminal law, impunity relates more to the situation where perpetrators of serious human rights or international humanitarian law are not prosecuted and thus take no accountability for the crimes. In other words, impunity grants those committing international crimes an exclusive protection from being punished as ordinary criminals are under normal circumstances. Consequently, the mission to fight against impunity in international crimes has been at the centre of international criminal tribunals, including the ICC.

In the Rome Statute, putting an end to impunity for the perpetrators of international crimes is specifically highlighted as one of the main purposes of the ICC. In many occasions, the ICC has declared that ending impunity is its “ultimate goal” to achieve,³¹ which is often emphasised in association with the prevention of crimes as another goal.³² When negotiating the establishment of the ICC and adopting its substantial law, the attitude that perpetrators of international crimes should not go unpunished was noticeably strong. In the 1st Plenary

³⁰ See Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability-The Role of International War Crimes Tribunals*, 2 Journal of National Security Law and Policy 111 (2006).

³¹ Such statement is majorly seen in the issue in regard to the un-cooperation of states to assist the ICC to arrest Omar Al-Bashir. See for example, the Prosecutor v Omar Al-Bashir (Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute) ICC-02/05-01/09, Pre-Trial Chamber III (11 July, 2016), para.17. Similar Decisions had been given to Uganda, Jordan, Chad, South Africa, Republic of Sudan, *et al.*

³² See The Office of the Prosecutor, *Report on Preliminary Examination Activities 2017*, para.16.

Meeting of the Rome Diplomatic Conference, the President of the Meeting, Mr. Giovanni Conso, confirmed the fundamental role of an international criminal court and the necessity for the prosecution of perpetrators of international crimes: “Armed conflict had raged in many parts of the world and terrible atrocities had occurred. At that very moment, acts of violence were being committed against innocent civilians. The world could not remain indifferent to such behaviour. Decisive measures were needed to bring such acts of violence to an end. The establishment of an international criminal court would send the unmistakable message to all those responsible for abominable crimes that they could no longer act with impunity and that they would be brought to justice. It would make it clear that no one was above the law and that anyone seen as bearing individual criminal responsibility for such atrocities would be punished.”³³

This statement on impunity became the basic belief among all the Delegates in the consequent discussions, and the principle of non-impunity was finally adopted into the Preamble of the Rome Statute. The wording in this statement is carefully considered in making sure that it had not constitute any violation of the rule of law and the requirements in procedural justice. First, it noted that the principle of non-impunity must be clear and unquestionable, that there must be a certain link between justice and atrocities. Second, punishment may not be the necessary outcome to gross human rights violations, since any penalty to criminals must be made by criminal courts with due procedure. Third, though criminal justice may not be an immediate solution to international crimes, personal responsibility to international crimes is of instant effect.

The International Court of Justice iterated a similar opinion towards impunity. In terms of the official immunity to a diplomatic officer of state, the impunity from criminal jurisdiction shall be separated from individual criminal responsibility as follows: “Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.”³⁴

The opinion of the International Court of Justice in this case was a plain re-affirmation to the Judgement of the UK House of Lords in the *Pinochet case*, in which the norm that the former governmental officials whose diplomatic immunity of criminal justice is in relation to crimes against humanity ceases, as their official status stops.³⁵ As a result, a person, no matter how powerful, commits an international crime, there will be indisputable personal responsibility that will trigger prosecution against those crimes at domestic or international level.

The principle of non-impunity to international crimes has also obliged states to take necessary actions to bring perpetrators to justice. The International Law Commission adopted and then submitted its final report named *The Obligation to Extradite or Prosecute* in its 66th session in 2014, which answered the question of how to fight against impunity at international level. In that report, the obligation of fighting against impunity for perpetrators of international crimes demanded the following: that when a perpetrator is responsible for serious violations of international human rights or international humanitarian rights, appears in the territory of a state, that state must take necessary judicial actions to either (i) prosecute the perpetrator; (ii) extradite the perpetrator if it has been proven to be more proper for the interest of justice; (iii) submit the perpetrator to a competent international criminal tribunal/court whose jurisdiction

³³ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary of the 1st Plenary Meeting*, UN Doc A/CONF.183/SR.1, para.21 (Rome, 15 June–17 July 1998) (June 15, 1998).

³⁴ See *Democratic Republic of Congo v. Belgium* (Judgment), *Arrest Warrant of 11 April 2000*, [2002] ICJ Reports, para.60 (March 2002).

³⁵ See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] UK House of Lords 3 WLR 1,456.

the State concerned has recognised.³⁶ The obligation to extradite or prosecute is based on the requirement of the rule of law that was adopted by the UN General Assembly at its 67th session in 2012 which declares that; “[I]mpunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose we encourage States to strengthen national judicial systems and institutions.”³⁷

This declaration equips domestic and international tribunals/courts with normative weapons: the power to initiate timely investigation, to combat international crimes that fall into the jurisdiction of the ICC, to be supported by the obligation to extradite or prosecute. All these grant the international prosecution a position as one of the only three options that are permitted by international law and recognised by the international community. In many post-conflict States, national authorisations do not function well and lack the sufficient capability to bring perpetrators to justice through national courts due of which, international mechanisms, the legal proceedings at the ICC in particular, may be the most reliable pillar in achieving justice according to the standards of international law.

The fight against impunity at the ICC, is primarily calling forth the prosecution. The Office of the Prosecutor of the ICC referred to the statement of the former UN Secretary General on the value of ending impunity, which was confirmatively supported by the UN Security Council, in order to illuminate the determination to accomplish such a goal, emphasising that ending impunity for international crime perpetrators is “one of the principal evolutions in the culture of the world community and international law”.³⁸ Furthermore, the Prosecution of the ICC firmly insists that appropriate prosecutorial investigation shall function as the first and crucial step for the Court to end impunity of international crimes by complimenting Article 17 of the Rome Statute, which stipulates, whether the case before the Court is admissible. The Prosecutor of the ICC views ending impunity as one indispensable component of justice, or even justice itself. In assessing the unwillingness or inability of a state in whose territory a particular case has occurred, to initiate genuine investigation or prosecution, the ICC Prosecutor specifically links the meaning of justice with the end of impunity of the concerned criminalsto ensure that any person who is responsible for the atrocities shall not escape from facing justice and the deserved punishment, provided that the case has undergone proper legal proceedings and concluded with conviction.³⁹

In the same document, the ICC Prosecutor implied that although peace is not excluded from the ICC, it should be inferior to justice because “the concept of the interests of justice should not be perceived as embracing all issues relating to peace and security”.⁴⁰ This opinion indicates that impunity may sometimes be used as a peaceful solution to conflicts; however, this is not accepted at the ICC if it impedes achieving justice. In addition, impunity is usually seen as undermining peace rather than keeping long-lasting peace. For example, the former UN Secretary-General Ban Ki-moon noted, during his visit in Sudan that "justice is an important part of building and sustaining peace [...] and a culture of impunity and a legacy of

³⁶ See The International Law Commission, *The obligation to extradite or prosecute: Final Report of the International Law Commission*, p.13 (2014).

³⁷ See UN General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, UN Doc A/RES/67/1, para.22 (Nov.30, 2012).

³⁸ See The Office of the Prosecutor, *Policy Paper on the Interests of Justice*, footnote 5 (2007).

³⁹ See The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, paras.50-58 (2013).

⁴⁰ See The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, para.69 (2013).

past crimes that go unaddressed can only erode the peace”.⁴¹ The real effect of impunity to peace and justice is more complicated than conceptualised discussions; the painfully realistic fact that most probably solutions to national or international conflicts, have ended up with different forms of peace-agreements where impunity is guaranteed to perpetrators, must not be ignored when denouncing impunity. It is due to the challenges to justice and peace in post-conflicts or on-going conflicts states arising from impunity issues, the existing mechanism of formal criminal justice at domestic level and international level has many difficulties in facing those challenges;⁴² therefore, the logic behind the debate should be clarified so that the complicities would not continue to becloud peace and justice.

4. Peace Versus Justice: The Doubtful Logic

Impunity for perpetrators of international crimes has many forms, and amnesty has been acknowledged as one of the most predominant amongst them, aiding perpetrators to go unpunished and thus vanishing from justice.⁴³ Therefore, the discussion in the next section will predominantly focus upon the impact of amnesty on peace and justice.

“Peace versus justice” as a problem before the ICC, was first invoked in the criticism of the ICC in the Uganda situation, which did not openly suggest that amnesty shall replace the prosecution. Rather, it technically besieged the question and points to the ICC’s impact on peace. The debates about the impact of the ICC on international criminal cases concentrate majorly on its role in peace negotiations between the Ugandan government and the alleged rebel group, the LRA. The criticism on the impact of ICC iterates the following: “Peace will be promised through amnesty, which is supported by restorative justice but rejected by the formal criminal justice of the ICC”. According to this statement, when peace and justice cannot be achieved at the same time, peace shall come prior to justice, which is opposed to the legal principles and values of the ICC. Such criticisms are based on experiences and consequences that arose from the ICC’s decision of not cancelling the arrest warrants against the LRA top leaders, when peace became a more distant hope for the Ugandan people. Being examined now, the criticisms towards the ICC, based on prediction and short-term evaluation, are not discreet either in practice or in theory.

In reality, the support of restorative justice over the legal mechanism of the ICC, under the hypothesis that the ICC’s involvement hindered peace building, is overstated, because no one was able to predict consequences if the ICC revoked its indictments against those perpetrators. However, if there should be a long-term analysis, researchers must give a scrutinised explanation of the time span required to provide proper and logical observations. The problems of a long-term analysis on the ICC’s impact to peace are that it necessitates for a great number of resources in its support and calls for accurate methods to distinguish the ICC’s influence from the other contributors to peace building. Additionally, whether the ICC has a long-term impact on peace building in a state, can be questioned in many ways. After all the ICC being a third party, will not totally take control or replace the justice system in a state. Under different circumstances, the ICC can bring changes in the domestic justice systems, and consequently engender positive effects to long-term peace. But such effect shall be deemed as international justice to domestic justice rather than towards peace. Perhaps the topic of the

⁴¹ See Ban Ki-moon *Kicks off first visit to Sudan*, UN News Centre (Sep.3, 2007), <http://www.un.org/apps/news/story.asp?NewsID=23679#.WkEBRN9l82x> (accessed on August 29, 2016).

⁴² See Donna Pankhurst, *Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace*, 20 Third World Quarterly 239 (1999); Susan Opatow, *Reconciliation in Times of Impunity: Challenges for Social Justice*, 14 Social Justice Research 149 (2001).

⁴³ See Office of UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, United Nations Publication, p.13 (2009).

impact of justice on peace itself is a moving target that needs to be examined thoroughly, case by case. The general resolution applicable to all international criminal issues may not exist.

Nonetheless, in theory, it is essential to “deconstruct” the logic behind the criticism against the ICC and to clarify the reasons for which the ICC’s justice system can become an obstruction to peace building. The problem lies in the relationship between restorative justice and the ICC’s legal mechanism. The opinion that “restorative justice is a better choice than formal criminal justice in the ICC because restorative justice will bring peace through the amnesty process, which would be undermined by the involvement of the ICC” is misleading. It simply invokes the debate of “peace versus justice” in which it seems that the international community must choose either one, as its prime aim. It is easy for people to pay more attention to the wording of “amnesty”, “peace”, “restorative justice” and “formal criminal justice”, and irrupt into debates without making careful comparisons between them. It might be a good way for a quick response when an issue similar to the Uganda situation, comes out in order to offer an opinion eventually. But this path of thinking may have been based on the wrong understanding of restorative justice.

There are two sub-statements inside the argued contradiction between restorative justice and the ICC. Firstly, it points out that “restorative justice is able to achieve peace through amnesty”. This sub-statement contains three elements, restoration, peace, and amnesty. According to the logic of the relationship between them, restorative justice can bring peace because: (i) restorative justice allows amnesty; (ii) amnesty promises peace. There are two questions to ask about this sub-statement: Is there any certain link between restorative justice and amnesty that confirms they are a pair of simultaneous terms? And does amnesty necessarily make peace a reality?

Most studies in this area focus on the second question, within which researchers argue among themselves about the importance of amnesty. Sometimes the only reason for conducting studies, on the usage of restorative justice in dealing with international criminal cases, is to enable amnesty. Amnesty, in many occasions, has replaced restorative justice. Many studies insist that amnesty will build up peace. Meanwhile there are others who declare that amnesty is not helpful towards attaining peace. Also, there is a mixed attitude toward this question by those in the field of positivistic research. No matter how the discussions develop, amnesty has been directed to peace by fully representing restorative justice, which is not compliant to the ICC. What is even more questionable about this issue is whether amnesty can represent restorative justice, which still remains unknown. Most of the studies base their conclusions on the fact that restorative justice and amnesty will always come together. The certainty of this is yet to be confirmed, because the values of restorative justice are not discussed in these studies. The stable link between restorative justice and amnesty has been treated as a pre-condition to develop relevant studies without any reasons. And because majority of the attention in restorative justice is drawn on amnesty, the other aspects of restorative justice have been highly ignored. This is even more obvious considering the discussions of the jurists, because amnesty falls in the ordinary field of legal studies, especially the studies of international law. However, the other aspects of restorative justice may not be fully noticed to have legal meaning. Restorative justice is now a very popular term for criminologists but not well known to jurists, whereas amnesty has been discussed too often in legal studies. While many jurists accept amnesty, it may not have a highly supporting rate amongst criminologists, because criminologists tend to witness a lot of other elements, other than amnesty. As a result, any other possibilities of peace-related benefits from restorative justice, have rarely been analysed. The truth is that there are more links between restorative justice and peace than people have imagined.

Furthermore, even though there are many people who believe that restorative justice can help to achieve peace, there is no natural link between restorative justice and peace. The most

famous example between restorative justice and peace was seen in South Africa. In spite of the world-famous Truth and Reconciliation Commission, there have been many negative opinions about the function of the amnesty process in South Africa. One criticism towards amnesty is that “[n]o international tribunal or body has yet had the opportunity to pass judgement on this matter”.⁴⁴ Also, the Cape Provincial Division of the South African High Court, along with the Constitutional Court, were blamed for “failing to address sufficiently the applicability” of the international humanitarian law and international customary law in national procedure, and to take the international obligation to prosecute the crimes against humanity.⁴⁵ Such failure did not mitigate the hatred between “white people” and other people, which was caused by the policies of apartheid. To the contrary, it is argued that amnesty had endangered the society of South Africa because many people complained of being forced to “forgive” during the amnesty process.⁴⁶ The key idea in restorative justice is that victims need to voluntarily participate in the process. So even while weighing peace over justice, restorative justice is not necessarily a better choice than formal criminal justice. However, in effect, restorative justice and formal criminal justice may achieve similar outcomes. Since restorative justice is not necessarily better, it is premature to suggest it as the alternative.

Secondly, restorative justice and the ICC are required to co-exist on the point that “the ICC undermines amnesty process and thus no peace would be achieved through the involvement of the ICC”. This sub-statement can also be examined through several smaller parts. There are three elements inside this sub-statement, the ICC, amnesty, and peace. In fact, compared to the first sub-statement, there are more hidden clues in why those three elements can be discussed together here. This sub-statement assumes that: (i) the ICC is the only body using formal criminal justice; (ii) formal criminal justice does not co-exist with amnesty; and (iii) restorative justice has no space at the ICC. The last assumption is obviously incorrect in regards to which the ICC has officially made a statement to clarify that restorative justice is one of the components of its system. The problem that arises is whether the restorative justice idea can also function beyond the activities relating to victim participation and reparation.

The internal logic to refuse restorative justice from being fully used at the ICC, highlights the elucidation to handle amnesty. Restorative justice, according to the arguments, avails amnesty. It is widely believed that amnesty potentially harms the root of justice and ruins the opportunity of long-lasting peace.⁴⁷ But even the United Nations has noticed the role of amnesty in solving armed conflicts and its contribution to peace.⁴⁸ For overcoming the problem of separating peace and justice, amnesty could be constructive if the formal criminal justice procedure is more adoptive.

Most of the researchers fail to pay attention, or believe it to be unessential to consider

⁴⁴ See Andreas O’Shea, *Amnesty for Crime in International Law and Practice*, Kluwer Law International, p.297 (2002).

⁴⁵ See Andreas O’Shea, *Amnesty for Crime in International Law and Practice*, Kluwer Law International, p.298 (2002).

⁴⁶ See Audrey R. Chapman & Patrick Bal, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 Human Rights Quarterly 1 (2001). Lyn S. Graybill, *Truth and Reconciliation in South Africa: Miracle or Model?*, Lynne Rienner Publisher, p.39, (2002). Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa*, 32 Diacritics 33 (2002). Joanna R. Quinn & Mark Freeman James, *Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa*, 24 Human Rights Quarterly 1117 (2003). Ervin Staub et al., *Healing, Reconciliation, Forgiving and the Prevention of Violence after Genocide or Mass Killing: An Intervention and its Experimental Evaluation in Rwanda*, 24 Journal of Social and Clinical Psychology 297 (2005). L. Gibson, *The Contributions of Truth to Reconciliation*, 50 Journal of Conflict Resolution 409 (2006).

⁴⁷ See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 The American Journal of International Law 1, 7, 9 (2001).

⁴⁸ See UN Special Rapporteur, Sean D. Murphy, *Third Report on Crimes against Humanity*, UN Doc A/CN.4/704, pp.131-133 (Jan.23, 2017).

whether formal criminal justice is the only acceptable justice mode for the ICC. The answer to this may be surprisingly unanimous from both, the advocates of the ICC and the advocates of restorative justice. As for those who support the ICC's work, the formal criminal justice is most suited for highlighting the spectacular identity of the ICC, as it is the only permanent super-national court that deals with the most serious crimes in human history. Formal criminal justice is regarded as the most advanced justice mode by many researchers which is the reason for its predominant position around the world. Most of the States regulate formal criminal justice in criminal codes and codes of procedure. Any State, which does not deal with criminal cases through formal criminal justice, may be seen as less advanced, arbitrary or even autocratic. The ICC has to be the embodiment of justice and hope for all humanity, so it is undoubtedly up to the ICC to elevate formal criminal justice at a superior position in its legal mechanism. But for those who do not support the indispensable role of ICC, the formal criminal justice at the ICC is just repeating the flaws of legalism. The self-justification of law may not make too much sense to the advocates of restorative justice because they believe that complete isolation of law from its social context weakens the realistic and practical availability of relevant legal provisions.

Formal criminal justice, which restrictedly serves the law, is unable to consider other factors apart from the law itself, and hence, it has weaknesses. The ICC must back down from its constant insistence on formal criminal justice. Additionally, formal criminal justice is often seen as the consequence of a "western regime" in criminal justice that is not useful for solving criminal cases in "non-western" states. The ICC has to accept the idea of amnesty and must cease to hold onto justice. If the ICC fails make any changes in its attitude towards amnesty, it should keep its jurisdiction on a humble level and openly acknowledge the reality that sometimes it is better to handle the cases with other forms of justice where amnesty is still available. It might be an embarrassment for many to admit that, but it will help them serve the ICC's purpose. In this context, if amnesty is globally condemned to international crimes, permitting it in international criminal tribunals cannot be easily accepted. Therefore, the ideal solution is to try and re-understand the concept of amnesty (impunity) in relation to the meaning of justice.

5. Restorative Justice Ends Impunity in International Criminal Justice

According to the Oxford English Dictionary, impunity generally means the "exemption from punishment or freedom from the injurious consequences of an action". This definition shows that non-impunity can be regarded as the practical punishment, and furthermore such punishment must execute the offenders. In the instruments of international law, impunity is defined as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account".⁴⁹ According to this definition, impunity is also associated with "accountability". Non-impunity, thus, could be acknowledged as "taking accountability of the perpetrators of international crimes". And accountability seems to be understood as criminal penalty.

Amnesty, being contrary to non-impunity, usually implies that no penalty would be sentenced to the offenders. The Oxford Dictionary of Law defines amnesty as "an act erasing from legal memory some aspects of criminal conducts by an offender" and it is "wider than a pardon which merely relieves an offender of punishment". In the worldwide range, amnesty often links people's memory to political criminals.

However, the allegations upon the ICC could, by no means, be easily regarded as "political criminals", considering the atrocities they had committed. The crimes, attributed upon them,

⁴⁹ See United Nations, Economic and Social Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1, p.6 (Feb.8, 2005).

could not necessarily be accepted as “political crimes” either. Their criminal behaviour indicted at the ICC is of unquestionable anti-human nature, even though the ICC has been blamed of being politically biased. Perhaps the issue whether those suspects at the ICC could be treated as political criminals is still worthy of debating, as the LRA repeatedly expressed its concern on the “unfairness” of the ICC’s “selective investigation” in the Uganda situation.⁵⁰ It is not the focus of the present study to examine or debate arguable points such as the criticisms of the ICC of not being totally politically impartial in its selection and operation of the cases. For this reason, amnesty would be deemed as its original meaning without being linked to political criminals. Hence, amnesty can mean that no response will be taken from criminal law to apply to criminal offenders. If the ICC keeps non-impunity as its “iron law” while facing those perpetrators of international crimes, then amnesty does obviously violate such rule because amnesty not only promises pardon of punishment to those criminals but also shelters them from official criminal records. As a result, amnesty is the most acceptable form in impunity for its over-merciful characteristic. What the perpetrators of international crimes can “benefit” from amnesty is that they don’t need to take any accountability from the consequences of their criminal actions. Amnesty is a total denial of the existence of commission of international crimes. That is why the ICC has consistently stressed that amnesty is not an option for it. Non-impunity, especially anti-amnesty, is the way to make the prosecuted criminals accountable.

Legal perspectives share a similar opinion on this issue. Ending impunity requires states to be banded by the obligation to prosecute or extradite the international crimes perpetrators. The prosecution, or prosecutorial actions, will not in any way conclude the punishment bestowed upon the criminals. The International Law Commission specifically distinguishes the English expression of “the obligation to prosecute or extradite” from its Latin form, *aut dedere aut judicare*,⁵¹ to clarify the obligation of fighting against impunity is not based on the pure retributive desire. If the principle to end impunity in international crimes does not demand for criminals to be punished, then the obligation of *aut dedere aut judicare* shall be interpreted as taking proper legal actions. In other words, States are only obliged to make timely, prudent and genuine response to the serious violations of international human rights law and international humanitarian law, which are not necessarily concluded with deprivation of rights and freedom. The non-link between punishment and impunity may provide a breakthrough to re-examining the relationship of restorative justice and the formal justice proceedings at the ICC.

The UN High Commissioner for Human Rights investigated the political transition in Sri Lanka and the resolutions of human rights violations of the past, and found that the failure of the Sri Lankan Government to comply with the obligation to end impunity was caused by the insufficiency to address the accountability for the most serious human rights violations and crimes.⁵² The UN Special Rapporteur perceived the same opinion and informed the UN General Assembly on behalf of the International Law Commission that “[a]mnesties have been found impermissible by regional human rights courts because they preclude accountability under regional human rights treaties”.⁵³ In its recent report, the Office of the High Commissioner for Human Rights highlighted that ending impunity through strengthening the accountability of those perpetrators of gross human rights violations had received remarkable outcomes in different states and regions; as well, taking account of the atrocities had also

⁵⁰ See *Uganda’s LRA Rebels Say ICC Arrest Warrants Obstacles to Peace*, VOA News (Nov.1, 2009), <http://www.voanews.com/content/a-13-2007-11-13-voa2/331413.html> (accessed on April 21, 2014).

⁵¹ See The International Law Commission, *The Obligation to Extradite or Prosecute: Final Report of the International Law Commission*, p.2 (2014).

⁵² See UN High Commissioner for Human Rights, *Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka*, UN Doc A/HRC/30/61, p.16, (Sep.28, 2015).

⁵³ See UN Special Rapporteur, Sean D. Murphy, *Third Report on Crimes against Humanity*, UN Doc A/CN.4/704, p.135 (Jan.23, 2017).

prompted national legislations to protect human rights and the wellbeing of local people.⁵⁴ On this point, taking accountability of perpetrators of international crimes has been practically connected to the obligation to end impunity.

Academic studies also underscore the importance of recognising accountability as a contributor to the non-impunity principle. The International Commission of Jurists treasures the value of holding human rights violators accountable for their actions in order to put an end to impunity, restore the rule of law and address the need of victims through the provision of justice accompanied by reparative progress.⁵⁵ Relevant research on post-war reconstruction indicates that the wide application of amnesty has exposed the confirmation of lack of accountability in many countries which denied the wrongness of the criminal actions of past regimes and even denied the very existence of those actions.⁵⁶ Taking no accountability of past international crimes, which is a violation of the non-impunity principle, can cause continuous instability in a country, thus undermining the efforts toward sustainable nation building.⁵⁷ The lens, which transformed from non-impunity to accountability, will not only increase the focus how criminals should behave but also what they should receive, thus allowing the non-impunity principle to be monitored multi-dimensionally.

For fighting impunity, the penal system in international criminal law is not the only path. The UN Human Rights Council proposed that: “[T]he occurrence of a human rights violation gives rise to a right to receive reparation for or on behalf of the victim or their beneficiaries, and a duty on the part of the State to make reparation and provide a possibility for the victim to seek redress from the perpetrator. The right to the truth entitles the victims, their relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorized, as well as the extent and pattern of past violations, and their root causes. It requires States to establish processes that lead to the revelation of the truth about what took place. Such processes contribute to the fight against impunity, the reinstatement of the rule of law and, ultimately, reconciliation. Truth-seeking processes also contribute to the prevention of violations through specific recommendations, including on reparations and reforms.”⁵⁸

Professor Bassiouni expressed the same idea before the Rome Statute went into force, stating that the elimination of impunity in dealing with international crimes calls for more toils than those in formal criminal justice, and that “the ICC will not prevent injustice, conflicts, or crimes. It will neither end impunity nor will it consistently achieve justice. The ICC is merely an added means to achieve accountability”.⁵⁹

Non-impunity does not necessarily mean that criminals of atrocities must be punished in the way stipulated in criminal law, nor does it limit relevant activities to absolute legalism; the obstacle between restorative justice and the ICC, impunity or amnesty, will not be problematic anymore. Restorative justice is not made of a certain pattern or model with constant steps.

⁵⁴ The Office of UN High Commissioner for Human Rights, *OHCHR Report 2016* (May 2017).

⁵⁵ See The International Commission of Jurists, *International Law and the Fight Against Impunity*, Practitioners’ Guide No.7, p.25 (2015).

⁵⁶ See Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 Columbia Human Rights Law Review 661 (2004).

⁵⁷ See Rena L. Scott, *Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges*, 33 *International Journal of Legal Information* 345 (2005).

⁵⁸ See UN Human Rights Council, *Report of the Group of Independent Experts on Accountability*, advance edited version, UN Doc A/HRC/34/66/Add.1 (internal citations omitted) (Feb.24, 2017).

⁵⁹ See M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 *University of Colorado Law Review* 409, 420 (2000).

Rather, it is more about criminal philosophies and concepts.⁶⁰ So, theoretically speaking, restorative justice does not pay too much attention in determining the methods be used in its process. Restorative justice sounds like a practice of the philosophy of pragmatism, which may utilise different measures to fulfil one purpose or value.⁶¹ In fact, the proponents of restorative justice do not spend time in recognising the philosophy behind the restorative justice idea. They focus more on the values of restorative justice.

The first and most pivotal value of restorative justice is the engagement of all parties of the criminal case. Many supporters of restorative justice criticise formal criminal justice as it does not consider victims' needs throughout its procedure. The criticism demonstrates that formal criminal justice puts focus on laws and how certain behaviours break the law. Therefore, it leaves little space for victims to fully participate in the criminal procedure. Furthermore, formal criminal justice positions crime between criminals and States instead of placing victims who are really harmed by the criminal behaviours, neglecting the requirement of the victims' healing needs.⁶² Others argue that formal criminal justice drives offenders away from victims because they concentrate on their "fight" with prosecutors.⁶³ Also, there are many other stakeholders who may be influenced by the crime but have no opportunity to take part in formal criminal justice. For restorative justice, "[s]takeholder participation is a central component and core value".⁶⁴ It encourages all parties to solve the issue caused by the crime positively, rather than denying each other's responsibility. Moreover, "the goal [of participation and engagement] is to build understanding, to encourage accountability and to provide an opportunity for healing".⁶⁵ From this angle, amnesty does not necessarily respect the same values as restorative justice, because the basic idea of amnesty is to erase all criminal accountabilities of the offenders. In international criminal cases, amnesty may imply a possibility for perpetrators to participate in the restorative justice process and meet with victims face to face. But taking social and moral accountability does not mean to have to sacrifice legal accountability. What is more important is that, as it has been repeatedly mentioned, without coercive power from legal authority, perpetrators may not be willing to get engaged with victims.

Another value of restorative justice is addressing the harm as an aftermath of crime. The process includes both the healing of victims and the listening to offenders. Addressing is different from solving. In restorative justice, addressing an issue often means to recover the damage caused by crime and calm both, the victim and offender, with the belief that crime may be resulting from social injustice.⁶⁶ For addressing the harm, there should be a peaceful environment in which victims and offenders can describe the crime from their respective view and then heal each other's feelings. This is specifically useful to pacify the mental harm caused after the commission of crime. Amnesty may create an environment for victims and perpetrators, which allows the elimination of their legal obligations; however, the elimination of legal obligations could be a big obstacle towards the healing process for the victims. On the

⁶⁰ See Susan Sharpe, *Walking the Talk: Developing Ethics Framework for the Practice of Restorative Justice* (Fraser Region Community Justice Initiatives Association 2011).

⁶¹ See William James, *The Meaning of Truth*, Harvard University Press, Vol.II, pp.45-50 (1975).

⁶² See Dennis Sullivan and Larry Tifft, *Restorative Justice: Healing the Foundations of Our Everyday Lives*, Criminal Justice Press/Willow Tree Press, pp.99-110 (2001).

⁶³ See Jim Consedine, *Restorative justice: Healing the effects of crimes*, Restorative Justice and Probation Conference, Warsaw, Poland (Dec.2, 2003).

⁶⁴ See European Forum for Restorative Justice, *Restorative Justice and Crime Prevention: Presenting a Theoretical Exploration, an Empirical Analysis and the Policy Perspective*, Final Report of the European Project 'Restorative Justice and Crime Prevention' (April 2010).

⁶⁵ Department of Justice of Canada, *Values and Principles of Restorative Justice in Criminal Matters*, <http://www.iirp.edu/pdf/RJValues-DOJCan.pdf> (accessed on May14, 2015).

⁶⁶ This opinion implies that to fully solve crime it is beneficial to listen the stories of offenders as well. See Daniel W. van Ness & K. H. Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th ed.), Anderson Publishing, pp.67-75 (2015).

one hand, restorative justice does not prefer the usage of punishment for the offenders, but on the other hand and on the basis of its theory, punishment is not naturally paradoxical to the idea and values of restorative justice.⁶⁷ In other words, there could be criminal punishment to offenders whenever both, the victim and the offender, agree on that. However, amnesty boycotts all forms of criminal accountability and turns all its attention to freeing perpetrators in contrast with restorative justice which focuses on all parties. Other values of restorative justice, such as community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends⁶⁸ will also be disposed off, if the perpetrators are completely disregarded, which would be the case in formal criminal justice. But since in international criminal cases, impunity and amnesty are at times mixed up, used and discussed, it is safe to state that blanket amnesty is the only form of impunity that shall be forbidden in international criminal justice.

In conclusion, under a broader meaning of accountability, restorative justice complies with the legal proceedings of the ICC, even according to the principle of non-impunity. Restorative justice makes perpetrators of atrocities accountable in several ways which include legal sentences, participation to community re-building, apology to victims, re-confirming the culture and values in the damaged society, re-integration and reconciliation, *etc.* In fact, restorative justice offers to the ICC, more types of accountability in fighting against impunity; in addition, it equips the ICC with a “zero tolerance policy” to crimes, which precisely re-sounds the legal principles of the Rome Statute. Furthermore, blanket amnesty is not tolerated in restorative justice because it harms victims for a second time and grants criminals the unthinkable privilege of taking no accountability for their crimes.⁶⁹

⁶⁷ See Conrad Brunk, *Restorative Justice and the Philosophical Theories of Criminal Punishment*, in Michael L. Hadley, eds., *The Spiritual Roots of Restorative Justice*, State University of New York Press, p.31 (2001).

⁶⁸ See John Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, pp.30-41 (2002).

⁶⁹ See Peter Lindström, *Zero Tolerance Criminal Policy and Restorative Justice*, in Elmar G. M. Weitekamp & Hans-Jürgen Kerner, eds., *Restorative Justice in Context: International Practice and Directions*, Willian Publising, pp.286-302 (2012).

Controversy and Consensus: Does the UN Convention on the Rights of Persons with Disabilities Prohibit Mental Health Detention and Involuntary Treatment?

Chen Bo¹

Abstract: The common function of global mental health laws is to authorize and regulate psychiatric detention and involuntary treatment. The UN Convention on the Rights of Persons with Disabilities (CRPD) poses a fundamental challenge to this system and requires an overall abolition. This article addresses how international human rights laws protect the rights of persons with psychosocial disabilities (or persons with mental health issues), particularly the provisions provided by the CRPD. The focus of this article is to review the debate around the desirability and practicability of the CRPD requirement of abolition, pointing out the important consensus in this debate: a need to develop non-coercive mental health services and reduce the use of involuntary arrangements.

Key Words: UN Convention on the Rights of Persons with Disabilities; Mental Health Law; Mental Health Detention and Involuntary Treatment; Paradigm Shift

1. Introduction

China ratified the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) in 2008,² and submitted its first state report to the Committee on the Rights of Persons with Disabilities (“CRPD Committee”) in 2010 on the implementation of the convention in China. In its Concluding Observations in 2012, the CRPD Committee expressed its concern about the “nvoluntary commitment system” in China for not respecting the “individual will of persons with disabilities”.³ The CRPD Committee also stated “38. The Committee advises the State party to adopt measures to ensure that all health care and services provided to persons with disabilities, including all mental health care and services, is based on the free and informed consent of the individual concerned, and that laws permitting involuntary treatment and confinement, including upon the authorization of third party decision-makers such as family members or guardians, are repealed.”⁴

Subsequently, this recommendation has not appeared to raise much attention or concern in the related law-making processes in China. When the Concluding Observation was adopted, China was close to the end of its 28 year-long law-making journey to have the first national Mental Health Law (“MHL”)⁵ whose very nature was fundamentally challenged by the CRPD Committee. The lack of legislative debate or reaction to the CRPD Committee’s recommendation in the MHL’s legislative history can be explained by the narrow window

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² See Convention on the Rights of Persons with Disabilities (adopted on January 24, 2007, entered into force May 3, 2008), A/RES/61/106 (CRPD).

³ See CRPD Committee, *Concluding observations on the initial report of China*, CRPD/C/CHN/CO/1 (Oct.15, 2012).

⁴ See CRPD Committee, *Concluding observations on the initial report of China*, para.38, CRPD/C/CHN/CO/1 (Oct.15, 2012).

⁵ See Mental Health Law of the People’s Republic of China, passed by the Standing Committee of the National People’s Congress on October 26, 2012, and entered into force on May 1, 2013.

between the Concluding Observations' adoption on the 15th of October 2012 and the final review of the MHL under the Standing Committee of the National People's Congress on the 26th of October 2012. However, there has been an international trend where states party to the CRPD have enacted legislation in which involuntary mental health interventions are still permissible, for example India.⁶ Other state parties, such as Ireland, Australia, and Canada, entered declarations or reservations in relation to provisions in the CRPD requiring abolishing involuntary interventions upon their ratification of the Convention.⁷ A straightforward and popular explanation to the fact that most, if not all, state parties are not following the CRPD Committee's recommendation on the abolition of involuntary mental health interventions is its radical and unrealistic nature.⁸

Given this context, the article seeks to help understand the freedom from involuntary interventions first, rather than jumping to the conclusion that it is indeed too radical and unrealistic, and therefore should be rejected or overlooked. In other words, the article will discuss the legitimacy of mental health legislations whose primary function is to authorise and regulate involuntary interventions in the new era of the CRPD. It will review what new requirements the CRPD added to the mental health services in its state parties and how these state parties and scholars react to these requirements. In doing so, a broader perspective will be adopted rather than just a doctrinal examination of relevant legal provisions. This approach is based on the belief that the constructiveness of international human rights law is not about "human rights diplomacy", in which human rights is part of bargaining, negotiation and even battles among states,⁹ but must be based on the communication and exchange process. Therefore, this article does not aim to simply conclude whether or not involuntary interventions are permissible or CPRD-compliant, since the answer from the CRPD Committee is, consistently, a clear "No". Instead, the ultimate goal is to find the consensus of the complex controversies: maximising service users' autonomy in mental health decision-making by providing non-coercive supports.

The article is also timely. China submitted its state report, combined for the second and third reporting cycles, on August 31, 2018 to the CRPD Committee and the review may take place in the coming years.¹⁰ The article seeks to help the mutual understanding between the newest international human rights standards and the MHL in China, home for over 170 million adults having at least one type of mental disorder and 16 million people having severe mental illness.¹¹

The article below begins with Section 2 which reviews the approaches to involuntary mental health interventions adopted by international and regional human rights mechanisms

⁶ See Mental Health Care Act 2017 (India).

⁷ See Declarations and Reservations to the CRPD, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en (accessed on August 1, 2018).

⁸ See John Dawson, *A Realistic Approach to Assessing Mental Health Laws Compliance with the UNCRPD*, 40 International Journal of Law and Psychiatry 70 (2015).

⁹ See Barbara Keys, *Congress, Kissinger, and the Origins of Human Rights Diplomacy*, 34 Diplomatic History 823 (2010).

¹⁰ China, Implementation of the Convention on the Rights of Persons with Disabilities: 2nd and 3rd Reports Submitted by States Parties under Article 35 of the Convention, CRPD/C/CHN/2-3 (2018).

¹¹ See Qian Ji-wei, *Mental Health Care in China: Providing Services for under-Treated Patients*, 15 The Journal of Mental Health Policy and Economics 179 (2012). Michael R Phillips et al., *Prevalence, Treatment, and Associated Disability of Mental Disorders in Four Provinces in China during 2001–05: An Epidemiological Survey*, 373 The Lancet 2041 (2009). A recent study finds that 16.6% of 32,552 participants have mental disorders in their lifetime before the interview. See Huang Yue-qin et al., *Prevalence of Mental Disorders in China: A Cross-Sectional Epidemiological Study*, 6 The Lancet Psychiatry 211 (2019). Besides, a Lancet editorial wrote in 2015 that "[a]n estimated 173 million adults in China have mental health disorders, of whom 4.3 million are registered as having severe mental health problems". See Lancet, *Mental Health in China: What Will Be Achieved by 2020?*, 385 The Lancet 2548 (2015).

before the CRPD's entry into force. Following a brief introduction of the CRPD in Section 3, the article will have a close examination of the arguments for and against the claimed too radical and unrealistic requirement of abolishing involuntary intervention overall in Section 4, based on which a middle ground of 'maximising autonomy' is promoted.

2. Involuntary Mental Health Interventions and Human Rights prior to the CRPD

The section will focus on two major mechanism in relation to their position of addressing involuntary mental health interventions, namely the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care ("MI Principles")¹² and European Convention on Human Rights ("ECHR").¹³ Before proceeding to them in more detail, it will first give a brief overview of the lack of formal recognition of rights of persons with mental health issues under the international human rights law before the CRPD's entry into force. Then it considers the specific requirements raised by the MI Principles and the ECHR, respectively. As will be suggested below, the human rights instruments prior to the CRPD require the recognition of the rights to dignity, autonomy and due process as safeguards of persons with mental health issues, but still allow involuntary interventions.

(a) Insufficient Protection in the 'International Bill of Human Rights'

After the Second World War, international human rights law grew rapidly as a response to the massive human rights violations that occurred during the war.¹⁴ The Universal Declaration of Human Rights,¹⁵ the International Covenant on Civil and Political Rights,¹⁶ and the International Covenant on Economic, Social and Cultural Rights¹⁷ were adopted between the 1940s and the 1960s as the "International Bill of Human Rights", recognising a wide range of human rights.¹⁸ However, none of the three earliest and most fundamental human rights documents explicitly mention persons with mental health issues. Although the principle of non-discrimination is included and the condition of mental health issues is arguably a protected ground against discrimination, the effectiveness of such protection was believed to be unsatisfactory. In the landmark study of whether existing human rights instruments had been adequately utilised in the context of disability, including the condition of mental health issues, Quinn and Degener observed

"More often than not, invisibility has meant that a universal right is simply not applied equally (if applied at all) to persons with disabilities. For example, in the case of education,

¹² See UN General Assembly, Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, UN Doc A/RES/46/119 (Dec.17, 1991).

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on November 4, 1950, entered into force on September 3, 1953. Technically, since it is considered to be "living tree", the ECHR and its case-law is parallel with, rather prior to, the CRPD. The point here is that the CRPD represents a new approach compared to the position adopted in the MI Principles and the ECHR.

¹⁴ See, Daniel Moeckli et al., eds., *International Human Rights Law* (Second Edition), Oxford University Press (2014).

¹⁵ See Universal Declaration of Human Rights (adopted on December 10, 1948), UNGA Res 217 A (III) (UDHR).

¹⁶ See International Covenant on Civil and Political Rights (adopted on December 16, 1966, entered into force on March 23, 1976), 999 UNTS 171 (ICCPR).

¹⁷ See International Covenant on Economic, Social and Cultural Rights (adopted on December 16, 1966, entered into force on January 3, 1976), 993 UNTS 3 (ICESCR).

¹⁸ See John P Humphrey, *The International Bill of Rights: Scope and Implementation Bicentennial Symposium: Constitutional Government - Strengths, Weaknesses, Future*, 17 William and Mary Law Review 527 (1975).

violations can have as much to do with the right to an equal and effective education as with the right to education as such. Likewise, in the case of civil commitment, the issue can be that relevant due process principles are not applied equally (*mutatis mutandis*) to persons with mental illness. Reform of the law on mental disability can be campaigned for as requiring restoration of equal rights and equal protection of the rule of law.”¹⁹

Leaving the issue of civil commitment to be considered later, the problem of human experimentation serves as another vivid example of how this omission resulted in human rights abuse to people with mental health issues in real life. Article 7 of the ICCPR requires that “no one shall be subjected without his free consent to medical or scientific experimentation”.²⁰ However, the fact was that human experimentation, including those without any intended benefit, were conducted on people with intellectual disabilities and mental health issues routinely without consent from participants.²¹ The generic recognition of human rights under the ICCPR failed to protect persons with mental health issues from non-consensual human experimentation because of the long history in which persons with mental health issues have been considered as a “separate class” with “lesser rights”²². More importantly, these abuses “have generally not been recognized as violations of human rights even by organizations that are engaged in human rights work”,²³ reflecting the deep-rooted marginalisation of persons with mental health issues even within the mainstream human rights community.

Additionally, other human rights violations, many of which are still lawful under domestic laws, include arbitrary detention (sometimes for life) without due process of law, forced sterilisation, being chained and caged both at home and in institutions, unmodified electroconvulsive treatment without anaesthesia, and other cruel, inhuman, and degrading treatment.²⁴

As a result of the worldwide outrage towards these human rights violations and the social movements against institutionalisation and abusive psychiatric practice, dedicated responses from international human rights standards were put forward.²⁵ For example, the United Nations General Assembly adopted the Declaration on the Rights of Mentally Retarded Persons in 1971.²⁶ The resolution “starts by pointing out that persons with disabilities enjoy a parity of human rights protection with all other persons”; and the fact that “it needed saying in the first place” reflected the ineffectiveness of the generic protection.²⁷

That said, it is equally worth noting that the human rights contained in the ICCPR and ICESCR have been invoked by persons with mental health issues and advocates, which in turn facilitated the development of dedicated mechanisms of human rights protection for the group of people. For example, the freedom from arbitrary arrest or detention ‘has bolstered efforts to

¹⁹ See Gerard Quinn, *Theresia Degener and Anna Bruce, Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, United Nations Publications (2002), p.27, <https://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf> (accessed on August 2, 2018).

²⁰ See ICCPR Article 7.

²¹ See Clarence J Sundram, *In Harm's Way: Research Subjects Who Are Decisionally Impaired*, 1 *Journal of Health Care Law and Policy* 36, 40 (1998).

²² See Piers Gooding, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities*, Cambridge University Press, p.42 (2017).

²³ *Ibid.*

²⁴ See Piers Gooding, *Change and Continuity: A Historical Overview of the Significance of the United Nations Convention on the Rights of Persons with Disabilities to Mental Health Law*, <http://webjcli.org/article/view/367> (accessed on August 2, 2018).

²⁵ See Jennifer Brown, *The Changing Purpose of Mental Health Law: From Medicalism to Legalism to New Legalism*, 47 *International Journal of Law and Psychiatry* 1 (2016).

²⁶ See UN General Assembly Resolution 2865 (XXVI) (Dec.20, 1971).

²⁷ See Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, in Gerard Quinn and Lisa Waddington, eds., *European Yearbook of Disability Law*, Intersentia, Vol.1, p.93 (2009).

require adequate procedural protections’ for those persons who are subject to mental health detention.²⁸ Similarly, many social and economic rights, particularly the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,²⁹ have provided a powerful legal, and also moral, basis in advocating for increasing the access to community services and suitable training that benefits persons with mental health issues.³⁰

(b) MI Principles: a pre-CRPD guide of mental health laws and human rights

As a response to the marginalisation in the mainstream human rights treaties, in particular the international concerns on the political abuse of psychiatry in the Soviet Union and beyond,³¹ the rights of persons with mental health issues have gradually received dedicated attention at the international level. The MI Principles, adopted by the UN General Assembly in 1991, was one of the results of the ‘Decade for Disabled People’ from 1983 to 1992 and the appointment of two special rapporteurs on human rights abuses and welfare in the context of disability.³² These principles have been praised as “the first step in providing a global set of minimal standards for protecting persons with mental illness and improving mental healthcare”.³³ The principles are phrased as ‘the most comprehensive international human rights standards’ for the group and “a critical global step in recognizing mental disability rights issues within the human rights arena”.³⁴ The MI Principles are particularly worth reviewing here, as they have formed the basis of many other international standards or guidance of mental health and human rights. These standards and guides include the World Health Organisation’s “Ten Basic Principles of Mental Health Care Law” and subsequently the “Resource Book on Mental Health, Human Rights and Legislation”³⁵. More importantly, the principles represent a classic “necessary but safeguarded” approach to involuntary mental health interventions adopted by the international human rights law prior to the CRPD, as will be discussed below.

The Principles represent a combination and compromise of both liberal values and beneficent (or arguably paternalistic) values.³⁶ Liberal values are evident in many principles. For example, every patient in a mental health facility has the right to “recognition everywhere as a person before the law”,³⁷ and “[a]ll persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the

²⁸ See Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 Maryland Law Review 20, 34 (2004).

²⁹ See ICESCR, Article 12.

³⁰ See Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 Maryland Law Review 34-35 (2004).

³¹ See Samantha Maingay et al., *Mental Health and Human Rights: The MI Principles–Turning Rhetoric into Action*, 14 International Review of Psychiatry 19 (2002).

³² See Samantha Maingay et al., *Mental Health and Human Rights: The MI Principles–Turning Rhetoric into Action*, 14 International Review of Psychiatry 37 (2002).

³³ See Samantha Maingay et al., *Mental Health and Human Rights: The MI Principles–Turning Rhetoric into Action*, 14 International Review of Psychiatry 19 (2002).

³⁴ See Michael Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in Michael Dudley et al., eds., *Mental Health and Human Rights: Vision, Praxis, and Courage*, Oxford University Press, p.80 (2013).

³⁵ See Brendan D Kelly, *Mental Illness, Human Rights and the Law*, Royal College of Psychiatrists, p.28 (2016).

³⁶ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 International Journal of Law and Psychiatry 257 (1993).

³⁷ See MI Principles, principle 13, para.1(a).

human person”.³⁸ Discrimination on the grounds of mental illness shall be prohibited.³⁹ The MI Principles also prohibit using medication as “a punishment or for the convenience of others”⁴⁰, exploited labour,⁴¹ sterilisation⁴² and psychosurgery or other irreversible treatments on involuntary patients,⁴³ and places a restriction on the uses of seclusion and restraint.⁴⁴ More evidently, Principle 9 provides that “treatment should be directed towards preserving and enhancing personal autonomy”.⁴⁵ All these principles are encouraging, especially considering the historical background of how persons with mental health issues were treated at that time, as discussed above in the previous subsection.

At the same time, the beneficent values are also explicitly endorsed, stressing on providing high-quality services. The title of the MI Principles contains the wording of “for the Improvement in Mental Health Care”. Principle 1 starts with “[a]ll persons shall have the right to the best available mental health care, which shall be part of the health and social system”.⁴⁶ To achieve this goal of providing better care, the Principles also require investment of resources into mental health facilities, including qualified professional staff and adequate supply of medication⁴⁷ and personalised treatment or care plan⁴⁸ that is appropriate to one’s health needs⁴⁹ and cultural background.⁵⁰

These two sets of values are clearly interrelated.⁵¹ Such interrelation reflects on the principle of “least restrictive or intrusive treatment”,⁵² individualised care plans involving the discussion with the person and review,⁵³ and the requirement of the therapeutic or diagnostic purpose of medication,⁵⁴ for example. After all, the freedom from institutionalisation is usually based on adequate access to high quality and non-coercive service in the community.⁵⁵ Nevertheless, the two sets of values are also in conflict, and the MI Principles “resolve them in a manner that favours paternalistic state coercion exercised through the actions of professionals over individual autonomy”.⁵⁶ For example, Principle 11 on consent to treatment has been subjected to heated criticism, being seen as a retreat rather than the enhancement of the right to consent or refuse treatment.⁵⁷ The most evident reflection of such a retreat is that, with the authorisation of an independent authority, a person having mental capacity under detention

³⁸ See MI Principles, principle 1, para.2.

³⁹ See MI Principles, principle 1, para.4.

⁴⁰ See MI Principles, principle 10, para.1.

⁴¹ See MI Principles, principle 13, para.4.

⁴² See MI Principles, principle 11, para.12.

⁴³ See MI Principles, principle 11, para.14.

⁴⁴ See MI Principles, principle 11, para.11.

⁴⁵ See MI Principles, principle 1, para.4.

⁴⁶ See MI Principles, principle 1, para.1.

⁴⁷ See MI Principles, principle 14, para.4.

⁴⁸ See MI Principles, principle 9, para.2.

⁴⁹ See MI Principles, principle 8, para.1 & principle 9, para.1.

⁵⁰ See MI Principles, principle 7, para.3.

⁵¹ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 International Journal of Law and Psychiatry 261 (1993).

⁵² See MI Principles, principle 9, para.1.

⁵³ See MI Principles, principle 9, para.3.

⁵⁴ See MI Principles, principle 10, para.1.

⁵⁵ However, it is also worth noting that some community-based measures could also be a venue in which the professional coercive power extends from institutions to the community. See Simon Lawton-Smith et al., *Community Treatment Orders Are Not a Good Thing*, 193 The British Journal of Psychiatry 96 (2008).

⁵⁶ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 International Journal of Law and Psychiatry 262 (1993).

⁵⁷ More on the discussion, particularly on the weak protection towards persons who is considered to lack mental capacity but does not resist treatment, see Caroline Gendreau, *The Rights of Psychiatric Patients in the Light of the Principles Announced by the United Nations: A Recognition of the Right to Consent to Treatment?*, 20 International Journal of Law and Psychiatry 259 (1997).

could be forced to receive treatment. It is so if “the patient unreasonably withholds consent for medication” and the proposed medication is considered “in the best interest of the person’s health needs” and necessary to protect the safety of the person or others.⁵⁸ This provision is believed to diminish the principle of autonomy completely by “ceding all decision-making power concerning medication to professionals”.⁵⁹

Similarly, involuntary admission could also be justified. The criteria are the severity of mental illness, “impaired judgement”, and “failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative”.⁶⁰ Although the principle of “least restrictive alternative” is in place, the scope of “prevent the giving of appropriate treatment that can only be given by admission to a mental health facility” is still broad. Another problematic provision is that the person’s informed consent would not be necessary if his or her “personal representative empowered by law”, for example a guardian under the MHL, gives the informed consent.⁶¹ In relation to the substantive provisions of detention and consent to treatment, the principle is “remove patients’ rights rather than reinforce them”.⁶²

The procedural safeguards of depriving one’s decision-making authority and liberty are considered to be “elaborate”.⁶³ The safeguards include fair hearing, judicial or other independent and impartial review body, access to counsel, periodic review, and a right to appeal.⁶⁴ The focus on procedural safeguards is on its face laudable, reflecting an awareness of due process against a serious threat to personal liberty and integrity. Nevertheless, the combination of the strong procedural safeguards and the weak substantive respect for autonomy appears to be “a sham”, merely justifying “coercion in the name of treatment”.⁶⁵ This concern has been proved a reality in many places in the world.⁶⁶ It is worth noting here, however, that China did not follow these principles of procedural safeguards in enacting its first national MHL two decades later. It raises a question of enforcement of the MI Principles, that were intended to form the “minimal United Nations standards for the protection of fundamental freedoms and human and legal rights of persons with mental illness”.⁶⁷

The implementation is unsatisfactory because the MI Principles are not the same status as a treaty or convention, which means the states do not have a legal obligation to follow.⁶⁸ No

⁵⁸ See MI Principles, principle 11, para.6.

⁵⁹ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 International Journal of Law and Psychiatry 265 (1993).

⁶⁰ See MI Principles, principle 16, para.1(b).

⁶¹ See MI Principles, principle 11, para.7.

⁶² See TW Harding, *Human rights law in the field of mental health: a critical review*, 399 Acta Psychiatrica Scandinavica Supplement 24 (2000).

⁶³ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 International Journal of Law and Psychiatry 266 (1993).

⁶⁴ More, see MI Principles, principle 17-18.

⁶⁵ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 International Journal of Law and Psychiatry 267 (1993).

⁶⁶ For example, in Ireland and the US. See Darius Whelan, *Protecting Rights in Mental Health Law: The Relationship between the Courts and Mental Health Tribunals*, in Mary Donnelly and Murray Claire, eds., *Ethical and Legal Debates in Irish Healthcare: Confronting Complexities*, Manchester University Press, p.208 (2016); and Michael L Perlin, “Salvation” or a “Lethal Dose”? *Attitudes and Advocacy in Right to Refuse Treatment Cases*, 4 Journal of Forensic Psychology Practice 51 (2004).

⁶⁷ See UN, Report of the Working Group on the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, U.N. Doc. E/CN.4/1991/39 (1991), paras. 2-3, as cited in Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 Maryland Law Review 43 (2004).

⁶⁸ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 International Journal of Law and Psychiatry 268 (1993).

implementation mechanism is set up on this basis,⁶⁹ making the weak protection even more toothless. That said, the MI Principles have, arguably, great significance in interpreting other binding law, including the ECHR⁷⁰ and domestic constitutional and human rights law.⁷¹ The Principles also provide a set of international standards for the rights of persons with mental health issues that could be a powerful tool in human rights monitoring process⁷² and could be utilised by international human rights NGOs, survivor groups and Disabled People's Organisations in their advocacy.⁷³ These indirect effects of promoting human rights for persons with mental health issues have been less successful in China.

The World Network of Users and Survivors of Psychiatry ("WNUSP"), an international advocacy group for the human rights of persons with mental health issues, criticised the MI Principles for the evident endorsement of psychiatric paternalism in both detention and involuntary treatment. The WNUSP highlights the lack of participation or consultation of mental health service users and survivors in the drafting process as evidence to this endorsement.⁷⁴ It argues that, if the adequate participation had been in place, "the Principles would have been quite different and would have a greater level of credibility".⁷⁵ Disabled People's International, a pan-disability organisation, was found to be the only NGO from a disability rights perspective that participated in the drafting negotiations and upheld the value of autonomy.⁷⁶

To summarise, the MI Principles represent a recognition of the "necessary but safeguarded" approach to the involuntary mental health interventions at the UN level. The drafters made innovative efforts to provide guidance on the regulation of mental health services and promotion of human rights and due process in the mental health institutions by adopting a number of encouraging principles. For this article, however, the very basis of the principles, including the endorsement of involuntary measures, sees the refusal of treatment or failure of giving informed consent as an obstacle to accessing treatment and restoring one's mental health. Thus, the involuntary measures should be subject to safeguards to prevent abuse, but they are necessary and even desirable under certain circumstances. This mindset is critical in understanding the core spirit of the MHL, which arguably only follows the 'necessary' part and omits the "safeguarded" part, against the background that policy priority in China is to increase the treatment rate.

⁶⁹ See TW Harding, *Human rights law in the field of mental health: a critical review*, 399 Acta Psychiatrica Scandinavica Supplement 24 (2000).

⁷⁰ See Eric Rosenthal & Leonard S Rubenstein, *International Human Rights Advocacy under the "Principles for the Protection of Persons with Mental Illness"*, 16 International Journal of Law and Psychiatry 272-279 (1993).

⁷¹ See Caroline Gendreau, *The Rights of Psychiatric Patients in the Light of the Principles Announced by the United Nations: A Recognition of the Right to Consent to Treatment?*, 20 International Journal of Law and Psychiatry 266 (1997).

⁷² See Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 Maryland Law Review 43-44 (2004).

⁷³ See Samantha Maingay et al., *Mental Health and Human Rights: The MI Principles—Turning Rhetoric into Action*, 14 International Review of Psychiatry 19 (2002).

⁷⁴ See Melinda Jones, *Can International Law Improve Mental Health? Some Thoughts on the Proposed Convention on the Rights of People with Disabilities*, 28 International Journal of Law and Psychiatry 183, 203 (2005).

⁷⁵ See Melinda Jones, *Can International Law Improve Mental Health? Some Thoughts on the Proposed Convention on the Rights of People with Disabilities*, 28 International Journal of Law and Psychiatry 183, 203 (2005).

⁷⁶ See Caroline Gendreau, *The Rights of Psychiatric Patients in the Light of the Principles Announced by the United Nations: A Recognition of the Right to Consent to Treatment?*, 20 International Journal of Law and Psychiatry 269 (1997).

(c) ECHR and its Growing Jurisprudence of Involuntary Interventions

This subsection presents a brief review of the ECHR and its case law on detention and involuntary treatment for people with mental health issues. The ECHR was adopted by the Council of Europe (“CoE”), a leading human rights organisation in Europe, in 1950. The European Court of Human Rights (“ECtHR”) was founded in 1959 with a mission to apply and interpret the ECHR in cases brought by individuals against the member states of the CoE.⁷⁷ This subsection will reveal that, although procedural safeguards are required to prevent arbitrariness, involuntary mental health interventions are in principle permitted under the ECHR and its case law. It represents the position of ‘necessary but safeguarded’ towards involuntary measures in the mental health setting, just like the MI Principles as discussed above.

Although China is not a member state of the CoE and, hence, the ECHR and its case law do not apply to China, this mechanism still merits consideration for two main reasons. First, the ECtHR jurisprudence represents a “due process of law” approach to the regulation of involuntary mental health interventions, which plays an important role in facilitating mental health law reforms in its member states, like the UK and Ireland.⁷⁸ Second, the case law involves member states of considerable diversity in terms of ideological history, the rule of law, and economic development, from Russia to Malta, which arguably provides a better reference to China than the mental health law of any particular country.⁷⁹

Before moving to the review of the relevant provisions and case law, it is worth noting that CoE also gives recommendations to its Member States in relation to mental health law and human rights. From the 1970s, the CoE has adopted a series of recommendations, for example Recommendation 818 (1977) on the Situation of the mentally ill⁸⁰ and Recommendation No. R (83) 2 on the legal protection of persons suffering from mental disorder placed as involuntary patients,⁸¹ urging its member states to turn their focus on rights protection in mental health settings and transfer the authority from psychiatric professional to courts.⁸² However, many requirements provided by these recommendations are significantly similar to the ones from the MI Principles. For example, the least restrictive measures⁸³ and procedural safeguards⁸⁴ appear in both the MI Principles and the CoE recommendations. Therefore, the legally binding force and the nature of constantly developing make the ECHR and its case law a “front-runner” in human rights protection.⁸⁵

The ECtHR has developed a body of case law on mental health detention and treatment. The basis of these cases includes Article 3 on the prohibition of torture, inhuman or degrading treatment, Article 5 on the right to liberty and security, Article 6 the right to a fair trial, Article

⁷⁷ See the official site of the Council of Europe, www.coe.int/en/web/portal/home (accessed on August 3, 2018).

⁷⁸ See Jennifer Brown, *The Changing Purpose of Mental Health Law: From Medicalism to Legalism to New Legalism*, 47 *International Journal of Law and Psychiatry* 1 (2016).

⁷⁹ See *46 Member States*, CoE, www.coe.int/en/web/portal/47-members-states (accessed on February 8, 2019).

⁸⁰ See CoE Parliamentary Assembly, *Recommendation 818 on Situation of the mentally ill* (1977).

⁸¹ See CoE Committee of Ministers, *Recommendation No. R (83) 2 of the Committee of Ministers to Member States concerning the legal protection of persons suffering from mental disorders placed as involuntary patients* (1983).

⁸² See Jennifer Brown, *The Changing Purpose of Mental Health Law: From Medicalism to Legalism to New Legalism*, 47 *International Journal of Law and Psychiatry* 1 (2016).

⁸³ See CoE Committee of Ministers, *Recommendation No. R (83) 2 of the Committee of Ministers to Member States concerning the legal protection of persons suffering from mental disorders placed as involuntary patients*, para.15 (1983).

⁸⁴ See CoE Committee of Ministers, *Recommendation No. R (83) 2 of the Committee of Ministers to Member States concerning the legal protection of persons suffering from mental disorders placed as involuntary patients*, Article 8 (1983).

⁸⁵ See Penelope Weller, *The Convention on the Rights of Persons with Disabilities and the Social Model of Health: New Perspectives*, 20 *Journal of Mental Health Law* 74 (2011).

8 on the right to respect for private and family life.⁸⁶ The article does not seek to make an original contribution to the literature of the ECHR and mental health laws. It only aims to suggest the principal position of the ECHR and its relevant case law towards mental health detention and involuntary treatment, as a typical position before the adoption of the CRPD. Hence, guided by the secondary resources written by scholars in this particular field, the subsection briefly reviews the ECHR Articles and the relevant case law under the following categories.

(i) Lawfulness of involuntary detention

Article 5(1) forms the legal ground of deprivation of liberty from people with mental health issues. It reads: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.”⁸⁷

The ECHR itself does not define the “persons of unsound mind” an out-of-date term that represents “old prejudices” in respect of persons with mental health issues.⁸⁸ The criteria for detention on this basis, however, has been clarified in a number of cases. The court held in *Winterwerp v the Netherlands* that to justify a deprivation of liberty for a person of “unsound mind”, a psychiatric diagnosis should be made on the basis of “objective medical expertise”, a “true” mental disorder of “a kind or degree warranting compulsory confinement”, and “the validity of continued confinement depends upon the persistence of such a disorder”.⁸⁹ The court saw mental disorders as “constantly evolving with medical science” and, therefore, did not adopt any precise definition.⁹⁰ Flynn observes that there exists “a wide margin of appreciation by the court to determine who is a person of unsound mind.”⁹¹ Nevertheless, to prevent abuse as a form of unjustified social control, the court provided that the detention on the ground of “unsound mind” cannot be used when the person’s “views or behaviour deviate from the norms prevailing in a particular society”.⁹² In another case, the court held: “The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law, but it must also be necessary in the circumstances.”⁹³

Article 5(1) requires that the deprivation of liberty should be “in accordance with a procedure prescribed by law”.⁹⁴ The ECtHR has interpreted that the detention of persons with mental health issues must not be decided arbitrarily.⁹⁵ In determining arbitrariness, the case law suggests that the domestic law prescribing detention must comply with the provisions of the

⁸⁶ See ECHR, Article 3, 5, 6, and 8.

⁸⁷ See ECHR, Article 5.

⁸⁸ See Jonathan Bindman et al., *The Human Rights Act and Mental Health Legislation*, 182 *British Journal of Psychiatry* 91 (2003).

⁸⁹ See *Winterwerp v the Netherlands*, 2 EHRR 387, para.39 (1979). More cases, see, for example, *Witold Litwa v Poland*, 33 EHRR 387, para.68 (2001).

⁹⁰ *Ibid.*

⁹¹ See Eilionóir Flynn, *Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches*, 22 *International Journal of Mental Health and Capacity Law* 75, 76 (2017).

⁹² See *Winterwerp v the Netherlands*, 2 EHRR 387, para.37 (1979).

⁹³ See *Witold Litwa v Poland*, 33 EHRR 387, para.78 (2001).

⁹⁴ See ECHR, Article 5.

⁹⁵ See *Winterwerp v the Netherlands*, 2 EHRR 387, para.39 (1979); *Kawka v Poland*, App No 2587/94, ECHR, (Jan.9 2001), para.48; *Amuur v France*, 22 EHRR 533, para.42 (1996).

ECHR⁹⁶ and also be accessible and precise to ensure foreseeability in the application.⁹⁷

Lastly, to guarantee the lawfulness of the detention on this basis, states must ensure the detention is imposed in a therapeutic environment where the detainee could receive appropriate medical attention.⁹⁸

(ii) Independent and periodical review

Article 5(4) of the ECHR forms the basis of the independent and periodical review of the detention. “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”⁹⁹

The term “court” has been interpreted broadly as long as it is considered to have: “independence from the executive; independence from the parties to the case; and a judicial character.”¹⁰⁰ Therefore, whether the reviewing body is named as a court or a mental health tribunal, it should have the authority to find the detention in question invalid or unlawful and order release, rather than being advisory only.¹⁰¹ The ECtHR jurisprudence has also established that, considering the significance of detention of persons with mental health issues, the requirement of impartiality provided in Article 6 on the right to a fair trial is also applicable to detentions on the ground of “unsound mind”. If a psychiatrist is involved with the procedure of a patient before the review, he or she should not sit in the court, or tribunal, in order to ensure independence and impartiality.¹⁰²

Another requirement by Article 5(4) is that the review must be speedy. The ECtHR has further interpreted this requirement, finding periodic reviews should be in place to ensure the liberty of persons in detention is not restricted unnecessarily when the detention is no longer justified.¹⁰³ The MHL adopts a similar substantive requirement, albeit absent the requirement for periodic independent review as a procedural safeguard.

Article 5 also applies to cases in which deprivation of liberty based on “unsound mind” occurs outside of psychiatric institutions. In *Stanev v Bulgaria*, the plaintiff was under guardianship and the legal representative authorised his institutionalisation in a social care home. The Court found the government breached Article 5, thereby “broadening the scope of locations” where deprivation of liberty can occur.¹⁰⁴

(iii) Involuntary treatment and informed consent

As suggested above, the ECHR has a strong focus in preventing arbitrary detention and requires procedural safeguards in the case law. On the other hand, ECHR and the case law only provide “weak protection” to involuntary treatment that usually occurs during detention in

⁹⁶ See *Plesó v Hungary*, App No 41242/08, ECHR, para.59 (Jan.17, 2012).

⁹⁷ See *Kawka v Poland*, App No 2587/94, ECHR, para.46 (Jan.9, 2001). Also see *H.L. v United Kingdom*, App No 45508/99, ECHR, para.114 (Oct.5, 2004).

⁹⁸ See *Aerts v Belgium*, 29 EHRR 50, para.49 (1998).

⁹⁹ See ECHR, Article 5(4).

¹⁰⁰ See Peter Bartlett et al., *Mental Disability and the European Convention on Human Rights*, Martinus Nijhoff Publishers, p.62 (2006).

¹⁰¹ See *X v United Kingdom*, 4 EHRR 188, para.61 (1981).

¹⁰² See *DN v Switzerland*, 37 EHRR 21, paras.42-56 (2003).

¹⁰³ See *Winterwerp v the Netherlands*, 2 EHRR 387, para.55 (1979). Also see Jennifer Brown, *The Changing Purpose of Mental Health Law: From Medicalism to Legalism to New Legalism*, 47 International Journal of Law and Psychiatry 1 (2016) for a review of case law about how often the periodic review should take place.

¹⁰⁴ See *Stanev v Bulgaria*, 55 EHRR 22 (2012); Eilíonóir Flynn, *Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches*, 22 International Journal of Mental Health and Capacity Law 78 (2017).

mental health settings.¹⁰⁵

Although not directly addressed, the ECtHR has gradually developed precedents from case law on this issue by adopting a broad interpretation of Article 3 on inhuman or degrading treatment and Article 8 on private life. Article 3 provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” In *Herczegfalvy v Austria*, the ECtHR stressed that persons with mental health issues detained in mental health facilities are protected by this provision and established two requirements for involuntary treatment. The treatment must be “to preserve the physical and mental health of the patient”; and, the patient must be “entirely incapable” of deciding on the acceptance or refusal of the treatment.¹⁰⁶ Although involuntary treatment can constitute inhuman and degrading treatment, such finding is difficult to achieve:

“Individuals who are detained in secure psychiatric institutions who have been deemed unable to consent to medical care, or who can be subject to treatment for a ‘mental disorder’ under the terms of their detention, face great challenges if they are to establish that involuntary treatment breaches Article 3 ECHR. Such treatment will not breach Article 3 if it is found to be therapeutically necessary.”¹⁰⁷

The wide margin of appreciation on ‘therapeutic necessity’ has been criticised for not taking account of alternative, less intrusive, or restrictive interventions.¹⁰⁸ An example used to suggest the unreasonableness of the wide margin of appreciation is the delivery of electro-convulsive treatment, which can be administered with a lower likelihood of causing injuries under anaesthetic and with muscle relaxants. The court could reasonably adopt a more substantive approach in considering “whether the treatment was administered in a humane way or indeed, in accordance with the wishes of the patient, who may have been willing to consent to the treatment in one form, but not in another.”¹⁰⁹

Article 8 providing for the right to respect for private and family life is also relevant here, which reads: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”¹¹⁰

On this basis, the ECtHR has established case law in which involuntary treatment amounts to an unjustified interference in one’s private life as protected by Article 8. The Court stressed in *Storck v Germany* that “even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against one’s will.”¹¹¹ However, the general prohibition of involuntary

¹⁰⁵ See Lisa Waddington & Bernadette McSherry, *Exceptions and Exclusions: The Right to Informed Consent for Medical Treatment of People with Psychosocial Disabilities in Europe*, 23 *European Journal of Health Law* 1 (2016).

¹⁰⁶ See *Herczegfalvy v Austria*, 15 EHRR 437, para.82 (1993).

¹⁰⁷ See Lisa Waddington & Bernadette McSherry, *Exceptions and Exclusions: The Right to Informed Consent for Medical Treatment of People with Psychosocial Disabilities in Europe*, 23 *European Journal of Health Law* 15 (2016).

¹⁰⁸ See Anete Erdmane, *Liberty behind Closed Doors-Involuntary Placement and Medical Treatment in Psychiatric Institutions from the Human Rights Perspective*, 4 *Vienna Online Journal on International Constitutional Law* 90 (2010).

¹⁰⁹ *Ibid.*

¹¹⁰ See ECHR, Article 8.

¹¹¹ See *Storck v Germany*, App No 61603/00, ECHR, para.143 (Jun.16, 2005).

treatment seems only to apply to persons who are considered as having mental capacity.¹¹² This is largely because Article 8(2) provides justifications to the restrictions of the right, including interference by a public authority that is “in accordance with the law” and “for the protection of health or morals, or for the protection of the rights and freedoms of others.”¹¹³ The application of this justification has been concluded as “if the domestic law provides for sufficient safeguards, including the review of treatment at appropriate intervals, and if the treatment is regarded as necessary and serving the legitimate aim of protecting the health of the patient or the rights and freedoms of others, such treatment can be imposed without consent.”¹¹⁴

(iv) A summary

This subsection reveals that the ECHR and its case law allow mental health detention and involuntary treatment in principle, given procedural safeguards and therapeutic necessity are in place. Compared to the growing jurisprudence on procedural safeguards for the deprivation of liberty on the ground of ‘unsound mind’, the ECtHR appears to grant the Member States a wider margin of appreciation in regulating involuntary treatment. Although involuntary treatment could constitute an unjustified interference in one’s private life, such finding is difficult to achieve.

(d) A Summary

This section illustrates how international human rights instruments prior to the CRPD address detention and involuntary treatment imposed on persons with mental health issues. In principle, involuntary interventions are permissible under certain circumstances and should be safeguarded by due process of law. In other words, the position of international human rights law before the CRPD on involuntary mental health interventions is “necessary but safeguarded”. This position is argued to be based on the presumption that limitation to personal liberty, integrity and autonomy of persons with mental health issues is justified and necessary, and “the issue was determining the bounds of permitted compulsion.”¹¹⁵ On this basis, the MI Principles intended to raise the awareness of good quality mental health services, promoting voluntariness and individualised care plan while endorsing detention and involuntary treatment as necessary measures to “facilitate” accessing care. The case law produced by the ECtHR is another typical reflection of such efforts in developing a human rights protection regime in line with the “necessary but safeguarded” approach. However, having such a regime may simply reinforce systems of coercion due to the margin of appreciation of states.

In contrast to this “necessary but safeguarded” approach, the CRPD has raised fundamental challenges to this very presumption and the legality of involuntary mental health interventions. Although this approach has not been altered in its case law, the ECtHR has suggested a growing, but still fragmented, awareness in citing the CRPD in its judgments.¹¹⁶

¹¹² See Lisa Waddington & Bernadette McSherry, *Exceptions and Exclusions: The Right to Informed Consent for Medical Treatment of People with Psychosocial Disabilities in Europe*, 23 European Journal of Health Law 19 (2016).

¹¹³ See ECHR, Article 8(2).

¹¹⁴ See Lisa Waddington & Bernadette McSherry, *Exceptions and Exclusions: The Right to Informed Consent for Medical Treatment of People with Psychosocial Disabilities in Europe*, 23 European Journal of Health Law 19 (2016).

¹¹⁵ See Peter Bartlett, *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law*, 75 The Modern Law Review 752, 753 (2012).

¹¹⁶ See Oliver Lewis, *Council of Europe*, in Lisa Waddington and Anna Lawson, eds., *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, Oxford University

The next section will turn to discuss the CRPD and its application to involuntary mental health interventions in more depth.

3. The Convention on the Rights of Persons with Disabilities and the “Paradigm Shift”

The CRPD is the first international human rights convention in the 21st century and “represents the culmination of two and a half decades of development in international human rights law aimed at addressing human rights violations experienced by people with disabilities”.¹¹⁷ After the ratification by its 20 state parties, the CRPD entered into force on 3 May 2008. This section will closely examine the CRPD provisions that are relevant to mental health detention and involuntary treatment.¹¹⁸

Before proceeding to the details of these provisions, this section will briefly introduce the CRPD as a whole. It will be followed by an examination of UN human rights bodies’ interpretations of the CRPD’s new requirement on involuntary mental health interventions and how the practice has upheld.

(a) An Introduction to the Convention

Similar to the ineffectiveness of the generic protection for persons with mental health issues, under the international human rights law prior to the CRPD, the broader community of persons with disabilities have not been generally considered to be the holders or subjects of human rights.¹¹⁹ The “default setting for considering disability” has been “a mixture of charity, paternalism and social policy” that usually only aim to maintain persons with disabilities, not supporting their full and meaningful participation.¹²⁰ This approach is not only the result of resource limitation, with nearly 80 per cent of the 650 million persons with disabilities are living in the developing countries, it has also been argued to be underpinned by a perception that sees disability as “eroding” human existence.¹²¹

Considering this background, and after years of difficult advocacy and negotiations, the CRPD sets out a human rights agenda of addressing the global issue of disability. In this human rights agenda of disability, the CRPD requires its state parties to treat persons with disabilities as a “‘subject’ with full legal personhood”, rather than an “‘object’ to be managed and cared for”.¹²² Drawing on the importance of positive measures of promoting substantive equality and the interdependence of all human rights, the CRPD forces people to rethink, more fundamentally, “when or whether the difference requires separate, special treatment” that is

Press, p.89 (2018). Also, see Andrea Broderick, *The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?*, 7 Cambridge International Law Journal 199 (2018) .

¹¹⁷ See Piers Gooding, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities*, Cambridge University Press, p.46 (2017).

¹¹⁸ For a comprehensive introduction to the CRPD, see Shivaun Quinlivan, *The United Nations Convention on the Rights of Persons with Disabilities: An Introduction*, 13 ERA Forum 71 (2012).

¹¹⁹ See Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, in Gerard Quinn and Lisa Waddington, eds., *European Yearbook of Disability Law*, Intersentia, Vol.1, p.89 (2009).

¹²⁰ Ibid.

¹²¹ See Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, in Gerard Quinn and Lisa Waddington, eds., *European Yearbook of Disability Law*, Intersentia, Vol.1, p.90 (2009).

¹²² Ibid.

usually done by creating segregation in the name of protection.¹²³

The purpose of the CRPD is set out in Article 1: “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.¹²⁴ Without adopting an explicit definition of disability, Article 1 provides a *de facto* definition: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹²⁵

The text of Article 1 adopts the term “mental impairments”, clearly referring to people with mental health issues. However, since “long term” is included, Kelly raises a question whether all persons with mental disorders fit the definition, since ‘many disorders are not “long term”’.¹²⁶ A common response to this question relies on the term “include”, which implies the CRPD does not mean to exclude any individual or group, and Preamble paragraph (e) that recognises disability as “an evolving concept” and focuses on the ‘interaction’ between persons with impairments and various social barriers.¹²⁷

As a “hybrid convention” that contains not only all the relevant substantive rights, but the philosophy of non-discrimination and inclusive equality,¹²⁸ the broad range of rights could be broadly categorised into the following kinds: (a) the rights that protect the person, (b) the rights that “restore autonomy, choice and independence”, (c) the rights of participation, (d) liberty rights and (e) economic, social and cultural rights.¹²⁹ Regardless of the academic debate whether the CRPD creates any new human rights,¹³⁰ the CRPD does include some rights that are not found in existing human rights conventions, for example the right to living independently and being included in the community.¹³¹ It targets the issue of institutionalisation, a particular problem to persons with disabilities that requires “national investment in community-based living options”.¹³²

These rights are also governed by a set of general principles set out in Article 3, including: “(a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women; (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.”¹³³

With all the specific rights and principles, in particular the emphasis on individual

¹²³ See Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, in Gerard Quinn and Lisa Waddington, eds., *European Yearbook of Disability Law*, Intersentia, Vol.1, p.92 (2009).

¹²⁴ See CRPD, Article 1.

¹²⁵ See CRPD, Article 1.

¹²⁶ See Brendan D Kelly, *Mental Illness, Human Rights and the Law*, Royal College of Psychiatrists, p.30 (2016).

¹²⁷ See Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Human Rights Law Review 1 (2008).

¹²⁸ See CRPD Committee, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6 (Apr.26, 2018).

¹²⁹ See Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, in Gerard Quinn and Lisa Waddington, eds., *European Yearbook of Disability Law*, Intersentia, Vol.1, pp.99-111 (2009).

¹³⁰ See Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Human Rights Law Review 32 (2008).

¹³¹ See CRPD, Article 19.

¹³² See Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Human Rights Law Review 29 (2008).

¹³³ See CRPD, Article 3.

autonomy and full and effective participation and inclusion in society, the CRPD aims to shift the old paradigm that persons with disabilities are objects of social welfare to a human rights model under which persons with disabilities are “subjects of rights” and “active members of society”.¹³⁴ The next sub-section will elaborate on the reflection of this paradigm shift in mental health laws.

The CRPD is also special and innovative in other respects: the highly participatory drafting process,¹³⁵ the stronger monitoring function of the CRPD Committee,¹³⁶ and the “transformative vision for fostering change at the domestic level”.¹³⁷ First, the CRPD is widely agreed to be “the most participatory international legal instrument”, and “those typically subject to the human rights violations in question took a leading role in its development”.¹³⁸ The leading role played by the WNUSP in shaping a number of relevant provisions to involuntary intervention is well documented.¹³⁹ Second, the monitoring mechanism required by the CRPD is expected to “reconfigure the structure and process of human rights oversight”.¹⁴⁰ The innovations include the creation of the periodic conference of state parties to exchange the experience of implementation and the CRPD Committee’s mandate of receiving collective complaints and consulting Disabled People’s Organisations (DPOs).¹⁴¹ Third, the focus of fostering domestic change is explicit in Article 33 and Article 4. In addition to the requirement in regard to the domestic implementation monitoring mechanism,¹⁴² Article 33 requires state parties to establish “one or more focal points” within government and “give due consideration to the establishment or designation of a coordination mechanism”,¹⁴³ urging state parties to have a coordinated framework to make changes at the domestic level.¹⁴⁴ This mandate is supported by Article 4(3) requiring persons with disabilities be involved “in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities.”¹⁴⁵

¹³⁴ See Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Human Rights Law Review 3 (2008).

¹³⁵ See Piers Gooding, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities*, Cambridge University Press, p.21 (2017).

¹³⁶ See Michael Ashley Stein & Janet E Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 Human Rights Quarterly 689 (2010).

¹³⁷ See Janet E Lord & Michael Ashely Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 Washington Law Review 449 (2008).

¹³⁸ See Piers Gooding, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities*, Cambridge University Press, p.49 (2017).

¹³⁹ See Cliona De Bhailis & Eilionóir Flynn, *Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD*, 13 International Journal of Law in Context 6 (2017). Also see Tina Minkowitz, *CRPD Advocacy by the World Network of Users and Survivors of Psychiatry: The Emergence of an User/Survivor Perspective in Human Rights*, Social Science Research Network (2012), SSRN Scholarly Paper ID 2326668, <https://papers.ssrn.com/abstract=2326668> (accessed on August 5, 2018).

¹⁴⁰ See Michael Ashley Stein & Janet E Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 Human Rights Quarterly 690 (2010).

¹⁴¹ See Michael Ashley Stein & Janet E Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 Human Rights Quarterly 696-697 (2010).

¹⁴² See CRPD, Article 33(2).

¹⁴³ See CRPD, Article 33(1).

¹⁴⁴ See Gerard Quinn, *Resisting The “Temptation of Elegance”: Can The Convention On The Rights Of Persons With Disabilities Socialise States To Right Behaviour?*, The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives, Brill, p.215 (2009).

¹⁴⁵ See CRPD, Article 4(3).

(b) Relevant Provisions to Involuntary Mental Health Interventions

Article 14(1) of the CRPD requires state parties ensure that persons with disabilities enjoy the right to liberty and security on an equal basis with others and “that the existence of a disability shall in no case justify a deprivation of liberty”.¹⁴⁶ Although involuntary mental health detention is not explicitly mentioned, Flynn argues it “must be read to prohibit all deprivations of liberty where the existence of disability is a factor in justifying the detention”.¹⁴⁷ It means any criterion of deprivation of liberty that takes disability into account is considered arbitrary and, therefore, impermissible.¹⁴⁸ According to this strict reading, a combination of disability and dangerousness or necessity for treatment, which is widely adopted by most mental health laws in the world, is not permitted by the CRPD.¹⁴⁹

In regards to involuntary treatment and informed consent, the CRPD provides in Article 25 that state parties “recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability” and “[r]equire health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care”.¹⁵⁰ It is significant that informed consent is explicitly required as an element of the right to health in international human rights law.

Article 15 and Article 17 are also relevant here. Article 15 provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.¹⁵¹ Article 17 provides that “[e]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others”.¹⁵² Treatments without the informed consent of persons with disabilities, especially intrusive and irreversible medical treatments, may violate the right to integrity and the right to freedom from torture or cruel, inhuman or degrading treatment.¹⁵³

Most importantly, Article 12 provides the core of the “paradigm shift” that underpins all these provisions. Article 12 requires state parties to “recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and to provide access to support in exercising their legal capacity.¹⁵⁴

The CRPD Committee, the monitoring body set up in accordance with Article 34, elaborates the close connection between Article 12 and above Articles addressing involuntary detention and treatment in the General Comment No.1 on Article 12 Equal recognition before the law, which is not legally binding but has a force of authoritative interpretation: “The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States parties must refrain from such practices and establish a

¹⁴⁶ See CRPD, Article 14.

¹⁴⁷ See Eilíonóir Flynn, *Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches*, 2016 International Journal of Mental Health and Capacity Law 81 (2017).

¹⁴⁸ See CRPD Committee, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities The right to liberty and security of persons with disabilities*, para.13 (September 2015).

¹⁴⁹ Ibid.

¹⁵⁰ See CRPD, Article 25.

¹⁵¹ See CRPD, Article 15.

¹⁵² See CRPD, Article 17.

¹⁵³ See Valentina Della Fina et al., *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, pp.307-337 (2017).

¹⁵⁴ See CRPD, Article 12 (2) (3).

mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.”¹⁵⁵

The General Comment continues to provide that: “States Parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. In conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities.”¹⁵⁶

Acknowledging that “[f]orced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities”, the CRPD Committee also requires state parties to abolish law and policy allowing or perpetrating forced treatment that violates all the rights proscribed by Article 12, 15, 16 and 17.¹⁵⁷

The position of abolishing involuntary mental health interventions, with other forms of substituted decision-making, has been repeated by the Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities - The right to liberty and security of persons with disabilities.¹⁵⁸ The CRPD Committee has also continued recommending state parties to do so in its concluding observations, among which the recommendation to China is quoted at the beginning of the article.

Moreover, this seemingly absolutist approach has also been accepted by some other UN human rights bodies. The most recent report by the Special Rapporteur on the rights of persons with disabilities urges state parties to abolish “[m]ental health legislation, as long as it authorizes and regulates the involuntary deprivation of liberty and forced treatment of persons based on an actual or perceived impairment (i.e. diagnosis of “mental health condition” or “mental disorder”)).”¹⁵⁹ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also calls to “[i]mpose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs such as neuroleptics, the use of restraint and solitary confinement, for both long- and short-term application.”¹⁶⁰ The UN Working Group on Arbitrary Detention also adopted its report in 2015, referring to States’ obligation to prohibit involuntary mental health interventions.¹⁶¹

However, not all UN human rights bodies adopt the approach of abolition. The Human Rights Committee states in its General Comment No. 35 that “[t]he existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate

¹⁵⁵ See CRPD Committee, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1, para.40 (Apr.11, 2014).

¹⁵⁶ See CRPD Committee, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1, para.41 (Apr.11, 2014).

¹⁵⁷ See CRPD Committee, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1, para.42 (Apr.11, 2014).

¹⁵⁸ See CRPD Committee, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities The right to liberty and security of persons with disabilities*, para.13 (September 2015).

¹⁵⁹ See Human Rights Council, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/HRC/40/54, para.64 (Jan.11, 2019).

¹⁶⁰ See Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, para.81 (Feb.1, 2013).

¹⁶¹ See Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*, WGAD/CRP.1/2015, para.56 (May 4, 2015).

procedural and substantive safeguards established by law.”¹⁶² Flynn points out that the Guidelines on CRPD Article 14 and the report of the UN Working Group on Arbitrary Detention are published later than the Human Rights Committee General Comment No. 35, which may solve the technical problem of the application of human rights law discrepancy between different interpretations.¹⁶³ The obvious gap of different understanding among different UN human rights bodies reflects the controversy of the requirement of abolition. The division of attitudes may also reflect on the potential sectional interests. As the next section will suggest, the groups of users and survivors of psychiatry have invested enormous efforts in advocating that the UN bodies accept the approach of abolition,¹⁶⁴ whilst the governments of most, if not all, state parties and psychiatrists strongly oppose abolition.

(c) A Summary

As explained above, the relevant CRPD provisions and interpretations provided by the CRPD Committee represent a seemingly extreme standard regarding involuntary mental health interventions. Compared to the human rights mechanism prior to the CRPD under which, given certain conditions are met, such interventions are subject to safeguards but still permissible, the CRPD approach requires an overall abolition.

The different positions presented by the CRPD approach and the approach of the ECHR or the Human Rights Committee highlight the tension among different stakeholders. The next section will examine the major criticism about the CRPD approach and how scholars with different backgrounds attempt to reconcile the opposing viewpoints.

4. Criticism to the CRPD Approach and the Possible Steps Forward

Section 2(c) of this Article reveals that the revolutionary “paradigm shift” proposed by the CRPD while this section considers the criticism of the shift and the efforts to find a middle ground. As will be suggested below, the conflict between people for and against the so-called radical and unrealistic approach is in fact limited to the necessity of maintaining the involuntary mental health interventions as a last resort. Nevertheless, the consensus is clear that the access to less restrictive measures should increase and support be placed in the community. In other words, the autonomy of persons with mental health issues in the decision-making of mental health treatment should be maximized. In doing so, the section attempts to argue that the significance of the debate is not about whether a piece of law providing involuntary mental health interventions as a last resort is CRPD-compliant, since the answer given by the CRPD Committee is a clear no. The importance, however, is to learn from the consensus which could potentially benefit further research and facilitate meaningful changes in both law reform and practice.

As briefly mentioned earlier, a number of state parties issued declarations, understandings and reservations when they ratified the CRPD even before the publication of the General

¹⁶² See Human Rights Committee, *General comment No. 35 Article 9 (Liberty and security of person)*, CCPR/C/GC/35, para.19 (Dec.16, 2014).

¹⁶³ See Eilionóir Flynn, *Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches*, 17 *International Journal of Mental Health and Capacity Law* 84 (2017).

¹⁶⁴ See Tina Minkowitz, *CRPD Advocacy by the World Network of Users and Survivors of Psychiatry: The Emergence of an User/Survivor Perspective in Human Rights*, Social Science Research Network (2012), SSRN Scholarly Paper ID 2326668, <https://papers.ssrn.com/abstract=2326668> (accessed on August 5, 2018).

Comment No. 1.¹⁶⁵ Australia declared its understanding that “the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary as a last resort and subject to safeguards”.¹⁶⁶ When the Committee was calling for comments and contribution to the draft of the General Comment No.1, a number of states party to the CRPD, civil society organisations and academic institutions submitted their statement, many of which had critical views.¹⁶⁷ For example, the Federal Government of Germany¹⁶⁸ and the Essex Autonomy Project¹⁶⁹ explicitly disagreed that all forms of substituted decision-making, which means one’s decision is made by someone else, should be abolished.

The controversy over the CRPD approach during the drafting negotiations is well documented.¹⁷⁰ De Bhailís and Flynn observe that the literature on Article 12 after the General Comment No. 1 has turned its focus to “either plotting its practical implementation or criticising the Committee’s interpretations and providing alternatives”.¹⁷¹ For example, the Netherlands made a number of declarations about involuntary interventions upon its ratification in 2016. The Dutch government declared its understanding that “the Convention allows for compulsory care or treatment of persons, including measures to treat mental illnesses, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards”.¹⁷² It also interprets Article 12 as “restricting substitute decision-making arrangements to cases where such measures are necessary, as a last resort and subject to safeguards”.¹⁷³

Given these critical attitudes, it is particularly worth noting that the CRPD requirement of abolishing involuntary mental health interventions does not imply that people in crisis should be abandoned and left without treatment or support. On the contrary, the CRPD Committee stressed that supported decision-making, a set of alternative and non-coercive decision-making support, should be invested in and made available and accessible to people in need. Its application in mental health laws has attracted increasing attention from both academia and

¹⁶⁵ See Declarations and Reservations of the CRPD, United Nations Treaties Collections, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV15&chapter=4&lang=_en&clang=_en (accessed on August 8, 2018).

¹⁶⁶ Ibid.

¹⁶⁷ See the submission from Norway, *Law Society of Scotland, and Essex Autonomy Project* for example, Draft General Comment on Article 12 of the Convention - Equal Recognition before the Law & Draft General Comment on Article 9 of the Convention – Accessibility, <https://www.ohchr.org/en/hrbodies/crpd/pages/dgcarticles12and9.aspx> (accessed on August 8, 2018).

¹⁶⁸ See Federal Republic of Germany, German Statement on the Draft General Comment on Article 12 CRPD, Draft General Comment on Article 12 of the Convention - Equal Recognition before the Law & Draft General Comment on Article 9 of the Convention – Accessibility (Feb.20, 2014), <https://www.ohchr.org/Documents/HRBodies/CRPD/GC/FederalRepublicOfGermanyArt12.pdf> (accessed on February 5, 2019).

¹⁶⁹ See Wayne Martin et al., *Response to the Committee’s Draft General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities*, Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law & Draft General Comment on Article 9 of the Convention – Accessibility (Feb. 21, 2014), <https://www.ohchr.org/Documents/HRBodies/CRPD/GC/EAPArt12.doc> (accessed on February 5, 2019).

¹⁷⁰ See Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future*, 34 Syracuse Journal of International Law and Commerce 429 (2006). See Valentina Della Fina et al., *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, pp.263-280 (2017).

¹⁷¹ See Cliona De Bhailís & Eilíonóir Flynn, *Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD*, 13 International Journal of Law in Context 6 (2017).

¹⁷² See Declarations and Reservations of the CRPD, United Nations Treaties Collections, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV15&chapter=4&lang=_en&clang=_en (accessed on August 8, 2018).

¹⁷³ Ibid.

policymakers.¹⁷⁴ In other words, under the new regime endorsed by the CRPD Committee, the state parties have an obligation to do more, not less. As this section will suggest below, the confidence in the effectiveness of these alternative and non-coercive measures holds the key to the debate.

This section first considers the major criticisms. Subsequently, it will examine the different proposals of how to work with the CRPD and the controversy around it, in order to facilitate meaningful reforms in mental health services and law.

(a) Criticism to the CRPD Approach

From the declarations, understandings and reservations quoted earlier in this section, it appears that the state parties recognise the value of supported decision-making arrangements and the necessity of reducing involuntary interventions in mental health service. The persistence of maintaining involuntary interventions and substituted decision-making measures as the ‘last resort’ is arguably because the state parties, as well as many scholars, find the non-coercive paradigm impractical and unrealistic.

Acknowledging the purpose of the CRPD in maximising autonomy, Dute argues that an overall abolition of substituted decision-making, including involuntary mental health intervention, is “definitely a step too far”.¹⁷⁵ This judgement is based on the “obvious reality to Dute that there are always people unable to exercise legal rights even with the most comprehensive support”.¹⁷⁶ Dute believes that to abolish substituted decision-making will lead to “unworkable situations, especially in healthcare, where complicated and sometimes far-reaching decisions must be made”.¹⁷⁷

Critical commentators like Dute often base their doubts on the effectiveness of supported decision-making arrangements. The so-called “hard cases” are usually raised to illustrate difficulties in applying supported decision-making in real life and the necessity of keeping substituted decision-making usually on the basis of “Best Interest Principle”.¹⁷⁸ A typical “hard case” may be a person in a coma but a medical decision is urgently needed.¹⁷⁹ Admittedly, the General Comment No.1 contains a solution to this scenario: ‘the “best interpretation of will and preferences” must replace the “best interests” determinations.’¹⁸⁰ When informed consent is impossible to get from the person concerned, or his or her expressed will and preference conflict with each other, an external person should be appointed to achieve the best interpretation of the will and preference of the person concerned. This best interpretation should form the basis for a decision in that situation and is subject to safeguards prescribed in CRPD Article 12.

¹⁷⁴ See Piers Gooding, *Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law*, 20 *Psychiatry, Psychology and Law* 431 (2013).

¹⁷⁵ See Joseph Dute, *Should Substituted Decision-Making Be Abolished?*, 22 *European Journal of Health Law* 315, 318 (2015).

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ The Best Interest Principle is usually adopted when a substitute decision-maker is appointed for the person concerned to make decision for him or her on the basis of what the substitute decision-maker believe as the best interest of the person. For example, see *Mental Capacity Act Code of Practice*, Guidance: Mental Capacity Act Code of Practice, published on July 22, 2013, Last updated on January 12, 2016, www.gov.uk/government/publications/mental-capacity-act-code-of-practice (accessed on April 13, 2020).

¹⁷⁹ See Piers Gooding, *Navigating the “Flashing Amber Lights” of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns*, 15 *Human Rights Law Review* 45 (2015).

¹⁸⁰ See CRPD Committee, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1, para.40 (Apr.11, 2014).

However, New Zealand states in its submission to the draft of General Comment No. 1 that “it is conceivable that effective supports in this context will be indistinguishable from substitute decision making”, which essentially questions how the best interpretation of one’s wills and preferences differs from the principle of best interest in practice.¹⁸¹ The Law Society of Scotland also shared the same doubt. It questioned the difference between the “best interpretation of will and preferences” and the substituted judgement of “the choice or decision which, it is believed, the adult would have arrived at if able to make and communicate a choice or decision in the matter in question”.¹⁸²

To some commentators, abolishing involuntary interventions is not only unrealistic, but also undesirable. Dute argues that the over-emphasis on autonomy will go against the principle of protecting vulnerable people “against the consequences of irresponsible decisions they may take and against possible abuse by others”.¹⁸³ Freeman and colleagues argue that the CRPD Committee’s interpretation “threatens to undermine critical rights for persons with mental disabilities, including the enjoyment of the highest attainable standard of health, access to justice, the right to liberty, and the right to life” and will also worsen the social stigma and discrimination against people with mental health issues.¹⁸⁴ World Psychiatry, an official publication of the World Psychiatric Association, also published an editorial, calling the CRPD “a problem child of international human rights law” that will hurt “the very people it purports to help”.¹⁸⁵

In addition to the concerns above, the claimed radical position of abolition, as required by the CRPD Committee, appears to its critics to be deterring law reforms in the states party to the CRPD. Freeman and his colleagues write that the states are now “facing intense pressure to implement far reaching changes that challenge fundamental principles of mental health care and treatment hitherto widely accepted as reflecting a human rights perspective”.¹⁸⁶ However, even under this “intense pressure” Dawson observes no evidence that state parties are following the Committee’s “more radical suggestions” in mental health law reforms and, therefore, a ‘more realistic interpretation’ should be adopted to guide future reform.¹⁸⁷

(b) Searching for a Middle Ground

Facing the heated debate around the legitimacy of involuntary interventions and substituted decision-making, state parties and scholars working in this field have sought to find a middle ground. A conceivable middle ground could address the concerns of both sides of supporting and opposing the CRPD requirement, thereby facilitating progressive reforms in law, policy and practice.

¹⁸¹ See New Zealand, Submission to the CRPD Committee on the Draft General Comment on Article 12 CRPD, United Nations Treaties Collections (Mar.11,2014). https://www.ohchr.org/Documents/HRBodies/CRPD/GC/NewZealand_art12.doc (accessed on August 8, 2018).

¹⁸² See Law Society of Scotland, *Submission to the CRPD Committee on the Draft General Comment on Article 12 CRPD*, United Nations Treaties Collections (November 2013), www.ohchr.org/Documents/HRBodies/CRPD/GC/LawSocietyOfScotlandArt12.doc (accessed on August 8, 2018).

¹⁸³ See Joseph Dute, *Should Substituted Decision-Making Be Abolished?*, 22 *European Journal of Health Law* 315, 318 (2015).

¹⁸⁴ See Melvyn Colin Freeman et al., *Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities*, 2 *The Lancet Psychiatry* 844 (2015).

¹⁸⁵ See Paul S Appelbaum, *Saving the UN Convention on the Rights of Persons with Disabilities - from Itself*, 18 *World Psychiatry* 1 (2019).

¹⁸⁶ *Ibid.*

¹⁸⁷ See John Dawson, *A Realistic Approach to Assessing Mental Health Laws Compliance with the UNCRPD*, 40 *International Journal of Law and Psychiatry* 70 (2015).

Some scholars have attempted to reconcile the tension by putting the CRPD's new requirement into the development history of mental health law and policy. Gooding observes that the functions of mental health laws in the common-law tradition have remained unchanged:¹⁸⁸ protecting the public from the potential harm from people with mental health issues, obtaining access to the services these people need, and safeguarding user's civil rights.¹⁸⁹ In light of this account of continuity and changes in the development of mental health laws, instead of denying the necessity, the CRPD merely requires an alternative arrangement to the coercive services in the pre-CRPD regime, namely supported decision-making.¹⁹⁰ Therefore, as discussed in the last sub-section on criticism towards the CRPD, the problem largely lies in the effectiveness of these non-coercive measures perceived by policy and lawmakers.

For example, Dute believes the practice of Personal Ombudsman in Sweden, a well-known non-coercive practice in mental health, and similar arguably CRPD-compliant arrangements are "expensive and time-consuming" and impossible to be applied widely.¹⁹¹ A determination of the effectiveness and feasibility of these arrangements are beyond the scope of this study.¹⁹² However, it is worth noting that, in his review of the history of mental health laws, Gooding refers to the resistance to informed consent among medical professionals and scholars in the past, drawing on its similarity with the objecting comments to the CRPD nowadays. Gooding quotes Beauchamp, a leading U.S. scholar in informed consent ethics and law, who observes that in the mid-1970s "[p]hysician saw the demands of informed consent as impossible to fulfil, at least in some cases, inconsistent with good practice care".¹⁹³

Another effort of this kind is to develop a system that could provide necessary intervention in emergency situations to save lives but is delinked from any disability-specific criteria. Some scholars argue for a moderate approach to making existing law and policy CRPD-compliant. For example, the Essex Autonomy Project, an interdisciplinary research team based in the University of Essex (UK), argues that the Mental Capacity Act 2005 (MCA) of England and Wales could become CRPD-compliant with certain minor amendments.¹⁹⁴ They argue that the functional test, a method of identifying mental capacity, becomes CRPD-compliant if the scope of application extends to everyone from the original disability-specific group of persons who lack mental capacity "because of an impairment of, or a disturbance in the functioning of, the mind or brain".¹⁹⁵ Against the interpretation offered in the General Comment No. 1, they believe the amended version will free the MCA from the accusation of direct discrimination, as the amended standard is for everyone with and without disability and therefore 'on an equal

¹⁸⁸ See Piers Gooding, *Change and Continuity: A Historical Overview of the Significance of the United Nations Convention on the Rights of Persons with Disabilities to Mental Health Law*, 20 *European Journal of Current Legal Issues* (2014), webjcli.org/article/view/367 (accessed on August 2, 2018).

¹⁸⁹ See Brenda Hale, *Justice and Equality in Mental Health Law: The European Experience*, 30 *International journal of law and psychiatry* 18 (2007).

¹⁹⁰ See Piers Gooding, *Change and Continuity: A Historical Overview of the Significance of the United Nations Convention on the Rights of Persons with Disabilities to Mental Health Law*, 20 *European Journal of Current Legal Issues* (2014), webjcli.org/article/view/367 (accessed on August 2, 2018).

¹⁹¹ See Joseph Dute, *Should Substituted Decision-Making Be Abolished?*, 22 *European Journal of Health Law* 315, 318 (2015).

¹⁹² There has emerged research that examines the effectiveness of non-coercive alternative mental health services, see Piers Gooding & Bernadette McSherry, *Alternatives to Compulsory Detention and Treatment and Coercive Practices in Mental Health Settings*, 26 *Journal of Law and Medicine* 300 (2018).

¹⁹³ See Tom L. Beauchamp, *Informed Consent: Its History, Meaning, and Present Challenges*, 20 *Cambridge Quarterly of Healthcare Ethics* 515, 516 (2011).

¹⁹⁴ See Wayne Martin et al., *Achieving CRPD Compliance*, Essex Autonomy Project (2014), repository.essex.ac.uk/13624/1/EAP-Position-Paper-FINAL-copy.pdf (accessed on November 14, 2015).

¹⁹⁵ *Ibid.*

basis with others’ as suggested by the CRPD Article 12.¹⁹⁶ Similar reasoning is also adopted in the proposal of fusing legislation of mental health and capacity law. For example, Dawson’s proposal of a “more realistic interpretation” reflects the understanding that using mental capacity as the basis for substituted decision-making is disability-neutral and therefore CRPD-compliant.¹⁹⁷ This approach echoes the proposal of the functional approach of legal capacity,¹⁹⁸ which is rebutted by the General Comment No.1.

However, there are other scholars who believe the moderate approach is insufficient¹⁹⁹ and, therefore, propose more comprehensive legal reforms.²⁰⁰ Relying on the position held by the CRPD Committee in the General Comment No.1 that the functional test is discriminatory in nature, Flynn and Arstein-Kerslake argue that it should be possible to develop a truly disability-neutral basis for intervention.²⁰¹ For example, state intervention should be ‘situation specific’ and only permitted in cases of ‘imminent and grave harm’, rather than population specific and far-reaching in every aspect of life.²⁰²

Lastly, there are also proposals that the access, quality and regulation over voluntary mental health service should be improved even when the involuntary approach is still in place. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health published a comprehensive report in 2017, analysing the power imbalance in the traditional biomedical mental health services.²⁰³ Instead of following many other UN human rights bodies that call for abolishing involuntary interventions overall, it adopts a pragmatic approach to giving recommendations. The report recommends states and other relevant stakeholders to explore and scale up investment in non-coercive alternative service models, to redirect resources that used to be put in institutional care into community-based care, and to invest in psychosocial services to empower users and respect their autonomy.²⁰⁴ In short, the Special Rapporteur only recommends states to “[t]ake targeted, concrete measures to radically reduce medical coercion and facilitate the move towards an end to all forced psychiatric treatment and confinement”.²⁰⁵

Similarly, McSherry also proposes a shift of focus into voluntary provisions that could potentially gain access to mental health service and aid the enjoyment of the highest attainable standard of mental health.²⁰⁶ This proposal is based on the context in Australia and in many other developed countries where most service users are voluntary, the definition of which may

¹⁹⁶ Ibid.

¹⁹⁷ See John Dawson, *A Realistic Approach to Assessing Mental Health Laws Compliance with the UNCRPD*, 40 International Journal of Law and Psychiatry 70 (2015).

¹⁹⁸ See Mary Keys, *Legal Capacity Law Reform in Europe: An Urgent Challenge*, in Gerard Quinn and Lisa Waddington, eds., *European Yearbook of Disability Law*, Intersentia, Vol.1, p.59 (2009).

¹⁹⁹ See Amita Dhanda, *Universal Legal Capacity as a Universal Human Right*, in Michael Dudley et al., eds., *Mental Health and Human Rights*, Oxford University Press, p.177 (2012).

²⁰⁰ See Piers Gooding & Eilíonóir Flynn, *Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?*, 4 Laws 245 (2015). Eilíonóir Flynn, *Mental (in)Capacity or Legal Capacity: A Human Rights Analysis of the Proposed Fusion of Mental Health and Mental Capacity Law in Northern Ireland*, 64 Northern Ireland Legal Quarterly 485 (2013).

²⁰¹ See Eilíonóir Flynn & Anna Arstein-Kerslake, *State Intervention in the Lives of People with Disabilities: The Case for a Disability-Neutral Framework*, 13 International Journal of Law in Context 39 (2017).

²⁰² Ibid.

²⁰³ See Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/35/21, (Mar.28, 2017).

²⁰⁴ Ibid.

²⁰⁵ See Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/35/21, para. 95(f) (Mar.28, 2017). Emphasis added.

²⁰⁶ See Bernadette McSherry, *The Right of Access to Mental Health Care: Voluntary Treatment and the Role of Law*, in Bernadette McSherry and Penelope Weller, ed., *Rethinking Rights-Based Mental Health Laws*, Hart Publishing, p.379 (2010).

be in question, but mental health laws only focus on involuntary measures.²⁰⁷ McSherry writes: “If mental health laws shift the focus more towards voluntary admission and treatment rather than focusing solely on involuntary admission and treatment, then there is at least a possibility that adequate resourcing of services and a reduction in counter-therapeutic coercive practices may follow.”²⁰⁸

(c) A Summary

This section addresses the main criticism of the ‘radical’ and “unrealistic” interpretation of CRPD in relation to involuntary mental health interventions and substituted decision-making. It also reviews the efforts in reconciling the opposing positions of the debate. One of the most fundamental disagreements may rest on the effectiveness and feasibility of non-coercive measures, which takes time to build an evidence-based case for. The mindset of practitioners and policy and lawmakers also takes time to change. Relying on the report of the Special Rapporteur on the right to health, what state parties could do, before the final abolition of involuntary mental health interventions as required by the CRPD Committee is then addressed.

The point is that a clear consensus of developing non-coercive services and reducing the reliance on involuntary measures is evident, given the enormous criticism towards the CRPD approach. Accordingly, since they point to the same direction of maximising autonomy and developing non-coercive services, the scholarly attempts of finding a middle ground merit serious consideration for the purpose of assessing the MHL.

5. Conclusion

The article has reviewed the “permitted but safeguarded” approach in regulating coercive services in the MI Principles and ECHR case-law, the “radical and unrealistic” requirement of freedom from involuntary mental health interventions provided by the CRPD, and the tension between the two. As addressed earlier, the position of abolishing involuntary mental health interventions and substituted decision-making overall is hotly contested. It has been strongly welcomed and promoted by certain groups, for example UN human rights bodies²⁰⁹ and survivor groups,²¹⁰ but equally strongly opposed by medical professionals and scholars.²¹¹ Given the debate, it is the reality that no state party has achieved CRPD-compliance in this regard. However, as argued in the article, this is exactly why we should learn from the debate about all the legitimate concerns, beyond the narrow focus on the permissibility of the involuntary interventions. Nevertheless, an important consensus is still identifiable: the autonomy of persons with mental health issues should be maximised and coercive interventions should be avoided when possible by increasing the access to non-coercive, community-based mental health services and exploring alternative forms of support.

²⁰⁷ See Bernadette McSherry, *The Right of Access to Mental Health Care: Voluntary Treatment and the Role of Law*, in Bernadette McSherry and Penelope Weller, ed., *Rethinking Rights-Based Mental Health Laws*, Hart Publishing, p.395 (2010).

²⁰⁸ Ibid.

²⁰⁹ See Section 3.2 of this Article.

²¹⁰ See, for example, Tina Minkowitz, *Why Mental Health Laws Contravene the CRPD—An Application of Article 14 with Implications for the Obligations of States Parties*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928600 (accessed on December 19, 2015); and Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Psychiatric Interventions*, 34 *Syracuse Journal of International Law and Commerce* 405 (2006).

²¹¹ See, for example, Paul S Appelbaum, *Protecting the Rights of Persons with Disabilities: An International Convention and Its Problems*, 4 *Psychiatric Services* 366 (2016).

Nonetheless, given the clear consensus discussed above, the power imbalance in the mental health services is believed by many to be a primary barrier to meaningful reform.²¹² In other words, real change is unlikely to happen unless the power structure that routinely denies legal capacity of persons with mental health problems or that marginalises their voices has been altered.²¹³ To better understand this polarising issue, further evidence-based research is required.

²¹² See Liz Brosnan, *Power and Participation: An Examination of the Dynamics of Mental Health Service-User Involvement in Ireland*, 6 *Studies in Social Justice* 45 (2012).

²¹³ See Eilíonóir Flynn, et al., eds., *Global Perspectives on Legal Capacity Reform: Our Voices, Our Stories*, Routledge (2018).

The Influence of ASEAN Community on the Integration of South China Sea Policy and China's Countermeasures

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Abstract: In order to seek a long-term and stable solution to the South China Sea disputes between China and claimants of ASEAN in the South China Sea, this paper analyses the ASEAN Community Party, which is composed of the ASEAN Political Security Community (APSC), the ASEAN Economic Community (AEC) and the ASEAN Social and Cultural Community (ASCC) from a legal and historical perspective. In our argument, we emphasize that the integration of ASEAN communities has made considerable progress under the guidance of the ASEAN Charter and the series of legal documents of the three ASEAN communities: in politics (including foreign relations), economy and society, and culture, among others. The policies and laws concerning security integration of regions, including the South China Sea, are included. These policies and laws highlight the integration characteristics of the ASEAN Community's institutions, legal documents and dispute settlement mechanisms on the South China Sea issue. In this regard, China should attach importance to the integration of ASEAN on the South China Sea issue, take the initiative to put forward proposals for cooperation with the ASEAN community, set up an international mechanism for economic cooperation in the South China Sea, or incorporate the South China Sea cooperation into the construction of upgraded version of China-ASEAN FTA, and consider the cooperation of the South China Sea in the light of the Belt and Road initiative. This will bring about long-term regional security and welfare benefits, as well as demonstrate China's regional and international governance capabilities.

Key Words: ASEAN Community; Regional Integration; South China Sea Disputes; Marine Development; International Cooperation

1. Introduction

On January 22, 2013 the Philippines, invoking the provisions of Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (hereinafter referred to as the Convention), unilaterally packaged the dispute between China and the Philippines over territorial and maritime delimitation in the South China Sea as a number of separate issues concerning the interpretation or application of the Convention and filed the arbitration. Subsequently, on February 19, 2013, the Chinese Government explicitly rejected the Philippine arbitration request. The arbitral tribunal ("arbitral tribunal") established at the unilateral request of the Philippines, despite the fact that there was no jurisdiction over disputes in the South China Sea between China and the Philippines, insisted on advancing the arbitration and issued an award on jurisdiction and admissibility on October 29, 2015 ("jurisdictional award"), and another award on substantive issues as well as the issue of residual jurisdiction and admissibility on July 12, 2016 ("final award").

Although only the Philippines initiated arbitration concerning the South China Sea, it has aroused the common concern of ASEAN, including the claimants of the South China Sea. In this concern, China insists that negotiation and consultation are the primary means of peaceful

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settlement of disputes over territorial sovereignty and maritime delimitation. It adopts a dual-track approach, on one hand, contacting with ASEAN members of the claimants of the South China Sea, and on the other getting in touch with ASEAN. China's contacts with ASEAN are based on the situation that ASEAN is a regional organization that appears with one voice and as one centre, which is different from China's previous emphasis on negotiating only with claimants. Nevertheless there are some shortcomings: for example, the deepening ASEAN will be considered in cooperation negotiations so that to make full use of ASEAN's own cooperation foundation, which is also the reality suitable for the ASEAN integration; at the same time, it is conducive to the deep cooperation between China and ASEAN, which is hold by the author as quite necessary and important and can become a long-term mechanism of maintaining stability in the South China Sea. The current situation, however, is that people are more concerned about the basic cooperation on the South China Sea, such as regional security and freedom of navigation.

Other deep-seated issues, such as marine resources, territorial boundaries, marine environment and scientific research are the most controversial points in disputes and have not yet been considered. The adoption of various deep cooperation mechanisms is also very important. For these reasons, it is necessary to conduct research and write relevant papers in this respect. In the research, the author studies and elaborates on ASEAN from the perspective of history and treaty text. She believes that ASEAN has gradually deepened its integration since its establishment in 1967, from regional security to regional economic cooperation and even social and cultural integration. The use of the legal documents, hard law and soft law of regional organizations together has enabled ASEAN to achieve its goal of opening up three communities. The study of ASEAN's integration process is worthy of attention. It will contribute to the cooperation with China in the South China Sea negotiations and in other interconnections and economic cooperation along maritime silk routes. This is because it saves on the negotiation cost and energy and time, and the policy and law implementation cost of cooperation, and jointly promote the in-depth cooperation between China and ASEAN. Thereby achieving long-term stability in East Asia.

ASEAN began to establish the ASEAN Community at the end of 2015.² Since then, the ASEAN Community has initiated the process of deeper integration of ASEAN, and its influence has gradually become more and more important to the surrounding areas, East Asia and even Asia with the integration deepening. It is necessary to study its start-up, legal basis, expected objectives and integration content because the interaction with a country and with a closed regional international organization is totally different. China is not only a country separated from ASEAN Community by a narrow strip of water, but also its close economic and trade partner. The practical significance is extremely obvious and important.

2. The Establishment of ASEAN Community and the Development of Its Integration

(a) The Establishment of ASEAN Community

The start-up of ASEAN Community is based on the legal and organizational foundation of ASEAN. The Association of Southeast Asian Nations (or ASEAN) is a closed regional organization. In 1967, with the efforts of five Southeast Asian countries, the signing of the

² Each pillar has its own Blueprint, and together with the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan Phase II (2009-2015), they form the Roadmap for an ASEAN Community 2009-2015, <http://asean.org/asean-political-security-community/> (accessed on January 17, 2017).

Bangkok Declaration was the symbol of its establishment.³ ASEAN's five stages of development has since then been open up.⁴ When ASEAN was founded during the Cold War, the big powers' competition in Southeast Asia had brought a sense of insecurity. Therefore, the main purpose of the five ASEAN countries to establish regional organizations was to ensure security, amongst the lack of substantive cooperation.

Since the end of the Cold War in 1989, ASEAN had followed the pace of world economic integration and adopted a series of policies and legal measures for economic integration within ASEAN which had also adopted some guiding principles, policies and rules in the diplomatic, military and political fields and had achieved a lot. Since 2003, ASEAN had entered the stage of accelerated development of comprehensive integration, that is, preparing to start the construction of ASEAN Community.

During the 9th ASEAN Summit in 2003, the leaders of member countries voted that ASEAN integration and ASEAN Community should be promoted and established. At the 12th ASEAN Summit in 2007, the leaders of member countries reaffirmed that the establishment of the ASEAN Community should be accelerated, and the timetable had then been explicitly written in the Cebu Declaration, setting the time for its establishment as December 31, 2015. After the accumulation of development from 1967 to 2007, especially the special preparation stage from 2003 to 2007, ASEAN had provided 15 political and security treaties, 25 economic treaties, 3 social and cultural treaties⁵ and 12 important organizational bodies,⁶ which altogether laid the legal and organizational foundation for establishing ASEAN Community and paved the way for its smooth operation.⁷

(b) The Composition and Integration of ASEAN Community

With the support of international treaties and organization mechanisms, ASEAN began to build a legalised ASEAN Community governed by the rule of law. First, it did this through the aid of international treaties. The ASEAN Charter and other important basic documents had been established in the form of treaties, and a large scale of legal instruments had been signed as well.⁸ The ASEAN Community, specifically, had designed three pillars as its base: the ASEAN Political-Security Community (APSC), the ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community (ASCC). For each pillar, ASEAN signed a blueprint for their development. Together with the Initiative for ASEAN Integration (IAI) Strategic Framework and the IAI Work Plan Phase II (2009-2015), ASEAN had formed the

³ Five countries at that time were Indonesia, Malaysia, the Philippines, Singapore and Thailand. They were also altogether called the Father of ASEAN's establishment. About ASEAN: ESTABLISHMENT, <http://www.asean.org/asean/about-asean> (accessed on January 20, 2017).

⁴ Namely, the initial development period from 1967 to 1975; the beginning stage of ASEAN integration from 1976 to 1991; the rapid development period of ASEAN economic integration from 1992 to 1997; the deceleration and recovery period of financial crisis from 1997 to 2003; and from 2003 to now. ASEAN has stepped into the rapid development stage of comprehensive integration. See Yang Li-yan, *Analysis on the ASEAN from International Law*, Guangxi Normal University Press, pp.5-6 (2000).

⁵ See Jean-Claude Piris & Walter Woon, *Towards a rules-based community: An ASEAN legal service*, Cambridge University Press, pp.191-193 (2015).

⁶ See ASEAN Charter, IV Organs, ss7-15, <https://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05-April-2016-IJP.pdf> (accessed on November 11, 2018).

⁷ See ASEAN Summit; ASEAN Coordinating Council; ASEAN Community Councils; ASEAN Sectoral Ministerial Bodies; Committee of Permanent Representatives; National Secretariats; ASEAN Committees in Third Countries and International Organizations, ACTCs; ASEAN Chair; ASEAN Secretariat; ASEAN Foundation; ASEAN Human Rights Body, <https://asean.org/asean/asean-structure/> (accessed on November 8, 2018).

⁸ See ASEAN Legal Instruments, <http://agreement.asean.org/explanatory/show.html> (accessed on July 20, 2017).

road map of ASEAN Community (2009-2015). These documents were also treaties that must be signed by member states.

Second, with the aid of international organization mechanism, the ASEAN had developed towards deep integration: three communities were all concerning political security, economy, society and culture. With ten member states and under the background of political pluralism, economic diversification, culture and religious pluralism, the ten countries had been integrated into one regional organization by the mechanism of international organization. Specifically, according to the documents of the road map mentioned above, it is to promote the development of the three communities with clear value orientation, specific measures with strong operability and accurate timetable, etc.

ASEAN Political Security Community (APSC).⁹ Emphasize three main principles or three characteristics: first, it is a Rules-based Community of Shared Values and Norms; Second, it is a Cohesive, Peaceful and Resilient Region with Shared Responsibility for Comprehensive Security; and Third, it is a Dynamic and Outward-looking Region¹⁰ in An Increasingly Integrated and Interdependent World.¹¹

ASEAN Economic Community (AEC).¹² Economic integration is not only the first important pillar of ASEAN cooperation, but also the most extensive field of ASEAN integration. The goal of AEC is to build ASEAN into a common production base, a single market, as well as a region that fully integrated into the international economy with competitiveness and balanced economy. It emphasizes four pillars: the first is the establishment of a single market and production base; the second is the establishment of a competitive economic region; the third is the fair expansion of the economy; the fourth is the integration into the global economy.¹³ To achieve this goal, the policies or rules covered by international trade agreements had been used to construct a series of indexes for deep integration:¹⁴¹⁵ that is, to follow up the implementation of the established goals through the operable AEC Scorecard mechanism.¹⁶

⁹ The APSC has the following key characteristics, <http://www.asean.org/images/resources/2014/Jul/ASEANAnnualReport20132014.pdf> (accessed on January 28, 2018).

¹⁰ See The ASEAN Economic Community Blueprint, <http://www.asean.org/wp-content/uploads/images/archive/5187-10.pdf> (accessed on April 28, 2018).

¹¹ The value orientation of APSC is to ensure that ASEAN members and their people can live in peace with each other and in a just, democratic and harmonious environment worldwide. To achieve this, APSC shall promote political development linked to democracy, the rule of law and good governance, and respect the principles of promoting and protecting human rights and fundamental freedoms written in the ASEAN Charter. Meanwhile, APSC seeks to strengthen the mutually beneficial relationship between ASEAN and its dialogue partners and friends.

¹² See The ASEAN Economic Community Blueprint, <http://www.asean.org/wp-content/uploads/images/archive/5187-10.pdf> (accessed on April 28, 2018).

¹³ The specific objectives are to reduce business costs by promoting the free flow of goods, services, investment, skilled labour and capital and increasing institutional and people-to-people connections; to narrow the development gaps between countries and ASEAN member countries by drawing up targeted plans; to establish the Regional Comprehensive Economic Partnership (RCEP) by participating in bilateral free trade agreements and joining ASEAN Free Trade Area.

¹⁴ See Gianluca Orefice & Nadia Rocha, *Deep Integration and Production Networks: An Empirical Analysis*, 37 *World Economy* 106, 136 (2014).

¹⁵ Deep integration refers to that trade and investment agreements not only contain tariff rules and traditional non-tariff trade restrictions, but also standardize the business environment in a broader sense. The issues of deep integration include competition policy, investor rights, product standards, public procurement and intellectual property protection, labour standards and environmental protection, etc.

¹⁶ The AEC Scorecard mechanism: The mid-term review of the AEC blueprint develops a survey and scorecard mechanism to assess progresses in implementing the standards and consistency in eight key areas, including automotive and rubber products, electrical and electronic equipment, cosmetics, medical devices, pharmaceutical products, pre-cooked foods, traditional medicine and health care industry. See Ledda, *Issues and Challenges in Standards and Conformance*, 19 *Philippine Journal of Development* 171, 188 (2015). These mechanisms are about

ASEAN Socio-Cultural Community (ASCC). The ASEAN Socio-Cultural Community aims to promote the ASEAN Community to be people-oriented and to assume social responsibility, to pursue the establishment of a common identity, as well as a society full of love and sharing. It is an inclusive, friendly and dynamic society with increasing welfare. Human Development; Social Welfare and Protection; Social Justice and Rights; Ensuring Environmental Sustainability; Building ASEAN Identity; Narrowing the Development Gap.¹⁷ To sum up, the path of integration of ASEAN Community is that the three pillars of political, economic, social and cultural development go hand in hand, or to say, to establish three major communities of political security, economy and social culture at the same time. The subregional community is thus for the first time in Asian history has been established. Comparing with the gradual integration of European Union's economy, politic and judicial society and other fields, it pioneers the creation of a regional integration development model.

The ASEAN Community, which is legalized and governed by rule of law, has adopted an integrated attitude on regional security issues. That is, to build the three communities with the help of soft and hard law of the international mechanism. Among them, there are more hard laws in the economic community and more soft laws in the political community, social and cultural community. However, it is noteworthy that the soft law being adopted by ASEAN Community will gradually promote the process of deepening ASEAN's integration.

3. Integration and Characteristic Analysis of Security Policies and Laws in ASEAN Community Area

(a) Documents on the Legal Framework of the Regional Security Policy of the ASEAN Community

The ASEAN Community's regional security policies and laws are mainly embodied in the following documents: Declaration of ASEAN Concord (1976); Treaty of Amity and Cooperation in Southeast Asia (1976); Declaration of ASEAN Concord II (1976), or Bali Concord II 2003; ASEAN Security Community Plan of Action (2004); ASEAN Charter (2007); ChanCha-am Hua Hin Declaration on the Roadmap for the ASEAN Community, (2009-2015); APSC Blueprint, (2009); APSC Blueprint, (2025).

realizing the goals of the four pillars of the Economic Community: i.e., promoting the free flow of goods, services, skilled labours, investments and capitals by eliminating tariffs and promoting the development of key industries, food, agriculture and forests and so on to achieve the free movements of goods; second, strengthening the economy competitive regional system by constructing competition policies, providing consumptive protection, intellectual property protection and constructing infrastructure; third, to develop small and medium-sized enterprises (SMEs) and promote integration to achieve equitable economic development; fourth, to integrate into the global economic integration. The scorecard mechanism was launched in 2008. It has been implemented in four stages: 2008-2009; 2010-2011; 2012-2013; and 2014-2015. In the meantime, ASEAN has adopted corresponding laws and policies to achieve the objectives of AEC, such as the entry into force of the ASEAN Comprehensive Investment Agreement (ACIA); the entry into force of the Protocols 1, 2, 7 and 9 of the ASEAN Framework Agreement on the Facilitation of Goods in Transit (AFAFGIT); subsuming all measures under the ASEAN Investment Agreement (AIA); temporary Exclusion Lists and Sensitive Lists under the ASEAN Comprehensive Investment Agreement (ACIA) upon entry into force of the ACIA; conducting activities in support of investment promotion and facilitation as scheduled, etc.

¹⁷ Value orientation is to build the community of a caring society to solve the problems of poverty, equality and human development; to develop the ability of managing the social impact of economic integration by building a community based on competitive human resources and with sufficient social security system factors; and to enhance environmental sustainability and sound environmental governance; to strengthen regional social cohesion to move towards ASEAN Community in 2015..

(b) Characteristic of Security Policies and Laws in ASEAN Community Area

Seeing from the number and quality of documents and bounded by the year of 2007, policies and rules on regional security were simple and meagre before 2007, and at that time it was considered that there was no regional security mechanism: the reason was that only resilience was emphasized, that is, the ASEAN Regional Forum was the only place that discussed security which was broader than that in the military field, rather than establishing basic defense agreements or formal alliances, and has therefore the characteristics of separateness,¹⁸ lack of integration and machinery.¹⁹ Some people even hold that there is hardly any regional security mechanism in ASEAN region.²⁰ Regional security policies and rules after 2007 are systematic and detailed. For one it is systematic and comprehensive; the other is the use of a variety of regulatory forms: such as the Charter and a variety of document forms that both including soft law and certain hard law factors and policies. For example, in the programmatic document of ASEAN Charter, the provisions on regional security are as follows:²¹ Paragraph 1 of Article 1, Chapter 1; Paragraph 15; paragraph 2(b), (c), (d) of Article 2, Chapter 1; Article 26, Chapter 8: Unresolved Disputes: If the dispute has not been settled, it must be submitted to the ASEAN Summit for decision after applying the provisions before this Chapter.

In the typical soft law document APSC Blueprint,²² the cooperation in the field of political security based on ASEAN Charter formulating common norms, establishing common mechanisms to achieve ASEAN's goals in the political and security fields are emphasized.²³ A comprehensive approach to security has also been proposed, such as abandoning aggression, threat or use of force by taking peaceful ways to settle disputes under international law; in the ASEAN Political Community Blueprint 2025 (hereinafter referred to as APSC Blueprint

¹⁸ See Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligation in ASEAN*, Cambridge University Press, p.33, p.34, p.36 (2015).

¹⁹ ASEAN cooperation shall take into account, among others, the following objectives and principles in the pursuit of political stability: 1. The stability of each member state and of the ASEAN region is an essential contribution to international peace and security. Each member state resolves to eliminate threats posed by subversion to its stability, thus strengthening national and ASEAN resilience. No.1. *The Declaration of ASEAN Concord*, Bali, Indonesia (February 24, 1976), https://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii (accessed on November 10, 2018).

²⁰ See Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligation in ASEAN*, Cambridge University Press, p.33, p.34, p.36 (2015).

²¹ Paragraph 1 of Article 1, Chapter 1: 1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region; Paragraph 15: To maintain the centrality and proactive role of ASEAN; and paragraph 2 of Chapter 1, Principle 2 provides that: (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity; (c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law; (d) reliance on peaceful settlement of disputes; Chapter 8 Settlement of Disputes Article 26 (Chapter 8, Article 26): unresolved disputes: When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision. See ASEAN Chart.

²² Soft law has the function of coordinating the consensus of sovereign countries at the lowest level, reducing the cost of participating in international exchanges and cooperation, and achieving some minimum common goals or gaining some benefits. It especially has the anticipated function during certain period of time when getting some consensus among countries with large institutional differences. This document is divided into 35 articles of three parts. Clause 6, 7, 8, 9 and 10 of Part II, e.g., the characteristics and elements of the APSC, are all related to regional security ... adhere to the existing ASEAN political documents: the Zone of Peace, Freedom and Neutrality (ZOPFAN), the Treaty of Amity and Cooperation in Southeast Asia (TAC) and the Southeast Asian Nuclear-Weapon-Free Zone Treaty (SEANWFZ), etc, and three key characteristics envisaged for APSC: Emphasizing a rules-based community of shared values and norms; building a community of comprehensive security, or to say, a cohesive, peaceful, stable and resilient region with shared responsibility for comprehensive security.

²³ See Article 7 from APSC Blueprint II: Characteristics and Elements of the APSC. APSC Blueprint, <http://asean.org/storage/images/archive/5187-18.pdf> (accessed on May 3, 2018).

2025),²⁴ which has been regarded as the short-term goal, the contents directly related to regional security are mainly in Part B.²⁵ Especially in part B.6 (B.6.1-B.6.3), and special provision for the South China Sea issue has been provided. It emphasizes the peaceful settling of the current ASEAN practice of continuing close consultation on the South China Sea among ASEAN member countries, including the Declaration on the Conduct of Parties in the South China Sea (DOC) and the Code of Conduct in the South China Sea (COC); enhancing dialogue and consultation on the South China Sea issues; ensuring the full and effective implementation of DOC, including effective monitoring and evaluation of its implementation; strengthening the negotiations between ASEAN and China, and adopting COC as soon as possible to ensure its full and effective implementation.²⁶ Third, the ASEAN Community shall play a greater role on the South China Sea issue. First, it shall directly make a public statement that the South China Sea is related to the ASEAN by adopting the attitude that ASEAN Community has been integrated:²⁷ it shall be held that the South China Sea issue is concerning with the regional peace and stability, as well as the freedom of navigation of food and energy transportation of ASEAN member countries. The South China Sea issue has an important and lasting benefit-based relationship with ASEAN Community.²⁸ Second, ASEAN (ASEAN Community that sets

²⁴ See APSC Blueprint 2025, <http://www.asean.org/wp-content/uploads/2012/05/ASEAN-APSC-Blueprint-2025.pdf> (accessed on May 1, 2018).

²⁵ Article 9: Lists the key elements of a peaceful, secured and stable region: strengthen ASEAN ability to deal with existing and emerging challenges; second, respond to urgent issues or crisis situations affecting ASEAN in an effective and timely manner; third, enhance ASEAN capacity to address non-traditional security issues effectively and in a timely manner; and fourth, resolve differences and disputes by peaceful means, in accordance with the ASEAN Charter and principles of international law. Those means are including refraining from the threat or use of force, adopting mechanisms for peaceful settlement of disputes, strengthening confidence-building measures, promoting preventive diplomatic activities and conflict resolution initiatives; fifth, to maintain South-East Asia as a zone free of nuclear weapons and other weapons of mass destruction. Moreover, to make contributions to the global efforts for disarmament, non-proliferation and peaceful uses of nuclear energy; sixth, to strengthen maritime security and cooperation in ASEAN and other regions by strengthening the ASEAN-led mechanism and complying with internationally recognized maritime conventions and principles. That is, strengthening the mechanism of ASEAN Political Security Community, intensifying ASEAN Defence Ministers' Meeting and conducting strategic dialogue on defense, security issues and practical cooperation. Meanwhile, consolidating ASEAN's core position in the process of ASEAN Defence Ministers' Meeting, enhancing the process of ASEAN Regional Forum, supporting ASEAN Community and strengthening the process of ASEAN Summit. To support the ASEAN Community, to strengthen the ASEAN+3 cooperation framework in support of the ASEAN Community, to respond promptly and effectively to emergencies or crisis affecting ASEAN, to strengthen ASEAN's ability to deal with non-traditional security issues timely and effectively, and to strengthen cooperation in combating transnational crimes, terrorism and drug smuggling and smuggling of small and light weapons, cybercrime, border management and transnational crimes, as well as cooperation of cross-border disaster and emergency management.

²⁶ The Foreign Ministers noticed that ASEAN member countries and China have already reached agreement on the single COC negotiation text and looked forward to announcing the completion of the first reading of the text in 2019 at the ASEAN-China Summit in 2019. ASEAN Foreign Ministry welcomes the strengthening of cooperation with China on the South China Sea, <http://www.sdxnyc.com/xinwen/guonei/201901194539.html> (accessed on January 21, 2019).

²⁷ In addition to organizing events and publishing books, journal articles and book chapters on the South China Sea, CIL research staff have prepared the following research materials on the South China Sea: ASEAN and the South China Sea: Extracts from ASEAN documents on the South China Sea from 1992 to 2011; Text of Joint Development Agreements in Southeast Asia, Gulf of Tonkin, North East Asia and the Timor Sea; Bibliography on Joint Development and the South China Sea, <https://cil.nus.edu.sg/research/ocean-law-policy/>. The website of Centre for Ocean Law, Law School of National University of Singapore (accessed on May 16, 2018).

²⁸ ASEAN Community believes that the issue is not just about the small islands and the vast South China Sea that ASEAN members claim, nor about any individual ASEAN member, but about ASEAN as a whole - having an interest in peace and stability in the region and freedom of navigation over the South China Sea. Most of ASEAN's business, including its members' food and energy deals, passes through the South China Sea. ASEAN and its members enjoy great interests in the South China Sea. This is very important for our security and our economy. ASEAN has an enduring interest in peace and stability in the region and freedom of navigation over the South

up in 2015) has gradually strengthened its integration attitude towards South China Sea issue. That is, bounded on the submission of the South China Sea dispute to arbitration, the integration can be divided into two periods: the first period: from the 1992 ASEAN Declaration on the South China Sea to the 2011 Joint Declaration of the ASEAN Defence Ministers on Strengthening Defence Cooperation of ASEAN in the Global Community to Face New Challenges. During this period, about 58 documents were issued in the name of ASEAN.²⁹

The second stage is from the Huangyan Island Incident, in which Chinese fishermen were harassed by Philippine ship in 2012 and Philippine officially submitted the dispute to the International Tribunal for the Law of the Sea for an arbitration against China on January 22, 2013 to now. During this period, The Association of Southeast Asian Nations (ASEAN) has issued several major documents, such as the ASEAN's Six-point Principles on the South China Sea during the ASEAN Foreign Ministers' Meeting held³⁰ in July 2012,³¹ the 2014

China Sea, for instance, most of ASEAN's business, including its members' trade in food and energy, passes through the South China Sea. ASEAN and its members enjoy great interests in the South China Sea. As we all know, multiple demands in the South China Sea are one of the keys to potential conflicts in this region. See Pavin Chachavalpongpun (ed), *Entering Uncharted Waters? ASEAN and the South China Sea*, Institute of Southeast Asian Studies, Preface (2014).

²⁹ Documents on ASEAN and South China Sea, <http://dongmengxueyuan.gxun.edu.cn/download.jsp?urltype=news.NewsContentUrl&wbtreeid=1502&wbnewsid=2601> (accessed on January 13, 2018).

³⁰ The ASEAN Foreign Ministers' Meeting finally drew to an end after postponed by two weeks: ASEAN held a series of Foreign Ministers' Meetings in Phnom Penh from July 9 to 13, 2012 but for the first time failed to issue the joint communique due to the 'divide over the South China Sea'. And after the meetings, the ASEAN Foreign Ministers' Statement, under the coordination of Indonesian foreign minister Marty Natalegawa, was issued on July 20, in which ASEAN put forward six principles on dealing with the South China Sea dispute. The Six Principles has followed the spirit of the DOC. On July 25, ASEAN Secretary General Surin Pitsuwan also said in an exclusive interview by our reporter that there was nothing new in the Six Principles. Since 1992, all the ASEAN Foreign Ministers' Meetings have dealt with the South China Sea issue in the Joint Communique and have been stressing that all parties should abide by the DOC. The 2009 Joint Communique dealt with the South China Sea in just two paragraphs. But at the 2010 meeting where the United States Secretary of State Hillary Clinton claimed that the South China Sea dispute touched on the American interest, the South China Sea dispute found expression in four paragraphs, which even increased to five paragraphs in 2011. When dealing with the South China Sea dispute, the 2011 Joint Communique added such a statement that we have discussed in depth the latest developments on the South China Sea issue and expressed deep concern about recent events. But it did not explicitly mention any specific event. See Ji Pei-juan, *The ASEAN Foreign Ministers' Meeting Ended After Postponed by Two Weeks*, People's Daily Online (Beijing) (2012), <http://world.people.com.cn/n/2012/0726/c1002-18599380.html> (accessed on January 28, 2018).

³¹ See ASEAN issues 'six principles on the South China Sea issue', <http://news.cntv.cn/20120721/111245.shtml> (accessed on January 27, 2018).

Document,³² the 2015 Document,³⁴ the 2016 Document,³⁵ the 2017 Document³⁶ and the 2018 Document.³⁷ In the Sydney Declaration, a joint statement of the ASEAN-Australia Special Summit held on 18 March 2018, ASEAN again declares the integration of ASEAN's policies on the South China Sea: First, it stresses the importance of entering into substantial negotiations with China on the South China Sea code of conduct (COC) that will be implemented soon. Second, it shows its concern over land reclamations and activities in the area which have eroded trust and confidence and increased tensions. Third, it attaches importance to safeguarding and promoting peace, security, stability, maritime safety and security, the rule-based order and the freedom of navigation in and overflight above the South China Sea. Fourth, it supports the peaceful settlement of disputes, with full respect for principles universally agreed upon and without resorting to the threat or use of force. Fifth, it underlines that non-military activities and self-imposed constraints shall be carried out in accordance with the international principles generally accepted. Sixth, it advocates that the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and relevant standards and recommended practices set by International Civil Aviation Organization (ICAO) and International Maritime Organization (IMO) shall be observed. Last but not least, it hopes to enter into treaties so as to guarantee South China Sea a promising future. For example, ASEAN

³² According to the New Light of Myanmar on May 11, 2014, the foreign ministers, representatives, and senior officials from the ASEAN countries, as well as ASEAN secretary general Le Luong Minh and deputy secretary general Wu Nian Lin attended the Meeting of ASEAN Foreign Ministers at the Naypyidaw international conference centre at 9 am on May 10. Myanmar foreign minister Wunna Maung Lwin chaired the meeting. At the meeting, the foreign ministers exchanged views on ASEAN's external relations, regional, and international affairs, adopted the ASEAN External Relations Guide and issued a statement on the South China Sea issue. The statement said that the ASEAN foreign ministers expressed special concern over the South China Sea issue, which has led to tension in the region. We suggest that relevant countries abide by the 1982 UN Convention on the Law of the Sea, refrain from behaviors that undermine regional stability, refrain from the threat or use of force, and adopt peaceful means to settle disputes. In the statement, ASEAN foreign ministers reaffirmed the importance of maintaining stability, maritime security and freedom of navigation in and over the South China Sea. In addition, ASEAN's six principles on the South China Sea issue, the 15th ASEAN-China leaders' meeting and the joint statement issued on the 10th anniversary of the Declaration on the Conduct of Parties in the South China Sea (DOC) are also of great significance. ASEAN foreign ministers called on ASEAN countries to work together to implement the Declaration on the Conduct of Parties in the South China Sea and promote the formulation of the Code of Conduct in the South China Sea (COC) and required the countries participating in the Declaration on the Conduct of Parties in the South China Sea to build mutual trust, <http://dongmengxueyuan.gxun.edu.cn/download.jsp?urltype=news.NewsContentUrl&wbtreeid=1502&wbnewsid=2601> (accessed on January 13, 2018).

³³ In 2014, China clashed with the Philippines at Second Thomas Shoal and with Vietnam in the Xisha Sea, again triggering tensions in the South China Sea. Hence, at the ASEAN Foreign Ministers' Meeting in May of that year, ASEAN issued a joint statement on the situation in the South China Sea, showed its 'great concern' about the development and emphasized the aspiration to safeguard the peace and stability in South China Sea and the freedom of navigation in and overflight above the South China Sea. And ASEAN expressed its 'serious concern' at all of the regional meetings such as ASEAN Summit and ASEAN Regional Forum in 2015.

³⁴ See Chairman's Statement of the 27th ASEAN Summit Kuala Lumpur, *Our People, Our Community, Our Vision*, pp.106-110 (2015), <http://www.asean.org/wp-content/uploads/2015/12/Final-Chairmans-Statement-of-27th-ASEAN-Summit-25-November-2015.pdf> (accessed on February 2, 2018).

³⁵ See Press Statement by the Chairman of the ASEAN Foreign Ministers' Retreat (2018), <http://asean.org/storage/2018/02/Press-Statement-by-the-Chairman-of-the-ASEAN-Foreign-Ministers-Retreat-clean.pdf> (accessed on March 10, 2018).

³⁶ In 2007 ASEAN Summit was held twice, respectively from April 26 to 29 and from November 13 to 14, and both issued a statement. In both statements, it was put in two or three paragraphs that ASEAN had watched on and took active part in dealing with the South China Sea dispute. And ASEAN's attitude towards the dispute and the solution thereto can also found expression in them. At the 5th ASEAN-U.S. Summit in May of that year, ASEAN not only discussed with the United States on the South China Sea dispute but reaffirmed in the joint statement that it had attached great importance to the dispute.

³⁷ Joint Statement of the Asean-Australia Special Summit, 'The Sydney Declaration', <http://asean.org/storage/2018/03/Joint-Statement-of-the-ASEAN-Australia-Special-Summit-Sydney-Declaration-FINAL.pdf> (accessed on March 20, 2018).

hopes not only to effectively implement the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) but also to conclude a virtually effective COC with China.

It is noteworthy that ASEAN community, as an integration, not only has met with China to discuss the settlement of the South China Sea dispute but has held meetings with the United States and Australia, then issued joint statements and frequently carried out activities. In 2019, the South China Sea dispute has soared above the Six Parties', *i.e.* five countries (the Philippines, Vietnam, Brunei, Malaysia and Indonesia) and China's territorial sovereignty and maritime jurisdiction over part of the Nansha Islands. This has attracted serious attention of the USA, Japan, the United Kingdom, Australia and India, to a large extent,³⁸ because the South China Sea is a major trade route for crude oil, and in 2016, more than 30 percent of global maritime crude oil trade, *e.g.* about 15 million barrels per day (b/d), passed through the Sea.³⁹

4. Analysis on the Characteristics of the ASEAN Community's Integration Policies and Laws on the South China Sea Dispute and Its Impact from the Perspective of International Law

ASEAN Community has made a gesture of integration in terms of the South China Sea dispute, trying to establish a new, regional security legal order, which requires regional state members to transfer part of their sovereignty. Obviously and importantly, ASEAN Community chooses to apply the mechanism-based international laws because international laws can provide countries of this region with the foundation for state power and can promise itself efficiency, prospect and order, which will facilitate the development of regional organizations. And another reason is the universality of the order that international law guarantees- that is- international legal order applies to the entire international community, which is composed of countries, and thus is universal in this case. The international laws are specifically applied as follows:

(a) The Adoption of the Regional International Organization Mechanism ASEAN is a Closed Regional Organization with 10 Member States

This structural feature has provided organizational guarantee for its integration. Since its establishment in 1967, ASEAN has experienced years of development and now pursues the goal of building political, economic and social communities, ushering in "a further integration".⁴⁰ In particular, it is stressed in the ASEAN Charter, which was issued in 2007 and

³⁸ The United States, India, Japan and Australia Formed Quad 2.0. In Huong Le Thu (ed), *New perspectives for the revived concept Views from The Strategist*, Australia Strategic Policy Institute, pp.3-4. <https://www.aspi.org.au/new-perspectives-for-the-revived-quad/> (accessed on February 14, 2019).

³⁹ In 2016, about 90% of the crude oil exported to Japan and South Korea was transported through the South China Sea and more than 90% of the crude oil moved through the South China Sea and then the Straits of Malacca, which, as the shortest sea route between African and the Persian Gulf suppliers and the Asian market, has become one of the world's major oil transportation hotlines. U.S. Energy Information Administration, <https://www.eia.gov/todayinenergy/detail.php?id=36952> (accessed on January 29, 2019).

⁴⁰ At the 9th ASEAN Summit in 2003, the ASEAN Leaders resolved that an ASEAN Community shall be established. At the 12th ASEAN Summit in January 2007, the Leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015 and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015. The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community. Each pillar has its own Blueprint, and together with the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan Phase II (2009-2015), they form the Roadmap for an ASEAN Community 2009-2015, <http://asean.org/asean/about-asean/overview/> (accessed on March 20, 2018).

took effect in 2008, that ASEAN is endowed with legal personality.⁴¹ And the 15 paragraphs concerning the purpose of the ASEAN Charter specially emphasize on the values, economic integration, regional security and democracy, etc, that ASEAN as a whole embodies. The ASEAN Charter and the design of three communities have provided legal guarantee (including soft law and hard law) for ASEAN's entering a new stage and organizational guarantee for the series of statements issued by ASEAN on the South China Sea dispute.

(b) By Virtue of the Multi-dimensionally Further Integration Mechanism

ASEAN's unified statements on the South China Sea dispute are based on its "multi-dimensionally further integration", which means that the ASEAN Community not only has achieved economic integration by virtue of ASEAN Economic Community but also has initiated political-security, social and cultural integration by virtue of political-security community and socio-cultural community. The word "integration" is defined as the unification of rules in a certain field and international organizations tend to be the vehicles for the pursuit of integration. And the European Union (EU) is a pretty typical example. Hence, economic integration achieved by virtue of a regional organization is easily acceptable to all countries.⁴² ASEAN's activities before 2007 more focused on regional economic integration and certainly it, by nature, was inclined to be a regional economic organization.⁴³ But since 2017, ASEAN has moved from economic integration further to political and social integration, showing a "multi-dimensionally further integration". With the help of these mechanisms, ASEAN has developed in a more effective way.

(c) The Deeper Integration of ASEAN's Foreign Relations

Based on the organizational structure and the member states, ASEAN is bounded by treaties. Meanwhile, it establishes relationship with other countries and international organizations through treaties signed in the name of ASEAN. And the treaties can be multilateral or bilateral,⁴⁴ which has contributed to the legalization of internal structure and of external international relations.

(d) The Legalization and Rule of Law Concerning Dispute Settlement with a View to Gradually Change the 'ASEAN Way'

The ASEAN Charter and relevant treaties usually has provided for the mechanism of dispute settlement, laws and policies, which forms the legal basis of settlement and it is also necessary for ASEAN to deal with external conflicts in accordance with the laws and policies. For example, the Treaty of Amity and Cooperation in Southeast Asia (TAC) issued by the ASEAN summit in 1976 has specially provided for the peaceful settlement of disputes, of which some provisions are directed at the conflicts between ASEAN member states while

⁴¹ The ASEAN Charter, ch II Legal Personality, s 3 Legal Personality of ASEAN. See Ingo Venzke & Li-ann Thio, *The Internal Effects of ASEAN External Relations*, Cambridge University Press, p.8 (2016).

⁴² See Yang Li-yan, *Research on Legal System of Regional Economic Integration*, Law Press, pp.1-99 (2004).

⁴³ See Yang Li-yan, *ASEAN Law and Policy and Modern International Law*, Guangxi Normal University Press, p.15 (2000).

⁴⁴ See Ingo Venzke & Li-ann Thio, *The Internal Effects of ASEAN External Relations*, Cambridge University Press, contents part (2016).

others at those between non-ASEAN countries.⁴⁵ And latter documents also provide for relevant procedural rules. For instance, it is underlined that disputes shall be settled through negotiation and then submitted to High Council if negotiations fail to work.⁴⁶ Certainly, countries and regions related to ASEAN also have been invited to join the TAC, including China, the United States, Australia, the EU, India and so on.

After the Cold War, ASEAN accelerated the economic integration in 1996 and its member states signed the 1996 Protocol on Dispute Settlement Mechanism (1996 Protocol) in accordance with the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation. The protocol mainly deals with disputes over the implementation of ASEAN regional economic agreements²⁷ and also applies to economic cooperation agreements previously signed by ASEAN that has not provided for dispute settlement. And similar to TAC, it is also a protocol that deals with disputes between countries but mainly economic disputes. It also provides that disputes shall be settled first in a friendly way. And if this fails, a panel shall be formed to assess the dispute and in accordance with the decision thereof, the dispute shall be submitted to Senior Economic Officials Meeting (AEM).

With the approval of AEM, the party injured may resort to enforcement mechanism, for example, for compensation and suspension of confessions. This change has dual meanings: the first is that ASEAN starts to develop the arbitration mechanism; the second is that the mechanism works and has special effects. Arts 22-28, Chapter 8 of the ASEAN Charter, which was enacted in 2007, has provided for the mechanism of dispute settlement, stressing that disputes in all fields shall be settled in a peaceful manner through dialogue and negotiation and that ASEAN shall establish dispute settlement mechanism in all fields where ASEAN cooperates. Settlement through interpretation or applying decided cases does not apply to ASEAN, mainly according to TAC and its rule of procedure. But ASEAN economic agreements that touch on interpretation and applicable cases are otherwise based on the ASEAN Protocol on Enhanced Dispute Settlement Mechanism. And according to the ASEAN Charter, dispute shall be settled through arbitration and unresolved disputes, after going through all of the procedures that the Charter has provided for, shall be submitted to the ASEAN Summit for decision. Since the ASEAN Charter took effect in 2008, these mechanisms have showed the world ASEAN's new laws and new structure and has become indicators of ASEAN's being a rule-based regional organization.⁴⁷

The foregoing characteristics of the ASEAN Community are worth serious attention when dealing with the South China Sea dispute. That is to say, when making policies on the South China Sea dispute, China needs to take into account the progress of the ASEAN Community in integration, especially the rules concerning the integration of dispute settlement, and the attitudes of relevant powers in Asian-Pacific region.

5. The Interaction between China and the ASEAN Community on the Resolution of the South China Sea Dispute and the Development of China's Stand

⁴⁵ See TAC, Articles 2 (d), 14 and 15, <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/> (accessed on May 10, 2018).

⁴⁶ *2001 Rule of Procedure of high Council of the TAC*, 34th AMM, HaNoi, Vietnam (July 23, 2001), http://asean.org/?static_post=rules-of-procedure-of-the-high-council-of-the-treaty-of-amity-and-cooperation-in-southeast-asia-2 (accessed on May 17, 2018).

²⁷ Arts.1. In the 1996 Protocol's Appendix I on Covered Agreements. Also see Tan Hsien-Li & Bob Beckman et al., *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instrument*, Cambridge University Press, pp.64-65 (2016).

⁴⁷ See Tan Hsien-Li & Bob Beckman et al., *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instrument*, Cambridge University Press, p.84 (2016).

(a) The Interaction between China and the ASEAN Community on the Resolution of the South China Sea Dispute

China has always advocated a peaceful resolution of the South China Sea and has actively took effective measures. First, China has taken an active part in dialogues with ASEAN and its member states on various forums and on various occasions: China started talking to ASEAN in 1991 when the cold war ended and became a full Dialogue Partner of ASEAN in 1996. When the financial crisis swept across Southeast Asia in 1997, China refused to depreciate the RMB thus winning the respect of ASEAN. Since then, ASEAN has accommodated the comfort level of China within various multilateral mechanism. As a result, China and ASEAN has developed their relationship in an all-round way and signed a number of agreements, with several on security, 11 on economic cooperation and 11 on comprehensive cooperation.⁴⁸ Especially after the 2016 South China Sea case, China and ASEAN started to promote a more active interaction. For example, at the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations held on September 7, 2016, the Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the DOC was adopted and 'Four Expectations' for advancing consultations on the COC were put forward.

Compared to that of a previous year, this statement deals with the South China Sea dispute in a balanced and positive manner, which does show that the situation of the South China Sea has cooled down and that China and all ASEAN parties, with great confidence and positive attitude, are committed to implementing it fully and effectively, advancing consultations on the COC and jointly contributing to the peace and stability in the South China Sea.⁴⁹ In May 2017, China signed with Vietnam, one of the claimants, the Sino-Vietnam Joint Communique, which includes the Agreement on Basic Principles Guiding the Settlement of Sea Issues between Vietnam and China. China and Vietnam both agreed to remain committed to the full and effective implementation of the DOC, to work towards the early adoption of a COC based on consensus, and to properly manage their difference about sea-related issue without taking actions that will make the situation more complicated and the dispute more broadly-based, so as to maintain the peace and stability of the South China Sea.

As mentioned above (in Part 2 and 3), ASEAN has always insisted on compliance with international laws, including the Law of the Sea. Especially since the South China Sea Arbitration case in 2016, ASEAN has kept a close watch on the South China Sea dispute and, as an integrated ASEAN community, has taken an active part in instead of remaining neutral on it.⁵⁰ A clear grasp of this point matters in resolving the South China Sea dispute.

At present, the interaction between China and ASEAN and between China and the claimant parties of the South China Sea issue are mainly based on the following documents: The Joint Statement of the Foreign Ministers of ASEAN Member States (July 25, 2016) and China on the Full and Effective Implementation of the DOC was issued;⁵¹ on The ASEAN Foreign Ministers' Meeting in Manila (August 6, 2017) where the Philippines, China and the

⁴⁸ See Shao Jian-ping, *China's Policy towards ASEAN: Misunderstanding and Correct Interpretation*, 1 Foreign Affairs Review 83, 106 (2017).

⁴⁹ See the website of China's Ministry of Foreign Affairs, http://www.fmprc.gov.cn/web/ziliao_674904/1179_674909/default_5.shtml (accessed on May 2, 2018).

⁵⁰ See Zhou Shi-xin, *An analysis of ASEAN's Neutral Policy on the South China Sea issue*, 1 Contemporary Asia-Pacific Studies 100, 123 (2016).

⁵¹ Joint Statement Between China And ASEAN, Full Implementation of the Declaration on the Conduct of Parties in the South China Sea, the website of Lianhe Zaobao, <http://www.zaobao.com/realtime/china/story20160725-645476> (accessed on May 16, 2018).

ASEAN foreign ministers signed the Memorandum of Understanding on the Establishment of a China-ASEAN Centre (revised) and discussed on the implementation of the DOC and the framework of the COC intended for preventing any conflict in the South China Sea. The framework now has not been made public and serves only as a restricted document with a view to providing a relaxed political environment for further negotiation on guidelines and rules.

China and ASEAN both hope that the South China Sea can be in a stable and peaceful environment so as to develop a future of cooperation. In other words, ASEAN believes that the peace and stability in the South China Sea serves the fundamental interests of China, ASEAN countries and international community. It reaffirms that the 2002 DOC is a milestone document that embodies the collective commitment of the Parties to promote peace, stability, mutual trust and confidence in the region, in accordance with the UN Charter and universally recognized principles of international law, including the United Nations Convention on the Law of the Sea 1982 (UNCLOS). It reaffirms that the DOC plays a key role in maintaining regional peace and stability; It will remain committed to the full and effective implementation of the DOC in its entirety and working substantively towards the early adoption of a COC based on consensus.

China also believes that it needs a peaceful and stable South China Sea because its foreign trade largely relies on the navigation in the South China Sea and it can become the biggest victim once the situation in the South China Sea is unstable. Now China has established bilateral negotiation mechanism with Vietnam and the Philippines and will push ahead with consultations on the COC, all of which indicate that the foundation for a stable situation in the South China Sea, to an extent, has developed. China advocates that the South China Sea dispute shall be settled through negotiation and controlled according to rules.

The conclusion of the COC framework gives expression to the rule making. Further on specific mechanism, China and ASEAN countries has held the ASEAN-China senior officials' meetings and the China-ASEAN joint working group meetings on the implementation of the DOC. Besides, China advocates for dispute mitigation through development cooperation so as to create conditions that facilitate the settlement of disputes. The COC does not touch on the issue of territorial sovereignty and maritime delimitation but regulates the dispute. China insists on a dual-track approach for dealing with the South China Sea issue, that is, specific disputes shall be settled through negotiations and consultations by countries directly concerned on the basis of respecting historical facts and international laws. In a word, China and ASEAN countries jointly safeguard the peace and stability in the South China Sea.⁵²

(b) To Establish an Effective Cooperation Mechanism between China and ASEAN in the South China Sea is the Key to Lasting Peace and Stability of the South China Sea

Substantive cooperation between China and ASEAN, such as the China-ASEAN free trade area, has been quite effective, and this effect is still continuing. Facts have proved that an effective free trade area plays an irreplaceable role in regional stability. The South China Sea is a semi-closed sea⁵³ in which both China and ASEAN countries have relevant interests, such

⁵² The framework of the Code of Conduct in the South China Sea is an important new node to improve the South China Sea Rules-Interview with Ouyang Yu-jing, Director General of the Department of Boundary and Ocean Affairs of the Ministry of Foreign Affairs, <https://baijiahao.baidu.com/s?id=1569062356453211&wfr=spider&from=pc> (accessed on May 23, 2018).

⁵³ Articles 122 and 123 of the UN Convention on the Law of the Sea provide for cooperation between coastal states in closed and semi-closed seas. Closed and semi-closed sea areas are generally seen as areas with fewer problems and more cooperation due to the limited number of coastal states. However, due to the competition of strategic power, the state of sovereignty and territory, economic interests and many other factors, closed and semi-closed sea areas may also fall into chaos. The involvement of military forces from outside the areas in closed and

as navigation, fishery, oil and gas, national and regional security and non-traditional security. In addition to the management and control mechanism, it is more important to establish a mechanism that can ensure the lasting stability and stability of this region. The author thinks that the most important are the mutually beneficial and win-win mechanism for economic cooperation and the international cooperation mechanism for non-traditional security.

(i) International economic cooperation mechanism for oil, gas and fishery in the South China Sea

This mechanism is mainly geared to oil and gas resources and fishery resources in the South China Sea. These resources are also the main economic causes of disputes between China and countries directly concerned in the South China Sea. This mechanism can be based on the comprehensive economic cooperation mechanism between China and ASEAN to establish a special cooperation mechanism for oil, gas and fishery, and the relevant mechanisms of the European Coal and Steel Community can be used⁵⁴ for reference.⁵⁵

The European Coal and Steel Community (ECSC) was established through the Treaty of Paris on 18 April 1951 and entered into force on 23 July 1952 for 50 years. According to this treaty, the basic tasks of the European Coal and Steel Community are to establish a single common market for coal and steel, remove relevant tariff restrictions and intervene in the production, circulation and distribution. The prominent sections pertain to the establishment of integrated measures in the field of coal and steel, and the equal participation of all member states as well as the transfer of some sovereignty. Such as the establishment of various organizations:

a. Senior organization whose members are recommended by the member states, eight of whom are appointed by consensus by the six states and another one by the eight members. The senior organization is responsible for making resolutions and offering proposals but does not take on the operating and management of enterprises. This organization has some elements of integration in the European Coal and Steel Community;

b. Council of ministers. Each member state appoints a government minister to form the council of ministers whose responsibility is to coordinate the actions of the senior organization and all member states.

c. Community parliament. It has 87 members, including 18 from France, 18 from the Federal Republic of Germany, 18 from Italy, 10 each from Belgium and the Netherlands, and 4 from Luxembourg. The community parliament shall, through democratic means, exercise supervision over the senior organization, and shall have the power to dissolve the senior organization through an impeachment bill passed by a two-thirds majority.

d. Court. It consists of seven judges serving a term of six years and their appointment must be agreed by all the six states.

The cooperation efforts in oil and gas development in the South China Sea between China and ASEAN can learn from the European Coal and Steel Community. Through the signing of the treaty on international cooperation in the South China Sea, the dual-track system advocated

semi-closed sea areas also creates various tensions. The realistic checks and balances of national interests and state power often make it more difficult to implement regional cooperation mechanism. We should fully recognize the complex situation faced by the cooperation in closed and semi-closed seas. Author's note.

⁵⁴ See Qi Huai-gao, *The European Coal and Steel Community and the Enlightenment to Joint Development in the South China Sea*, 25 Pacific journal 15 (2017).

⁵⁵ Dr. Qi Huaigao held this view in a paper published at the end of 2017. The author had previously stated it in his speech Upgrading China-ASEAN Free Trade Agreement for South China Sea Cooperation in the academic discussion on Moving Beyond Disputes in the South China Sea at the University of New England on August 1, 2016. Author's note.

by China is designed or adopted:⁵⁶ put forward the views on the South China Sea issue on the basis of recognizing ASEAN Community integration; At the same time, consider to establish the leading organizations and benefit distribution mechanism recognized by the claimant states, which may emphasize the equality between countries and transfer some powers at the same time so as to achieve a balance recognized by all. About the marine economic cooperation mechanism in the South China Sea: First, emphasis should be placed on abiding by international laws, including the UN Law of the Sea; second, the signing of treaties of cooperation in the South China Sea between China and ASEAN; third, the designing of related concrete rules:

First, institutionalize the principle of cooperation:

a. there should be a set of institutional rules of authority allocation, which should reflect the balance between sovereignty and sovereignty transfer.

b. a set of rules should be embedded in advance to lay the foundation for the realization of east Asian integration in the future.

c. the cooperation should be divided into several categories and different categories will adopt different decision-making mechanisms.

d. The ultimate goal of institutionalizing cooperation is to link it closely with permanent world and regional peace, economic development and the well-being of people.

e. effective dispute settlement organization should be established.

Second, the designing of organizations, leading organizations:

a. senior organization: a senior organization involving China and ASEAN claimants in the South China Sea can be established to be responsible for making resolutions and offering proposals but not take on the operating and management of enterprises. This organization has some supranational elements of integration in the international cooperation mechanism in the South China Sea;

b. council of ministers. Each ASEAN member concerned with the South China Sea and the relevant countries with close relations with the South China Sea appoint a government minister to form the council of ministers whose responsibility is to coordinate the actions of the senior organization and all member states.

c. supervision organization for international cooperation in the South China Sea. Each member state is allocated some places so as to constitute the membership of this organization. This supervision organization shall, through democratic means, exercise supervision over the senior organization, and shall have the power to dissolve the senior organization through an impeachment bill passed by a two-thirds majority.

d. dispute settlement organization, made up of a number of legal and economic experts serving a term of six years and their appointment must be agreed by all the parties concerned in the South China Sea. This organization is very important.

Third, there should be specific areas and timetables for gradual cooperation:

a. the institutional cooperation of the eight maritime divisions in the law of the sea is included.

b. Cooperation in non-traditional security fields, especially maritime cooperation in fields involving international human rights and international crimes, such as combating drugs and piracy.

c. Ensure innocent passage and transit passage by sea and air.

d. Carry out cooperation in marine scientific research.

⁵⁶ See Han Jing, *China's Dual-Track System for Settling the South China Sea Issue Gets "Likes" - "Dual-Track System" is in line with the Current Situation in the South China Sea and has been communicated to ASEAN countries*, Qianjiang Evening News (Zhejiang, August 12, 2014).

(ii) The possible cooperation in the South China Sea incorporated into the upgraded version of China-ASEAN FTA

At present, the main content of the updated version concerns goods, services, investment and economic technology, whereas the new content mainly includes cross-border e-commerce.⁵⁷ Perhaps the content of economic cooperation in the South China Sea can be added into the upgraded version and the investment factors can be put in cooperation in the South China Sea when upgrading the China-ASEAN investment treaty. Make full use of this operational mechanism to effectively reduce regional tensions. Facts have proved that the FTA is an appropriate and effective mechanism that can be applied and the CPTPP, the FTA recently signed by the EU and the US-Mexico-Canada agreement (USMCA) serves as an example. These are considered giant FTAs and their contents go beyond trade and investment to include regulatory innovation in the global governance system.

(iii) Bilateral international cooperation in the South China Sea under the context of the Belt and Road Initiative

The following pertains to the development of the maritime silk road. As the Chinese Premier said, we need to build a ‘New Land-Sea Corridor’ in the South China Sea and link land and sea to achieve two-way connectivity.⁵⁸ At present, the development of the maritime silk road is on track. For example, the Jakarta-Bandung high-speed railway and the first phase of China-Thailand railway cooperation project will start at the end of 2017. The number of maritime silk road projects has gradually increased, showing that the Belt and Road has become a popular international cooperation platform and international public good.⁵⁹ Therefore, international cooperation in the South China Sea should be based on this major premise. First of all, cooperation should be conducted in projects with strong public welfare, and more public goods in great demand with high technical content, high infrastructure investment and numerous beneficiaries should be provided, such as non-traditional security fields mentioned above. In addition, China can take the lead in building the digital South China Sea, gradually

⁵⁷ See the website of the Ministry of Commerce for the upgraded treaty of the China-ASEAN Free Trade Area: upgrading of China-ASEAN Free Trade Agreement (‘10+1’). http://fta.mofcom.gov.cn/dongmeng_phase2/dongmeng_phase2_special.shtml (accessed on November 13, 2018).

⁵⁸ This is according to a report on Li Keqiang’s visit to Singapore on November 13, 2018, “What practical cooperation did Li Keqiang and his Singaporean counterpart talk about? Four dialogues tell you”. It said: “the New Land-Sea Corridor will link land and sea to achieve two-way connectivity, which will send a signal of peace to the South China Sea area”, http://news.ifeng.com/a/20181113/60157994_0.shtml (accessed on November 13, 2018). During his visit to Singapore, Li Keqiang said the signing of memorandum of understanding on the New Land-Sea Corridor between China and Singapore will send a signal of peace to the South China Sea area: we will build a big commercial corridor, a busy commercial corridor, and that must be supported by peace and stability in the South China Sea. In addition, China and Singapore have also signed an upgraded China-Singapore free trade agreement. Author’s note.

It said: ‘the New Land-Sea Corridor will link land and sea to achieve two-way connectivity, which will send a signal of peace to the South China Sea area.’

⁵⁹ Let’s Work Together to Build a Bright Future of Development and Prosperity - Written on the Occasion of the First Anniversary of Belt and Road Forum for International Cooperation, <https://www.yidaiyilu.gov.cn/xwzx/gnxw/55228.htm> (accessed on May 14, 2018).

promoting cooperation in substantive areas such as oil, gas and fishery.⁶⁰ Finally, the South China Sea will move towards comprehensive international governance.⁶¹

6. Conclusion

The settlement of the South China Sea dispute is a long-term process faced by the countries around the South China Sea and the regional organizations as stakeholders. The implementation of the Indo-Pacific strategy of the United States after April 2018,⁶² China should attach importance to the deepening of ASEAN integration and its integration-style statement on the South China Sea dispute. In settling the South China Sea disputes, we should not only consider the ideas of the claimants in the South China Sea, but also adopt the suggestions made by the increasingly integrated ASEAN community. At the same time, China should have its own plans and suggestions for the settlement of the South China Sea dispute. Following these suggestions made on the basis of the ASEAN Community's integration and through learning from successful examples of international cooperation, we can work with the countries around the South China Sea and the regional organizations of stakeholders to carry out institutional innovation and path innovation, maximize regional welfare and bring peace and order to the region so as to establish an effective international cooperation mechanism for lasting peace and stability in the South China Sea. Of course, it will be difficult for China to

⁶⁰ China has launched the G20 Digital Economy Development and Cooperation Initiative, Belt and Road Digital Economy Cooperation Initiative and other initiatives. At the fourth World Internet Conference late last year, Relevant departments of China, Laos, Saudi Arabia, Serbia, Thailand, Turkey and the United Arab Emirates also jointly launched the Belt and Road International Cooperation Initiative on Digital Economy, which opened a new chapter of Belt and Road digital economy cooperation. See the 10th edition of People's Daily Overseas Edition on April 30, 2018.

⁶¹ Wu Shi-cun et al proposed to conduct global ocean governance in the South China Sea: It is believed that the theory and practice of global ocean governance are the product of the development of ocean order from the disordered state of power competition to the rule-and-mechanism-centered stage. Meanwhile, as an important content of ocean order, the architecture of ocean governance system also reflects the arrangement structure of power and rules of order. At present, the international and South China Sea area's ocean order is undergoing profound adjustment, and ocean governance has also entered a new stage of development. China and ASEAN countries should seize the opportunity of the current adjustment of ocean order in the South China Sea and establish a rules-based ocean governance system in the South China Sea by improving rules and regulations and establishing a network of regional ocean governance cooperation mechanisms. In this process, China and ASEAN countries should firmly hold the dominant position and play a role commensurate with its own national strength and regional influence. See Wu Shi-cun & Chen Xiang-miao, *Ocean Governance in the South China Sea from the Perspective of Ocean Order Evolution*, 4 Pacific Journal 25, 36 (2018). However, the author believes that the South China Sea will eventually move towards comprehensive international governance, but this will go through a process in the international governance of the South China Sea: first, the soft law international governance mechanism will be opened, and after some achievements, it will be gradually extended to the governance of the South China Sea under the hard law international mechanism.

⁶² After April 2018, the Trump administration clearly put forward the concept of "Indo-Pacific Strategy", which is to build "a free and open Indo-Pacific": Deputy assistant secretary of state for East Asian and Pacific affairs Alex Wong said 'free' has two meanings: at the international level, all Indo-Pacific countries enjoy freedom from coercion and can pursue their chosen path in some form of sovereignty; At the national level, Indo-Pacific countries make progress in government administration, basic human rights, transparency and anti-corruption, and society becomes more free. 'Open' first refers to the opening of sea and air corridors, followed by the opening of infrastructure, and then the opening of investment and trade. On June 2, US Defense Secretary Mattis echoed the Indo-Pacific Strategy at the Shangri-la security conference, and further explained four major issues of concern to the US Indo-Pacific Strategy: (1) for the security and freedom of the maritime Commons, the United States will support its partners in strengthening navy and law enforcement capacity to enhance their ability to manage and protect maritime boundaries and interests; (2) enhance security cooperation and promote interoperability with allies and partners on equipment and platforms; (3) enhance the rule of law and transparent governance; (4) support the developing mode led by private sector. From Chen Jimin, *US Indo-Pacific Strategy and Its Challenge to China*, <https://www.OBOR100.com> (accessed on October 20, 2018).

achieve the above goals by taking into account the interests of various parties over a period of time. However, it may also provide China with a moment to demonstrate China's participation in global and regional governance and present its proposal. To seize this moment is both an opportunity and a challenge for China.

Seeking an Appropriate Expression of “Historic Rights” in the Law of the Sea

-- Investigating historic rights in the South China Sea

Jing Ming*

Abstract: The definition and scope of “historic rights” remains ambiguous in the law of the sea, although many scholars have attempted to bring clarity. The absence of an indisputable interpretation makes the dialogue between different linguistic backgrounds problematic and obstructs the peaceful resolution of maritime disputes. International Law Commission’s (“ILC”) attempt on codification and progressive development of international law, based on existing practices, offers some essential input but the wording in rulings of international judicial bodies hardly illustrates a general route. The limitations of textualism are exposed when confronted with similar concepts such as “historic rights”, “historic title”, “historic waters” and “historic bays”. Observing the origin of each term at its conception is necessary for clarifying their respective meanings and implications. Historic rights encompass both sovereign and functional right; sovereign rights include, but are not limited to, historic waters and historic bays, while functional rights mainly refer to traditional fishing, navigation and other activities. “Historic title” is derived from territory law and was sometimes used in previous practices to refer to sovereign rights. Historic rights are recognized as exceptional rights under United Nations Convention for the Law of the Sea (“UNCLOS”) and are compatible with the contemporary regime. The ignorance to China’s historic rights in the South China Sea by the tribunal resulted from the ambiguity of the concept to some extent. The “historic rights” in the South China Sea could be suitably expressed as a chapeau with specific contents of historic waters within a nine-dash line or U-shaped line, and all functional rights concerned including fishing, navigation and all other maritime activities.

Key Words: Historic Rights; Expression; UNCLOS; South China Sea

1. Introduction

Concepts embodying historic rights catch the attention of international scholarship, partly because they frequently appear in territorial boundary and maritime entitlement disputes.¹ However, the expression of historic rights in international law, including its literal meaning and its normative value, are still confronted with a variety of problems. When the South China Sea arbitration brought this issue to the forefront, yet again, the first and most direct issue came from the confusion in the translation between English and Chinese lacking a unifying context. “Which term is the correctly corresponds to the common saying of “li shi xing quan li”(written as “历史性权利”) in Chinese? Should litigators define it as historic rights, historic title, or something else entirely?”

It is far more complicated than a mere translation issue. Instead it is significant work to express the concept of “li shi xing quan li” in international law so that the international community is able to comprehend its contents and scope. International law theorists,

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¹ See Sophia Kopela, *Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration*, 48 *Ocean Development & International Law* 2, 181, 195 (2017).

international judicial decisions and even state practices struggle to depict the full picture of its sources² and its values. Recent development in the legal scholarship has further proved the difficulty and complicity of this task.³

Unavoidably, the majority of disputes on territorial boundary and maritime entitlements enroll some historic rights. The parties of previous cases disagree on two points. First, a unified definition of historic rights, requiring a detailed observation of the contents it may cover; second, its significance to the claiming states, which requires deeper research into its entitlements within international law.⁴ Specifically, in the South China Sea dispute, the core issue was how China expressed their “historic rights” within the nine-dash line in its position paper.⁵ From a Chinese perspective, one must argue both, that the analysis in the arbitration award on historic rights is defective, and additionally express to the international community the jurisprudence behind it and its application in regards to the specific contents and scope. This, if successfully done, may largely contribute to its recognition by the international community as a whole.

While reviewing the literature on historic rights, difficulties in comprehension arise in an obvious manner. Firstly, the meaning of “li shi xing quan li” in Chinese context is itself ambiguous,⁶ which makes it difficult in finding an appropriate and corresponding translation in English. Disagreements between Chinese scholars and those from outside China, have surfaced to a large extent from these conflicting comparisons. Secondly, disagreements have exacerbated as territorial sovereignty and maritime entitlement arguments automatically relate to geopolitics and national emotions⁷ in most scenarios. Without written rules in existing international law, the limited decisions of international judicial bodies vary. Some

² See Bouchez L.J., *The Regime of Bays in International Law*, Sythoff A.W. (1964). Strohl M.P., *The International Law of Bays*, Martinus Nijhoff Publishers (1963). Blum Y.Z., *Historic Titles in International Law*, Martinus Nijhoff Publishers (1965). Clive R. Symmons, *Historic Waters in the Law of the Sea – A Modern Re-Appraisal*, Martinus Nijhoff Publishers (2008). Natalie Klein, *Dispute Settlement in the UN Convention on the Law of Sea*, Cambridge University Press (2005).

³ See Tan Zhong-zheng, *The Legal Status of the “Historic Titles” in the United Nations Conventions on the Law of Sea: with Special Reference to the Philippines’ Relevant Claims in the South China Sea Arbitration*, 3 Chinese Review of International Law 3, 22 (2016). Li Yong & Zhang Li-na, *On Dual Nature of legal Base of “Historic Rights”*, 36 Hebei Law Science 2, 62, 71 (2018). Gao Zhi-hong, *Multidimensional View on Historic Right*, 17 Journal of Nanjing University of Aeronautics and Astronautics (Social Sciences) 1, 44, 50 (2015). Qu Bo, *Historic Rights: From the Perspective of International Law*, 55 Jilin University Journal Social Sciences Edition 5, 69, 78 (2015).

⁴ See PCA Case Resources, Anglo-Norwegian Fisheries (United Kingdom v. Norway), R.I.C.J. (Dec.18, 1951). Continental Shelf Delimitation, Tunisia v. Libyan Arab Jamahiriya, R.I.C.J. (Feb.24, 1982). Eritrea v. Yemen, Maritime Delimitation (Second Stage), R.I.A.A. (Dec.17, 1999). El Salvador v. Honduras, Nicaragua intervening, Land, Island and Maritime Frontier Dispute, R.I.C.J. (Sep.13, 1990). Maritime Boundary Arbitration (Barbados v. Trinidad & Tobago), R. I. A. A. (Apr.11, 2006). South China Sea Arbitration, the Philippines v. China, R. I.A.A. (Jul.12, 2016), <https://www.icj-cij.org/en/list-of-all-cases> and <https://pca-cpa.org/en/cases> (accessed on December 29, 2019).

⁵ According to the statements of the Ministry of Foreign Affairs of P.R.C., there is no clear contents and scope of “historic rights” either. Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Dec.7, 2014), http://www.chinadaily.com.cn/china/2014-12/07/content_19037946.htm (accessed on December 26, 2019). Some scholars regard this as “constructive ambiguity” in diplomatic statement, which may confer benefits if subtly interpreted. See Han Yi-chou, *Research on “Constructive Ambiguity” in International Law*, 32 Studies in Law and Business 171, 179 (2015).

⁶ See Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, Foreign Languages Press, p.113 (2018).

⁷ See Tuomas Forsberg, *Explaining Territorial Disputes: From Power Politics to Normative Reasons*, 33 Journal of Peace Research 433, 449 (1996).

interpretations may even result in an exaggerated expansion of the concept.⁸ Such interpretations, though facially under the Vienna Convention, deviated from the general route of evolution of a legal regime. Inappropriate expression of historic rights in international law negates the initiative from relevant parties to negotiate and coordinate, thus obstructing the peaceful settlement of maritime disputes, further hindering the development of maritime rules in international law. Third, the concept of “historic rights” is evolving as a consequence; its contents and scope may change with new practices.⁹ Early legal scholarship might ignore the emerging characteristic of historic rights and fail to reflect its meaning in a timely or updated manner to some extent,¹⁰ and are thus vulnerable to inter-temporal law critiques. Inspecting the concept from a dynamic perspective is also crucial in recognizing its contents and digesting its true meaning under contemporary international law. Apart from the conflation of historic rights and historic title, cross reference with other relevant terms, such as historic bay, historic waters, traditional fishing rights, has also fanned the flames as these terms also require further clarification.

For presenting a clear picture of historic rights in the South China Sea, this paper attempts to accomplish an appropriate expression through the general route of how a legal regime is formulated and interpreted. International Law Commission (ILC) endowed itself with the functions of “codification” and “progressive development”, as two manners to prepare rules in different fields of international law.¹¹ Codification means the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine. Progressive development, suggested by its name, is the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law has not been sufficiently developed in the practice of States. This paper attempts to clarify the manner in which the concept of “historic rights” should follow. The concept “historic rights” is collective, which contains sovereign rights and functional rights. Different categories of historic rights may lie in different stages using the ILC’s benchmark, as some functional rights have more extensive practices.

This complicity mirrors the limitation of textualism and further motivates this paper to list the frequently, if not all, mentioned rights and deepen the international backgrounds of their conception. A case analysis on the South China Sea is then conducted to see whether the primary picture at this stage could accommodate the uniqueness of this area. In addition to seeking an appropriate expression of historic rights in the South China Sea, this paper also tries to contribute to defragmenting the rules of the law of the sea through systemizing the regimes under this concept and analyzing their compatibility with UNCLOS.

2. Prudential Codification of Historic Rights

There is no clear boundary as to the contents and scope of “historic rights” in the existing rules of international law. This paper first tries to observe the terms of “historic rights”, “historic title”, “historic bay” and “historic waters” neutrally. Codification as an essential function of ILC, based on the existence of general state practices, precedents and doctrines in

⁸ This argument is put forward to explain that some practices opened a mouth of claiming more and caused more litigations. Such as the rights of coastal states decided as “*ipso facto and an initio*” in North Sea Continental Shelf Case would be easy for an expansive interpretation to get more benefits.

⁹ See Atsuko Kanehara, *Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute*, 61 Jochi Hogaku Ronshu (Sophia Law Review) 27 (2017).

¹⁰ See Yehuda Z. Blum, *Historic Titles in International Law*, Martinus Nijhoff Publishers, p.99 (1965).

¹¹ See Article 15, in Statute of International Law Commission, adopted by the General Assembly in resolution 1744 (II) of Nov. 21, 1947, as amended by resolutions 485 (V) of Dec.12, 1950, 984 (X) of Dec. 3, 1955, 985 (X) of Dec. 3, 1955 and 36/39 of Nov. 18, 1981, <https://legal.un.org/avl/ha/silc/silc.html> (accessed on March 2, 2020).

the relevant field, is more identical to a declaration of customary international law rules.¹² ILC, as a leading body in international law evolution, largely relies on treaties to fulfill this function, making the codification procedure nearly equivalent to drafting treaty rules.¹³

Scholarship of the identification of historic rights in the law of the sea is arduous work. Identifying the concepts of “historic title”, “historic bay”, “historic waters” and “traditional fishing rights” is also time consuming. Compared with the ambiguity of “historic rights”, these four are relatively more frequently used in the existing study of international law. Among those, an ambitious attempt was witnessed to make “historic rights” a big and omnipotent chapeau and include all the four above under its brim.¹⁴ However, this interpretation is merely convenient, and neglects the practice and implementation of the terminology. The word “rights” in “historic rights” is the hardest to define, whose intension and extension seems to never be deeply unearthed in any ruling decision of international bodies.

In article 7 of the draft International Convention submitted to the Buenos Aires Conference of the International Law Association in 1922 by Captain Storny, “A State may include within the limits of its territorial sea the estuaries, gulfs, bays or parts of the adjacent sea in which it has established its jurisdiction by continuous and immemorial usage or which, when these precedents do not exist, are unavoidably necessary according to the conception of Article 2; that is to say, for the requirements of self-defense or neutrality or for ensuring the various navigation and coastal maritime police services.”¹⁵ This is regarded as one piece of early evidence of historic rights’ inchoation. In the eighth conference of the United Nations International Law Commission (ILC) in 1956, some States motioned for discussing the legal status of historic bays.¹⁶ In the memorandum published by the Secretariat of the United Nations in 1957, it is clearly mentioned that historic rights are claimed not only in respect to bays, but also in respect to maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighboring mainland, also in respect of straits, estuaries and other similar bodies of water.¹⁷ It is recognized in this document that there is a growing tendency to describe these areas as “historic waters”, not as “historic bays”.¹⁸

Concepts of “historic title”, “historic bays” and “historic waters” are codified by the international community through conventions based on the early notifications above. The

¹² See Article 15, in Statute of International Law Commission, adopted by the General Assembly in resolution 174 (II) of Nov. 21, 1947, as amended by resolutions 485 (V) of Dec.12, 1950, 984 (X) of Dec.3, 1955, 985 (X) of Dec. 3, 1955 and 36/39 of Nov. 18, 1981, <https://legal.un.org/avl/ha/silc/silc.html> (accessed on March 2, 2020).

¹³ See Li Ming, *What is Called International Law Study?* 1 Chinese Review of International Law 99, 106 (2014).

¹⁴ See Zou Ke-yuan, *Historic Rights in International Law and in China's Practice*, 32 Ocean Development & International Law 149, 168 (2010). Martin I. Glassner, *The International Law of the Sea*, by D. P. O'Connell, Edited by I. A. Shearer, 9 Md. J. Int'l L. 279, 285 (1985).

¹⁵ See *Historic Bays: Memorandum by the Secretariat of the United Nations, official records of the United Nations Conference on the Law of Sea*, Vol. I, UN Doc. A/CONF. 13/1, p.30 (Feb. 24 to Apr.27, 1958), https://legal.un.org/docs/?path=../diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf&lang=E (accessed on March 3, 2020).

¹⁶ See Mr. J.P.A. François, *Report on Questions Relating to the Regime of the High Seas and the Territorial Sea*, A/CN.4/97 and Corr.1 and Add. 1-3 (Jan.27, 1956), https://legal.un.org/docs/?path=../ilc/documentation/english/h/a_cn4_97.pdf&lang=EFS. (accessed on March 3, 2020). See Satya N. Nandan et al., *United Nations Convention on the Law of Sea 1982: A commentary*, § 3, Martinus Nijhoff Publishers, pp.118-119 (1993).

¹⁷ See *Historic Bays: Memorandum by the Secretariat of the United Nations, official records of the United Nations Conference on the Law of Sea*, Vol. I UN Doc. A/CONF. 13/1, p.30 (Feb. 24 to Apr.27, 1958), https://legal.un.org/docs/?path=../diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf&lang=E (accessed on March 3, 2020).

¹⁸ See *Historic Bays: Memorandum by the Secretariat of the United Nations, official records of the United Nations Conference on the Law of Sea*, Vol. I, UN Doc. A/CONF. 13/1, p.30 (Feb. 24 to Apr.27, 1958), https://legal.un.org/docs/?path=../diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf&lang=E (accessed on March 3, 2020).

Convention on the Territorial Sea and Contiguous Zone in 1958, first recorded historic bays¹⁹ and it was worded as an exceptional circumstance from the general rule of drawing lines. The Convention on Continental Shelf at the same time correspondingly mentioned the possibility of special circumstances in boundary line determination,²⁰ though with no explicit wording of historic bays. A milestone in historic rights studies is the monograph “Judicial regime of historic waters, including historic bays” published by ILC in 1962, which significantly put forward the concept of “historic waters” and attempted to clarify its elements by quoting the analysis of the International Court of Justice (ICJ) in the Fisheries case between the UK and Norway in 1951. Three major elements of “historic waters” were directly listed and discussed in detail, which were the exercise of authority over the area on which the state claimed historic rights, the continuity of the exercise and the attitude of foreign states.²¹ Though it did not define a clear boundary of “historic waters”, its position was clear that “historic waters” were not limited to “historic bays”. Although an absolute justification of “historic waters” still relies upon the amount of historic evidence and that is where the States base their claims.²² The fact that the scope of historic waters is bigger than that of historic bays is recognized by considerable State practices. Even in the Fisheries case, both the UK and Norway agreed that historic waters are not merely historic bays.²³

Efforts of codifying “historic rights” peaked in 1973 during the third conference of the law of the sea, especially in regards to the delimitation of the exclusive economic zone and the continental shelf between states with opposite or adjacent coasts. The equitable principle of delimitation finally won the prevailing support, while historic rights continued its status as an exceptional circumstance.²⁴

Prudence is consistently witnessed in the progress of codifying “historic rights” in the law of the sea by the international community. This is partly due to the tension between the normativity requirement of codification and the profound influence of natural law on the evolution of international law in the 20th century. As the emphasis of normativity by Grotius has persistently accompanied the law of the sea,²⁵ the significance of nature law in international law development has also been iterated in the authorship of Pufendorf.²⁶ Existing practices or

¹⁹ Convention on the Territorial Sea and Contiguous Zone, Article 7, para (6) “The foregoing provisions shall not apply to so-called “historic” bays, or in any case where the straight baseline system provided for in article 4 is applied.”

²⁰ Convention on the Continental Shelf, Article 6, paras (1) (2), “Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.” “Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.”

²¹ See Judicial Regime of Historic Waters, including Historic Bays, Document A/CN.4/143: Study prepared by the Secretariat, p.13 (Mar.9, 1962).

²² See Wang Jian-ting, *Jurisprudence Basis of Historic Rights and its Positive Research*, 19 Pacific Journal 87, 88 (2011).

²³ See *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, R.I.C.J., p.132 (Dec.18, 1951).

²⁴ See United Nations Convention on the Law of the Sea, Article 10, Article 15, Article 298 (entered into force on November 16, 1982).

²⁵ See Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations, translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers*, by A.C. Campbell, A.M. with an Introduction by David J. Hill, M. Walter Dunne, p.10 (1901).

²⁶ See Pufendorf Samuel Freiherr von et al., *Of the law of nature and nations. In eight books*, Wentworth Press, p.951 (2016).

doctrines in historic rights can hardly support the normativity required to formulate a mature regime in the law of the sea, which may also have been realized by all parties of the law of the sea conference. The dynamic characteristic of international law adds furthermore difficulties to this complicated mission. The ambitious attempt to clarify the contents and scope of “historic rights” through codification was confronted with a bottleneck, and another insight into progressive development is worth pursuing.

3. Progressive Development of Historic Rights

Unlike codification, progressive development does not have a high threshold of existing norms. This is more identical a design or draft of new rules in a specific field when such State practices, precedents and doctrines are not enough to constitute a rule by themselves.²⁷ Empirical analysis may compensate for the lack of evidence for normative construction. Judicial practices are pieces of valuable evidence, in which the expression of “historic rights” may largely influence the development of its interpretation. The choices of expression in some significant cases are summarized in Chart 1 below.

Chart 1²⁸:

Disputes Parties, time, organs of decision	Historic waters	Historic bays	Historic title	Traditional fishing rights	Historic rights
Fisheries case UK v. Norway 1951, ICJ	2	In context of historic grounds, more than 5	9	In context of grounds, more than 5, no direct mention	0
Continental shelf delimitation case, Tunisia v. Libya 1982, ICJ	3	2	5	2, historic fishery included	27
Maritime dispute case Eritrea v. Yemen 1999, PCA	0	0	4	31, historic median- line, more than 20	1
Land, island and maritime frontier case, El Salvador v. Honduras,	10	25	11	0	Rights of Innocent passage

²⁷ See Article 15, in Statute of International Law Commission, adopted by the General Assembly in resolution 174 (II) of Nov. 21, 1947, as amended by resolutions 485 (V) of Dec.12,1950, 984 (X) of Dec. 3, 1955, 985 (X) of Dec. 3, 1955 and 36/39 of Nov.18, 1981, <https://legal.un.org/avl/ha/silc/silc.html> (accessed on March 2, 2020).

²⁸ See PCA resources, Anglo-Norwegian Fisheries (United Kingdom v. Norway), R.I.C.J. (Dec.18,1951). Continental Shelf Delimitation, Tunisia v. Libyan Arab Jamahiriya, R.I.C.J. (Feb. 24, 1982). Eritrea v. Yemen, Maritime Delimitation (Second Stage), R.I.A.A. (Dec.17, 1999). El Salvador v. Honduras, Nicaragua intervening, Land, Island and Maritime Frontier Dispute, R.I.C.J. (Sept.13, 1990). Maritime Boundary Arbitration (Barbados v. Trinidad & Tobago), R. I. A. A. (April 11, 2006). South China Sea Arbitration, the Philippines v. China, R.I.A.A. (Jul.12, 2016), <https://www.icj-cij.org/en/list-of-all-cases>, and <https://pca-cpa.org/en/cases/> (accessed on December 29, 2019).

1990, 1992, ICJ					more than 5
Continental shelf and exclusive economic zone delimitation case, Barbados v. Republic of Trinidad and Tobago, 2006, PCA	0	1	4	Historic fishing rights, more than 15	In fishing context, more than 10
South China Sea case, Philippines v. China, 2016, PCA	13	27	39	Historic fishing rights, together 38	76

Conducting quantitative analysis aids in drafting an outline of the expression “historic rights” in the history of international justice. Generally, historic title is frequently used in decisions of international judicial bodies before the South China Sea. In most decisions, historic titles do not appear alone. The wide use of “historic bays or titles” and “historic waters or titles” created further confusion in literal meanings. *Eritrea v. Yemen* seemed to be an exception, in which fishing served as a major concern expressed in memorandums from both parties,²⁹ and thus the arbitration tribunal organized under Annex VII allocated more effort to illustrate the traditional fishing regime between two parties. As far as the South China Sea is concerned, historic rights are recurrently mentioned in the award as compared to historic title. This is mainly derived from the choice of words in China’s position paper, which according to some scholars is an indefinite wording by intention.³⁰ Among the 76 mentions of historic rights, approximately half are direct or indirect quotations from public documents of China.³¹ In the reasoning of the tribunal, the contents and scope of historic rights China claimed are unclear and unreasonable.³²

Historic rights in decisions before South China Sea Arbitration appeared rarely in comparison to other concepts. It was only in the Continental Shelf Delimitation Case between Tunisia and Libya that this concept appeared comparatively more frequently, in three manners. First as “historic rights in the Gulf of ...”,³³ which may refer to the sovereign rights that the claiming state may exercise in the bays or waters; second as “historic rights possessed by the coastal people” or “historic fishery rights”,³⁴ which may refer to the functional rights including, but not limited to, traditional fishing rights exercised by the citizens of the claiming state. In either of these two contexts, the expression of “historic rights” is not a chapeau, but with consolidated contents and implications of specific merits. The third manner dealt with “the validity of historic rights is not a question of proportionality,”³⁵ is similar to a chapeau, with no specific meaning, but rather a reiteration of what was previously discussed. In this circumstance, as a chapeau, the expression of the concept “historic rights” still has some boundaries, though not as concrete as the former two. Although it appeared in an abstract manner, it still emphasized upon the essential interest a State claimed, which to some extent

²⁹ See *Eritrea v. Yemen*, Maritime Delimitation (Second Stage), R.I.A.A., p.346 (Dec.17, 1999).

³⁰ See Liu Nan-lai, *About the Legal Status of U-shape Line from the Viewpoints of International Law of the Sea* (2002), <http://www.nansha.org.cn/study/9.html> (accessed on December 5, 2019).

³¹ See the Philippines v. China, the South China Sea Arbitration, R.I.A.A., p.117, p.201, p.202, p.215, p.255, p.271, p.275, p.278, p.307, p.308, p.312, p.313 (Jul.12, 2016).

³² See the Philippines v. China, the South China Sea Arbitration, R.I.A.A., para.271 (July.12, 2016).

³³ See *Tunisia v. Libyan Arab Jamahiriya*, Continental Shelf Delimitation, R.I.C.J., para.99 (Feb.24, 1982).

³⁴ See *Tunisia v. Libyan Arab Jamahiriya*, Continental Shelf Delimitation, R.I.C.J., para.102 (Feb.24, 1982).

³⁵ See *Tunisia v. Libyan Arab Jamahiriya*, Continental Shelf Delimitation, R.I.C.J., para.103 (Feb.24, 1982).

resembled the expressions that China used in its position paper in the South China Sea. The concern of historic title in this case came out simultaneously with “historic reasons”,³⁶ which means title is not a specific category of rights within the chapeau of the historic rights concept. Rather, it is more likely a reason or piece of evidence on which historic rights are based. It is hard to derive any conclusion from this single case. With no further support from other decisions, this single piece of evidence may only serve as a presumption. Clarifying the relationship between “historic rights” and “historic title” requires deeper research into the backgrounds of both, especially the latter in relation to international law.

Next, this paper will identify the concepts of historic bays, historic waters and traditional fishing rights and their origins as well as explore the past and present of historic title.³⁷ Accompanied with the emerging contents of historic rights, more normative values are also being derived from its enriching implications.

4. Judicially Formulated Regimes of Historic Bays, Historic Waters and Traditional Fishing Rights

Most known “historic rights” come from usage by the long and peaceful exercise of States’ authority.³⁸ Usage, similar to the concept of customary international law, came into existence much earlier than the modern rules of the law of the sea. Before having been recognized as exceptional circumstances in the three significant conventions, these historic rights followed a unique road of birth and growth that are parallel to modern treaty laws. Therefore, the contents of historic rights, despite its categorization into historic bays, historic waters and traditional fishing rights for convenience, are not likely to correspond to the regimes under the framework of conventions representing modern law of the sea item by item. The empirical studies previously mentioned also demonstrated the extreme difference in the contents and scope of historic rights in different cases, which may strengthen the necessity to delve into each term to completely comprehend its specific entitlements under the chapeau of so called “historic rights”. In turn, recognition of these concepts also relies on essential judicial constructs, making a brief review of the milestone cases creating these terms necessary.

(a) Formulation of Historic Bays

The concept of a historic bay was initiated in the ruling of the North Atlantic Coast Fisheries Case, in which “the Tribunal while recognizing that conventions and established usage might be considered as the basis for claiming as territorial, those bays which on this ground might be called historic bays, and that such claim should be held valid in the absence of any principle of international law on the subject; nevertheless is unable to apply this, a contrario, so as to subject the bays in question to the three mile rule, as desired by the United

³⁶ See *Tunisia v. Libyan Arab Jamahiriya, Continental Shelf Delimitation*, R.I.C.J., para.100 (Feb.24, 1982).

³⁷ The concept of “sociological approach” was mentioned to defragment the fragmented phenomenon in regional issues in the *Report of the International Law Commission to the General Assembly on the work of its fifty-seventh session*, A/60/10 (May 2-June 3, July 11-August 5, 2005), <https://legal.un.org/ilc/reports/2005/english/chp11.pdf> (accessed on December 29, 2019). The paper tries to finally find a solution towards an appropriate expression of historic rights in South China Sea through the concrete analysis of its background. This to some extent could avoid the dilemma caused by textualism. Reasoning used in the judicial practices of Chart 1 also evidences the strong influence of sociological approach on the development of international law.

³⁸ See *Historic Bays: Memorandum by the Secretariat of the United Nations, official records of the United Nations Conference on the Law of Sea*, Vol. I, UN Doc. A/CONF. 13/1 (Feb.24 to Apr.27, 1958), https://legal.un.org/docs/?path=../diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf&lang=E (accessed on March 3, 2020).

States.”³⁹ Although the final decision was not made completely in favor of the historic rights argument, the concept of an historic bay is clearly recognized as an independent source from normal delimitation rules, which may be valid in the absence of any international law principle. This is a huge development of historic rights in the history of the law of the sea as well as international law, towards which so far most voices from the international legal scholarship community express or imply a positive attitude. The spirits, as reiterated in the Convention of Territorial Sea and Contiguous Zone,⁴⁰ regard historic bays as part of internal waters of the claiming State, regardless of whether it embodies all elements required to be internal waters in general international law or not.⁴¹ Historic bays, as a part of “historic rights”, are definitely sovereign.

(b) Formulation of Historic Waters

The concept of historic waters, as defined in the Fisheries case dealt by ICJ, is wider in scope than historic bays, saying “the waters falling within the conception of a bay being deemed to be internal waters, and those having the character of legal straits being deemed to be territorial waters.”⁴² Historic waters may include territorial waters of a State, while historic bays more often refer to the internal waters. This position, settled in the Fisheries case, is widely agreed on concerning the scope of historic waters, wider than that of historic bays, while the existence of corresponding sovereign legal status for both remains undetermined. Historic waters require the exercise of authority by the coastal state in a public, continuous and explicit manner, while it must win the recognition, or at least tolerance, from the international community.⁴³ The entitlement a coastal state may generate from historic waters, to some extent, depends on its practice of exercising sovereignty. For instance, if the state permits the innocent passage of foreign vessels, the historic waters would fall within territorial waters with little uncertainty. Instead, if the state requires a specific permit for all types of entry into the area and no objection from the relevant parties is seen, the waters may be considered closer to internal waters. Historic waters objectively authorize the coastal states, the legal entitlements equivalent to internal waters or territorial waters, based on the elements stated above.⁴⁴ The secretariat of the United Nations recognized that as long as the specific areas could constitute historic waters based on clear historic evidence, coastal states may claim and reserve the sovereign rights merely based on the historic status, regardless of the modern rules of the law of the sea.⁴⁵ This recognition may also imply that even if the rules regarding territorial sea change in the future, the entitlements generated by historic waters will remain with no derogation. The “historic” characteristic of historic waters does not necessarily translate to a

³⁹ See *Great Britain v. United States of America*, R.I.A.A., *The North Atlantic Coast Fisheries Case*, para.205 (Sep.7, 1910).

⁴⁰ Convention on the Territorial Sea and Contiguous Zone, Article 7, para (6) “The foregoing provisions shall not apply to so-called “historic” bays, or in any case where the straight baseline system provided for in article 4 is applied.”

⁴¹ See Qu Bo & Yu Tianyi, *Thought on the Status of Historic Rights as Customary International Law*, 11 *Journal of Dalian Maritime University* (Social Sciences Edition) 51, 54 (2012).

⁴² See *Anglo-Norwegian Fisheries* (United Kingdom v. Norway), R.I.C.J., p.132, (Dec.18,1951).

⁴³ See *The Law and Procedure of the International Court of Justice 1951-1954: General Principles and Sources of Law*, 30 *British Yearbook of International Law* 27, 28 (1953).

⁴⁴ See Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015*, 2 *China Oceans Law Review* 90, 207 (2015).

⁴⁵ See *Judicial Regime of Historic Waters, including Historic Bays*, Document A/CN.4/143: Study prepared by the Secretariat, p.34 (Mar.9, 1962).

long or ancient history of the arguments or entitlements; the key point is its pre-existence before the modern rule of the law of the sea and that it is respected by the international community as a whole.⁴⁶ Historic waters as part of “historic rights” are also sovereign, which may be weaker than historic bays.

(c) Formulation of Traditional Fishing Rights

Traditional fishing rights in nature are not enjoyed by State parties, but instead by their citizens, existing to ensure the livelihood of local fishermen and thus represent the respect of modern law of the sea towards human rights. This respect was performed through its influence on maritime delimitation in the Fisheries case between the UK and Norway, in which ICJ gave sufficient consideration to the livelihood of Norwegian fishermen and thus justified the straight line, although it deviated from the coastal line.⁴⁷ This human rights concern, however, is occasionally exaggerated by some State parties such as in the maritime dispute decision between Eritrea and Yemen, where the parties showed an obvious willingness to take advantage of human rights merit for a better standing in sovereignty.⁴⁸ After noticing the controversial faith, the tribunal did not let the traditional fishing regime sway its analysis. Concerns for their reputation easily lead the judicial bodies to rule in favor of the parties claiming traditional fishing rights based on the practice of their citizens, which however may only apply to fishing rights, showing a limited influence on maritime delimitation.⁴⁹ When both parties claim traditional fishing rights with respective evidence of their citizens’ fishing practices, the difference in amount, frequency and the purity of fishing practice may also differentiate the final result of rights division. The “purity of fishing” in this context means the extent of autarky of the people’s activities, that is, to what extent they fish merely for their survival, whether their method is artisanal or industrial.⁵⁰ By avoiding the position of human rights defender, the Eritrea and Yemen case tribunal evaded a probable controversial precedent, which if left unchecked, would have made the traditional fishing rights a jack of all trades. Traditional fishing rights, as exercised by citizens, despite being categorized in “historic rights” for convenience, are not sovereign.

The appearance of “historic bay” and “historic waters” in judicial rulings reflected the gradual evolution of “historic rights”, which as an independent source of rules from the law of the sea, are still influential in contemporary international law. The recognition of traditional fishing rights, though cautious enough, is still law constructed by judicial bodies, whose sensitivity regarding human rights may easily lead to a disputing the judgment and produce the likelihood of over-emphasis of historic rights in future State practice. So far, the primary discovery is: under the chapeau of “historic rights”, historic bays and historic waters are sovereign historic rights, to be exercised by the claiming State parties if justified; traditional fishing rights are functional historic rights, not to be exercised by claiming State parties. Though the legal status of the sovereign historic rights partly depends on State practices, historic bays are generally stronger in sovereignty than historic waters.

5. Historic Title and Its Expression in UNCLOS

⁴⁶ See Zhou Zhong-hai, *On Historic Title in Law of Sea*, Book of Papers of International law by Zhou Zhong-hai, Beijing Publisher, p.409 (2006).

⁴⁷ See *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, R.I.C.J., p.132 (Dec.18,1951).

⁴⁸ See *Eritrea v. Yemen, Maritime Delimitation (Second Stage)*, R.I.A.A., para.274 (Dec.17, 1999).

⁴⁹ See *Eritrea v. Yemen, Maritime Delimitation (Second Stage)*, R.I.A.A., para.128 (Dec.17, 1999).

⁵⁰ See Leonardo Bernard, *The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation*, Proceedings from the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation, p.18.

Different from the other three, the concept of historic title was not birthed judicially. Though it has been mentioned in most of the key decisions leading to the three concepts above, it failed to discuss its representative value in detail. Title is an ancient concept, which none of the courts or tribunals has the courage to clarify its definition and scope under their ruling. This lack of confidence in legislation through practices may appeal the role of treaty laws; judicial bodies only need to interpret the concept, easing the process. The Convention of the United Nations on the Law of the Sea (UNCLOS) took over the exception status of historic rights from the Convention of Territorial Sea and the Contiguous Zone and excluded the general rule regarding the elements of bays, delimitation of territorial sea between states with opposite or adjacent coasts and compulsory jurisdiction in an explicit manner.⁵¹ The wording in article 15 “historic title or other special circumstance” awards “historic title” a special status, being an exception in drawing lines and delimiting territorial sea between States with opposite or adjacent coasts with no further explanation of what historic title means. This leaves a large margin of discretion for courts and arbitration tribunals in interpreting “historic title”. Analyses of the rulings mentioned hereinabove also demonstrate a much stronger inclination of the judges and arbitrators to interpret “historic title” after 1994 when UNCLOS came into being. Interpretation and application of UNCLOS is one of the main categories over which the judicial bodies have competence,⁵² and it’s not surprising to note that they show a keen interest in interpreting this key concept for a better exercise of their authority.

The wording in UNCLOS “historic title or other special circumstance” generates at least three interpretations of these key concepts. First, historic title is a chapeau similar to that of “historic rights” according to some scholars, which represents all historic rights, including both sovereign and functional ones. If so, article 15 implies historic bays, historic waters and traditional fishing rights are all exceptional circumstances in maritime delimitation between States with opposite or adjacent coasts. This is against previous practices which had explicitly limited the influence of fishery rights on maritime delimitation. Second, historic title is nothing but a chapeau, with neither specific contents nor implications of any rights. Therefore, historic title in UNCLOS is nothing but a declarative signal as an exceptional circumstance. One piece of evidence supporting the latter against the former is that almost all concepts once appeared before the third conference;⁵³ if the framers intended to embody historic title with the implications of some specific rights, they would have done so explicitly. This acknowledgement presumption deprived the term of all implications behind historic title with no explicit words. Both interpretations went to the extreme. This paper takes a third view, that is, historic title is not a chapeau, implying only historic waters, excluding historic bays and traditional fishing rights.

First, as explained above, one major difference between these concepts is the strength of sovereignty they represent respectively. Historic bays usually fall within internal waters, though with some exceptions in State practices, which represent a strong signal of sovereign nature and entitlements. Historic waters, as illustrated in the Fisheries case, usually fall within territorial seas, whose sovereign property is not that strong. Traditional fishing rights, which have been determined clearly in the Eritrea v. Yemen case, have only limited influence on maritime delimitation, and are to some extent, not sovereign but only functional. This interpretation is consistent with the subject of this category of rights as citizens, as opposed to

⁵¹ See United Nations Convention on the Law of the Sea, *Article 10, Article 15, Article 298* (entered into force on November 16, 1982).

⁵² *Ibid.*

⁵³ For the Secretariat’s study as presented to the International Law Commission, see [1962-II] ILCYB (A/CN.4/143) 1; for the Commission’s report, see [1967-II] ILCYB (A/6709/Rev. 1 and Rev. 1/Corr. 1, ch. III), p.369.

State parties. The concept “historic bays” is directly mentioned in article 10 and article 298 of UNCLOS. In article 298, the wording “historic bays or titles” also implies logically that the titles here do not include bays. The literal implication from general logic is definitely insufficient. A review on the meaning of “title” is thus necessary for a better formulation of what historic title implies.

(a) Origin of “Title” from Territory Law

Title has vastly different meanings in private and public law. In private law, it often refers to the commercial value of some specific type of property in business transactions.⁵⁴ This is completely irrelevant to the concept of historic title in public law. Title in public law represents the sovereignty of territory in a specific circumstance. Historic title in international law is a concept gradually emerging from the original title to territory based.⁵⁵ This title in international law, however, can be inherited from State to State, which is determined by ICJ with regards to land, island and maritime frontier dispute case between El Salvador and Honduras. The ruling of this case permitted Nicaragua’s intervention.⁵⁶ In some occasions, the original title does not belong to States, but the indigenous groups. In the advisory opinion of Western Sahara, as the well-known milestone of recognizing the native title of aboriginal residents, ICJ took the position that it was a cardinal condition of a valid “occupation” that the territory should be terra nullius, a territory belonging to no one, at the time the act alleged to constitute the “occupation”.⁵⁷ When the original title belongs to aboriginal people, the title may also be inherited from the groups of people to States through agreements. This happened in the arctic waters of Canada in which the government inherited the ancient title from Inuit people through Nunavut Act in 1993.⁵⁸

Though the meaning of historic title derived from territory law may evolve when it pertains to the law of the sea, its relation to sovereignty remains unchanged. Its origin in territory law ties it closely to sovereignty, and correspondingly in the law of the sea, the ancient title generally refers to a long lasting and consistent claim for waters.⁵⁹ This long and consistent claim must be exercised by a State party. Nonetheless, it is impossible for an aboriginal group to claim waters in front of the international community as well. Historic title in the law of the sea represents sovereignty, which may be inherited by one State from another State or from the long and consistent claim of waters. This helps establish a link between historic title and historic waters. That is, the claim for waters (sovereign) must come from some type of historic title. Title in international law, if reasonably based, may justify the claim of historic waters. Correspondingly, in UNCLOS, the wording “historic bays or titles” provides a chance for State parties to claim for historic waters using the title inheritance theory.

(b) “Shopping” Interpretations of Historic Title by Judicial Organs

No further implication of the meaning behind historic title is detrimental to UNCLOS, as

⁵⁴ See Katz, Larissa M., *The Concept of Ownership and the Relativity of Title*, 2 Jurisprudence 1, 191, 203 (2011).

⁵⁵ See Andrea Gioia, *Historic Title*, in R. Wolfrum, eds., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, pp.820-821 (2012).

⁵⁶ See *El Salvador v. Honduras, Nicaragua intervening, Land, Island and Maritime Frontier Dispute*, R.I.C.J., para.400 (Sep.13, 1990).

⁵⁷ See *Advisory Opinion on Western Sahara*, R.I.C.J., paras.79-80 (Oct.16, 1975).

⁵⁸ See Diana Ginn, *Aboriginal Title and Oceans Management*, in Don Rothwell and David Vanderzwaag, eds., *Toward Principled Oceans Governance*, Routledge, p.287 (2006).

⁵⁹ See Clive R. Symmons, *Historic Waters in the Law of the Sea – A Modern Re-Appraisal*, Martinus Nijhoff Publishers, pp.65-66 (2008).

there is no general arrangement of regime regarding historic rights over the fragmented rules of historic bays, historic waters and traditional fishing rights. On one side, this can be explained by the controversies among all State parties that deprived the convention of the capability to accommodate a general regime in historic rights issues. On the other, by establishing a unique system of dispute resolution with diverse mechanisms regulated in the annexes, the convention intentionally restrained its power of international legislation through codification and left enough opportunities for later judicial bodies to develop the rules in some specific areas, especially those closely connected with State practices. Historic rights most certainly fall within this category, the specific situation of which may differ from one case to another. This very property also makes it impossible for the convention to make a package deal during their original design.

In fulfilling the framers' desires, all judicial bodies frequently mentioned historic title and attempted to interpret it in their rulings. However, no decision thus far tried to mend the relationship between the concept of historic title and other specific types of historic rights. Instead, the courts or tribunals shopped the concepts in their awards in the same manner as the investors shopped the forum in legal conflicts.⁶⁰ Historic title was picked up when it was closely linked to some rights in the arguments of the State parties. Judicial bodies either interpreted it to have the same or a similar meaning to what the parties claimed, by combining the terms when ruling in favor of these rights for other reasons, such as "historic rights and titles,"⁶¹ or distinguished it from these rights with other bases or concerns. The traditional fishing rights were clearly distinguished from historic title in the Eritrea and Yemen ruling, in which it was explicitly rejected that the traditional fishing regime generated any type of "titles".⁶²

(c) Compatibility Issue with the Contemporary Regime

In contrast with the consistent avoidance of historic title in judicial practices, attempts from legal scholars to fill the gap are prevalent. Prof. Keyuan Zou regards historic rights as a chapeau of all concerned rights, including jurisdictional and sovereign rights, such as historic bays and historic waters, together with functional traditional fishing rights.⁶³ In his view, historic title (also a chapeau) only emphasizes a signal of sovereignty, in a much narrower scope than the former.⁶⁴ The convention as a codification fruit of the law of the sea regime mentioned the fragmented categories of historic rights without giving a general arrangement, while the contents and scope of these categories of rights recognized in the convention to a large extent, deviate from their origins in earlier decisions. The inconsistency between the early practices and the convention also partially account to the difficulties of later judicial bodies in formulating the contents and interpreting the scope of historic rights. Moreover, the vacuum left in the convention brought about a critical disagreement among scholars over its compatibility of pre-existing practices, that is, whether the historic bays, historic waters and traditional fishing rights established in early decisions before 1982, still maintained their exact

⁶⁰ See David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment 51 (December 2012).

⁶¹ See *Tunisia v. Libyan Arab Jamahiriya, Continental Shelf Delimitation*, R.I.C.J., para. 100 (Feb. 24, 1982).

⁶² See *Eritrea v. Yemen, Maritime Delimitation (Second Stage)*, R.I.A.A., p.346 (Dec.17, 1999).

⁶³ See Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32 *Ocean Development & International law* 2, 149, 168 (2001). See also Martin I. Glassner, *The International Law of the Sea*, by D. P. O'Connell, Edited by I. A. Shearer, 9 Md. J. Int'l L. 279, 285 (1985).

⁶⁴ See Zou Ke-yuan, *Historic Rights in International Law and in China's Practice*, 32 *Ocean Development & International law* 2, 149, 168 (2001). See also Martin I. Glassner, *The International Law of the Sea*, by D. P. O'Connell, Edited by I. A. Shearer, 9 Md. J. Int'l L. 279, 285 (1985).

contents and scope in the contemporary regime. Prof. John Norton Moore was inclined to negate the value of historic waters, unless the relevant State parties put them on record in the Historic Bays Memorandum by the Secretariat of the United Nations.⁶⁵ A general regime regarding exclusive economic zone and continental shelf of the convention was reached in the third law of the sea conference with no permitted reservation, which according to this view represents the consensus of all State parties and thus excludes the jurisprudence of historic rights in conflict with the convention rules.⁶⁶

The memorandum in 1957, constricted by time and the awareness of States contained limited records at that time. Issues such as the South China Sea were not included. Many Chinese scholars, however, take the compatibility view. Prof. Zhao Jianwen emphasizes the inter-temporal law rule established by Max Huber in the *Palmas* case and thus influenced the vested rights.⁶⁷ According to his analysis, the characteristic of UNCLOS will not exclude the usage of historic waters in existence before the convention. As a holistic code of the law of the sea, the convention expresses enough respect for the vested rights, based on the laws at their conception, embodied in the preamble in Article 10, Article 14 and Article 298, as long as the existence of vested rights causes no contradiction with *jus cogens*.⁶⁸ Prof. Qu Bo thinks the regime of historic rights at least has the status of emerging customary international law, based on the abundant claims of consistent entitlements from different coastal State parties as State practices and the peaceful toleration from the international community as *opinio juris*.⁶⁹

This paper supports the compatibility view as well. First, apart from Article 10, Article 15 and Article 298 of the UNCLOS, which previously took over the exception circumstance of historic rights from judicial rulings, the preamble of UNCLOS also expressed a strong sense of respecting the vested rights before the convention.⁷⁰ The compatibility view is thus consistent with the purpose of the convention. Second, the issue of compatibility arises mainly by the interpretation of historic title. However, as previously discussed, the historic title is a sovereign signal of historic waters, whose meaning could be determined by lessening the margin of interpretation by the judicial bodies in their rulings and further give an approximate answer to the question of compatibility. When we discuss the compatibility issue, we are mainly concerned about the co-existence between the regime in the convention and the specific historic rights as exceptions, rather than the sovereign signal of historic title. The pre-existence of historic bays, as recognized by UNCLOS, based on its meanings established in the previous judicial rulings and historic waters under the name of historic title are legitimately justified. Lastly the term of compatibility under UNCLOS lies in Article 311, which literally prioritizes UNCLOS over the rights and obligations created by other international agreements, rather than the external sources of treaty laws. It may be controversial to imply from these provisions, that UNCLOS automatically prevails customs.

6. The Appropriate Expression of Historic Rights in the South China Sea

The crux of confusion exposed the constraint of dogmatism when we majorly rely on the

⁶⁵ See Mitchell P. Strohl., *The International law of Bays*, Springer Science & Business Media, p.52 (2012).

⁶⁶ See Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, in I.A. Frowein and R. Wolfrum, eds., 6, Max Planck Yearbook of United Nations Law 37, 137 (2002).

⁶⁷ See Zhao Jian-wen, *United Nations Convention on Law of Sea and the Vested Rights of China in South China Sea*, 2 Chinese Journal of Law 147, 157 (2003).

⁶⁸ Ibid.

⁶⁹ See Qu Bo and Yu Tian-yi, *Thought on the Status of Historic Rights as Customary International Law*, 11 Journal of Dalian Maritime University (Social Sciences Edition) 52 (2012).

⁷⁰ See UNCLOS, The Preamble, "Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

literal interpretation. Textualism is a customary rule of international law for treaty interpretations established at the Vienna Convention. Though it is loyal to the ordinary meaning of the terms, it sometimes obstructs the true message conveyed through practice. In the context of the law of the sea, it easily feels at a loss when conducting isolated research into historic rights without considering maritime practices. The reasoning above further proves that the appropriate expression of historic rights in the law of the sea does not come from blindly applying textualism. Therefore, this paper tries to trace the inclination of wording in judicial rulings. In a field of international law where no extensive practices exist, judicial interpretations bear much more expectations in concept formulation and further clarifications as part of a contribution to ILC's progressive development work. However, confronted with diverse and variant circumstances in maritime disputes, a consistent approach of formulating or interpreting a specific concept is unlikely to be witnessed. Another step into the concrete background of the South China Sea is needed to find an appropriate expression.

The South China Sea has its unique regional characteristics. An appropriate expression of "historic rights" further requires observing how China expressed it and the possible implications behind the expression. As discussed above, historic rights in the law of the sea, if comprehended as a chapeau, include sovereign and functional rights, the former including historic bays and historic waters. There is no bay in the South China Sea, so we can exclude the disturbance of "historic bay". The main controversy then is the concept of "historic waters". Another concern within the nine-dash line or the U-shaped line is the sovereignty of the islands and rocks, which is not a maritime dispute in nature. Historic title over the sovereignty of these features is governed by territory laws instead. The Philippines states that it has instituted the arbitration proceedings in order to challenge China's claim of "sovereignty" and "sovereign rights" over a vast maritime area lying within a so-called "nine-dash line" that virtually encompasses the entire South China Sea.⁷¹ This statement also reflects the challenge on two grounds, both the sovereignty in territory law and the sovereign rights in the law of the sea. China's claim to "indisputable sovereignty over the islands in the South China Sea"⁷² within the nine-dash line or U-shaped line, whether based on historic title or not,⁷³ is a territory law claim. A cautious interpretation of Article 298 will exclude this part of dispute from the compulsory jurisdiction. From the Chinese perspective, in expressing the indisputable sovereignty over the islands in the South China Sea, negating the jurisdiction and avoiding a deeper interpretation is advantageous to their case. Explicit exceptional status of "historic bays or titles" in UNCLOS applies only to maritime delimitation. However, the existence of a declaration clause in the preamble to respect the existing situation leads to another presumption that the sovereignty of islands and rocks issue is subject to the general arrangement of exclusive economic zone and continental shelf also makes sense.

The concept of historic title is well-known in international law,⁷⁴ which allows States to claim, on a historical basis, sovereignty or sovereign rights over both insular land territory and

⁷¹ See Republic of the Philippines, Department of Foreign Affairs, Notification and Statement of Claim, para.2 (Jan.22, 2013).

⁷² Note Verbale CML/17/2009 to the Secretary-General of the United Nations from the People's Republic of China with regard to the joint submission made by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf (May 7, 2009), www.un.org/depts/los. See also Statement of the Ministry of Foreign Affairs of the People's Republic of China (Jun.21, 2012).

⁷³ See Florian Dupuy and Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 *American Journal of International Law* 124, 128, 139 (2013).

⁷⁴ See *Eritrea v. Yemen*, Territorial Sovereignty and Scope of the Dispute (First Stage), 22 *R.I.A.A.*, para.106, p.209, p.239 (Oct.9, 1998).

maritime areas.⁷⁵ The fact that States have claimed and maintained sovereignty, over the territory or maritime areas in question throughout, is essential to constitute the historic basis.⁷⁶ Evidence does exist in favor of the claim of China to territorial sovereignty over the archipelagos in the South China Sea,⁷⁷ but the expression “historic title” (sometimes translated into “历史性权源” or “历史性所有权”) will probably create more controversy in the international community. History of the South China Sea did not resemble the route of title from territory law as discussed above. The expression of indisputable sovereignty over the adjacent waters, however, is necessary and significant for China,⁷⁸ and for mixed reasons, it must be persisted. With regard to the maritime zones apart from adjacent waters, the expression of “historic waters” is generally suitable⁷⁹ as historic title can apply to “waters other than bays, to straits, archipelagos and generally to all those waters which can be included in the maritime domain of a State”.⁸⁰

Historic waters can cover very large areas. For example, Hudson Bay, which is claimed as a historic bay by Canada, encompasses some 1.23 million square kilometers,⁸¹ and the archipelagic waters of the Philippines originally claimed as historic waters comprise some 440,994 square nautical miles.⁸² In comparison, the area enclosed by the nine-dash line covers approximately 1.94 million square kilometers,⁸³ and the area which makes up the Spratly Islands extends to some 425,000 square kilometers. China has not explicitly relied on historic title with regard to the South China Sea before the tribunal, but Article 14 of the Law on the Exclusive Economic Zone and the Continental Shelf of the People’s Republic of China contains the provision that “*the provisions in this Law shall not affect the historical rights that the People’s Republic of China has been enjoying ever since the days of the past*”.⁸⁴ In its Note Verbale to the United Nations Secretary General of April 14th, 2011, China stated that “China’s sovereignty related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence”.⁸⁵ In published reports, the nine-dash line has been interpreted as synonymous with a claim based on historic title to sovereignty over the island groups, and to the historical rights of fishing, navigation and other marine activities including the exploration

⁷⁵ See Andrea Gioia, *Historic Title*, in R. Wolfrum, eds., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, p.819 (2012). Also see Nuno Marques, Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*, Martinus Nijhoff, p.37 (2003).

⁷⁶ Ibid.

⁷⁷ “It is undeniable that China has a historic claim to sovereignty over all of the islands, reefs and banks in the South China Sea.” Robert Beckman, China, UNCLOS and the South China Sea, Asian Society of International Law, Third Biennial Conference (Aug.27-28, 2011).

⁷⁸ China has “core interests” in South China Sea, which has been emphasized several times in the speeches of Mr. Wang Yi and Mr. Yin Zhuo. http://www.xinhuanet.com/world/2015-05/25/c_1115401978.htm (accessed on December 28, 2019).

⁷⁹ It should be recalled here that the Philippines was a champion of the concept of historic waters at the First and Third United Nations Conference on the Law of the Sea. Summary Records of the Meetings of the Second Committee, 6th Meeting, Official Records of the United Nations Conference on the Law of the Sea, 6, UN Doc A/Conf.13/C.2/SR.6-10, 7, para.15 (Mar.7, 1958). See also Summary Records of Meetings of the Second Committee, 5th Meeting (July 16, 1974), 36th Meeting (Aug.12, 1974) and 45th Meeting (Aug.28, 1974).

⁸⁰ See Judicial Regime of Historic Waters, including Historic Bays, Document A/CN.4/143: Study prepared by the Secretariat, p.34 (Mar.9, 1962).

⁸¹ See Leo J Bouchez, *The Regime of Bays in International Law*, Leyden, AW Sythoff, p.229, p.230 (1964).

⁸² See *Magallona v. Ermita*, Supreme Court of the Philippines, G.R. No 187167, p.30 (Aug.16, 2011).

⁸³ See *Republic of the Philippines*, Department of Foreign Affairs, Notification and Statement of Claim, para.11 (Jan.22, 2013).

⁸⁴ See Law on the Exclusive Economic Zone and the Continental Shelf of the People’s Republic of China, Annex I, Doc A.28, Article 14 (Jun.26, 1998).

⁸⁵ See Note Verbale CML/8/2011 (Apr.14, 2011).

and exploitation of mineral resources in the sea area enclosed by the line.⁸⁶ The latter part is a compound category of functional rights, which is easier to achieve recognition if expressed in an appropriate manner.

The concept of historic title and that of the maritime zones under UNCLOS are governed by ‘distinct legal régimes’.⁸⁷ The exceptional circumstance recognized in UNCLOS allows for derogation from otherwise applicable rules of international law,⁸⁸ and therefore, can affect the application of some articles.⁸⁹ The regime of historic waters has not been superseded by UNCLOS,⁹⁰ possibly leading to the inapplicability, in whole or in part, of the rules of UNCLOS with regard to the regime of maritime zones and boundary delimitation. The rules on historic rights are quasi-superimposed as a separate layer of normativity over UNCLOS.⁹¹ In the Association of Southeast Asian Nations (ASEAN) - China's Declaration on the Conduct of Parties in the South China Sea (DOC), the parties concerned “undertake to resolve their territorial and jurisdictional disputes by peaceful means ... in accordance with universally recognized principles of international law, *including* the 1982 UN Convention on the Law of the Sea”,⁹² which further confirms the maritime disputes in the South China Sea are not governed exclusively by UNCLOS.

7. Conclusion

The paper tries to seek an appropriate expression of historic rights in the South China Sea by exploring the contents and implications of all five key concepts: historic rights, historic title, historic bays, historic waters and traditional fishing rights.

In the attempt of unearthing the definitions of all these concepts, this paper tries to satisfy the important manners of international law evolvement, codification and progressive development. Limited and inconsistent practices in judicial rulings hardly provide a suitable

⁸⁶ See Gao Zhi-guo and Jia Bing-bing, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 American Journal of International Law 98, 108, 113, 114, 121, 123 (2013). Also see Li Jin-ming and Li De-xia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 Ocean Development and International Law 287, 291, 293 (2003).

⁸⁷ See *Tunisia v. Libyan Arab Jamahiriya*, Continental Shelf Delimitation, R.I.C.J., para.100 (Feb. 24, 1982).

⁸⁸ See Andrea Gioia, *Historic Title*, in R. Wolfrum, eds., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, pp.816-817 (2012). *Eritrea v. Yemen*, Territorial Sovereignty and Scope of the Dispute (First Stage) 22 R.I.A.A., p.209, p.239, para.106 (Oct.9, 1998).

⁸⁹ See Summary Records of the 61st Meeting of the First Committee, III Official Records of the United Nations Conference on the Law of the Sea, Territorial Sea and Contiguous Zone, UN Doc A/CONF.13/C.1/SR.61-66, 190 (Apr.22, 1958).

⁹⁰ See Zou Ke-yuan, *Law of the Sea in East Asia: Issues and Prospects*, Routledge Studies in International Law Routledge, p.174 (2005). Rudolf Bernhardt, *Rechtsfragen historischer Buchten*, in Dieter Blumenwitz and Albrecht Randelzhofer, eds., *Festschrift für Friedrich Berber zum 75 Geburtstag*, Beck, pp.47-48 (1973). *Judicial Regime of Historic Waters, including Historic Bays*, Document A/CN.4/143: Study prepared by the Secretariat, p.38 (Mar.9, 1962). “It was felt that States could not be expected to accept rules which would deprive them of considerable maritime areas over which they had hitherto had sovereignty.”

⁹¹ See Nuno Marques, Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*, Martinus Nijhoff, p.99 (2003). *Eritrea v. Yemen*, Maritime Delimitation (Second Stage), R.I.A.A., p.109 (Dec.17, 1999) “The traditional fishing regime ... is not qualified by the maritime zones specialized by the United Nations Convention on the Law of the Sea.”

⁹² ASEAN-China Declaration on the Conduct of Parties in the South China Sea, signed during the 8th ASEAN Summit in Phnom Penh, para.4 (Nov.4, 2002). Australia- United States Ministerial Consultations (AUSMIN) 2011 Joint Communiqué (Sept.15, 2011), in which the two States “call on governments to clarify and pursue their territorial claims and accompanying maritime rights (in the South China Sea) in accordance with international law, including the Law of the Sea Convention”. ASEAN’s “Six Point Principles on the South China Sea”, Principle 4 (Jul.20, 2013). See also Vaughan Lowe & Stefan Talmon, *The Legal Order of the Oceans: Basic Documents on the Law of the Sea*, Oxford, Hart, Doc 69, 771, 772 (2009).

answer. To observe the concepts of historic bays, historic waters and traditional fishing rights within the backgrounds of their first judicial formulation, and to explore the origin of historic title for evaluating its compatibility with the contemporary framework of UNCLOS, could compensate for the limitations of textualism. The concept of historic rights is a chapeau with specific contents, including sovereign rights and functional rights. The concept of traditional fishing rights is functional and has limited influence in maritime delimitation. Rights in historic bays and historic waters are sovereign, between which, the concept of historic bays is stronger in sovereignty. Historic title originates from territory law and could be inherited from State to State and from groups to States. Historic title in the law of the sea refers to the long and consistent claim over waters, which in UNCLOS, strengthens the property of sovereignty to historic waters. Explicitly accepted as “special circumstance” in UNCLOS, legitimate historic rights are compatible with the convention framework and should not be superseded by the modern law of sea regime.

China has a determined interest in the South China Sea. An appropriate expression of historic rights is a requisite for the international community to comprehend and further accept it, in part or in whole. The arbitrary dismissive attitude of the tribunal showed in the award, may ascribe to the ambiguity of the expression before and the confusion thus caused. Under the chapeau of “historic rights”, a claim of historic waters (in Chinese “历史性水域”) within nine-dash line or U-shaped line, and all functional rights concerned using the name of “titles” recognized in UNCLOS could be a sensible solution. The latter should be explained as a clear package of rights including fishing, navigation and all other marine activities, (in Chinese “包括捕鱼, 航行及其他一切海上活动在内的功能性权利”). Through seeking an appropriate expression of historic rights in the South China Sea, this paper hopes that a systematic formulation of all these concepts may contribute to a clarify the interpretations of judicial bodies in the future and the efforts of ILC in the defragmentation of international law. In geopolitical practice, some surrounding States are also claiming or factually exercising, functional rights. To these States, an appropriate expression of China’s claim also gives a clear instruction of the contents and scope of the rights they may claim or exercise legitimately, which may also contribute to the coordination of geo-economics and strengthen the bond of geopolitics.

Expanding the Res Judicata of a Public Interest Litigation Filed by Consumer Groups

Lu Ying¹

Abstract: In principle, the res judicata of a public interest litigation filed by a consumer group subjectively expands to the parties to the litigation, whilst it objectively concerns the judgment in the text of adjudicate. Since a public interest litigation filed by a consumer group tends to maintain public interests by way of a group litigation, the res judicata of such litigation should subjectively expand to consumers whose interests have been prejudiced as well as the organizations and groups which have the right to litigate; the same should also extend to judicatory ground objectively. It is difficult to adapt to actual judicial practice if a theoretical expansion explanation is made only with respect to the res judicata of consumer group public interest litigation. China should improve its diversified dispute resolution mechanism and consumer group litigation mechanism so as to narrow the gap between the system design and theoretical explanation and actual needs.

Key Words: Consumers; Public Interest Litigation; Public Interest; Group Litigation; Res Judicata

A consumer group public interest litigation means refers to litigation that is filed by a consumer group in respect of any act that harms such public interests as the legitimate rights and interests of consumers. Like other civil litigations, a public interest litigation filed by a consumer group has res judicata, meaning that the parties to such litigation and the court should not make any different claims or judgments with respect to the subject matter of the litigation for which a judgment has been made.² In practice, however, since a public interest litigation filed by a consumer group tends to maintain public interests by way of a group litigation, the res judicata of such litigation will more often than not expand.

1. Subjective Scope Expansion of the Res Judicata of a Public Interest Litigation Filed by a Consumer Group

The subjective scope of the res judicata also referred to as the party subject to the scope of the res judicata, means that the res judicata extends to opposing parties in principle.³ No relativity of the res judicata is stipulated directly in any laws of China, but certain provisions of the Civil Procedure Law and its judicial interpretations have embodied such principle.⁴ According to the relativity principle of the res judicata, neither party should file a suit or claim

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² See Zhang Yanli & Yu Peng et al., *Civil Litigation Theory and System*, Law Press, p.85 (2017).

³ Translated by Lin Jian-feng, *Deep Analysis of Civil Litigation Law and Theory* by Takahashi Hiroshi of [Japan], Law Press, p.558 (2003).

⁴ Article 124.5 of Civil Procedure Law stipulates: "if the party concerned files an action again after the judgment, ruling or mediation agreement has become effective, the plaintiff shall be notified of such review, except a ruling by a People's Court to withdraw." Article 247 of the Interpretation of Civil Procedure Law provides for the constitutive requirements with respect to such review, including that the parties concerned, litigation subject matter and claim in the prior and subsequent litigations should be the same. The relativity principle of res judicata was stipulated from the perspective of an "effective judgment", meaning the parties concerned are not permitted to file a litigation again as they are bound by such effective judgment, while a person other than involved in the case may do so.

in respect of a final and binding judgment nor should no court accept a case where the judgment is final and binding with respect to its subject matter. The prior litigation should serve as a basis for judgment if a subsequent litigation is related to it.⁵ The res judicata of a public interest litigation is relative, in principle; however, the res judicata of a public interest litigation filed by a consumer group often expands since such litigation tends to maintain public interest.

(a) Public Interest Attributes of a Public Interest Litigation Filed by a Consumer Group

According to Article 55 of the Procedure Law, Article 47 of the Law on Protection of the Rights and Interests of Consumers and Article 1 of the Interpretations of the Issues Concerning Applicable Laws in Consumer Civil Public Interest Litigation Cases (the “Consumer Public Interest Litigation Interpretations”) issued by the Supreme People’s Court and other laws, rules and regulations of China, such authorities and organization (including China Consumer Association and provincial consumer associations) as mandated by the law have the right to file a public interest litigation in respect of any such act that prejudices any social public interest (for instance, the legitimate rights and interests of indefinite number of consumers are harmed or the personal or property safety of consumers is jeopardized). According to such regulations, the purpose of such system design as a public interest litigation by a consumer group is to maintain the public interest of consumers and such litigation may be filed only by such an authority or an organization as mandated by the law, including a consumer association at the provincial or above level. Such system design is obviously advantageous in that a consumer public interest case reflects the characteristics of “petty amount but a large number of victims”; that is, a single victim suffers a small amount of loss, but there is a large number of such victims.⁶ A consumer is not motivated to safeguard his own rights by litigation since the cost of such litigation is often higher than the benefit obtained from such litigation; currently, there are 3,296 consumer associations at different level in China, including 31 consumer associations at the provincial or above level. Since it has relatively strong litigation ability with perfect organizational structure, a consumer association may maintain the interest of consumers as a whole by filing public interest litigation.

In practice, such system design tend to result in two main issues: first, whether the res judicata of a public interest litigation extends to consumers who sustain actual damage; and second, can other authorities or organizations claim against the same defendant in respect of the same subject matter after a plaintiff has filed a public interest litigation for which a judgment has been made by a court. This is illustrated by the following example: “the Public Interest Litigation Filed by Jilin Provincial Consumer Association against Longchang Seasoning Firm in Guangfu Road for Infringement upon the Rights and Interests of Consumers” (which case was heard by Changchun Intermediate People’s Court). The actual business operators of Longchang Seasoning Firm in Guangfu Road (“Longchang Seasoning Firm”) are Hang Chang, Hang Chenglong and Wang Yali. From August to November 2014, Longchang Seasoning Firm sold to indefinite number of consumers substandard edible salt totaling 9.45 tons; in addition, a total of 9.7 tons of counterfeit edible salt that had yet to be sold was discovered and seized. Such salt was tested and verified by Jilin Provincial Product Quality Supervision and Inspection Institute to be substandard. Therefore, Jilin provincial Consumer Association (“Jilin provincial Consumer Association”) filed public interest litigation and pleaded to order the three defendants to make a public apology in the news media at the

⁵ See Zhang Yan-li & Yu Peng et al., *Civil Litigation Theory and System*, Law Press, p.85 (2017).

⁶ See Huang Xi-wu, *Civil Litigation Law and Civil Public Interest Litigation*, 25 Law Application 22 (2011).

provincial or above level on the ground that Long Chang Seasoning Firm, Han Chenglong and Wang Yali had prejudiced the public interest of consumers.

The court decided that the three defendants should assume civil liability and make a public apology since they had encroached upon the legitimate rights and interests of a large number of consumers by selling substandard edible salt.⁷ The above is a typical public interest litigation case filed by a consumer group. Based on the relativity of the subjective scope of the res judicata, the judgment shall apply only among the parties to the litigation. Nevertheless, if the relativity principle of the res judicata is strictly adhered to, two questions may arise: what the judgment had to do with the consumers whose rights and interests have been damaged and can other organizations file an action against the defendants in respect of the same infringing act? These questions, in essence, embody the characteristics to maintain public interest through a public interest litigation filed by a consumer group, thus resulting in a need to expand the subjective scope of the res judicata in practice.

(b) Circumstances in which the Subjective Scope of Res Judicata is Expanded

Many countries of the continental law systems recognize the expansion effect of the subjective scope of res judicata with respect to a civil litigation theoretically, meaning that the party concerned has some connection with certain third parties who have also a legal relationship with the subject matter of litigation. A few countries have specially made regulations in this regard. For instance, Article 115.1 of the Civil Procedure Law of Japan stipulates that: “the determination of the scope of the persons affected by the effect of a judicial judgment: (1) the parties concerned; (2) such party concerned when it becomes a plaintiff or defendant for other parties; (3) the successor included in preceding paragraph of this Clause after the oral argument is over; (4) the party who holds the subject matter of the litigation for the parties listed in the preceding three paragraphs.” The expansion issue of the subjective scope of the res judicata of a public interest litigation filed by a consumer group in China may be discussed by reference to the above theory, as follows: “First, on the expansion of the res judicata to consumers.”

A number of countries of the continental law system recognize “litigation undertaking” in a civil action, meaning a third party is qualified to novate the party concerned with respect to the rights and obligations of the subject matter of a litigation, and the judgment applicable to the parties concerned also extends to the subject of the rights and obligations. The party which undertakes the litigation in actual fact files an action on behalf of the party concerned and exercises the litigation right of such party.⁸ In a consumer group public interest litigation, the subject matter is whether a business operator has harmed the public interests of consumers; such subject matter has legal connection with general consumers rather than with a consumer association; the consumer group in actual fact exercises the litigation rights that would otherwise belong to consumers when it files a public interest litigation according to laws, rules and regulations. This is similar to the concept of litigation undertaking where the consumer group is the party that undertakes and the consumers who have been prejudiced are undertaken. Scholars are of the opinion that in a consumer group litigation a litigation filed by a group constituted by operators is actually to claim on behalf of the victims who have suffered losses due to unfair business competition and practice, though such victims are not considered as the

⁷ See the Judgment by Chang Chun Intermediate People’s Court (2016) Ji 01 Min Chu No. 819.

⁸ Translated by Lin Jian-feng, *Civil Litigation Law: Deep Analysis of System and Theory* by Takahashi Hiroshi of [Japan], Law press, p.216 (2003).

subjects of such claim in substantive law.⁹ Based on the litigation undertaking theory, the res judicata of a litigation filed by a consumer group should expand to those undertaken, i.e. general consumers who have not participated in such litigation directly.

The “the Public Interest Litigation Filed by Jilin Provincial Consumer Association against Longchang Seasoning Firm in Guangfu Road” case serves as an excellent example. In this case, three defendants harmed the interests of consumers by selling substandard edible salt to such consumers, such consumers had the right to file an action against such defendants for default or right infringement. The selling behavior of the defendants did not prejudice the interest of Jilin Consumer Association directly. Jilin Consumer Association in actual fact novated the consumers as a qualified plaintiff when it filed a public interest litigation according to laws, rules and regulations, whilst the consumers whose interests were harmed held the rights and obligations with respect to the subject matter of the litigation. Therefore, the behavior of Jilin Consumer Association has constituted “litigation undertaking”. In addition, the court ruled that three defendants should make a public apology, which apology is obviously made to the consumers. So, based upon the “litigation undertaking” theory, the subjective scope of the res judicata of the judgment in this case actually extends to the consumers whose interests have been harmed.

Second, on the expansion of the res judicata to other organizations with the right to litigate. Article 15 of Interpretation of the Consumer Civil Public Interest Litigation provides, after the judgment has come into force with respect to civil public interest litigation filed by a consumer, other authorities or organizations with the qualification as a plaintiff should not file a civil public interest litigation separately in respect of the same infringing act. In fact, such a provision has made a breakthrough in the relativity of the res judicata, which extends to other organizations that do not participate in a litigation. That is, when a judgment with respect to public interest litigation becomes effective, other organizations with the right to litigate are not permitted to litigate again in respect of the same infringing act, even though such organizations have not participated in the public interest litigation.

The theoretical basis of such provision may be analyzed by reference to the “honest and credibility” principle in the law of Japan. In a case heard by the Supreme Court of Japan, the Court expanded the subjective scope of the res judicata: in the previous case, the plaintiff A filed a litigation against the defendant BC for “registration transfer” on the basis of a land repurchase agreement, but A lost the case; in the subsequent case, the plaintiffs ADEF filed a litigation against defendants BOC on for registration transfer on the ground that the expropriation was not valid. In a later case, DEF were added as the plaintiffs, while G was the new defendant. In principle, such parties added were not bound by the res judicata of the previous case. However, the Court rejected the plaintiffs’ claim on the ground that the DEF may have a conflict of interest with the case since the plaintiffs DEF in a later case are brothers with A and may be aware of the previous case; the defendant G in a later case was the assignee of the subject matter in the previous case; and the subject matter in two cases were basically the same. Therefore, the res judicata of the previous case has expanded to all the plaintiffs in the later case.¹⁰

On the basis of the law of Japan, we may have the following considerations with respect to the res judicata of a public interest litigation filed by a consumer group: firstly, after the judgment of a prior public interest litigation comes into force, other organization with the right should be aware of such litigation. if litigation continues in respect of the same infringing act, defendants may be mired in indefinite litigations; this is against the “honesty and credibility principle”. Secondly, the acceptance by a court of a case prosecuted by other organizations

⁹ See Tao Jian-guo, *Study of Consumer Public Interest Litigation*, People’s Press, p.51 (2013).

¹⁰ Translated by Lin Jian-feng, *Civil Litigation Law: Deep Analysis of System and Theory* by Takahashi Hiroshi of [Japan], Law press, p.584 (2003).

with the right to file a public interest litigation is in actual fact against “no trial principle” since all or part of the claims raised by the plaintiffs have been rejected by a court in the prior case and the subject matter and the defendants may be the same in the later case.

2. The Expansion of the Objective Scope of the Res Judicata of a Public Interest Litigation Filed by a Consumer Group

The objective scope of the res judicata means the res judicata has an effect on the matters adjudicated in the judgment, which matters are generally restricted to the text of adjudicate made by a court with respect to the subject matter of a litigation.¹¹ The tradition theory of civil litigation law believes that judicatory ground is the basis of the text of judicata instead of the purpose of litigation; therefore res judicata should not extend to judicatory ground. Nevertheless, there is an actual practical need for the expansion of the objective scope of res judicata as a public interest litigation filed by a consumer group has the characteristics of group litigation.

(a) The Group Litigation Attributes of a Public Interest Litigation Filed by a Consumer Group

Group litigation system, which started in German, means that certain groups with legal personality as stipulated by the law is qualified as a party concerned that may file a lawsuit as plaintiffs.¹² Group litigation may be divided into several types: the first is a petition for an injunction, which means that a consumer group may petition for an exclusion or an injunction in respect of unfair competition; the second is a claim for liquidated damages; that is, authorized by consumers, a consumer group may exercise the right to claim for liquidated damages on behalf of such consumers; the third is a petition for deprivation of improper interest, meaning the a consumer group may file an action to require the lawbreaker to turn over the improper interest to the State Treasury when an operator has cause damage to most of the consumers by breaking the law intentionally.¹³ Litigation of such type has the following characteristics: first, the purpose of the group litigation is to maintain public interest; second, the plaintiff is a non-profit and non-government organization that is expressly stipulated by the law.¹⁴

In China, public interest litigation filed by consumer groups embodies the characteristics of group litigation: in the first, the purpose of such litigation is to maintain public interest. A consumer association files a public interest litigation according to the law, not because its own interests are prejudiced but because the public interests of consumers are. Then, the qualification as a plaintiff is based on special provisions in law. According to the law of China, only such organization stipulated by the law as a consumer group at the provincial or above level may become a plaintiff in a consumer group public interest litigation; meanwhile, according to Article 13 of the Consumer Public Interest Litigation Interpretations, a plaintiff's claim is restricted by the law, in that it may petition for a defendant to assume such civil

¹¹ See Zhang Yan-li & Yu Peng et al., *Civil Litigation Theory and System*, Law Press, p.99 (2017).

¹² Translated by Wang Ya-xin & Liu Rong-jun, *Procedural Justice and Litigation* by Taniguchi Heian of [Japan], China University of Political Science and Law Press, p.197 (1996).

¹³ See Tao Jian-guo, *Study of Consumer Public Interest Litigation*, People's Press, pp.41-44 (2013).

¹⁴ See Liu Xue-zai, *Study of Civil Public Interest Litigation System*, China University of Political Science and Law Press, pp.84-95 (2015).

liabilities as cessation of infringement, exclusion of hindrance, elimination of danger or extension of a formal apology instead of any such other claims as liquidated damages.

According to the above analysis, consumer public interest litigation filed by consumer groups in China is more similar to “petition for an injunction” in German Law in terms of legal form. Why strict legal restrictions exist with respect to the plaintiff’s qualifications and legal proceedings of a consumer public interest litigation may be: to ensure that the group litigation of such type will proceed in an orderly manner. If there were no any legal restrictions with respect to the qualifications as a plaintiff, defendants would be bogged down in endless litigations and courts would face too many of the cases of the same type. Then, to ensure group litigation proceeds in an orderly manner. If a consumer association were permitted by law to claim for liquidated damages, the interests of consumers would be harmed by any unjustified enrichment in such litigation.

In practice, however, questions may arise with respect to such system design: since a consumer association cannot claim for liquidated damages, may the consumers who have suffered actual losses and filed an subsequent law suit quote the judicatory ground in the prior public interest litigation so as to mitigate or even eliminate the burden of proof in such subsequent litigation ? the essence of such question is the group litigation nature of a public interest litigation filed by a consumer group versus the needs for the expansion of the objective scope of res judicata.

(b) Circumstances in which the Objective Scope of Res Judicata is Expanded

The traditional view holds the res judicata extends to the text of adjudicate and judicatory ground should have no res judicata: firstly, compared with a claim, judicatory ground is a subordinate means and the parties concerned may not have considered the issue carefully. Secondly, if judicatory ground is not binding, a court may make a judgment with respect to the subject matter of litigation more effectively and accurately since it does not have to logical sequence in substantive law; otherwise, the legal proceedings will be long and cumbersome because the court has to made judgment with respect to all issues according to the logical sequence in substantive law.¹⁵ In a consumer group public interest litigation, it should be permitted by law that res judicata should expand to judicatory ground on the basis of a group litigation characteristics and consumers should also be allowed to quote the same in any action for indemnity.

First, from the point of view of procedural law development. There is a view that judicatory ground is the basis and soul by which a court as certain facts and make a judgment. If res judicata is restricted to the text of adjudicate, it means a judge may make a totally different decision that will lead to a totally different judgment, though the facts are basically the same, therefore res judicata should be given to judicatory ground.¹⁶ Such view has been recognized in some countries of the continental law systems. For instance, the theory of issue preclusion validity is proposed by a Japanese scholar. Such theory holds that the judgment made by a court in the judicatory ground with respect to any issues argued by the parties concerned and heard by the court should be binding. No losing parties should file any litigations contradictory to such facts determined, nor should any court make any contrary judgments. In Japanese judicial precedents, courts often admit evidence of such issues in the judicatory ground of prior litigations on the basis of such theory.¹⁷ Also, as regards consumer public interest litigations,

¹⁵ Translated by Lin Jian-feng, *Deep Analysis of Civil Litigation Law and Theory* by Takahashi Hiroshi of [Japan], Law Press, pp.505-506 (2003).

¹⁶ See Zhang Yan-li & Yu Peng et al., *Civil Litigation Theory and System*, Law Press, p.102 (2017).

¹⁷ See Chang Yi, *Study of Civil Litigation Law*, Law Press, p.197 (2010).

German law provides for the expansion system of adjudication effect. For example, Article 11 of Law of Germany on Injunction Litigation stipulates that a party concerned to a subsequent individual litigation may quote the judicatory ground in the prior litigation against the defendant if such defendant has lost the previous case.¹⁸

Article 9 of the Regulations of the Evidence of Civil Action issued by the Supreme People's Court of China stipulates that no party is required to prove with respect to any facts confirmed in a judgment of a People's Court that has taken effect, unless there are sufficient contrary evidence. There is a view that such regulations do not provide for the expansion of res judicata of a judgment to judicatory ground.¹⁹ In fact, however, such regulations embody the idea of the expansion of the objective scope of res judicata. For instance, after public interest litigation, consumers have the right to quote in any subsequent litigations such facts as confirmed by the public interest litigation. In the debt dispute case of Hefeng Bafeng Ethnic Drug Chemical General Company of Hubei Province vs. Hubei Provincial Bafeng Pharmaceutical & Chemical Share Co., Ltd heard by the Supreme People's Court, the Court admitted the facts and judicatory ground determined in the prior judgment. In its opinion, the Court stated that the written judgments of the first and second instance mentioned were the attribution of the ownership of the thermal power plant involved in the case; though the cases of first and second instance were not causes for ownership affirmation and the affirmation of the attribution of the ownership was not in the text of adjudicate, the parties concerned was not required to prove and cross-examine with respect to the relevant affirmations in the above judgment that had taken effect. Therefore, the judicial confirmation in the trial of first and second instance had a fundamental effect on the fact determination and outcome of the present case.²⁰

Second, from the perspective of the system design of consumer group public interest litigation. In a public interest litigation, since a consumer association cannot claim a defendant for any liquidated damages, consumers have the right to claim for liquidated damages subsequently. In such subsequent litigation, consumers are also required to prove such facts of essentials such as any default or right infringement by an operator or any losses caused by the operator to consumers and such facts of essentials may have been heard in such public interest litigation or discussed in such instrument of justice. If consumers are permitted by law to quote such facts and judicatory ground confirmed in such public interest litigation, consumers' burden of proof and cross-examination will be mitigated greatly. If consumers must prove in such subsequent litigation, the court may make a determination different from that in the previous litigation in respect of the same facts of essentials which will lead to a different result of judgment as consumers, weak in the ability to litigate and prove, may provide improper evidence.

In the Public Interest Litigation Filed by Jilin Provincial Consumer Association against Longchang Seasoning Firm in Guangfu Road for Infringement upon the Rights and Interests of Consumers, Jilin Consumer Association provided various test reports issued by a number of testing organizations, in order to prove its claim, and the court admitted such reports as evidence and affirmed in the judicatory ground that the edible salt supplied by three defendants failed to conform to the national standard, thus harming the interests of consumers. In a subsequent claim filed by consumers for liquidated damages, such consumer is not required to submit any evidence to prove the fact of default or infringement. This obviously will mitigate the burden of proof for such consumer, while it may also reduce the workload for a court, provided such consumer is permitted by law to quote the facts and judicatory ground determined in the previous litigation. Conversely, if consumers are not permitted by law to

¹⁸ See Tao Jian-guo, *Study of Consumer Public Interest Litigation*, People's Press, p.49 (2013).

¹⁹ See Chang Yi, *Study of Civil Litigation Law*, Law Press, p.201 (2010).

²⁰ See Judgment by the Supreme People's Court (2011) Min Er Zhong Zi No. 30.

quote, the court may support the claim of some consumers because of their ability to present evidence and reject the claim of other consumers since they are weak in ability to do so. This may eventually lead to different judicial judgments for the same cases.

3. To Close the Gap between Expansion Theory of Res Judicata and Practical Needs

Public interest litigation filed by consumer groups is a relatively new type of litigation in China. We may explain and handle some of the problems in practice on the basis of the expansion theory of res judicata. But, in some circumstances, the expansion theory of res judicata is not sufficient to meet juridical practice in that: first, as the fundamental purpose of a consumer group public interest litigation is to maintain public interest, the subjective scope of res judicata may be expanded so as to make more consumers benefit from such litigation. But a public interest litigation is not efficient and convenient because proceedings for a civil action are rigid; fact finding is formalized and litigation cost is high.²¹ In no way will the expansion theory of res judicata solve such problems. Second, the objective scope of res judicata may be expanded to allow consumers to quote the judicatory ground contained in public interest litigation in order to claim against unscrupulous operators for liquidated damages. Yet, how will the cases of the same type be reduced while convenience is provided? How will such unscrupulous operators be punished economically without a subsequent litigation by consumers? The expansion theory of res judicata cannot solve such problems, either. Therefore, a perfect diversified dispute resolution mechanism and modern group litigation system should be built in China in order to close the gap between theory and practice, once and for all.

(a) To Perfect a Diversified Dispute Resolution Mechanism

In juridical practice, a consumer association will often facilitate the speedy resolution of a dispute by way of such diversified dispute resolution mechanism as investigation, warning, reconciliation and mediation. As of now, the consumer associations at the provincial or above level in China have filed 4 group public interest litigations. In one of such litigations, the plaintiff won the case and in other 3 cases, the plaintiffs withdrew the actions after a settlement had been made with the defendants.²² The diversified dispute resolution mechanism in common use in practice mainly consists of such procedures as investigation and urge before an action and settlement in an action.

First, the investigation and urge procedure before an action. It is stipulated by law in some countries that a consumer group should urge operators to correct illegal business practice through the investigation and warning procedure before a public interest litigation is filed.²³ Article 41 of the Consumers Contract Law of Japan stipulates: “before a litigation is filed, a qualified consumer group shall require the operators as a defendant to cease the infringing act by a written notice... and no litigation shall be filed within a week after such notice has been served, except that such defendant refuses the requirement to cease the infringing act.” Article 37.5 of the Law of the PRC on the protection of the rights and interest of Consumers also

²¹ See Zhang Yan-li & Yu Peng et al., *Civil Litigation Theory and System*, Law Press, p.11 (2017).

²² The case determined in favor of the plaintiff is (2016) Ji 01 Min Chu No.819 heard by Chang Chun Intermediate People’s Court and the cases withdrew by the plaintiffs are (2015) Hu-Zhong Min-(Min) Chu Zi No. 10, (2015) Hu-Zhong Min-(Min) Chu Zi No. 9 heard by Shanghai No. 1 Intermediate People’s Court and (2016) Su 01 Min Chu No. 2034 heard by Nanjing Intermediate People’s Court.

²³ Study of Key Issues in a Consumer Civil Litigation in Record and Explanation of the First Consumer Public Interest Litigation in China compiled by Shanghai Consumer Rights and Interests Protection Committee.

stipulates: “(a consumer association should) accept a complaint from consumers and investigate and mediate in respect of such complaint.” Obviously, it is mandated by law for a consumer to make an investigation and mediation before a litigation is filed, which investigation and mediation has become an important means of speedy resolution of a dispute.

For instance, Shanghai Consumer Rights and Interest Protection Committee versus Tianjin Samsung Communication Technology Co. Ltd for tort liability (heard by Shanghai No.1. Intermediate People’s Court) (“Shanghai Consumer Rights and Interest Protection Committee versus Samsung Co. for Tort Liability”). Before the lawsuit, Shanghai Consumer Rights and Interest Protection Committee (“SCRIPC”) formulated the work specification of consumer public interest litigation of Shanghai consumer rights and interests protection commission (trial), which standardized the procedures of accepting, investigating, evaluating, deciding and coordinating the clues of public interest litigation cases, so as to ensure the standardization and legality of public interest litigation. Next, comb typical problem. Before the lawsuit, Shanghai consumer protection commission sorted out the summary of consumers’ annual complaints and found that abnormal problems of mobile phone software were the focus of consumer complaints, so the preliminary selection of this issue as the direction of public interest litigation. Finally, carry out professional research and judgment.

Before the lawsuit, Shanghai consumer protection commission invited professional institutions to conduct functional tests on smart phones, invited legal experts and communication experts to demonstrate legal issues in public interest litigation, and finally formulated a scientific public interest litigation strategy. The above litigation process management mechanism well covers the important aspects of public interest litigation, such as conducting research, selecting the litigation direction, and formulating the litigation strategy, so as to ensure that public interest litigation has both social typical significance and legal feasibility. SCRIPC found that a certain model Samsung mobile phone had 44 pre-installed applications, but Samsung Co. had failed to inform consumers of such pre-installed applications, nor had it provided any means of uninstalling such applications. SCRIPC believed that Samsung Co. had violated the rights of consumers to know and choose.

Therefore, a consumer group public interest litigation was filed, requesting the court to order Samsung Co. to make available information in the package or user guide of mobile phones about such pre-installed applications and provide a means of uninstalling. In such process, Samsung Co. added the function to uninstall application and improved the product package and official website information. SCRIPC eventually withdrew the action.²⁴ Before the action, SCRIPC had investigated and urged in a comprehensive way. First, to find out facts. After the mobile phone samples had been tested by a testing organization authorized by SCRIPC, it was found that all mobile phones tested had pre-installed applications. The producers had failed to inform consumers of the same, nor had they provided any means to uninstall. Samsung Co. was typical there. Second, requiring to correct. SCRIPC made a reasonable use of the procedure to investigate and urge prior to an action. Before the litigation and in the course of such litigation, SCRIPC urged Samsung Co. to correct a number of times. Samsung Co. finally implemented the correction plan. The purpose of a litigation was achieved, while the consumption of judicial resource was reduced.

Second, settlement procedure during a litigation. In current judicial practice, the precondition to settlement in a public interest litigation filed by consumer groups is that an operator ceases illegal business practice according to the requirements of a consumer association. If a plaintiff withdraws an action, the court should examine its reasons for such withdrawal so as to ensure that the parties concerned truly intend to settle and the settlement

²⁴ See the Judgment by Shanghai No.1 People’s Court Hu-Zhong Min-(Min) Chu Zi No. 10.

agreement does not prejudice public interest.²⁵ It is stipulated in the law of the United States that a court should examine as follows if a party to a consumer group litigation requests to settle: whether the content of the settlement is fair, whether an operator as a defendant has economic ability to perform the settlement agreement and whether both parties concerned are in collusion to harm the interests of any other parties.”²⁶

In the case of “the Consumer Association of Jiangsu Province versus Nanjing Water Group Co. Ltd. for tort liability” (heard by Nanjing Intermediate People’s Court), Nanjing Water Group Co. Ltd. provided to consumers a form contract, the Water Supply Contract. Article 7 of the Contract stipulates that a consumer shall pay 0.5% penalty daily on the outstanding amount if such consumer defaults on the payment of water rate. The Consumer Association of Jiangsu Province (“CAOJP”) believed that the penalty as provided for in the Water Supply Contract violated the rights and interests of consumers by exceeding such standard as stipulated by law and filed a consumer group public interest litigation in 2016. The court was requested to confirm that the penalty clause in the contract concerned was invalid. Both parties reached a settlement in the process: first, CAOJP examined the water supply contracts of all water supply companies in the province to find out if there were any unfair clauses and authorized the consumer organizations of various municipalities to urge to the water supply companies to revoke such clauses. Second, by appointment and official notices, CAOJP negotiated with Nanjing Water Group Company Ltd for a settlement. The latter repealed the penalty clause by amending the Water Supply Contract. Under the circumstances, CAOJP withdrew the action. The court ruled that the plaintiff may withdraw the action since both parties had truly intended to settle and Nanjing Water Group Company had repealed the penalty clause.²⁷

(b) The Perfection of Consumer Group Litigation System

In form, the consumer group public litigation in China is more like “a petition for an injunction” in German Law. Compared with German Law, there is no such *actio rei persecutoria* or action for deprivation of illegitimate interest. In order to make it easy for consumers to claim for damages, punish illegal operators when consumers have incomplete information, while the number of the cases of the same type may be reduced, China should build a system of “*actio rei persecutoria*” and action for deprivation of illegitimate interest in time to come, by reference to Germany.

First, *actio rei persecutoria* by a consumer group. The Legal Services Law of Germany stipulates that a consumer group may file an *actio rei persecutoria* as authorized by consumers. The consumer group shall deliver the liquidated damages obtained to the consumers who have so authorized after the case has been won and deduct the litigation costs as agreed.²⁸ In practice, it is convenient for consumers to claim for economic losses by way of such litigation, which, in theory, is also suitable for China. First, to have more ways to seek legal remedies. Consumers in China who have suffered actual economic losses due to any illegal business practice by an operator will have to claim for liquidated damages separately in another litigation because they will not be compensated in a consumer group public interest litigation filed by a plaintiff who is restricted by law in respect of its claims. If a consumer group is permitted by law to file an *actio rei persecutoria* in due course in China, it will be convenient for consumers to safeguard their rights by authorizing a consumer association to claim for

²⁵ See Cai Yan-ming & Hong Hao, *Analysis of Due Process of Law*, China University of Political Science and Law Press, p.287 (2000).

²⁶ See Yang Yan-yan, *On Group Litigation Compromise in the USA*, 4 Global Law Review 485 (2006).

²⁷ See the Judgment by Nanjing Intermediate People’s Court (2016) Su 01 Min Chu No. 2034.

²⁸ See Tao Jian-guo, *Study of Consumer Public Interest Litigation*, People’s Press, p.43 (2013).

liquidated damages. It will also reduce the number of the cases of the same type by leaps and bounds if a large number of consumers who have suffered losses authorized such consumer association to claim against such unscrupulous operator for damages. Second, to be in convergence with the representative action system. We may draw on the experience of the “representative action with indefinite population” in China when an *actio rei persecutoria* filed by a consumer group is considered. According to Article 54 of the Civil Procedural Law of China, in a representative action with indefinite population, the court may inform obligees to participate in such litigation by a public announcement and such obligees should register with the court promptly, the *res judicata* of such litigation extends to the obligees so registered; and the judgment has predeterminate force in respect of the obligees who have not registered. If such obligees file litigation within the statute of limitations and a court finds their claim affirmative, it should be ruled that the judgment made should apply directly. In considering an *actio rei persecutoria* filed by a consumer group, it may also be stipulated by law that a consumer association should be authorized by as many consumers as possible by way of a public announcement and register such consumers with the court when a litigation is filed; after such litigation, the *res judicata* of the judgment extends to the consumers so registered and has predeterminate force for consumers not so registered, all by reference to a representative action. such measures will provide a remedy to more consumers, while the case of the same type may be handled more efficiently.

Second, actions for deprivation of illegitimate interests. Article 10 of the Law against Unfair Competition of Germany stipulates that a consumer group may require the court to order an illegal operator to turn over improper gains to the state treasury if such operator has caused damage to most of the consumers and made a gain by himself due to any violation by it of any laws. The conditions applicable to an action for deprivation of improper gains are as follows: firstly, a plaintiff should be an organization or group as stipulated by law; secondly, an operator as a defendant intentionally has intentional illegal business practice that results in losses to consumers and a gain to himself; and thirdly, the economic interest confiscated should belong to the state treasury.²⁹

An action for deprivation of any improper gains in German Law may become a supplement to the group litigation system in China: first, to share the function of group litigation. An operator will not be penalized economically if a consumer group (or other qualified plaintiff) files a petition for an injunction in the circumstance where most of the consumers suffer losses due to any illegal business practice by such operator, whilst the individual information concerning such consumers is impossible to determine; no authorization will be obtained by such consumer association from consumers to file an *actio rei persecutoria* because it has no such individual information about such consumers. In an action for deprivation of improper gains, it is permitted by law for a consumer association to file a litigation by itself and request the court to order to confiscate any improper gains of such operators. Such litigation mode may make up for the deficiencies with respect to the two litigations modes mentioned above and will effectively prevent such operator from holding the illegal gains any further.

Secondly, to facilitate judicial practice. Since no authorization is required by a consumer association from consumers when an action for deprivation of improper gains is filed, it is convenient to file such litigation directly. If such consumer association wins the case, a defendant will be ordered by a court to turn over any improper gains to the state treasury directly. In practice, such system design will be easier to implement.

²⁹ See *Study of Civil Public Interest Litigation System*, China University of Political Science and Law Press, pp.139-142.

Analysis on Salvage Contract by Employment --Based on the Case of M.V. “Archangelos Gabriell” Salvage Reward

Wang Yong & Hou Guo-bin¹

Abstract: This article offers an analysis on the nature of Salvage Contract by Employment and its application of law under Chinese law, based on the retrial judgment on the salvage contract dispute between Nanhai Rescue Bureau of the Ministry of Transport and Archangelos Investments E.N.E and Hong Kong Andalousen Co., Ltd., Shanghai Representative Office. Further discussion is made upon concerning issues of Salvage Contract by Employment. The article expects to provide analyses and suggestions of shipping salvage within the judicial circumstance of China.

Key Words: M.V. “Archangelos Gabriel”, Salvage Contract by Employment, “No Cure, No pay”, the Salvage Convention

1. Introduction

On 7 July 2016, the Supreme People’s Court of the People’s Republic of China (“Supreme Court”) reviewed a salvage contract between the retrial applicant, Nanhai Rescue Bureau of the Ministry of Transport (hereinafter referred to as “Nanhai Rescue Bureau”) and the respondent, Archangelos Investments E.N.E (“Investment Company”) and Shanghai Representative Office of Hong Kong Andalousen Co., Ltd., (“Shanghai Representative Office”).² The Supreme Court issued the judgement immediately after the hearing, resulting in widespread concern in the shipping and insurance industry. The judgement has been controversial amongst experts and scholars.³ The basis of these differing opinions involve: (1) the application of law to the Salvage Contract by Employment; (2) the distribution of salvage reward by the salvaged parties; (3) effect of Supreme Court's decision on insurance compensation under the Salvage Contract by Employment; and (4) the maritime lien for the salvage reward and the limitation of liability for maritime claims of the salvors.

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² See Nanhai Rescue Bureau of the Ministry of Transport v. Archangelos Investments E.N.E and Hong Kong Andalousen Co., Ltd. & Shanghai Representative Office case, the Supreme People’s Court of the people’s republic of China (July 27, 2016).

³ Professor Si Yu-zhuo considers that salvage by employment means the salvaging party carries out the salvage operation at the request of the salvaged party and has the right to claim the salvage reward as agreed. The salvage by employment do not meet the constitutive requirements derived from the principle of “No cure, No pay” stipulated in the International Convention On Salvage 1989 and the Chapter 9 of Maritime Law. Therefore, the contract concluded between the parties is not in compliance with the legal attributes of salvage contract under Chinese Law. However Professor Fu Ting-zhong believes that salvage by employment satisfy the constitutive requirements of “Marine Salvage” and should be regulated by Maritime Law, but the salvage reward be determined under the Contract law other than the principle of “No cure, No pay”. The judge of the people’s court of the people’s republic of china, Yu Xiao-han also holds the opinion that the International Convention On Salvage 1989 is applicable to the fixed rate salvage contract, so does Maritime Law, but in terms of the calculation of salvage reward, the provisions of the Convention and Maritime Law should be excluded, and the domestic civil laws apply.

Prior to examining these issues, a background of case is warranted: MV “Gabriel”, owned by Investment Company laden with 54,580 tons of crude oil sailed from Hong Kong to port of Qinzhou, Guangxi China. On 21 August 2011, the ship became stranded in the westward channel of Qiongzhou Strait. Cracks occurred below the forepeak waterline and the ship began to make water, which seriously endangered the ship and oil cargo on board. On the same day at 2040 hours, Investment Company concluded a salvage contract with Nanhai Rescue Bureau through Shanghai Representative Office. It was stipulated in the contract that Nanhai Rescue Bureau undertook the obligation to provide assistance in refloating operation and diving exploration service, and Investment Company should pay salvage reward in return, which was calculated by the tugs’ horsepower, time and manpower etc., engaged in the salvage operation, irrespective that whether the MV “Gabriel” can be successfully refloated or not. Later on, as arranged by Zhanjiang Maritime Safety Administration, MV “Gabriel” was offloaded by another salvage company, not the contract party Nanhai Rescue Bureau, although Nanhai’ tug arrived and stood by at the site of the casualty. Subsequently, MV “Gabriel” was successfully refloated and arrived at Qinzhou Port without any assistance of Nanhai Rescue Bureau. Afterwards, Investment Company refused to pay the salvage reward to Nanhai Rescue Bureau. Nanhai Rescue Bureau had no choice but to bring a lawsuit before Guangzhou Maritime Court claiming for service costs in amount of RMB 7,240,998.24 incurred under the salvage contract against Investment Company and Shanghai Representative Office. The court issued a judgment on 18 March 2014, confirming that the relevant provisions of the Maritime Law of the People's Republic of China (hereinafter referred to as the “Maritime Law”) applied in this case, and the salvage contract was established and effective. Meanwhile, the service of escorting, transportation and underwater exploration provided by Nanhai Rescue Bureau fell within the category of “Marine Salvage”. In addition, the judgment of the first instance made proper adjustment of the amount of salvage reward according to the services provided by Nanhai Rescue Bureau, and finally Investment Company was ordered to pay the salvage reward of RMB 6,592,913.58 to Nanhai Rescue Bureau. After the first instance verdict, Investment Company appealed to Guangdong High People’s Court (hereinafter referred to as the “Guangdong High Court”), requesting for rescission of the first instance’s judgment, and alleging that proportion of 38.85% of the salvage reward adjusted by the first instance may be on the shoulder of the Investment Company, whereas the remaining 61.15% should be vesting on the cargo interests.⁴ Guangdong High Court held that the provision of Article 179 of the Maritime Law should apply in this case and the salvaged party should pay salvage reward in accordance with the agreement, rather than the effect of salvage. At the same time, in accordance with Article 175 of the Maritime Law,⁵ and Article 183,⁶ Guangdong High Court finally ruled that Investment Company bore the salvage reward on the basis of the proportion of the value of MV “Gabriel” in the total value of the salvaged property,⁷ i.e., Investment Company’s request that it should not bear more than 38.85% proportion of the salvage reward was upheld by Guangdong High Court. Subsequent to the Guangdong High Court’s judgement, an application to Supreme Court for retrial was filed by Nanhai Rescue Bureau. Nanhai Rescue Bureau advocated the revocation of the second instance judgement and requested that the Investment Company be ordered to pay all the salvage reward. Supreme Court held that the

⁴ The cargo value salvaged in this casualty accounted for 61.15% percent against the total salvaged value.

⁵ See Article 175 of Maritime Law “the Master of the ship in distress or its owner shall have the authority to conclude a contract for salvage operations on behalf of the owner of the property on board.”

⁶ See Article 183 of Maritime Law “The salvage reward shall be paid by the owners of the salvaged ship and other property in accordance with the respective proportions which the salvaged values of the ship and other property bear to the total salvaged value.”

⁷ See Salvage contract case of MV “Gabriel” (Archangelos Investments E.N.E v. Nanhai Rescue Bureau of the Ministry of Transport), Guangdong High People’s Court Order, para.19 (June 16, 2015).

salvage contract involved in this case was a Salvage Contract by Employment, rather than a “No cure, No pay” salvage contract stipulated in the Maritime Law and the International Convention on Salvage 1989 (hereinafter referred to as the “the Salvage Convention”).⁸ Payment terms and standards shall be regulated and determined in accordance with Contract law of the People’s Republic of China (hereinafter referred to as the “the Contract Law”), i.e., stipulations in the contract overrode the principle of “No cure, No pay” in the Maritime Law. The judgment set aside the second-instance judgment issued by Guangdong High Court, and upheld the first-instance judgment. Investment Company was ordered to pay salvage reward of RMB 6592913.58 to Nanhai Rescue Bureau.⁹

2. Analysis of the Supreme Court’s Judgment

The Supreme Court’s judgement caused controversy among experts and scholars in shipping industry. These disputes were concentrated on three main issues concerning: (1) The legal nature of the salvage contract established in the case of MV “Gabriel” and whether the contract was a type of salvage contract? (2) whether the application of law to salvage contract in this case excluded the provisions of the Salvage Convention and the Maritime Law; and (3) whether the subject bound to pay the salvage reward included the owner of the goods who did not participate in the process of signing the salvage contract.

(a) The Legal Nature of the Salvage Contract in this Case

Under the first section of the decision, the Supreme Court’s judgment pointed out that “this case is a dispute under salvage contract,” while section (3) of the first paragraph stated that “the salvage contract involved in this case is not a ‘No cure, No pay’ salvage contract, but a Salvage Contract by Employment.” This article is of the opinion that the statement herein contains two folds of meanings: (1) the salvage operation involved in the case was “Marine Salvage”, as stipulated by the Maritime law, and the salvage contract of the MV “Gabriel” fell into the category of salvage contract provided for in Maritime law accordingly; (2) This contract was a Salvage Contract by Employment in which the salvage reward was determined on basis of salvage operations and fixed payment rates, rather than a “No cure, No pay” salvage contract.

(b) Application of the Salvage Convention and Chapter 9 of the Maritime Law

Section (2) of the Supreme Court’s judgement held that both the Salvage Convention and the Maritime Law did not intend to constrain the parties from making any different stipulations with respect to the determination of salvage reward, which may not in line with the principle of “No Cure, No pay” as provided for by the law and convention; the second part of Section (3) indicated that either the Salvage Convention or the Maritime Law had not specifically stipulated the payment terms and standards of the salvage reward under the Salvage Contract by Employment, it should be subject to the provisions of the Contract Law to regulate and

⁸ See Salvage contract case of MV “Gabriel” (Nanhai Rescue Bureau of the Ministry of Transport v. Archangelos Investments E.N.E and Hong Kong Andaousen Co., Ltd. & Shanghai Representative Office case), the Supreme People’s Court of the People’s Republic of China, para.14 (July 27, 2016).

⁹ See Salvage contract case of MV “Gabriel” (Nanhai Rescue Bureau of the Ministry of Transport v. Archangelos Investments E.N.E and Hong Kong Andaousen Co., Ltd. & Shanghai Representative Office case), the Supreme People’s Court of the People’s Republic of China, para.16 (July 27, 2016).

determine the rights and obligations of the parties in this case. This statement suggests that the Supreme Court 's concluded that: (1) the validity of Salvage Contract by Employment, although not a “No cure No pay” contract as stipulated by the convention and law, was still subject to provisions of the Salvage Convention or the Maritime Law; (2) The application of the Contract Law was limited in two aspects in a marine salvage contract. First, the contract law applied only if there were no specific provisions in compliance with the Salvage Convention and the Maritime Law, and second, the scope of application of the Contract Law was restricted to the regulation of the payment terms and standards of the salvage reward.

(c) The Cargo Interests, that Does not Enter into the Salvage Contract by Signature, as Indicated in the Discussed Case, are not Bound to Share the Obligation to Pay the Salvage Reward

Although the title of section (4) of the judgment discussed “how to determine the amount of the salvage reward requested by Nanhai Rescue Bureau”; its content involved the subject who was bound to pay the salvage reward. This part excluded the application of Article 183 of the Maritime Law, under which cargo interests and owners of other salvaged property are requested to pay the salvaging party. In other words, cargo interests are not obliged to pay salvage rewards directly to the salvaging party, whenever a salvage contract by engagement is involved.

(d) Summary of the Supreme Court’s judgement

In summary, the Supreme Court’s judgment on the salvage contract of the MV “Gabriel” ascertained the nature of the Salvage Contract by Employment, namely the Salvage Contract by Employment still fell into the category of salvage contract at sea, as provided for in the Maritime Law or the Salvage Sonvention, although the calculation of reward was different from that of the “No cure, No pay” salvage contract. Secondly, the judgment did not exclude the application of the Salvage Convention and the Maritime Law, and it affirmed that the Salvage Contract by Employment was within the scope of the Salvage Convention and the Maritime Law, and the Contract Law applied only in the absence of specific provisions of the Salvage Convention and the Maritime Law. Finally, the judgement confirmed that the counterparty of the salvage contract was the subject who was bound to pay the salvage reward, not including any third party. Article 183 of the Maritime Law did not apply to Salvage Contract by Employment. A detailed discussion will be given hereafter.

3. The legal nature of Salvage Contract by Employment and its application of law based on reviewing the case of MV “Gabriel”

(a) The Salvage by Employment is within the Scope of the Salvage Stipulated in the Salvage Convention and the Maritime Law

The legal nature of the salvage by employment is a prerequisite for the application of law. Neither the Salvage Convention nor the Maritime Law gives a clear definition of “Marine Salvage,” however under Article 1 of the Salvage Convention, “salvage operations” are defined as “the act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.” No substantial differences exist between Article 171

of the Maritime Law and Article 1 of the Salvage Convention.¹⁰ The academic definition of Marine Salvage is : “a salvor voluntarily rescues ships, cargoes and other property that are in danger at sea or in the navigable waters connected to the sea.”¹¹ Yet at the same time, the majority agree that the constitutive requirements of Marine Salvage are summarized as (1) the object of the salvage is a ship or other property; (2) the salvage occurs at sea or in navigable waters connected to the sea; and (3) the property being salvaged is in danger.¹² Retrospect to the case of MV “Gabriel,” the salvaged object MV “Gabriel” was a sea-going ship, which met the first requirement; the place of occurrence was in the westward channel of the Qiongzhou Strait, which lay within the navigable waters at sea with the second requirement satisfied. According to the facts acknowledged by the Supreme Court, the MV “Gabriel” and the goods on board were dangerous after the ship became stranded because of potential marine pollution accidents, which would seriously threaten the environmental safety of the sea. This urgent situation matched the third requirement. In summary, the salvage provided by Nanhai Rescue Bureau met the requirements of Marine Salvage elements specified in the Salvage Convention and the Maritime Law.

Furthermore, there are some views to believe that the above definition of Marine Salvage is only a definition of the factual act of Marine Salvage, rather than a definition of the legal act of Marine Salvage.¹³ The legal act of Marine Salvage refers to the act of “the salvor engage in salvage operations and intend to obtain salvage reward (it means the “No cure, No pay” reward), and only salvors who conduct legal act of Maritime Salvage are vested with the right to claim salvage reward provided for in the Salvage Convention or the Maritime Law.¹⁴ Hence the salvage act should comply with the subjective criterion, which means that the salvor should intentionally aim to obtain salvage reward under the principle of “No cure, No pay”. It will not be deemed as a legal act of Marine Salvage if the salvor does not possess the will of obtaining the salvage reward, and will not be regulated by the Salvage Convention and the Maritime Law. This is not our position for the following reasons: firstly, the cornerstone of Marine Salvage is salvaging marine property in dangerous situation at sea, rather than the motivation of obtaining the salvage reward. Secondly, it is not appropriate and equitable in some special circumstance if the will of obtaining the salvage reward under the principle of “No cure, No pay” is regarded as a precondition for the establishment of a salvage act. For example, a considerable part of the population of domestic coastal fishermen, who may not have the chance to be educated to the extent to understand that they are entitled to claim salvage reward under Maritime law, conduct the salvage operation purely out of good ethics and integrity, should the law deprive their rights to claim for salvage reward only because of their lack of awareness that they will be paid after saving property and life? It is an unacceptable situation to the modern civilized society if the answer is positive. It also further leads to contradiction to “the principle of encouraging salvage operations” as established by article 180 of Maritime Law.¹⁵ This paper argues that there is a misinterpretation of the “No cure, No pay” principle and perform the salvage act out of the virtue of being kind and charitable, they should still be entitled to claim salvage reward in the view of encouraging salvage, i.e., salvage reward, whether determined by “No cure No pay”, or “Service tendered” or even to the extent that salvor do not intend to obtain any rewards, do not

¹⁰ See Article 171 of Maritime Law “The provisions of this Chapter shall apply to salvage operations rendered at sea or any other navigable waters adjacent thereto to ships and other property in distress.”

¹¹ See Hu Zhengliang & Han Lixin (eds), *Admiralty Law*, Peking University Press, p.103 (2016).

¹² See Fu Ting-zhong, *The Nature of Contract of Employment Salvage and Its Application of Law*, 27 Chinese Journal of Maritime Law 14 (2016).

¹³ See Si Yu-zhuo, *The Legal Attributes and Application of Employed Salvage*, 27 Chinese Journal of Maritime Law 5 (2016).

¹⁴ Ibid.

¹⁵ See Article 180 of Maritime Law “The reward shall be fixed with a view to encouraging salvage operations, taking into full account the following criteria.”

change any elements of the definition of marine salvage.

(b) The Application of Law to Salvage Contracts by Employment

The Supreme Court ruled that the Salvage Contract by Employment in the case of MV “Gabriel” was governed by the Salvage Convention and Chapter 9 of the Maritime Law, and the Contract Law was applicable in the aspect of the payment terms and standards of salvage reward. However, there are also opinions that the principle of “No cure, No pay” is the soul of the Salvage Convention and the Maritime Law. Therefore, the Salvage Contract by Employment is an ordinary maritime service contract, not subject to the regulation of the Salvage Convention and the Maritime Law, and shall be governed by the Contract Law.¹⁶ This article argues that the application of law to Salvage Contracts by Employment should be discussed on the basis of objective facts and China’s legislative regulations. It should be regulated within the framework of the Salvage Convention and the Maritime Law as far as possible. Regulations of Contract law or any other civil law apply only while there is absence of specifications in the Salvage Convention and the Maritime Law. The details will be discussed below:

(i) Chance to Apply Foreign-related Law or Conventions in the Case of MV “Gabriel”

In China, judicial practice, foreign related law or conventions apply only on condition that foreign related civil legal relations are involved. It is common understanding that there is no clear definition of “foreign-related civil legal relations” under Chinese Law. However, under Article 1, paragraph 1 of the “Supreme People’s Court’s Interpretation of Several Issues concerning the Application of the Law of the PRC on the Application of the Law on Foreign-Related Civil Relations(1)”, if one or both of the parties are foreign citizens, foreign juridical person or other organizations or stateless persons, the case shall be deemed to be of foreign-related civil legal relations. In the case of the MV “Gabriel”, the ship was a Greek oil tanker, and the place of residence of the respondent (the Investment Company) lay in Greece. Therefore, it is without dispute that the legal relationship of Salvage Contracts by Employment in this case was foreign-related.

(ii) Application of the Salvage Convention and the Maritime Law to the legal relationship of the salvage contracts by employment

With regard to the provisions concerning the application of foreign-related laws, the prerequisite issue in this case is the legal nature of the dispute involved. There is no objection that cases of salvage contract dispute should be deemed as credit and debt disputes regardless of the means of fulfilling the salvage operation, by employment, pure salvage, or the way of “No cure, No pay”. According to Article 41 of the Application of Civil Relations in Civil Relations of PRC, where both parties have not chosen the applicable law, the law of the habitual residence of the party that best reflects the characteristics of the contract or other laws most closely related to the contract should prevail. The distress and salvage location of the MV “Gabriel” was in the Qiongzhou Strait of China. The contract was reached between Shanghai Representative Office and Nanhai Rescue Bureau. Therefore, either the “the Doctrine of Characteristic Performance” or the “Most closely related principles” indicates that Chinese Law shall prevail in this case.

¹⁶ See Si Yu-zhuo, *The Legal Attributes and Application of Employed Salvage*, 27 Chinese Journal of Maritime Law 7 (2016).

At the same time, in accordance with Article 4 of the Supreme People's Court's Judicial Interpretation of Several Issues concerning the Application of Foreign Civil Law (1), the application of the Convention should be subject to the provisions of the General Provisions of the Civil Law, the Bill Law, the Maritime Law Civil or the Aviation Law which is proper. In this case, Chapter 14 of the Maritime Law specifically regulates the application of the law in maritime foreign-related legal relations. According to Article 268 of this chapter, when the provisions of Maritime Law differ from those of the Salvage Convention, the Convention takes precedence. The Flag state of the MV "Gabriel" was Greece. Both Greece and China were contracting parties of the Salvage Convention. Summing up the foregoing facts, it can be seen that whether the Salvage Convention and the Maritime Law would apply to Salvage Contracts by Employment should be subject to the specific provisions of the Convention and Municipal Law. As mentioned above, Article 1 (a) of the Salvage Convention is consistent with the definition of "Salvage Operations" of Article 171 of the Maritime Law. We can know literally that both laws cover the salvage operations under the Salvage Contract by Employment. This paper argues that where there are clear rules on specific aspect by law, there is no need to interpret the law by other means so as to ensure the predictability and stability of the law unless there exists a logic error in the law itself. In other word, Salvage Contract by Employment is governed by proper conventions and domestic regulations, and conventions will prevail if there are some conflicts.

(iii) Subjects bound to pay salvage reward includes the cargo interests who do not participated in the signing of the salvage contract

The third-level courts judgements differed on this issue, and are dicussed in the first part of this article. This paper considers that "privity of contract" applied in the judgements issued by the Supreme Court and the Guangzhou Maritime Court. The Supreme Court's judgment further specifically excluded the application of Article 183 of the Maritime Law.

This paper submits that it is appropriate for "privity of contract" to be applied in this case. Article 13 (2) of the Salvage Convention and Article 183 of the Maritime Law have similar provisions, and the clause of the Salvage Convention clearly stipulates that the salvage reward shared by the parties in accordance with the salvaged value is limited to the reward which is ascertained according to Clause 1 ("No cure, No pay"). Considering that the content of this chapter of the Maritime Law is drafted by referring to the Salvage Convention, it can be understood that the salvage reward covered in Article 183 of the Maritime Law shall only point to the salvage reward under the principle of "No cure, No pay".

It was unfortunate that the Supreme Court did not explain the provisions of Article 175 of the Maritime Law on the master and the owner's right to sign salvage contracts on behalf of other property owners to a further extent. This paper submits that the sharing of salvage reward should be based on the recognition that neither the Salvage Convention nor the Maritime Law intends to preclude the principle of will autonomy in the field of private law, and in the meanwhile Articles 6(2)¹⁷ and Articles 13(2)¹⁸ of the Salvage Convention, Articles 175 and 183 of the Maritime Law should be combined together to determine the salvage reward: (1)With

¹⁷ See Article 6(2) of the Salvage Convention "The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel."

¹⁸ See Article 6(2) of the Salvage Convention "Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares." Nothing in this Article affect the application of Article 7 nor duties to prevent or minimize damage to the environment.

the widespread promotion of the standard template of salvage contracts and the application of modern communication equipment, cases of sharing salvage reward under pure salvage are currently rare. However, the risks at sea are constantly variable, and it may still be impossible to reach a salvage contract in an emergency circumstance. In such situation, there is no room for the application of Article 6 (2) of the Salvage Convention and Article 175 of the Maritime Law. The Article 13 (2) of the Salvage Convention or Article 183 of the Maritime Law will directly apply, and the salvage reward should be shared by the owners of the salvaged property in accordance with the ratio of the salvaged value to the total salvaged value.

When it comes to salvage under contract, regardless of whether it is a “No cure, No pay” salvage contract, Salvage Contract by Employment or any other types of salvage contracts, it should first be made clear whether the content of the agreement between the salvaged and the salvor violates the national mandatory laws and regulations or public order and good customs or the interests of the country and third parties. When above-mentioned circumstances are excluded, it is advisable to respect the autonomy of the parties and the binding of the contract to the both parties. In respect of the identification of the parties to a contract, this paper considers that it can be adjusted respectively by Article 6 (2) of the Salvage Convention or Article 175 of the Maritime Law after the application of the law is determined.

For the time being, there are still two type of Phenomenon existing: the normal one is that the contract clearly states that the ship party has the right to sign the salvage contract on behalf of property owners. For example, the first part of the Lloyd’s Standard Form of Salvage Agreement 1995 (hereinafter referred to as the “LOF1995 Contract”) sets out: the master of the salvaged ship has the authority to sign the contract on behalf of the ship, cargo, fuel, materials, and the owner of the other property. According to Article 6, paragraph 2 of the Salvage Convention and Article 175 of the Maritime Law, the master has the right to sign a salvage contract on behalf of the ship and other salvaged property owners, and the articles do not treat the “No cure, No pay” salvage and “salvage by employment” differently. In this case, this paper argues that the salvage reward should be shared in proportion by the Salvaged ship and other property on the basis of the legal representation of the master and ship owner whatever the nature of the salvage reward. The other one is different from the LOF1995 contract.

There is no clear specification that the master or ship owner has the right to sign the salvage contract on behalf of the owner of the goods and other property owners, such as the Salvage Contract by Employment in the “Gabriel” case. According to the facts identified in the judgment, Shanghai representative office did not mention that he was signing a Salvage Contract by Employment on behalf of the property owner except the ship. Whether Nanhai Rescue Bureau had the right to claim the entire salvage reward against Investment Company in this circumstance? This paper suggests that it depends on the claim and evidences produced by Investment Company.

If Investment Company claims that the salvage reward should be shared in accordance to the salvaged proportion, he should prove that the original intention of signing the contract at that time possessed the true meaning of the expression that he was on behalf of other cargo interests, such as seeking advice from cargo interests about the quotations and negotiations, the phrases such as “Subject to the Cargo interests’ confirmation” were used when negotiating the offers with salvage companies. The judgment confirmed the facts that Investment Company did not prove that he had the meaning of exercising “legal representative right” when signing the salvage contract. Therefore, this paper agrees with the Supreme Court to rule that Investment Company undertook the salvage reward alone. In addition, the “legal representation right” granted to shipowners and masters by the Convention is not unconditional. It is believed by the mainstream theory that the status of the right of shipowners and shipowners to sign salvage

contracts is derived from the “Agent by Necessity” under the common law.¹⁹ In this case, the master or owner should contact other property owners as soon as possible after the accident in order to obtain the authorization of these interested parties. With the increasingly updated marine communication equipment, the ship’s Global Maritime Distress and Safety System (GMDSS) equipment is able to meet the need of communication at any time, including sending and receiving of messages, mail exchanges, satellites, medium and high-frequency telephones, etc. The period of time for the master and the owner to function as the “agent by necessity” is getting much shorter. This paper considers that the restriction of the “legal representation” of the master and owner should not be too strict in a reasonable period of time after the occurrence of the emergence.

4. Impacts of the Legal Nature of Salvage Contracts by Employment and Application of Laws on other Legal Systems

Marine Salvage, General Average, the Limitation of Liability, Marine Insurance and other systems constitute an organic unity of maritime laws. The determination of the nature of the Salvage Contract by Employment and the application of the law has greater impacts on the maritime law system. If the salvage by employment is excluded from marine salvage, it will arouse huge disputes both in theory and in practice.

(a) The Impact on the Maritime Lien

The claim to salvage reward under the Maritime Law is secured by Maritime Lien of the same.²⁰ If the Maritime Law is not applicable to the reward under salvage by employment, whether the salvors’ right to claim the salvage reward under Salvage Contract by Employment is secured by maritime lien may cause great controversies. At present, there are two completely opposite viewpoints: one one side, are those that believe if the salvage reward under the Salvage Contract by Employment is removed from the Maritime Law, the right to claim salvage reward will be deprived of the priority, which is contrary to the ideology of encouraging salvage at sea advocated in international legislation.²¹ On the other, if the maritime lien is granted, a large number of maritime service contracts should be granted the maritime lien respectively, which will narrow the scope of the ship’s mortgage and is not conducive to regulating the legal conflict between the maritime lien and the ship’s mortgage.²² This paper believes that the purpose of the establishment of maritime lien should be based on a comprehensive consideration.

On the basis of the above doctrine, the reason why the salvage reward is listed into claim right secured by the maritime lien is that the salvage act provides the basis for the realization of other claims. It is, therefore, necessary to retain the maritime lien of salvage reward even though it is based on salvage contract by employment. However, there still exists disputes if we simply affirm the maritime lien of salvage reward under the Salvage Contract by Employment. When the salvage is of little effect and the salvage reward calculated based on

¹⁹ See Aleka Mandaraka-Sheppard, *Modern Maritime Law: Managing Risks and Liabilities*, 2 informal law from Routledge 423 (2013).

²⁰ See Article 22 of Maritime Law “The following maritime claims shall be entitled to maritime liens: (4) Payment claims for salvage payment.”

²¹ See Fu Ting-zhong, *The nature of contract of employment salvage and its application of law*, 27 Chinese Journal of Maritime Law 16 (2016).

²² See Si Yu-zhuo, *The Legal Attributes and Application of Employed Salvage*, 27 Chinese Journal of Maritime Law 10 (2016).

the fixed rate is much higher, the salvage reward will undermine other claims guaranteed by security right on ships. Although there are no examples in practice, this contradiction is advised to be resolved by the amendment of the Maritime Law²³. This article believes that reward under the Salvage Contract by Employment should be confirmed in the process of the Amendment of Maritime Law in such manners: (1) For the part of reward which does not exceed the salvaged value, it should be secured by the maritime lien, and; (2) For the part of reward which has exceeded the salvaged value, the exceeding part should fall in to ordinary maritime claim, i.e., not secured by maritime lien.

(b) The Impact on the Practice of Marine Insurance

The term “salvage expenses,” normally stipulated in insurance contract, is usually not defined clearly in insurance contract clauses of the ship insurance and cargo transportation insurance. It is common understanding that the concept of the salvage expenses in insurance industry is derived from salvage reward as defined in Chapter 9 of the Maritime Law. The exclusion of the salvage reward under the Salvage Contract by Employment from Maritime law will determine whether it is covered by the insurance contract and by what kind of insurance. This paper considers that the insurer’s obligation to pay is not absolute under Salvage Contract by Employment. The salvage expenses under the insurance contract should be interpreted as the proportion of the total salvage reward which should be shared by the ship owner based on the basis of salvage value under Chapter 9 of the Maritime Law. The salvage reward in the case of MV “Gabriel” was ruled by the Supreme Court that all salvage reward should be solely borne by Investment Company, under which circumstance the shipowner does not have the right to ask the insurer to cover the salvage reward under Salvage Contract by Employment. This article suggests that the safe way, when salvage contract by employment is involved, is to calculate the portion shared by the shipowner in accordance with the General Average adjustment rules, then the shipowner turns to the Hull insurer for claim in the name of General average expenses. Or the salvaged shipowners can also claim “sue and labor charges” from the insurer as appropriate either.

(c) The Right of the Salvor and their Insurers to Limit their Liability for Maritime Claims

Shipowners and salvors may limit their liability for the claims as provided for in Article 207 Maritime Law. The legal status of the salvors under the Salvage Contract by Employment was not clear until the Supreme Court’s judgment of the case of MV “Gabriel”, which finally made clear that Salvage Contract by Employment belonged to the salvage contract stipulated in Chapter 9 of the Maritime Law. The Salvage Convention and the Maritime Law apply in the Salvage Contract by Employment, and only in the cases where the Convention and laws do not provide for, the Contract Law shall apply in the aspect of the payment terms and standards of salvage reward. Obviously, the legal status of the salvors has nothing to do with the payment terms and standards of salvage reward. Therefore, this paper considers that the salvor can invoke the limitation of liability to maritime claims in Chapter 11 of the Maritime Law. In addition, there is no definition of “salvor” in Chapter 11 of the Maritime Law, but “salvors” include anyone who provides services directly related to salvage operations as well as personnel who provide operations such as salvaging, clearing, and so on in accordance with Article 1, paragraph 3, and Article 2, paragraph 1, of the 1976 Convention on Limitation of

²³ The amendment of Maritime Law was put on schedule in September 2018 by the Standing Committee of the National People’s Congress, the draft of the amendment is still being open for comments.

Liability for Maritime Liabilities. It can be seen that the concept of “salvor” in the limitation of liability for maritime claims is more extensive than that defined in the Salvage Convention and Chapter 9 of the Maritime Law.

5. Conclusion

It has been over 5 years since the decision of MV Gabriel case, yet the disputes arising from the case have not yet been addressed sufficiently. There have been a variety of interpretations by experts in the field. Whereas, unfortunately, the Maritime Law did not specifically regulate the salvage by employment, and there are not enough cases for further discussion, which leads to inconsistent understanding of this case. The paper serves to provide clarification of the judgement of the case of “Gabriel”, further discusses the nature and application of law of Salvage Contract by Employment, and analyses the impacts on shipping industry brought by the retrial, on basis of which several suggestions are given for the amendment of the Maritime Law.

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CONTENTS

International Economic Law

- | | |
|-----------------------------|--|
| Liang, Yong & Hou, Chu-chen | The Renovation of Investment-Related Environmental Clauses in USMCA and China's Stance |
|-----------------------------|--|

International Institutions and Treaties

- | | |
|----------|--|
| Li, Di | Restorative Justice, Impunity and Amnesty in International Criminal Law |
| Chen, Bo | Controversy and Consensus: Does the UN Convention on the Rights of Persons with Disabilities Prohibit Mental Health Detention and Involuntary Treatment? |

Dispute Settlement

- | | |
|--------------|--|
| Yang, Li-yan | The Influence of ASEAN Community on the Integration of South China Sea Policy and China's Countermeasures |
| Jing, Ming | Seeking an Appropriate Expression of "Historic Rights" in the Law of the Sea -- Investigating historic rights in the South China Sea |

International Business Law

- | | |
|---------------------------|---|
| Lu, Ying | Expanding the Res Judicata of a Public Interest Litigation Filed by Consumer Groups |
| Wang, Yong & Hou, Guo-bin | Analysis on Salvage Contract by Employment -- Based on the Case of M.V. "Archangelos Gabriell" Salvage Reward |

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