

# THE FOUNDATION FOR LAW AND INTERNATIONAL AFFAIRS REVIEW

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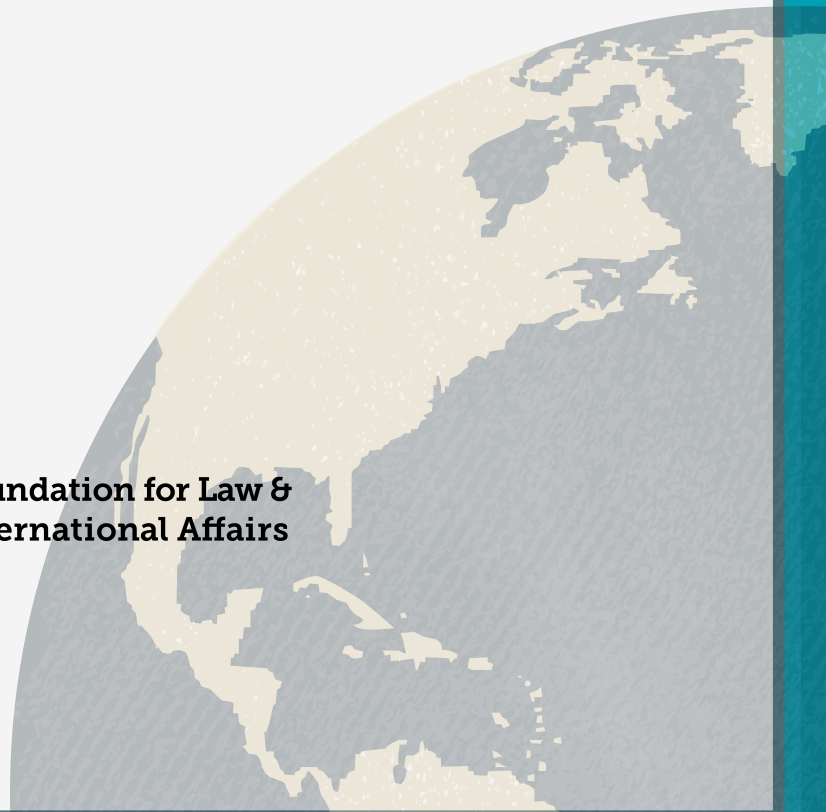
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# **Foundation for Law and International Affairs Review**

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On February 27, 2021, to strengthen international cooperation, the Foundation for Law and International Affairs Review (FLIA Review) and the School of Foreign Languages of East China University of Political Science and Law held “International Symposium: Globalization in a Post-COVID World: Retreat or Revival?”

This issue of the FLIA Review first introduces an overview of the symposium and then covers seven articles under topics including COVID-19 and Law, International Environmental Law, Energy Law, and International Criminal Law.

Editorial Board  
June 30, 2021

# **A Review of the Symposium “Globalization in a Post-COVID World: Retreat or Revival?”**

## **Opening Remarks<sup>1</sup>**

Suqing Yu

Good morning, honored professors and dear friends. It's my great pleasure to greet all distinguished professors and young friends online, on behalf of the School of Foreign Studies of East China University of Political Science and Law. I really appreciate all the great efforts from FLIA, Foundation for Law and International Affairs. As we all know, COVID-19 has inflamed the debate about the future of globalization, rising protectionism, and populism. Now, as contagion and equipment shortages grow, it seems as though interconnectedness itself is under attack. The pandemic has shown how deeply in time all of our faiths are. It is also a wake-up call to the vulnerabilities in the global system. But we must judge the problem correctly if we are to find the right remedy. The problem with the globalized world is not in the connectedness, but a lack of resilience which is the ability to cope with changes and shocks. Interconnection brings us great benefits and can be a source of resilience if well figured. The early Internet was designed as a communication network, able to survive a nuclear attack. Groups or networks for trade, migration, finance, and information grow ever larger and more complex. This creates prosperity, but the risk is not offset by prudent planning or acts to create a global governance mechanism. COVID-19 has again shown the fragility of the global system, but globalization and a shuttling supply chain are now simply desirable, not possible. We must build a more resilient form of globalization, one that retains the benefits of interconnectedness while enhancing safeguards and response capabilities, so that we can be ready for the next big challenge. At this moment, the School of Foreign Studies of East China University of Political Science and Law collaborates with Foundation for Law and International Affairs to hold this symposium to explore possible paths towards constructing the future and enough framework of globalization. I believe this meeting will surely bring new vitality and opportunities to the academic development in global governance, international law and language studies together with all my colleagues from the School of Foreign Studies. I wish this conference a big success.

Thank you!

(By Suqing Yu, Dean and Professor of School of Foreign Studies, East China University of Political Science and Law).

Larry Backer

Colleagues and dear friends, I'm delighted to be able to welcome you to this exciting international symposium on globalization in a post-pandemic world. I want to especially praise the Foundation for Law and International Affairs and the School of Foreign Studies of East China University of Political Science and Law for their innovative and forward-thinking approaches that make this conference possible. I add my personal thanks to Shaoming Zhu. I've known her for more years than I can remember whose work on behalf of the Foundation for Law and International Affairs.

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<sup>1</sup> This content was transcribed by Qianhan Qian from East China University of Political Science and Law.



Colleagues, friends, you've been given a most formidable task. Each of you will contribute to a profound discussion about the effect of the pandemic on the forward or backward trajectories of globalization. This presents one of the most important questions that we all face over the next several years. I'm eager to learn from you as you move the scholarly discussion of the issues to a new and more sophisticated level. I want to start this symposium with a very brief suggestion for how it may be possible to frame some of these approaches to those important contributions to knowledge. The plague even transforms as it accelerates, but there is no magic to the plague. This conference brings together a group of distinguished scholars whose work has been significantly advanced knowledge on precise ways in which COVID-19 has either accelerated trends or is in the process of transforming the global order as we once knew it. That may be worth thinking from six distinct points that I will raise very briefly. First, it's important to underline that there will be effects on the current world order, yet it's too early to identify the long-term effects confidently. Second, the foundational relationship between the individual, the collective and governing institutions will change in profound and quite noticeable ways, while it is likely that the discourse of personal liberty or collective responsibility does not change in the short run. The application of these principles will change them both in socialist and liberal democratic systems. Third, the scope of governmental authority is also likely to change. It is difficult, though, to predict the direction of that change, and it is likely to be highly contextual, partly will depend on the way in which its system disperses power between its public and its private organs. Fourth, the bureaucratization of all aspects of life, actually signals the movement of power from the political to the managerial elements of institutions. The pandemic revealed in all of its majesties that the state and its principles are captive to the administrator, to the technician, to the field expert, and to those who design and operate systems that connect policy to implementation. States that expose and exploit that connection tends to do well. States that seek to suppress their trajectory by muzzling or silencing their technocrats often find themselves criticized, and their efforts undermine. Fifth, the nature of borders will change; borders will indeed matter more for the control of people. At the same time, they will matter less for the organization of economic activity. Lastly, there's an important role to be played by the emerging great regional economic collectives. In particular, the role of the Belt and Road Initiative as a structure through which challenges like those presented by COVID-19 profound further study. With these thoughts in mind, I welcome you to the symposium and look forward to what I expect to be quite profound contributions to knowledge that will now be made here.

Thank you!

(By Larry Backer, Board Member of Foundation for Law and International Affairs; W. Richard and Mary Eshelman Faculty Scholar Professor of Law and International Affairs at Pennsylvania State University).

Shaoming Zhu

Thank you so much! I specially invited Professor Larry Backer here to address the theme of the symposium because we actually talked about the theme of this symposium last year when this just started all over the world. Although it's a little bit late, I'm still glad we are able to do it this year because we all had a very, very long year in 2020, and I believe many of us have suffered in different ways. But hopefully, our talk today will be able to offer some solutions, or at least some suggestions to the global society in terms of rules, international law, multi-culture, communication, and global governance. I personally believe it's going to be a better year this year, and I hope we can all join these efforts. And to at least make our academic society and the people around us be happier and just have a brighter belief in the future, please allow me to just give a short introduction to the organization Foundation for Law and

International Affairs. It's a very young organization that was incorporated in 2015. But since then, we have been growing, and now we have more than fifty researchers from all over the world. It's also a global virtual team, of course. Today I would like to especially address two important programs that Foundation for Law and International Affairs is currently carrying on. One is Foundation for Law and International Affairs Review. As Foundation for Law and International Affairs Review is an open-access journal, any topics under the intersection of law and international affairs are welcome, and we are accepting papers on a rolling basis, so there's no specific deadline. Just feel free to send us your article, and we will go through the peer review process, and if it's suitable for the journal, it will be published as soon as we can. The other program I'd like to introduce here is the one we will officially launch tonight, Beijing time. The third panel of this symposium is called inclusive diplomat, one of the missions that the Foundation for Law and International Affairs is currently carrying. It's to dissolve the false boundaries and connect our mutual world because we believe many of the problems, we face today are false boundaries. And I think the false boundaries are one of the things in front of us and require all of our awareness to dissolve and create a mutual, better, inclusive world for all of us. So anyway, hopefully everyone today will have fun in the next fifteen hours.

Thank you!

(By Shaoming Zhu, Founder and President of Foundation for Law and International Affairs).

# **Panel One: The Implications of the Coronavirus Outbreak on Globalization<sup>1</sup>**

**Chair:** Yong Wang (Professor of East China University of Political Science and Law)

## **1. COVID-19 as the Vanishing Mediator of Globalization**

Douglas de Castro

Greetings from Brazil; it's very good to be here with you tonight or this morning.

This representation is a part of a larger research agenda that I've been conducting in Brazil, which investigates the Bandung spirit in the relationship between Latin America and China.

The methodology is the epistemological stance in my paper. It is a grounded theory, which means that I'm looking into data, the quantitative data, watching what emerges from data, and a postcolonialism approach, especially the third world approach to international law. Despite working with the grounded theory, I've developed the hypothesis that COVID-19 emerges as a vanishing mediator, which I will explain later. The concept of the globalization process, new conditions, and new ideas that emerge to rethink the status of the globalization process melt into the air, as Mark and Elsa post in their manifesto.

First of all, talking about globalization is to bring the subject of modernity, or I should say, the crisis of modernity. For which reason? Automaticity. Automaticity will bring happiness and progress to humanity, and this is not what we've been observing, especially during the second world war. It is more like rationalism, creating this monster, and after the creation, it becomes irrational. And that's why I put it here, the picture of Frankenstein. The monster is created by rational thinking, but as soon as it is brought to life, it is alive, it becomes irrational and represents the crisis of the modernity project.

I think also, postmodernism is not the answer. I mean, deconstruct globalization. So, we need to just think about the crisis and what we're going to replace when we deconstruct globalization to mention the postmodernism postulate. My argument is that COVID-19 is a vanishing mediator. The quote here from Etienne Ballbar in which who says that the vanishing mediator is the figure, admittedly presented in speculative terms of a transit or institution force for community or spiritual formation. That creates conditions for a new society and a new civilization standard, albeit on the horizon and in the vocabulary of the best, reorganizing the elements inherited from the institution itself that has to be overcome. When we look into COVID-19, we look into the responses in two levels of analysis. The first one is international. When we observe at the international level, we see an apathy of initiatives store common global problems or complex issues. In regards to COVID-19, if we look into the climate change regime, we can choose to observe that apathy. When we look from the national level, we see populist agendas and the disregard, two independences. And something more serious, I should then point out the approach of securitization of COVID-19. Putting a sanitary issue in the political agenda justifies the war against COVID-19, so since we are in work with COVID-19, many instruments detrimental to fundamental rights are justified within this framework.

COVID-19 has the vanishing mediator because we're looking into a potential and constructive way in which we can work this out within this framework, the Bandung spirit, which rejects in period colonial stances and also the constructivism that looks into ideas and

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<sup>1</sup> This content was transcribed by Yaping Wang, Yijing Zhu and Yier Ji, all from East China University of Political Science and Law.

capabilities are necessary, but placing a stronger approach to ideas and shared experiences. So, bring the bricks to be my empirical stands to my argument.

Sharing experiences within developed countries is a reality. We tend to observe that because as we look to COVID-19 within the south, a framework, we tend to see the viable ability of the people, but also, we tend to see ingenuity. If we have most of the vaccines developing out of the 150 initiatives, we tend to see the Russian one, the Chinese one, the Indian one. So, of course, there is more viable ability in our region, but also we tend to see ingenuity. And this is part of the optimism that I bring into this discussion which unlocks the potential for the corporation and solidarity, which is embedded with the Bandung spirit. Regional responses to regional problems or in other words, adding a level of analysis to the problem. I've been arguing for quite some time that international law doesn't respond to all of the challenges or national law, so we should consider more. This is a regional level of analysis in which problems can be solved more easily as complex as they are.

Thank you!

(By Douglas de Castro, Visiting Scholar at Foundation for Law and International Affairs; Professor of Law at Ambra University).

## **2. A Shift in the Hierarchy of Needs Unleashed by COVID-19: From Maslow to Max Neef in Search of Transcendence**

Jean-Pierre Doussoulin

Hello everyone, let me just start to explain how I'm thinking about the relationship between the hierarchy of needs, concepts, and the comments. COVID-19 was formally called a global pandemic by the World Health Organization on March 11, 2020. Today, the number of infected cases has passed ninety million and continues to rise. The impact of the disease is far below their implications, not like other ones, including the Spanish flu. It has a much powerful impact on society. Every aspect of the economy and society is affected by it, including economic rewind, contraction in the rear economic activity, and lower energy system. So, due to this pandemic, we can note the fate of the question and conversation related to COVID-19.

I think that consciousness has shifted towards survival and transcendence. On the surface, I'm sure that all of the activities and all initiatives have shifted away from the menace to our planet. It was changed toward the immediate and more tangible danger to our life under COVID-19. Speaking about the crisis, relationships between the government are covered by focusing on the response. We can discuss a large period of the debate and speech around the response to human needs during the crisis.

As a consequence of this uncertain world, people are desirable for transcendence and humans need hierarchy and satisfiers changed after the pandemic. This can be seen as a result of the natural change in the behaviors and perspectives that can positively impact the biosphere and now decide for the sentence from a positive side.

This expert authority research analyzed the change in the hierarchy of needs as a result of COVID-19. My presentation focused on the challenge that followed this transformation. This challenge is a question of needs and satisfaction if you trade the dialogue space on human needs. Let me continue with sending well-known theory of human needs. First, I would like to present a famous person from Maslow who studies positive human qualities and the life of people. In 1954, Maslow created the theory of human needs and expressed the theory in his book *Motivation and Personality*.

This taxonomy is based on this work on human-scale development and was published for the first time in 1986. The structure of Maslow's approach proposes talking about the urgency of sustainability of the planet towards an ideal of transcendence, not only human transcendence

but also the trueness of the planet. So, this research introduces the theory of human development developed by Max Neef. This theory is focused and based on the satisfaction of fundamental human needs on the generation of the growing level of several lands, on the construction of organic articulation of people with nature and the ignorance either get similar to the discussion in the speech. One of the most important concepts is the distinction between needs and satisfiers. Needs are expressing culture and social contents through existential contiguity. In the right part of my presentation, the theory describes these needs are assumed to be constant through all human culture and across storage areas. Every normal human being is sensible of the limit of the boundaries of existence before and after on behalf. In addition, according to their religious statement, transcendence can be related to the ability to touch human beings for the measure on their environments, creating a distance. The desire for transcendence can be expressed towards technology and environmental sustainability. Finally, environmental sustainability is responsible, interacting with the planet to the resource and avoid the ability for the future generation and their needs. It can be interpreted or is similar to the theory of the state economy.

The application of our combine and framework in this context rise to two mythological challenges. First, we have to rebuild Max's matrix of needs with the people after COVID. Second, if possible, we will try to analyze some sort of systemic relationship. This research shows the challenge in the hearty of needs as a result of COVID-19 and extends the theory of what kind of issue it is. The COVID-19 pandemic provided an opportunity for the city to recover from the shock to think of a sustainable future. They will place the vision and values of the community in the middle of the surrounding for another magnificent need with a ring around, then presenting the sustainability relating to Sussex sustainability.

We have all been taken down on some level, and we are now looking to protect ourselves. The barrels' success and failure of COVID-19 policy respond to provide a chance for reflection.

That's my presentation. Have a good day, and goodbye.

(By Jean-Pierre Doussoulin, Université Paris-Est, Chercheur associé au Laboratoire Érudite; Assistant Professor in Economics at Universidad Austral de Chile).

### **3. COVID-19 Implication on and the Response by Customs**

Shujie Zhang

My topic mainly links to some practical issues. Among all the government agencies dealing with international trade, Customs would be one of the most "international" agencies. If you trace back the history, you will find out that Customs controls are linked to the cross-border movement of goods, travelers, and means of transport. All Customs regulations and rules may need to resort to the International Customs instruments and tools. Sometimes we call China Customs "guard of the national gate." We see that in the past forty years, China Customs has played a very important role. It's a ministerial agency from the global perspective because international trade played a very important role in the national economy in China. As leading agencies in border management and trade control, Customs administrations in the world process nearly 98% of international trade. Therefore, Customs is at the forefront to encounter the frustrations, risks posed by the outbreak of COVID-19. Guided by World Customs Organization, the international Customs community has negatively and positively realized the new reality created by the pandemic and taken a wealth of measures to cope with the challenge and make ready for innovation and transition of Customs administration in a post-COVID world.

So, what is the role of Customs? Here I will introduce some perspectives from World Customs Organization. Basically, Customs take on three major roles.

1. It facilitates international trade and also protects the security of the global supply chain.
2. Customs collects duties and other taxes since we need to ensure fair and efficient revenue collection.
3. It's quite a link to the confidence and the challenge, and how we make this link protect the society, and it is the major matter that not only China but also other countries have to think over.

If we look back on the international Customs landscape in the past twenty years, two key themes center on Customs control: trade facilitation and security. In 1999, we adopted the most important international convention in the Customs world, called the Revised Kyoto Convention and focuses on simplifying and harmonizing the Customs procedures across the globe. The Revised Kyoto Convention is treated as a blueprint for modern Customs, comprising around 600 provisions covering all of Customs procedures. In the Revised Kyoto Convention, three key concepts for modern Customs are “simplification, harmonization, and standardization.” The historical logic is never straightforward and linear. However, in 2005 because of the 911 terrorist attack in the United States, we came to a new kind of situation—anti-terrorism became a new priority for the international Customs community beyond the United States. So, World Customs Organization has just established a new international instrument called the SAFE Framework of Standards to Secure and Facilitate Global Trade (usually referred to as the SAFE Framework) which shifted focus on trade security. In 2008, because of the global financial crisis, it was considered that revenue collection should resume its prominence, especially in developing countries. In 2013, the World Trade Organization Agreement on Trade Facilitation had finally adopted a long negotiation process, and it seems that the limelight shifts back to trade facilitation.

For Customs, the “new reality” posed by COVID-19 can be observed in two layers. Obviously, immediate impacts and trends in the cross-border movement of travelers and cargo: closing of borders in different countries; travel restriction and ban; reduction Customs workforce; less imported/exported goods, significant reduction of Customs revenue, etc. A deeper observation emerges that a “paradigm shift” may come to light for Customs: “border divides” is the somewhat hard truth, though Customs tries to “connects”; security, especially biosecurity, raises an imperative matter on the Customs policy agenda, restructuring of global supply chain brings more challenge to Customs; the pandemic may also create a new opportunity for Customs to innovate their working methods.

The international Customs, though frustrated by anti-globalization, led by World Customs Organization, has taken a range of initiatives to cope with the pandemic. A dedicated project has been launched. World Customs Organization has rigorously put forward and consolidated its instruments and tools to guide its member to facilitate the cargo, especially relief consignments like medical supplies. World Customs Organization also forged a closer partnership with other international organizations, which is a clear manifestation of how international institutions could contribute to the face of crisis. Looking into the future, World Customs Organization commits its member to bolster Recovery, Renewal, and Resilience for a sustainable supply chain. In the light of the future, the two key concepts like Globally Networked Customs and Coordinate Border Management, become more relevant for closer Customs cooperation, which is also the answer to where to go for globalization.

China Customs, which was created as a new organization in 2018 by merging previous Customs and sanitary & phytosanitary organs, created a new model for Integrated Border Management. The new organization does stand a benchmark on the efficiency and effectiveness in tackling the tremendous challenges posed by the pandemic. Looking into the future, China Customs is promoting a 3-Smart strategy, namely “Smart Customs, Smart Borders, Smart Connectivity,” in international Customs cooperation.

Finally, I do think that COVID-19 poses a big challenge for Customs. We Customs can work together to help the revival of the global Customs supply chain. “Risks can also be used as an opportunity,” since how Customs work and how Customs cope may be a new paradigm shift.

Thank you!

(By Shujie Zhang, World Customs Organization Accredited Expert; Professor at Shanghai Customs College).

## **4. Reviving Transnational Clean Energy Investment as Part of Global COVID-19 Recovery**

Aishwarya Saxena

Hello everyone, good morning. I’m so happy to be here and listen to wonderful presentations from everyone. I research clean energy investment in Asia and Africa, and I want to shift your focus to what the world might look like when the COVID-19 pandemic is over and what might be required to sustain a healthy world. One of those aspects is, of course, the energy sector, and for the next ten to eleven minutes, I will talk to you a bit about climate change, the status of how it affects our lives today. I will also talk about how the environment has recovered during the COVID-19 pandemic. I will also talk to you briefly about clean energy investment and how it has been infected during a pandemic.

Let’s jump into climate change, which constitutes one of the biggest existential threats to us at the moment. It is not something that we used to see, like when I was a little girl in school. I had heard of climate change and heard of global warming, but I thought it was such a distant reality. While in our role today, unfortunately, we have begun to bear the brunt of climate change and extreme weather conditions that start occurring all over the world. Here in California, especially in the last few years, most disastrous wildfires are fueled by rising surface temperatures of the earth. In 2019 the world hit about record-high emissions rate, and about two-thirds of that were emitted by growth in emissions from the energy sector, by electricity generation.

And it is so bad that today, even businesses have begun to factor climate change as a major risk when they embark on a project and as part of their overall planning. Despite all of this, and although electricity generation has grown, about eight hundred million people in the world still remain without access to electricity, and about two-thirds of them are on the continent of Africa. So that’s a grim statistic and also a scary one. Imagine how much more admission it would take for all of these people to have access to electricity. There can be two answers. One is a lot of growth in emissions and the other is almost no emission if we do it the right way through clean energy.

Since COVID-19 has sort of ruled their lives for the last year and a half, which is also really impacted environmental conditions on earth and impacted clean energy in general, it has been an interesting impact. It’s not really binary, and it’s not very black or white. We don’t know if it’s been good or it’s been bad, so let’s look at it a little bit.

These are some pictures from India. On the top left is a very large river in southern India, which is full of trash and very dirty. On the top right is the image of the same river just about sixty days after a lockdown in India. The water is clean, and there’s no trash. In the picture on the bottom right, as you see, there’s a dolphin.

Nothing special about it, right? But what is special is that these dolphins are seen in Mumbai. Mumbai is among the world’s most polluted cities and the water bodies are especially seriously polluted. And forget dolphins, you’d be lucky if you see any sort of aquatic life coming towards the surface. They are always towards the back, towards the deep waters, which

is a little bit cleaner. So, this is a huge, pleasant surprise to people in Bombay because we used to see few dolphins.

It is a huge shock to everyone that we have dolphins in Mumbai now. And these are all after the lockdown as a result of the reduced burden of human activity on the planet. Factories had shut down, and cars were not moving because everyone was home. People were not littering and disposing of plastic objects into water bodies. And as a result, global carbon emissions were reduced by about eight percent. This is similar to what happened during the global financial crisis of 2008. That's all very good. However, if we don't maintain this reduction in emissions, the emissions might actually end up doubling as economies resumed. Let me show you a few more examples to put my case in point. New Delhi once had horrible smog problems, but one month after lockdown, we see no smoke anymore. Such visual changes also happen in Namsal Mountain in South Korea. After the pandemic, the air is cleaner due to fewer cars in the streets and fewer factories in operation. Now let's look at some of the barometric data. This is a representation of the atmospheric Nitrogen Oxide density over China before and after just a few days into the lockdown, and it seems to have significantly reduced. On the right side, you see Singapore, the same thing. Slowly, the emission levels in the air have significantly reduced. The same thing in Italy, you see the concentration of emissions is very high and then it turned just slightly like a pinkish, very light readjust about a few days, into almost a month, into the lockdown. So, it should not take a pandemic for the planet to recover, or planet recovery and rejuvenation of our planet, should that be the norm for future generations? Well, I think it really should be the norm. However, to sustain that, it would take a lot of effort from not just governments, but the global economy in general, and businesses have a huge role to play in this.

Now let's look at what's going to happen after the world start to open up fully. Economies have already significantly opened up. They have started full-scale operations. Vaccinations are ongoing at a very fast rate. However, in most of the recovery plans now, the global recovery plans from different countries have little focus on clean energy. Unemployment is rampant. Economies are just not doing good at all. There's just not enough money to allocate to clean energy, but I think this is equally important because this is about sustaining a healthy quality of life on the planet.

About three hundred billion dollars of investment per year would be required to maintain the carries court goal of maintaining the earth's temperature, add or below 1.5°C over the next five years. However, less than 3% and when moved out, a period between 2020 to 2024, about 12% of the global stimulus plans are allocated to this, which is very low in comparison to how big finishing is this. And if we start looking at the death rates from pollution, respiratory issues, this becomes more and more important to increase more investment and put in more of a catalyst in the energy sector for clean energy investment.

Now has the pandemic affected clean energy investment? Now let's look more at the private sector side, which just looked at the government down on it and their recovery plans. And fortunately, the pandemic stalled a lot of energy projects. Companies were facing a weekend balance sheet. They just didn't have enough money to go, and especially abroad. Governments' focuses also shifted globally, and as was said before, there are bigger problems like public health situation, homelessness, and unemployment. At the start of 2020, it was very optimistic news that clean energy investment was growing very strong, at about 2%, and was expected to continue growing at that rate. But after the pandemic, it's supposed to plummet and expected to be plummeting by 20%, which is sad but also understandable given the circumstances.

How do we fix that? We can begin by making clean energy investment a larger part of recovery plans. Governments can try to allocate larger amounts of stimulus spending for green energy.



The other thing that can be done from beyond the governments, with the private industry, is to tap into very good markets in southeast Asia and Africa. Economies, where are heavily interested have shown a lot of interest in investing in clean energy, especially nuclear energy. In China and Russia, they have actually been very helpful characters for countries in Southeast Asia and sub-Saharan Africa, especially to kick start their nuclear power programs, and also invest in other green infrastructure. This is where the role of businesses comes in. And although it may be a little risky to think about investing abroad right now, this is where it matters most, because we have built in the momentum of reducing carbon emissions. If global clean energy investment keeps growing at the rate of what it was at the beginning of 2020 at 2%, we can actually maintain the advantage that we've got during the COVID-19 pandemic as far as the environment is concerned. There's a lot of need for transnational collaborations. Only when companies and corporations that work in the energy sector, governors, and local communities collaborate can we maintain and sustain this clean energy movement.

Thank you!

(By Aishwarya Saxena, Lloyd M. Robbins Fellow & Doctoral Candidate at University of California Berkeley School of Law).

## **5. A Discursive Approach to China's Role in Global Public Health Governance: News Values Constructed in the News Discourse of COVID-19 of 2020**

Ranran Zhang & Tianyu Huang

Global governance is defined as “the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organizations, both inter-and non-governmental, through which collective interests on the global plan are articulated, right and obligations are established, and differences are mediated. It is a movement towards political cooperation among transnational actors aimed at negotiating responses to problems that affect more than one state or region. Global governance can be good, bad, or indifferent, refers to concrete cooperative problem-solving arrangements, and relates to the way in which global affairs can be managed.

About the academic fields, usually, the global governance will fall into politics or international relations. The top one of the current works of literature in CNKI is Chinese politics and international politics, and the second one is about economics. Some researchers also propose that we can define global governance not in substantive but in methodological terms. Thus, it can become an analytical concept that provides a specific perspective on world politics. Also, from a further literature observation besides the web, we can see disciplines of research articles in the last 10 years. There are international relations, political science, and also environmental studies. In this way, we can see that in literature both home and abroad, a discursive approach is rarely involved, and this paper examines how China's role in dealing with COVID-19 is pictured in the news values constructed through the news discourse.

The research data in the current study include news reports from the Economists of 2020 (from January to December), related to COVID-19, altogether 185 news reports, 217579 words tokens. Guided by the concept of collocation or co-selection in corpus linguistics (Sinclair 1991, 2004), the two authors extract two concordance lines from the data with the help of AntConc. With the help of the Internet, from the first co-occurrence, we get 215 lines, and for the second, we have 29 lines. A further detailed attitude analysis within the framework of appraisal is possible for these lines with their much larger local contexts.

Attitude is a part of appraisal and has three parts: Affect, Judgement, and Appreciation. Affect is concerned with language resources that construe emotional feelings. The judgement deals with language resources for evaluating behavior according to normative principles, including social esteem. Appreciation is used to examine language resources that construe the value of things, including natural phenomena and semiosis. For example, for the judgement, the veracity of “another master of disinformation” is negative. It shows attitudinal analysis based on the appraisal system. There is a relation between attitudinal analysis and news values. COVID-19 is construed as a news event with great impact or consequence largely through the attitudinal choices of appreciation, especially the categories of reaction and valuation. Although the data in the present study are particularly related to “China”, COVID-19 is not construed as a regional public health crisis that influences China only, but a global crisis. While the proportion of negative attitude is obviously much more than that of positive attitude, the positive resources do exist and construe the positive side of the global crisis. The virus as a new event appears much frequently in the first two months and occurs in the sub-title of news reports 5 times. Against the backdrop of a global crisis of COVID-19, China acts as the main actor in this news event. Its behavior and the measures it takes are the two major targets in the discursive construction of China’s role in dealing with this crisis, which typically fall into the attitudinal choice of judgment and appreciation, respectively.

In construing China’s role, there is a clear attitudinal contrast between the news values of the elite and personalization and a clear judgement contrast to China’s elite: positive social esteem vs. negative social sanction. This may show some insights for further international communication for the Chinese government to promote itself to the world about what kind of behavior is considered good, doubted, or criticized. When talking about the lockdown in China, they use negative valuation and negative propriety like “had to.” But for Italy, as to the same lockdown, they just use a positive one.

With a bottom-up perspective, the study approached China in a global public health governance role by investigating the news values construed through news discourse. The investigation of China’s role in relation to its news values can indicate the ideologies or stances hidden in western media, informing empirical studies to a comprehensive understanding of “China” in the eyes of others. This empirical study also observes that China is frequently mentioned in the corpus and plays a significant role in dealing with the global crisis. On the other hand, further efforts are needed to optimize the global public impact of China’s participation in global governance.

(By Ranran Zhang, Assistant Professor of School of Foreign Studies of East China University of Political Science and Law; Tianyu Hu, Master Candidate, School of Journalism of Fudan University).

## **6. Critical Insights from the Chinese Social Credit System in the Post COVID World**

Wenyan Zhang

Different countries may have different meanings as to the credit. And the credit system in America has a quite different meaning from that in China. So, what is the preference of the Social Credit System in our country? The Social Credit System does not just assign credit scores to citizens and other legal entities. Some scholars may have such a misunderstanding to describe the Social Credit System in China as a scoring system. Some even have hostile attitudes towards the Social Credit System in China. Such words as “monitor”, “surveillance,” and “social control” have been used in papers about the Chinese Social Credit System.

However, during the pandemic, Social Credit System in China has proved useful to our country. Our government has used Social Credit System to fight against the pandemic.

Some scholars have traced the origins of the Social Credit System back to the market economy. They consider the purpose of the Social Credit System is to fight against the economic disorder. Some other scholars consider Social Credit System is to make the credit information files for the legal entities in China, just like what the Dang'an system has done. But the Dang'an system, which produces the information files for the citizens, is quite distinguished from Social Credit System.

Social Credit System, especially the social values promoted in this system, has a connection to Confucianism. The purpose of Confucianism is to promote social values. The moral principles embodied in our Social Credit System can actually be traced to Confucianism. The first document to set up Social Credit System is "Planning Outline for the Construction of a Social Credit System," aiming to promote honesty and traditional virtues and to raise faith levels of the entire society. This purpose is quite similar to the values advanced in Confucianism. Our Social Credit System is to make the abstract moral principles underlying Confucianism into concrete legal provisions.

Some scholars may have confused Social Credit System with the financial credit system. The financial credit reporting system is similar to the consumer credit systems in America and some western countries. The financial credit system is "Zhengxin" in Chinese. The purpose of this system is to promote financial trustworthiness. Compared with the financial credit system, Social Credit System aims to promote all of the values in all aspects. The financial credit system is led by People's Bank of China. Differently, Social Credit System is led by various departments in China. More specifically, the financial credit system is established in the late 1990s. In 1997, Bank Credit Registry and Consulting System was established. In 2006, Credit Reference Center was established.

Our government has taken a top-to-down approach, meaning there are no unified national laws centered around Social Credit System. There are just national guidelines. The national government issued national guidelines, like "Planning Outline for the Construction of a Social Credit System." Under the guidelines, a lot of local governments have launched social credit laws. For example, in Shanghai, the Shanghai government has made "Shanghai Municipal Regulations on Social Credit." In Henan, the government has made "The Measures for the Administration of the Restoration of Public Credit Information of Henan Province." All of these above are the local laws in the aspect of the credit system.

How is Social Credit System implemented? First, our government has established a lot of infrastructures to support the credit system. The most important infrastructure is the Information Sharing Platform. Our central government has established a central information sharing platform to collect all of the information from different departments and the local governments. The local governments have also established their own information-sharing platforms to collect the information and transfer the information to different departments. Cyberinfrastructure is another important infrastructure, which is Credit China. Credit China (<https://www.creditchina.gov.cn/>) has disclosed and collected a lot of public credit information of citizens and other legal entities. People can browse these websites to check some credit information about people and enterprises.

There is also an important mechanism supporting Social Credit System, which is the Joint Punishment and Reward Mechanism. It may be conceived that in Social Credit System, some governments may just assign the scores to different legal entities. But actually, according to some local regulations, this is not the case at all. Some local credit regulations have provisions as to the "blacklist" and "redlist." The "blacklist" is similar to the notorious list in America. The behaviors in the "blacklist" shall be punished. There are various punitive actions, such as restrictions on participating in government procurement, restricted use of government land,

restricted access to financial subsidies and preferential policies, suspension of approvals on sci-tech research and development projects. Behaviors listed in the “redlist” may have some preferential treatment and rewards.

Social Credit System has proved to be useful to the pandemic fighting. The central government has responded very quickly to the emergent issue. Moreover, at least 15 provinces and 19 municipalities have made updates to their local social credit systems. For example, in Jiangsu Province, 24 cities and districts issued COVID-related amendments. This is a very good example of how the central government can mobilize the local governments, and the local governments can respond quickly to the orders of central governments and fight against emergent issues.

Our Social Credit System is not very perfect, and there are criticisms. The first one lacks unified national laws. It has caused some problems. For example, there are many divergences among the local laws. Another criticism is about the concerns on the protection of privacy interests. Concerns about the blurry line between morality and regulation also arise. For example, there is a huge difference between moral behaviors and immoral behaviors. But Social Credit System sometimes does not make a separate line between these two behaviors.

There are also some difficulties in adopting the Social Credit System in America. For example, in America, there are some constitutional issues as to the privacy protection issues, and there may be some issues of legal authorities between the states and the federal government. Different from China, where the central government leads the local governments, there is a power separation between the states and the federal government in America.

(By Wenyan Zhang, Associate Professor of East China University of Political Science and Law).

## **7. The Security Exception Clause Under the Impacts of Non-traditional Security: Changes, Justifications and Countermeasures<sup>2</sup>**

Yong Liang

Under the accumulated impacts of the de-globalization and the return of state in recent years and especially the public health crisis of COVID-19, dozens of countries have significantly extended their understanding of the connotation of national security. Besides, they have improved or strengthened foreign investment national security review mechanism. Furthermore, some countries even “proactively” take some abnormal regulatory measures under the name of protecting national security and seek dynamic interpretation of the security exception clause in the International Investment Agreements. The latest concluded US-Mexico-Canada Agreement of 2018, the Comprehensive and Progressive Trans-Pacific Partnership of 2018, Brazil-India Investment Cooperative Treaty of 2020, and Regional Cooperative Economic Partnership of 2020 have made some changes on the security exception clause, which may also lead to a significant impact on the future development of the application of the security exception clause. The two-tier development of the security exception clause in practice and a text may distort the relative balance of the security exception clause and further aggravate the unbalance of the international investment rules.

Based on empirical research on Investor-state Dispute Settlement cases sued against the Argentine government and the Indian government and textual research on the developments of the security exception clause in the latest concluded International Investment Agreements, I attempt to explore China’s countermeasures to the developments of security exception clause. Under the guidance of the overall national security concept, the double-edged security

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<sup>2</sup> The abstract of presentation was submitted by Associate Professor Yong Liang.

exception clause shall be clearly defined as a “prepared but rarely invoked” defensive clause for positioning and content design. It shall continue to insist on invoking the security exception clause under the strict restraints to prevent the excessive strengthening or even alienation of national security in practice or application and effectively guarantee a better balance of benefits and interests of all parties in international investment relations.

(By Yong Liang, Associate Professor of Fudan University Law School).

## **8. The Pandemic COVID-19 Accelerates the Transformation of National Protectionism to National Precautionism**

Shuchun Wan

The long-term impact of COVID-19 may bring about a new era of emphasis on “precautionism”: developed countries no longer protect their own enterprises in foreign trade competition, but turn more their attention to protecting their citizens and consumers from the risks. Precautionism will change the key point of the international trade rules in the future. The main goal of international trade rules in the future is no longer to push tariffs down, but to coordinate measures to prevent the risks among the countries. To participate in the formulation of common priorities, the capacity of the technology and standards will guide the policy-making under Precautionism.

The pandemic spreading in different countries happened at different times, so the paralysis of global trade had even been avoided. The impact of COVID-19 has a huge impact on trade in the short term. But the import and the export never stop between the countries. Under the crisis of the Pandemic COVID-19, a series of special and emergency health measures has been taken in different countries. The objectives of these measures are: to facilitate the exchange of goods supply, to ensure the medical supplies meet the standards to protect the health and safety of its territory and citizens.

And some measures are directly related to customs: (i) the exemption from Customs duties on imported medical protective articles and materials; (ii) the relevant provisions on the import and export of certain specific commodities. For example, to facilitate the clearance of the imported personal protective equipment, some countries of the European Union accept the imported masks at least with foreign standards, which is equivalent to European Union standards or other European Union standards. Meanwhile, the other measures also involve: (iii) permit the deferred payment of duties and other taxes; (iv) some special Customs supervision. And (iv) some relevant provisions of Customs supervision procedures which are related to cargo transportation and warehousing. All the above measures related to Customs are adaptive in the short term intended to rely on foreign trade to compensate for the shortage of domestic production to a certain extent and wait for the time to promote economic recovery.

Benefiting from the technological development, the tariff reduction and the cost reduction of the supply chain from 1990 to 2000, the world trade experienced the rapid expansion of the supply chain, efficient utilization of capital, and cost reduction. Since then, globalization has slowed several times, which was linked to the financial crisis in 2008 and the Fukushima nuclear leaking in Japan in 2011. And the public health crisis caused by COVID-19 accelerated the reconstruction of globalization towards diversification.

It could be argued that, to a greater extent, globalization is restructuring towards diversification. For example, some countries may set up factories in many countries, not only in China. Some enterprises will reorganize the industrial chain and ensure a certain elastic space, even which may not be the best choice in the cost. So, in the past, maybe more of the attention has been paid to the costs of the environmental change, but the next step may be to consider resilience, which will consult the higher prices, the shrinking profits and the slowing

of the international exchanges. The long-term impact of the pandemic COVID-19 will prompt countries to restructure the industrial chain under the name of “precautionism,” which may become a strategic measure for some countries. Based on the principle of national precaution, the pandemic outbreak accelerates the transformation of national trade protectionism, a new trend that could be named “precautionism.”

In the past 50 years, with the reduction of tariffs worldwide, the average tariff level has fallen from 30% to 5% today, could be considered that national trade protectionism has almost disappeared. On the contrary, non-tariff barriers, such as the quality specifications and the measures of the standards, continue to expand. But this is not a manifestation of national protectionism, rather than an early warning, or it could be called “a common priority” based on the security factors. It is the logical result of today’s society with the increasing and the aging of the population. The logic here is: when a society becomes richer, it becomes more sensitive to the risk.

The focus of the World Trade Organization is no longer to protect the enterprises from the negative effects of the competition through the tariff reductions in the international trade, but to protect the citizens and consumers far away from the risks. Of course, including the protection of the imported goods, which is derived from all aspects of the national legislation and policies. This shows that COVID-19 accelerated the transformation of national trade protectionism.

The pandemic outbreak may bring about a new era when everyone is emphasizing “precautionism”: Precautionism will change the key point to the rules in the future of international trade. The main goal of the international trade rules in the future is no longer to keep negotiating to reduce the tariffs down until zero, but to coordinate the measures of the prevention of the risk among the countries. In fact, this coordination process could become more complex, as it depends on the priorities in common that the different countries can achieve in a wider range, such as the culture, the level of economic development and awareness, etc. Surely, the policy-making under “precautionism” may cost more.

For example, if there is an average cost for an enterprise to make elite products accordant with the standards of an importing country, such as about 15% of its product price or final service price, but based on the precaution, the costs which is required under precautionism may be increased by 3-4 times.

It is clear that the priorities set out by these countries will always help them to build their economic chains to approach and realize what is profitable for them. Therefore, investing in technology and standards to gain sufficient capacity to participate in the formulation of “the priorities in common” will guide policy-making under Precautionism. After the outbreak of COVID-19, no country will ever lower its standards of precaution.

China’s Customs is always working on coordinating economic development and security. There are two levels of standards which are the international and the national standards. And China customs always need to make comprehensive use of the international rules to promote international enforcement operations. Facing the construction of an opening and safe gate, China Customs would work more on the following standards and the legal norms: (i) The control of the territory in the present pandemic situation. Pay attention to the imported food of the cold chain, this means of transport could be the risk monitoring. (ii) Strictly preventing the invasion of alien species and the outbreaks of the spread of the cross-border animals and plants. The customs will improve the mechanism of risk monitoring to prevent the global epidemic of animal and plant diseases and strengthen the quarantine management of the inbound and outbound animals, plants, and products.

The customs will strengthen the inspection of import and export commodities, and strictly control the quality and safety of the key commodities such as automobiles, medical devices, children cars, old electromechanical and the others: strengthen the safety supervision of the

dangerous goods; to protect the intellectual property rights on the import and export goods; combating the smuggling of the endangered species such as ivory, their products and to stop the waste from outside of the country, cracking down the smuggling of drugs, weapons and ammunition, and the smuggling of the tax-related commodities such as refined oil.

(By Shuchun Wan, Professor of Shanghai Customs College)

## **9. Global Governance on Free Data Flow during the Post-COVID Period**

Fang Fang<sup>3</sup>

Nowadays, personal data turn into a new type of “raw material,” and transborder data transfer becomes the lifeline at the age of the information economy. Personal data is of great importance in aspects like national security, digital trade, and public safety. And this time, it has been witnessed that cross-border data flow is crucial to containing and ultimately overcoming the Coronavirus. Famous for regulating personal data transfer and privacy protection, European Union’s General Data Protection Regulation has produced the “Brussel Effect” since it had passed in 2016. When facing global health security, how do major countries make use of personal data to combat the virus? Does the Brussel Effect of General Data Protection Regulation still work? If yes, then de facto effect or de jure effect? Are there any implications for the global governance on Transborder Data Flow during the post-COVID period? And in the area of free data flow governance, will Beijing Effect take the place of the Brussel Effect?

(By Fang Fang, Associate Professor of School of Foreign Studies of East China University of Political Science and Law).

## **10. Global Governance and China’s International Discourse Power**

Yu Li

Thank you, Professor Wang, and good morning everyone. This speech covers five parts. Now, let’s speak with the first part. The current world is undergoing major changes unseen in the past century, and we present these changes in the following two ways. On the one hand, globalization has been witnessing increasing global problems, and the drawbacks of the existing global governance system have become increasingly prominent. On the other hand, over the past four decades of reform and opening-up, China has made remarkable achievements, and the Chinese-style governments are increasingly getting the attention from the international community, such as the proposal with a shared future for mankind and the Belt and Road Initiative.

Then what is global governance? Now here comes the definition from the commission of global governance. A government group is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated, and cooperative action may be taken. It includes formal as well as informal arrangements that people and institutions have agreed to or perceive to be in their interest. Now, here we can see some key points in this definition. Its actors include both individuals and institutions with some common affairs. They

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<sup>3</sup> The abstract of presentation was submitted by Associate Professor Fang Fang.

can be either public or private. Its purpose is to accommodate conflicting or diverse interests and act cooperative action.

Now, let's move on to international discourse power. It is the extension of the national discourse power in the international community. It has become an important target of the game among the major powers in international politics. The competition for international discourse power has shifted from international discourse power to global governance discourse power. Then the competition for this is mainly embodied in two aspects. One is the dispute among the actors of discourse power. The other is the content of discourse power. The former is mainly manifested among different countries and between state actors and non-state actors. Now, many developing countries with continuously increasing power begin to work hard to promote the reform of the existing international system and actively seek their representation and make their voice heard in the global governance system to safeguard their legitimate rights and interests. That means contents of the discourse power in global governments mainly refer to the competition between countries in the aspects of their influence on public opinion, the right to set international agendas, the right to formulate and interpret international systems, and their contribution to international concepts.

Part three focuses on the major difficulties in China's discourse power in global governance. In 2004, Kim presented China's position in the world by saying, today no military, social, demographic or environmental crisis can be adequately addressed in a multilateral framework without China's cooperation or, at the very least, benevolent acquiescence.

However, it is still necessary to know that the construction of China's international discourse power still faces many obstacles and difficulties, and there are still some key issues that have not been resolved.

First, reconstruction of China's institutional discourse power is faced with tremendous resistance from other countries mainly reflected in the fact that they deliberately maintain the international system to protect their endowment and prevent China from participating in establishing the global rules. Secondly, China currently has insufficient ability to formulate issues in setting the international agenda and spread its ideas. In recent years, with the substantial improvements in the coverage of Chinese media, there is still no globally influential media in China that can guide international opinion and discourse power. Thirdly, the innovation in China's diplomatic discourse has not been effectively transformed into an advantage in the disseminating of its diplomatic discourse. The discourses of China's path and Chinese model have also attracted academic and political circles all at home and abroad. But on the whole, China still has a long way to go to eliminate it. Absurd arguments and discourse traps that some countries have directed against China, such as the China threat theory and the China collapse theory, build up its discourse power.

In part four, we raise five measures to improve China's discourse power in global governance.

Firstly, it is necessary to offer China more international public goods and spread the governance concepts with the Chinese characteristics. As a responsible member of the international community, China is to participate in global governance more deeply from international cooperation and provides more high-quality international public goods or the common prosperity of the world's economy.

Secondly, China should strengthen its ability to set the agenda in global governments. Setting agenda is the most important manifestation of the discourse power, making an actor more active in global governance. Strengthening the ability to set the agenda has become a tool for acquiring and expanding power, affecting the formulation and implementation of national strategies.

Thirdly, China needs to strengthen its relations and cooperation with other countries through joint "voicing." The global outbreak of COVID-19 has caused a huge blow to the



global economy. China has controlled the spread of the pandemic in the shortest possible time that's winning the battle against the virus. Instead of standing isolated, China actively participated in the governance of the world, public health, in the international public health governance. China's image as a responsible country has also motivated people in other countries to gradually understand the connotation of China's "people first" discourse. In the current global public has an incident, China has constructed its health security concept.

Fourthly, Chinese non-governmental organizations should be encouraged to participate in global governance. NGOs are now playing a larger role in global governance. They are a part of a stable society and independent from any government. The discourse power is manifested in a bilateral relationship in countries, and in multilateral relations between international organizations, not only in the foreign exchanges between governments but also in international, non-governmental organizations and various exchanges among people worldwide.

Fifthly, China should improve the international communication capability of its mainstream media, such as Xinhua News Agency. With the improvement of its comprehensive strength, China has become an important participant and contributor to global governments. It contributes Chinese wisdom, and Chinese approaches to world economic growth, peace and stability and order and fairness. However, China's contribution has not been fully understood by the world. And China often faces the dilemma of public opinion. Therefore, it is extremely important to tell the story of China well. Not only to inspire the domestic people but also to make the world understand the real China.

In the conclusion part, we summarize this article by noting that China's discourse power is now at a new historical starting point that is from the care of the country itself to global governance. The construction of the international discourse system and the obtaining of international discourse power is a systematic project. And a country's discourse power depends on what the country has achieved and what contribution it can make to mankind.

Thank you !

(By Yu Li, Assistant Professor of School of Foreign Studies of East China University of Political Science and Law).

## **11. The Opportunity of Globalization through the Crisis: Analysis from the Perspective of the International Medical Cooperation during Anti-Coronavirus Process**

Hongdi Chen & Xinzhi Zhao

The worldwide epidemic caused by COVID-19 may give birth to the opportunity to urge globalization due to this research focus on international medical cooperation during the anti-coronavirus process. To speak dialectically, even though the current pandemic caused irreversible damages to the global economy, public safety, and international transportation. On the other hand, enhanced international medical cooperation to combat the coronavirus. Statistics show that there is a frequency that the international cases involved in medical research published on top medical journals like The Lancet, the international transportation of Medical Supplies, the dispatch of medical personnel, and international medical meetings have increased since COVID-19 struck Wuhan, China. We investigated the cases in the fields above. We analyzed that the COVID-19 pandemic gathers countries stuck by the pandemic together to seek an efficient mechanism to cooperate, to accelerate the establishment of the international cooperation process, and to remind people of the advantage of such cooperation enhanced in the background of globalization, which might be regarded as an opportunity through the crisis.

Since the right-wing forces take leading positions in some countries gradually, such countries headed by the United States, pursue Unilateralism and Trade Protectionism and stigmatize globalization. For example, since Donald Trump, the former President of the United States, entered and hosted the White House, the United States has initiated numerous worldwide conflicts like the trade war with China, the withdraws from Iran Nuclear Deal, and quitting World Trade Organization. Such countries also stigmatize China as the villain to cause the COVID-19 pandemic, seeking a turnabout to hinder the process of globalization. However, according to this research, China did the best job to take this opportunity through the crisis and acted as the initiator to call for international cooperation, which contradictorily enhanced globalization through international medical cooperation. This research casts light on the positive effect of the COVID-19 pandemic on globalization, and might help combat the rumors made up by some countries against China.

Thank you!

(By Hongdi Chen and Xinzhi Zhao, both are Master Candidates of School of Foreign Studies of East China University of Political Science and Law).

## **12. The United States Military End-User List in a Post-COVID World Exerts Maximum Pressure on Chinese Entities**

Ziwen Ye

Thank you, Professor Wang. Too good to see you here online.

Let's start with the Export Administration Regulations posted on the U.S. Department of Commerce. It's a new military end-user list and the first charge of 100 Chinese entities and Russian companies.

When we come to the military end-user list, we may doubt what military end-users are? It's about the military, but it is not just like that. It is not far from our daily life. The military end-user may be a company. Just imagine you own the company, a Chinese company that you build about. You sell the goods by your vessels, but the United States deems that your companies promote the military and have the military capabilities of the Chinese government. That is to say, the modern modernized Chinese military. So, the U.S. Department of Commerce made a list. They made your companies on this list. And suppose you order exports of the United States items exported to your companies. In that case, the United States government will determine that your companies are military end-users for the purpose of the military end-use. And when we take into the military end-user list, there are 58 Chinese entities. Most of the entities are in two industries. There are aerospace and high-tech industries. It is a very tricky thing because export control is used in a United States economic sanction. The United States government said that they aim to guarantee their national securities by controlling the export for military end-use. But how come they focus on the Chinese and Russian high-tech industries? In summary, the military end use list is a new way for the United States to screen the export, re-export, or transfer to the Chinese companies.

Let's move on to the outstanding part of my topic, and I'm going to present a brief summary of the evolution of the United States military end-user systems in export control.

The United States revised the Export Administration Regulations to add Military End User List in a post-COVID world, further expanding the scope of military end users in order to sanction China and exert maximum pressure on Chinese technology entities. I present an approach to resist the United States economic sanctions in ways of scientific and technological innovation, internal compliance, rules on counteracting unjustified extra-territorial application of foreign legislation, and other measures. To utilize the characteristics of the United States export control to China from the "strategic contact" era to the "strategic competition" era, I

analyzed the evolution of the United States' control over military end-users, and military end-uses. Results showed that the ideological campaign between China and the United States was more acute in the post-COVID world. In terms of export control, the United States launched maximum pressure campaign against China from protecting domestic industries and promoting employment at an early stage to maintain the leading role in science, technology, engineering, and manufacturing to restrain China from acquiring emerging and foundational technologies. The United States exerted the strategic competition policy towards China to guarantee the current international political structure. However, Chinese entities have long relied deeply on the United States' high-tech intermediate goods of aerospace, electronics, and communication equipment. They may resist the United States economic sanctions by attaching importance to high-tech innovation, establishing a compliance system for entities to deal with the Military End-User List, and applying the blocking statute promulgated in 2021.

Thank you!

(By Ziwen Ye, Ph.D. Candidate of School of International Law of East China University of Political Science and Law)

## **Panel Two: International Law, Multinational Communication, and Global Governance<sup>1</sup>**

**Chair:** Wei Shen (Professor of KoGuan School of Law of Shanghai Jiao Tong University)

### **1. The International Convergence of Criminal Procedural Law in China - A Critical Discourse Analysis of Defendant's Rights<sup>2</sup>**

Suqing Yu

After the Second World War, there was widespread concern about protecting human rights, and many domestic and international laws have tried to address this issue. Due to the special asymmetric power relations among the courtroom trial participants in criminal proceedings, there has also been much attention to restraining public power and protecting the rights of criminal defendants. Between 1979 and 2018, a series of reforms of the Criminal Procedure Law of the People's Republic of China was carried out in the context of globalization and the Reform and Opening-up Policy. It shows clear signs of international convergence, especially in its focus on the rights of the accused. This concern can be reflected in the specific language used in the various versions of the Criminal Procedure Law of the People's Republic of China. Based on the theoretical framework of Critical Discourse Analysis proposed by Fairclough, three types of verb phrases related to the accused: “kěyǐ+ X” (may+X), “yǒuquán+X” (have the right to+X) and “tígōng +X” (provide+X) in the four versions of the Criminal Procedure Law of the People's Republic of China from 1979 to 2018 are analyzed for two other interrelated dimensions of discourse — discursive practice and social practice that occur in a specific political and social context. The analysis shows that changes in the use of verb phrases are not just a linguistic phenomenon. Instead, they reveal changes in the ideology of legislators and society, and the related changes in the relationship between defendants and public power. As a result of these changes, our criminal defendants enjoy more rights conferred by the Criminal Procedure Law of the People's Republic of China and have more power in the judicial process. During and after the COVID-19 pandemic, the judiciary has also facilitated the implementation of new approaches in criminal proceedings to protect criminal defendants' rights.

Thank you!

(By Suqing Yu, Dean and Professor of School of Foreign Studies, East China University of Political Science and Law).

### **2. Is America Back to Multilateralism? President Biden's China Trade Policy**

Eric Yong Joong Lee

The 2020 United States presidential election is now over. Mr. Trump was defeated, and Mr. Biden took office in January 2021. They're also listening to “the essence of Biden's

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<sup>1</sup> This content was record by Shuixingyun Liu, Xiaorui Cao and Qianhan Qian, all from East China University of Political Science and Law.

<sup>2</sup> The abstract of presentation was submitted by Professor Suqing Yu.

inauguration speech”—America is back. People around the world are cautiously expecting the revival of multilateralism in the United States and the world.

My presentation will be dealing with Biden’s future China trade policy, which is now increasingly challenging in the world. Because of time limitation, I would invite you to refer to my paper, “Is America Back to Multilateralism: The Prospect Of President Biden’s China Trade Policy”, which was just born today, published at China and WTO Review.

I would like to jump to Chapter Four because we have limited time. In Chapter Four and Chapter Six, I’m tackling the rationale of the future policy of the Biden administration of the United States: (1) Will President Biden adopts a more amicable policy towards China? (2) Is President Biden coming back to multilateralism? And (3) the significance of President Biden’s message: “America is Back!”

We have to think with two aspects on the future direction of President Biden towards China. Firstly, almost all recent American administrations—regardless of Republican or Democrat—have viewed China as a challenger and competitor to the American hegemony in Asia and the World. Joe Biden will likely not be an exception. No sudden change may be thus predicted at the beginning of the Biden presidency. However, his approach to China may be different from Trump’s. The most urgent and prior mission for the Biden administration is to recover the domestic economy and social trust, which were totally demolished during the Trump administration. The unprecedented insurrection to the Capitol demonstrates how feeble and unstable today’s social cohesion is in America. I think the most dangerous challenge that the United States faces is not Islamic extremists or terrorism, nor China, but domestic schism that may shake the Union down to its core.

In January this year, President Biden delivered his core message. He said, in this sense, Biden would likely try to end the trade war with China in any manner and rehabilitate the strategic partnership with China, at least maybe to the level of the Obama administration. “America is Back!” were the first words that President Biden delivered to both the United States and the international society. His message shows that the new administration will emerge out of “America first” and re-engage in multilateralism and free trade, which have been regarded as the contemporary global ideology. Such a policy shift will require mutual compromise and cooperation between the United States and other allies in order to realize common values such as economic growth and stability throughout the international community. So, in this sense, mega-FTAs, the Regional Cooperative Economic Partnership of 2020, and the Comprehensive and Progressive Trans-Pacific Partnership of 2018 will be firm stepping stones to vitalize Asia-Pacific trade and investment in the future as a whole.

So, after COVID-19, I think more inclusive beliefs should be promoted at the global level, and multilateralism should be in alliance with the private sector, think tanks, and others. A smoother process of delivering and distributing COVID-19 vaccine should be insured and developed. The community should be prepared for the Biodiversity and Climate Conference in 2021. The 19th Century’s extreme nationalism brought two world wars in the early 20th Century. And more recently, unilateral policy under the Bush and Trump administrations drove the United States into war and terror, which is yet to be offered despite the great loss of human lives. So, in the human history of terrorism, no country could keep its development without sharing prosperity, without neighbors. It is a lesson not only to the United States but all of us.

Thank you!

(By Eric Yong Joong Lee, Professor of International Law at Dongguk University).

### **3. Cyberspace Governance in a Post-COVID World**

Le Cheng

Thank you so much for the invitation. Today's topic for mine is Cyberspace Governance in a Post COVID-19 World. It is a part of my project, "Establishing and Perfecting the Comprehensive System of Cyber Governance," supported by the National Social Science Foundation Project. The talk is also related to some relevant publications, just recently released. Most of them, of course, is related to cybersecurity.

I think all of us here have already experienced or felt a kind of battle against the virus in physical domains, information domains, company domains, et cetera. So, the public crisis is especially related to the attack of cyberspace.

Crises such as epidemics and natural disasters will always provide cybercriminals with a large number of attack opportunities, and COVID-19 is no exception. COVID-19 has not eliminated the cybercriminals but has a breeding ground for their fermentation. For countries around the world, the number of attacks on the national infrastructure has been increasing during the pandemic, most of which target medical and health institutions. Sometimes we called it a critical information structure.

According to a report issued by the China Academy of Information and Communications Technology, hackers brute force cracking attacks on the medical system reached a peak of 800,000 per day during the epidemic. The websites of many prefecture-level medical and health institutions suffered distributed denial of service attacks and large-scale malicious scanning and infiltration. We can see, especially during COVID-19, that such crimes are very serious and the computer network system is under great pressure.

Centralized attacks on key assets, systems, and networks will immediately destroy key functions, and have indirect effects. The resulting damage will be gradually transmitted through the government, society, and economic departments, et cetera. The epidemic has spawned online industries such as network offices, telemedicine, and online education. The social demand for cyberspace security has become higher. Nowadays, in most parts of the world, people forced to work at home have dispersed the company's business and its operations. Firewall, data leakage prevention and network monitoring are no longer valid because most business people work at home. Attackers now have more access points to detect or exploit, which leads to a geometric increase in network security risks. For governments and enterprises, as the importance of remote work increases, it is necessary to ensure that all endpoints used by employees are fully protected. But unfortunately, that's not the case.

Criminals take advantage of people's growing fear of viruses and desire for information to continuously upgrade various online scams, including phishing software, spam, ransomware, and forged URLs, in order to steal sensitive information or spread malicious software for huge profits. For example, according to some statistics, cyber-attacks arise 600 percentage. So, just as the new coronavirus can spread through droplets, contact, and other forms, malware can also infiltrate through different vectors, the spread of which follows the same pattern as the epidemic infection itself.

Next, I would like to do a very brief discussion. In today's world, the global industrial chain is deeply intertwined. Thus, the construction of correct cognition and proper management of various impacts and challenges brought by the rapid development of technology is the key tasks for promoting effective cooperation in cyberspace governance.

From the perspective of national infrastructure construction, COVID-19 has reflected the advantages of a batch of "new infrastructure" using 5G. Especially within the big battle of the China-US trade war, the Huawei case or Wanzhou Meng Case is still going on in Canada, the court of Vancouver.

From the perspective of society, COVID-19 will accelerate the upgrading of industry informatization. With the strong support of digital technologies, including 5G, digital tools such as big data, cloud computing, online teaching, telecommuting and online recruitment have been widely used, fully securing the business output and personal life during the epidemic.

From the perspective of security, the medical industry, education industry and e-government greatly improve the quality, and security of telecommuting. Personal privacy and data security, mobile collaborative office, digital government, smart city, online bidding, electronic seal cloud data center security construction, and other services will be the main focuses, especially the health system, which is most closely associated with the epidemic.

Then for the network security industry, according to the statistics in recent years, the growth rate of the network security industry is weakly correlated with the macroeconomic growth rate. Although the COVID-19 pandemic will affect the customer's budget quickly leading to safety input lag, "time after epidemic" will become the new norm for traditional enterprise digital transformation with the recovery of productivity.

Put it briefly, with the multiple attacks brought by such global public health crisis, and countries have gradually realized the importance of international security as well as international collaboration.

Finally, here are my suggestions. The first is to advance digital transformation in a planned way; the second is to establish a network security system; the third is to improve sub-security emergency, a response mechanism; last but not least, to promote the international network of Information sharing. That's the end of my talk.

(By Le Cheng, Professor of School of International Studies and Guanghai Law School of Zhejiang University; Editor-in-chief, International Journal of Legal Discourse; Co-Editor, Social Semiotics).

## **4. Globalized Post-COVID World-Legal Perspective on Decarbonization**

Jitendra Kumar

We are living in a globalized world. It is common knowledge. Globalization has turned a planet into a global village by transforming travel and communication to an unprecedented level. It means people are getting closer and shrinking the distance in search of better employment and living standards.

Other things have been about the cross-border activities involving an inter-country exchange of goods and services and people, ever since the identification of the cause of the outbreak of COVID-19 in late 2019 and it's a pandemic designation in March of 2020. Research and development activities have been evolving into a broader understanding of the epidemiology of the novel coronavirus as a spread of infectious disease to mitigate the mortality associated with it. Pandemic has transformed life. Economic fallout associated with the COVID-19 pandemic has triggered the worst global recession in nearly a century. In response, governments worldwide have carried out unprecedented fiscal interventions to provide emergency assistance and try to stabilize their economies. As a warning, the damage caused by the pandemic source highlights the potential economic and social impact of the mounting climate change crisis.

Now let's look at the adverse effects of the COVID-19 pandemic. It is reported that more than 70% of startups have had to terminate full-time employee contracts since the start of the pandemic. Over 40% of the startups only have enough cash for 1 to 3 months of operation. GDP contracted in 2020, making it the deepest global recession in decades. Businesses have transformed, many in dire straits.

The world is at a historic crossroads. Choices made today will shape the world for generations to come. The COVID crisis has created a moment of opportunity to build a more sustainable world that can absorb extreme weather shocks and events and hold a prosperous

future based on a green foundation. It is time for post-correction, perhaps though the human health and economic costs of the COVID-19 pandemic continue to be high.

The crisis provided an unprecedented opportunity to change course and to reveal a global economy that is more resilient in the face of future shocks such as climate change. In unprecedented times, we face our lives dependent on monumental proportions. Considering its broad social, political, and economic impacts, COVID-19 presents challenges and opportunities by connecting the immediate need to cut the spread of the disease and meet the United Nations sustainable development goals in decarbonizing.

Nevertheless, is it possible to strengthen the economic recovery from COVID-19 while building greener economies? Green industries can create millions of jobs, not just in the long term, but today. Rebuilding with a strategic focus on climate-smart approaches will help make the inevitable low-carbon transition. So, maintaining a reliable electricity supply and keeping the lights on with a minimum carbon footprint is vital. Moreover, in attaining this goal, nuclear energy is the best suitable option. It offers three advantages. First, more energy can be produced by using nuclear materials than energy from fossil materials. Secondly, the use of nuclear energy is free from greenhouse gas emissions. There are policy considerations involved. Therefore, nuclear energy provides an advantage both regarding sustainability and mitigating conditions related to climate change. This is the reason nuclear energy is receiving much attention from policymakers and the public. If this trend is an indication and in the long term, many governments need to consider the option of nuclear power.

To maintain any significant level of economic growth by meeting the energy demands for the next century, the exception is if any would be only those states who are in doubt with their urban and energy resources. When the fundamentals are about to change, that change can signal the opportunity to rise to new heights. We are at a turning point where the humidity has crossed an infection mind, and it has poised for bigger things.

So, it is time we started having some tough conversations about environmental justice. We need leaders who are willing to sacrifice some of the approval to create the healthiest, most sustainable society. My question is: Do you see many such leaders?

Thank you!

(By Jitendra Kumar, Professor of Law at Nirma University).

## **5. Reframing the “Universality” of International Law in a Post-pandemic World: From the Perspective of the Belt and Road Initiative through a Gender Lens**

Ying Wu

There is no denying that the COVID-19 pandemic has reshaped the face of globalization. It has cast doubt on taken-for-granted economic and governance models, leading to a gradual turning away from the individualization of international law championed by the United States back towards the Westphalian origins of the international legal system. With the existence of the digital iron curtain, the liberal international order has been replaced by authoritarian international law. In this power-shift era, such a transformation is in line with the international law transitioning into a polycentric system. However, there is an anxiety that normative pluralism may lead to international legal fragmentation, which questions the universality and effectiveness of international law. The anxiety may reflect the binary of self and others in the international legal history of the relations between the West and the East. As China presents itself as an alternative center for governance, I analyzed the feasibility of China's attracting countries to fill in the gap and revitalize the global order, especially mentioning the context of



the Belt and Road Initiative. By refraining from the universality of human rights as the universalization of human rights, human rights are the “rights to come,” which are being perfected through progressive implementation of human rights corpus.

Thank you!

(By Ying Wu, Ph.D. Candidate of KoGuan School of Law of Shanghai Jiao Tong University).

## **6. International Law Path for the Coordination of the Growth of the Digital Economy and the Interests of all Parties in the Context of Globalization**

Liyan Yang

What’s globalization? I think most people know. Here I just give you a little bit of background. First, Globalization is the spread of conduct, technology, information, jobs across nations, etc. In economic terms, it describes the interdependence of nations around the globe. Developed countries can gain a competitive edge through globalization. Developing countries also benefit from globalization by providing more attractive jobs. There are lots of examples of Globalization concerning fields of economy, culture, politics, sociology, technology, geography, and so on. Among those kinds of globalization, the most influential one is economic globalization. It reflects the continuous expansion and neutral integration of the rapidly growing significance of information in all types of products and activities.

Then what’s the digital economy? Actually, there is no definition. According to a report from the United Nations, the world is only at the early stage of digitalization. The evolving digital economy and several economic terms lack widely accepted definitions. There may be many interpretations of the same term from relevant literature, analyses, and forums because of the insufficiency of understanding on clarity regarding those phenomena, reflecting the high speed of technological progress. The report consists of several parts. The first part introduces fundamental aspects of the digital economy. The second part expounds on digital and information technology. The third part concerns because we set the digitalizing sector.

The Digital Economy has been a powerful force in the development of the international economy in recent years. It’s a product of technological progress and has greatly promoted development in all aspects of globalization. The world economy is transforming fast as a result of the rapid spread of new digital technologies, whose major implication might be the UN Agenda 2030 on Sustainable Development.

So how can we view the digital economy? There are positive and negative influences. Positive ones show us that the Expansion of the Digital Economy creates many new economic opportunities. Digital data can be used for developing purposes and solving social problems. Platforms are facilitated by transactions, networking as well as information. The transformation of all markets through digitalization can fasten the production of higher-quality goods and services. Digitalization opens up new channels for value addition and gross structure. When it comes to negativity, the transformative power of data for economic, social interaction increases the risk of pitfalls.

Faced with these negative influences, how should we do from the perspective of international law? First of all, the Globalization of the Digital Economy requires more consensus in decision-making at the international level. All of international society should discuss public policy. Secondly, the digital gap indicates the need for new policies and regulations to have more equitable distributions to benefit of ongoing digital transformation. Thirdly, use the international legal mechanism such as international treaties and international

institutions. Fourthly, make full use of the World Trade Organization and bilateral treaties. There are some digital treaties in the United States-Mexico-Canada-Agreement. Recently the Australian government just asked Facebook and Google to obey the new law on news media, which resulted in lots of conflicts between governments, platforms, and individuals. Finally, set up a dispute settlement mechanism for those digital economic conflicts.

These are my thoughts. Thank you for your attention.

(By Liyan Yang, Professor of School of International Law of Southwest University of Political Science & Law).

## **7. Hovering between the Legality and Legitimacy: The Critical Analysis on Jurisdictional Immunity of International Organizations**

Xuyang Guo

Before COVID-19, when carrying out some tasks, soldiers made some misconducts during United Nations Peacekeeping Operations. Besides, after receiving funding projects from multilateral development banks, developing regions tended to lack approaches to avoiding human rights violations and effective legal mechanisms to protect the legal rights and interests of the injured parties, especially minority groups in these regions. One of the typical examples is *Jam et al., Petitioners International Finance Corporation*, in which the Supreme Court of the United States made the final decision that Petitioners International Finance Corporation enjoyed restrictive immunity.

During COVID-19, the pandemic highlighted the role of international organizations, such as the World Health Organization. The core issue is that there is neither retreat nor revival of globalization after the pandemic, but new types of them may come into existence. And theoretical concerns are how to reach a delicate balance between immunities enjoyed by international organizations based on the functional necessity principle and the protection of minority rights in order to maintain the long-term legitimacy of these organizations.

I would like to introduce the definition of my research themes, i.e., jurisdictional immunity, functional immunity, absolute immunity, and restrictive immunity. I do the research mainly through three research approaches; the first is doctrinal analysis on the basic concepts and the history of immunities of IOs, the second is a comparative study on domestic and international judicial decisions, the last is reviewing the internal accountability mechanisms of international organizations from a critical perspective. I add two conclusions. One jurisdictional immunity enjoyed by international organizations is not absolute, and the scope of jurisdictional immunity enjoyed by different international organizations should be specifically distinguished on the principle of “functional necessity.” The other is to coordinate the jurisdictional immunity of international organizations and guarantee the legitimate rights of injured private parties. The basic principles of the rule of law and the protection of human rights should be upheld in legislative and judicial practice.

Thank you!

(By Xuyang Guo, Assistant Professor of Shantou University Law School).

## **8. Social Distancing or Ideological Distancing - Critical Multimodal Discourse Analysis on the Western Media Discourse on China's Governance during COVID-19**

Haiping Wang

Using the previous images of China in the “others’ eyes”, especially the cartoon by James Gillray, I consider the biased image of China from the West, which reflected the ideological collision. I list the reasons behind the transition as follows:

- (1) the power relationship between the East and the West;
- (2) the expansion of the modern western civilization;
- (3) the freedom narrative establishes the legitimacy and superiority of the western social and political order;
- (4) the negation of “the other”.

I draw the conclusion that because of strong western centralism, China’s images gradually dimmed. Westerners’ superiority over the East has long existed, which is called orientalism, meaning a system and style of thought that is regarded as a general theory of representation or misrepresentation in which the West dominates the East. Orientalism can be reflected by linguistic devices. For instance, some racially-biased western media stigmatized China as a starving country, and it was the shortage of food that led to the outbreak of COVID-19. A video clip narrating a scene where a journalist interviewed a drunken man and distorted his words to deceive the western audience was used to prove that some descriptions concerning China were neither authentic nor friendly.

At last, I want to share my findings that the conceptual and perceptual gap between East and West has become a barrier to mutual understanding and cooperation between them in fighting against COVID-19. More seriously, it has manifested the embedded ideology conflicts in terms of collectivism-individualism, left-right, unilateral-multilateral, which has become a war of words. Critical multimodal discourse analysis can visualize political ideologies realized by combinations of semiotic resources in those biased media discourses after the outbreak of COVID-19.

Thank you!

(By Haiping Wang, Associate Professor of School of Foreign Studies, East China University of Political Science and Law).

## **9. The Proposal to Initiate a Global Carbon Emission Trading System**

Yunpeng Wang

Based on my observation, most of the literature on law and climate change indicates that the key to tackling global warming is to formulate a global institution to encourage universal participation involving state and non-state actors. However, the consensus is hard to achieve because of the conflict of national interests between states, especially developing countries and industrialized ones. Many scholars turned to the club approach or mitigation alliance to further international cooperation. They believe that linking the carbon markets bilaterally or regionally will formulate an alliance among a bunch of states. However, these carbon clubs or mitigation alliances tend to be formulated among states with similar geography interests or economic development levels. In reality, the linking has been realized between only developed states, such as European Union, Switzerland, Iceland, and New Zealand. The club approach seems to undermine environmental integrity, a fundamental target pursued by the Paris Agreement. It is necessary to find a more ambitious and effective way to include and encourage cooperation among developed and developing states.

Grounded on Article 6.2 and Article 6.4 of the Paris Agreement concerning the cooperation through the market mechanism, I present an idea of the Global Carbon Emission Trading System, which serves as an international institution to produce a global carbon price to stimulate innovation and investment in the low-carbon area. The basic features of the Global Carbon Emission Trading system shall include as follows: Firstly, the Cap is defined by a

global carbon budget; Secondly, carbon allowance should be issued by an international organ, not national organs; Thirdly, carbon allowance should be traded in a global platform.

There are three possible pathways to build Global Carbon Emission Trading System. Plan A, which is the most ambitious. Under this design, carbon allowance is issued and traded between firms, which are the real traders. The United Nations Framework Convention on Climate Change administers the operation of the Global Carbon Emission Trading System, with the state playing as an intermediary agent to provide assistant administrative services.

Plan B, less ambitious but more feasible. Global Carbon Emission Trading System issues carbon allowance to the states under the direction of the United Nations Framework Convention on Climate Change. States issue Global Carbon Emission Trading System domestically to firms incorporated within their territory, and then carbon allowance is to be traded between states.

Plan C, characterized by its two-level design. At the international level, the Carbon allowance is issued by Global Carbon Emission Trading System under the global carbon budget. United Nations Framework Convention on Climate Change shall set a standard price for carbon allowance. At the national level, the state issues its national carbon emission allowance. The state shall allow firms to meet their obligation by carbon allowance. The ratio between carbon allowance and national carbon emission allowance will be decided by the price reflected from the national trading of the national carbon emission allowance and the suggested price of carbon allowance by the global platform. The international carbon trading is between national carbon emission allowance via carbon allowance. Under this plan, carbon allowance plays as the unity equivalent for national carbon emission allowance whose prices vary because of the different costs to mitigate and diversify regulatory regime. In other words, the carbon allowance is the “Special Drawing Right” in the international carbon financial market.

All these initiatives serve the same target, formulating a unified global carbon price. They are only blueprint drawn from theoretical observation, with detailed provisions to be improved.

Thank you!

(By Yunpeng Wang, Associate Professor at Henan University School of Law).

## **10. Prospects for Multilateralism: The Contribution of Environmental Law**

Mark Poustie

Good morning! Thank you very much for inviting me to the session today.

We know that in the last few years, there is disrespect for the international community. This is perhaps exemplified by the Trump administration. But it's a feature in a number of other states, which is obviously disappointing. The gap between knowledge and action is also a challenge in the environmental context. We don't have such full signs to the certainty about the range of environmental impacts. But obviously, the risks are so great. We can justify action on the basis of the precautionary principle, but there has to be political will. There is also a gap between either inadequate action or complete action and responsibilities. Sadly, we know that states are not making particularly significant progress at the moment to fulfill their relatively unambitious Paris Agreement commitment. States need to stand up, and there must be mechanisms to hold states accountable for inaction or inadequate action. Those don't necessarily need to be at the international level. States can be held to their international obligations by groups domestically.

In addition, COVID-19 has damaged progress towards sustainable development. There have been some localized gains in terms of reduced emissions from traffic. But still, there are very significant problems in relation to greenhouse gas emissions from energy production and

so on, which are continued and unabated. So, I want to think about prospects for multilateralism in environmental law context, which includes: the role of states; the prospects, particularly for this year; the United Nations and its role and the concept of “Transnational environmental law,” which means that environmental law isn’t simply in the hands of states, but exactly also in the hands of non-state actors.

Thinking about the points of hope for the international community acting from states, the 26th United Nations Climate Change Conference is coming up later this year in Glasgow, United Kingdom. I actually think it is a significant opportunity for the United Kingdom to demonstrate leadership. It’s also a fantastic opportunity for the Biden administration to show their re-engagement with the multilateral community. In addition, there will obviously be civil society pressure.

The biodiversity regime of the United Nations Climate Change Conference was postponed from October 2020 and is going to be held in May 2021 in Kunming. And that I think is a good opportunity for China to show its leadership in the approach to multilateral environmental treaties, which the United States has stepped back over the past few years. I’m hopeful that China will do that.

COVID-19 itself provides the opportunity for many States to reflect on the way forward, and there is a huge number of discourses of a moment about green recovery opportunities. So rather than pity our fate and continued reliance on fossil fuels, we undertake this fundamental shift away to renewables, and I think it is time we did that.

Concerning the United Nations Environment Program, an important issue that is sometimes forgotten is that the United Nations Environment Program is actually coming up to its 50th anniversary, which actually makes me feel quite old. Anniversaries are quite powerful. In Ireland, where I’m living, we are coming up to the hundredth anniversary of our independence from the United Kingdom. These kinds of anniversaries can be a powerful catalyst to make progress or embolden and empower the United Nations Environment Program. One of the good examples of the United Nations Environment Program is that the United Nations Environment Program recently produced a report on Making Peace with Nature, which does shorten the way forward to a more sustainable future. The United Nations Environment Program continues to play a leading role, and I think its forthcoming anniversary will help it, not the god.

Briefly, I will move to the role of non-state actors in the environmental law sphere. Communities of Practice consist of experts who come together internationally and influence the international law-making process and strengthen capacity at the national level. A good example of this would be the World Commission on Environmental Law. They’ve had a long-running program on the environmental rule of law. They have been doing a lot of work to promote a Global Pact for the Environment, which the United Nations General Assembly Resolution led in May 2018. This pact would reflect the fundamental environmental law principles from the early Stockholm Declaration. In addition, judges dealing with environmental matters have come together to the Global Judicial Institute on the Environment. This body enables judges from across the world to share experience in building environmental jurisprudence capacity, training, research, and publications. In conclusion, these kinds of bodies are working in a multilateral way at different levels, trying to further the development of environmental law. That gives me quite a lot of hope.

Continuing with Communities of Practice, there is also the dimension of inter-agency cooperation, sometimes termed “Global Administrative Law.” And in the environmental sphere, the International Network for Environmental Compliance and Enforcement is noteworthy. There are a whole host of regional networks whose function involves sharing information and bringing together national environmental agencies, which lead to harmonization of processes, capacity building, and harmonization of approaches in

implementation and enforcement. We can base these on the generally customary and treaty duties for States to cooperate with each other on all environmental matters. I think that's a notable development because it hasn't been damaged by the break from the multilateralism of globalization that we've been going through. These kinds of links are deepening and strengthening. So, the gain may provide a very good foundation at a slightly different level to ensure that we can go forward more multilateral.

Finally, it's about civil society. The United Nations Environment Assembly brings together not representatives from States but all kinds of civil society groups. The fifth United Nations Environment Assembly recently came to an aim which again focuses very much on the idea of a green recovery. This kind of body can help to spur both the United Nations' environment Program and the wider community of states. It's a way for civil society to exert some degree of significant pressure at the international level. And about the United Nations Environment Program, here is a quote from Inger Andersen, 'The science is clear. We have to change our ways, and we have to be sure that 2021 is that turning point.'

My final slide also provides some degree of hope in ensuring that we move forward in a globalized way. I mention that perhaps their international framework for environmental law is not particularly strong in the context of enforcement. But what is increasingly hot across the world is that either inaction or inadequate action to address international obligations increasingly leads to domestic litigation against governments by civil society groups. Maybe the most well-known case is the agenda litigation law in the Netherlands. And in my own state, Ireland, there is a successful climate case against the government last year. There is also climate litigation on the green in France and many other States. Even though the overall international environmental law enforcement system is relatively weak, particularly in contrast to international trade law dispute settlement, this is actually a very positive development because societies can put pressure on their governments to ensure that they are making progress to address key issues like climate change.

I'd also like to finish up, but the final point NGOs do have quite a significant role in pushing forward international treaty regimes. Obviously, in Glasgow's 26th United Nations Climate Change Conference, they will be a huge civil society element. But sometimes, they can do this in a much more direct way. NGOs in developing treaty regimes have drafted a proposed Protocol on the Illicit Trafficking of Species of Wild Fauna and Flora. And that protocol would be a protocol to the United Nations Convention Against Organized Crime. If that were adopted, it would provide a very strong basis for law enforcement cooperation to fight against wildlife crime. Wildlife crime is an area where the world sees a transformation of political willingness to address the issue. It wasn't a big issue thirty years ago, but now it's in everyone's minds. China uses celebrities and so on to try to suppress the demand for wildlife products. But there's no really big political willingness to address this and end wildlife crime acting. I try to push the international community further by developing a good international instrument linked to the United Nations Convention Against Organized Crime.

(By Mark Poustie, Dean and Professor of University College Cork School of Law).

## **11. United Nations Security Council and Its Role in Challenging the COVID-19 Pandemic**

Hatice Kubra Ecemis Yilmaz

After the COVID-19 pandemic spread, it began to appear that it caused problems in many areas. States are implementing precautions for the problems that arise and are trying to reduce both the spread of the COVID-19 pandemic and the damage caused. Many states have begun their measures by declaring a state of emergency. However, the legality dimension of the

measures taken is important. The control of the COVID-19 pandemic has also led to discussions among states. Some heads of state have been accused of late reporting the information that would enable the epidemic to be prevented and controlled. States need to cooperate in combating this global crisis by removing differences of opinion among states about the emergence and control of the epidemic. The reluctance of states to cooperate in combating the pandemic has increased the willingness of international organizations to assist. International organizations have been formed as a result of multilateral agreements, and they organize and implement cooperation between states, obey several areas of international law, and ensure international cooperation. Many international organizations, especially the World Health Organization, affiliated with the United Nations, are trying to take steps regarding cooperation.

In addition, it should not be forgotten that there is a security dimension to combating pandemics in the international arena against epidemics. It can be understood from United Nations Security Council's decision numbered 2177 on September 18, 2014, that the COVID-19 pandemic will threaten international peace and security. In the decision numbered 2177, it was stated that Ebola disease spread rapidly from West Africa and threatened international peace and security, and the public health problem was recognized as a threat to peace and security in the international arena for the first time. Based on this decision, COVID-19 should be considered a threat to international peace and security.

From this point of view, I aim to examine the legal responsibility of states to cooperate in these complex times, and address the duties and shortcomings of the World Health Organization in cooperation. It will also be analyzed how the United Nations Security Council, which is given the main responsibility for protecting international peace and security, could not take effective decisions in combating the pandemic due to the mutual accusations and differences of opinion of the permanent members. While conducting the analysis, a comparative approach will be used to determine whether the decisions of the United Nations Security Council are consistent in ensuring international cooperation, and the security council's past and present decisions will be subject to examination.

(By Hatice Kubra Ecemis Yilmaz, Assistant Professor at Ankara Yildirim Beyazıt University).

## **12. Legal Cooperation between China and Africa towards Achieving the Belt and Road Initiative - from the Perspective of China and Ethiopia**

Yongmei Chen & Haile Andargie

First, thanks to the organizers, and thanks to Professor Shen for the hard work to host this panel. This paper was written by me and my student, Ph.D. Haile Andargie.

Today I want to share with you the topic of Legal Cooperation between China and Africa towards the Belt and Road Initiative, especially from the perspective of China and Ethiopia. I am from China, and my student comes from Ethiopia, and that's why we choose this topic. Our paper will cover five parts, but today I will not discuss all the parts one by one. I will focus on the first part, and the fifth one and will have a brief introduction to the previous three parts.

Firstly, it is a brief introduction. As we know, the Belt and Road Initiative was introduced by Chinese President Xi Jinping in 2013. Generally speaking, China has identified five areas of cooperation. That is policy coordination, infrastructure connectivity, trade facilitation, financial integration, and people-to-people bond. Those are the five areas, and our understanding is that besides the hard connectivity such as infrastructure, we think legal

cooperation is important because if we talk about policy cooperation, we also need to think of legal cooperation. In terms of China and Africa, even though the two sides have a long history of communication, under the background of the Belt and Road Initiative it leads us to think about what we can do from both sides to achieve the Belt and Road Initiative goals.

Next move to the second part. When we talk about what we can do in order to achieve the objectives of the Belt and Road Initiative, maybe we can go to say what is China's approach. Generally speaking, China can take two approaches. One is a rule-based approach, and another is a flexible and informal approach. When we talk about the rule-based approach, China may set up a legal framework and then ask other countries to follow. But as we know, China hasn't yet taken the rule-based approach. Instead, China takes a more flexible and informal approach. We know that the Belt and Road Initiative is neither an international treaty nor an international organization. Actually, we can say it is a framework or a series of unrelated but interconnected bilateral trade pacts and partnerships. Our understanding is that even though the Belt and Road Initiative has been launched by China. It leads all the participants to make some contribution and effort to build. Even though the first step is the Belt and Road Initiative and the second is some soft laws, finally, we will talk about some hard laws because only under the hard laws can we achieve substantive objectives.

Now let's move to the third part. The third part talks about the existing legal cooperation between China and Ethiopia. In terms of the bilateral relationship, China and Ethiopia had their trade relation back to 1970. But it was almost 2018 that leaders from the two sides began to discuss the Belt and Road Initiative issues. When we talk about the present legal cooperation, maybe we need to say the cooperation between China and Africa because Ethiopia is one member of the African Union, so the cooperation between China and the African Union also represents the cooperation between China and Ethiopia.

In terms of regional cooperation, there are three kinds of main cooperation. The first is the African Union Agenda 2063. Actually, it is not cooperation but an agenda proposed by the African Union and published in 2015. Why I also treat it as one kind of legal cooperation because it has common objectives with the Belt and Road Initiative. In this agenda, the African Union listed objectives they would like to achieve by the year 2063. For example, they planned to build their infrastructure as well as develop their e-economy. These objectives are actually consistent with the objectives of the Belt and Road Initiative. That's why there is a common understanding and common objectives between the African Union Agenda and the Belt and Road Initiative. That's also why in 2016, China and the African Union signed memoranda of understanding on cross-continental infrastructure development.

Second, there is a forum which is called the Forum on China-Africa Cooperation. China initiated Forum on China-Africa Cooperation in October 2000 to promote trade and investment relations in the public and private sectors. Forum on China-Africa Cooperation Legal Forum is meant to create legal cooperation between African countries and China in building the Belt and Road Initiative. That is the further step between the cooperation in China and African countries.

And under the umbrella of the Forum on China-Africa Cooperation, there is the third kind of cooperation. It is China-Africa Joint Arbitration Centre. China and African countries have set up three arbitration centers. The three centers are in Johannesburg, Nairobi, and Shanghai, respectively.

Besides the regional level, let's move to the bilateral level cooperation between China and Ethiopia. Here I will mention two treaties. One is the Bilateral Investment Treaty concluded by China and Ethiopia. The treaty was signed in 1999. That is actually at a very early stage. The treaty covers some traditional clauses in almost every bilateral investment treaty. Another treaty is the Extradition Treaty concluded between China and Ethiopia. Here is why I mention this treaty because, unfortunately, we have to face the reality that Ethiopia is facing a serious



problem—corruption. China and Ethiopia should work on legal cooperation to ensure that the Belt and Road Initiative goals would not be contaminated by corruption. That is one reason why the two parties concluded the Extradition Treaty.

The fourth part of this paper is about Challenges of Existing Legal Cooperation between China and Ethiopia. Firstly, the current Bilateral Investment Treaty is outdated and insufficient to deal with the Belt and Road Initiative. It is indicated under Article 13 that the Bilateral Investment Treaty shall remain to enforce for ten years. Until now, it is not clear whether China or Ethiopia has submitted a notice of termination of the agreement. Secondly, the treaty fails to embrace the modern sustainable concepts in the Belt and Road Initiative, such as environmental protection and labor concept. Thirdly, it hasn't incorporated the clauses of intellectual property rights protection into it.

Besides the bilateral investment treaty, existing Multilateral Forums do not fully address the Belt and Road Initiative. On the one hand, we don't think the World Trade Organization system is reliable to deal with the Belt and Road Initiative because World Trade Organization's most members are states, while the Belt and Road Initiative deals with lots of private-to-private issues. On the other hand, the three arbitration centers have different arbitration rules. So, we think there are still some limitations in terms of the China-Africa Joint Arbitration Centre.

Next, I will say let alone the African Union Agenda and Forum on China-Africa Cooperation are too general as platforms. They are hard to address the Belt and Road Initiative issues. Unilaterally, China made some efforts, such as setting China International Commercial Court. But it's too early to say China International Commercial Court does encourage Ethiopia to submit its cases before the proceedings staffed with Chinese judges.

In the last part, we pose some ways by which we may change the above-mentioned phenomenon. The first way is to renegotiate the new Bilateral Investment Treaty that embraces the typical characteristics of the Belt and Road Initiative, which includes strong investment protection, convenient dispute settlement mechanism, cross-cutting clauses of environment, IP, and corporate social responsibility, etc. The second way is to revisit existing treaties on extradition, creating common obligations to corruption for investors, host states, and home states, respectively. The third is that Ethiopia should work hard to finish the ongoing World Trade Organization accession as soon as possible and needs to ratify the International Center for Settlement of Investment Disputes convention to settle the Belt and Road Initiative investment disputes. Fourthly, there is a need for China-Africa Joint Arbitration Centre to consider a regional approach in developing arbitration procedures. Moreover, comprehensive legal research on legal cooperation should be focused on. Last but not least, in the long run, China and Ethiopia should sign a bilateral treaty specifically addressing the Belt and Road Initiative.

With these, I conclude my presentation and thank you.

(By Yongmei Chen, Professor of School of International Law of Southwest University of Political Science & Law; Haile Andargie, Assistant Professor of Debre Markos University).

### **13. China's Experience of the Rule of Law in COVID-19 Prevention and Control**

Guihua He & Yuan Gao

Since the emergence of unexplained pneumonia cases in December 2019 until now, under the strong leadership of the Central Committee and the strong support of all parties, with the active participation and cooperation of the people of Hubei, especially the people of Wuhan, through painstaking efforts, a decisive victory was secured in the battle to defend Hubei Province and its capital city of Wuhan, which was a major step forward in the nationwide virus

control effort. At present, the outbreak of the overseas epidemic is still increasing, the pressure of China's prevention of foreign imported cases is increasing, and the complexity of preventing the rebound of the epidemic at home is also increasing. We analyze China's fundamental experience of epidemic prevention and control and the importance of coordinating epidemic prevention and control, summarizes the epidemic prevention and control measures about the rule of law at each stage based on the division of the five major stages of China's fight against the epidemic, and analyzes the power of the rule of law contributed by these measures to win the war against the epidemic, and makes an outlook about epidemic prevention and control about the rule of law in the future.

First, let's move on to China's Fundamental Experience of COVID-19 Prevention and Control. The Communist Party of China is a unified and efficient compound system of people-centered philosophy. The Central Committee of the Communist Party of China faces up a joint prevention and control mechanism for the first time. During the period from January 26, 2020, to March 26, 2020, the Central Committee of the Communist Party of China held 20 meetings and issued formal documents. China made unified command in accordance with the development of the epidemic and pressed the overall direction of national epidemic prevention and control.

I consider the importance of coordinating epidemic prevention and control by the rule of law has two aspects. Applying the rule of law for epidemic prevention and control is an inevitable requirement for adhering to the comprehensive strategy to advance the law-based governance of China. Besides, this is a powerful way to implement scientific and orderly epidemic prevention and control.

In December 2019, when Hubei Province reported unexplained pneumonia cases, there are relative laws and regulations on public health, related items and their management, and other indirect assistance in epidemic prevention and control. China's existing epidemic prevention and legal control system provide for all stages of epidemic prevention, outbreak and health protection, providing a legal basis for epidemic prevention and control.

From December 27, 2019, to February 16, 2020, China adopted the most strengthened prevention and control measures to fight against the epidemic, such as tight restrictions on the movement of people and channels that exist in Hubei Province. China collected clues from analysis on ineffective epidemic prevention and control, which both are Chinese confidence.

From February 17, 2020, to the end of March 2020, with epidemic cases in Hubei Province no longer rising and daily new cases in many provinces within control. At this stage, Chinese President Xi Jinping proposed coordinating epidemic control with economic and social development. Applying the rule of law to fight COVID-19 is merely reflected in the summary of the previous stage of epidemic control experience. National People's Congress decided to increase wildlife protection and seriously punish illegal wildlife trade in light of Chinese President Xi Jinping's speech. Ministry of Justice proposed supervising legal services for epidemic prevention and resumption of work. This stage's shift from mobilizing the whole society to focusing on resumption of work links the past and the future.

From late March 2020 (when new local contracted cases return to zero) to January 2021, China focused on preventing inbound cases and domestic research while continuing COVID-19 control. Applying the rule of law in epidemic prevention was adjusted according to changes of key epidemic control paths. In terms of epidemic prevention and control, most provinces downgraded their public health emergency response level and strengthened the prevention of inbound cases. Second, in terms of resumption of work, China continues to play the guiding role. Governments are required to play a role in resuming economic and social development during the epidemic.

The last part is my outlook on the rule of law in the post-COVID-19 time. We still need to uphold the strength of the rule of law. First, we should continue to improve the legal system

for epidemic prevention and control. Next, epidemic prevention and control measures must be shifted over time. Finally, ongoing epidemic prevention and control should be under the rule of law.

Thank you for taking the time to listen to our presentation.

(Guihua He, Professor of Law at Chang'an University; Director of the Institute of Law at Chang'an University; Vice President of the Health Law Society of Shanxi Law Society; Yuan Gao, Master Candidate of Law at Chang'an University).

## **Panel Three: Youth Resilience in the Post-COVID World: Education and Action<sup>1</sup>**

**Chair:** John Hunter (Vice President of Foundation for Law and International Affairs)

### **1. International Higher Education Today**

Mathew Johnson

The conversation today is particularly pointing for me. A little later this morning, I went to a county about 40 miles away, where I would volunteer for the day at a vaccination clinic distributing vaccination for COVID-19. COVID-19, from my perspective, is emblematic of some of the challenges and benefits of internationalization. We would not have the vaccine but for international cooperation at a level never before seen in human history. The case in which we moved so quickly from diagnosis to treatment to vaccination has never before been seen. So that is the paradox. Internationalization and globalization come with many wonderful things and meanwhile generate some of the more challenging parts of human society. I have taken students to South Africa and Bolivia, Mexico and Scotland, to India and Iceland, Sweden, and several other places around the world. I have had a career for over 30 years, taking students abroad with me. I'm a sociologist, and I study the way people organize themselves politically and how they organize their education systems. Chief and my researchers always explain the role of higher education institutions in encouraging individuals to be active members of their society and citizens. I visited my students in India, Bolivia, Mexico, London, Hongkong, Singapore, Ghana, and many other places after they graduated to see what they have done with their lives, and over and over again, I was impressed with what a university education provides for students, in terms of adding to their agency to be change-makers in the world. Later I became director of the Carnegie Classification for Community Engagement, the Carnegie Foundation for the Advancement of Teaching. It is probably one of the most influential foundations, at least well-understood in the higher education framework. For over a hundred years, it has been involved in things like the credit hour. The dreaded credit hour that now binds us all. That was really originally a measure of faculty labor, not learning, yet many institutions frame our learning around credit hours as though that was the magic unit. They were also responsible for modern tastes pedagogy in law schools, the modern structure of American Medical education, and many other elements. In 1972, They developed the basic classification system. The classification system is now used worldwide to differentiate different types of institutions. Are you originally comprehensive? This categorization was originally designed to allow researchers to compare institutions in different settings. Fortunately, that categorization quickly came to a social hierarchy. In 2000, the foundation designed a new classification system—the elective classification system.

The first elective classification was an elective classification and community engagement. The foundation wants to remind institutions, and fundamentally we have a public purpose. And that public purpose can be expressed in different ways. The first way is in community engagement. So, they build the classification in community engagement which has been operable in the United States now for 20 years. It is an alternative ranking. It requires a year-long self-study and to be certified by a panel of researchers. We are running an international

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<sup>1</sup> This content was transcribed by Shiyun Wang, Yuchen Luo and Ziqiong Deng, all from East China University of Political Science and Law.

pilot in Australia and Canada, and five other countries will come on board after COVID-19. It is an iterative and reciprocal process as we've gone international with the classification, learning about ourselves along the way and changing our own framework in the United States. Now we are adding new frameworks, a framework for leadership, a framework for racial equity, and a framework for sustainability. We hope that this type of classification will spread around the world, emphasizing the public purpose of higher education in terms of international higher education. For me, there is perhaps no other form that has more public purpose embedded in it. The power of teaching students in an international location or receiving an international student here in Albion is amazing. It gives students the opportunities to take a perspective they have never taken before, learn cultural humility, and understand that the world around them is really a social construct. And that social construct can be changed, perhaps more than anything that humanizes others. These things are all prerequisites for a peaceful and collaborative world in the future. Just as John mentioned, the next generation will have to work very hard on these things. International students carry a disproportionate share of the cost of higher education in the United States. Many American institutions have suffered a significant or even fatal economic blow by not welcoming their international students to the United States. Many US institutions use the revenue created from their international students to assure access to low-income US students and so have not been able to welcome those students to campus. Virtual has been attempted by many of these campuses, but it doesn't work. There is something different about being in the smells and sounds, being in the conversation, and the flow of a different culture that is not capturable in a virtual setting. So, it remains to be seen how these institutions will recover after COVID-19, but the economic incentive to pull international students is very high.

COVID-19 is an acute issue, but there are chronic issues we need to take into account as we think about international education, so I want to leave you three questions. First is the question of carbon. The next decade will bring more visibility and more public debate about climate change than ever before. We see changes in our climate and in our world happening all around us, and public figures taking stands about limiting their own personal carbon footprint, some refusing to fly, what will institutions do to adapt to a low carbon form of higher education, and will that limit our access to exchange programs and international travel? Will there be fewer, but longer trips as some authors have positive where students take a whole year or perhaps two years in a different location? Will we attempt to develop new virtual solutions that have yet been insufficient? Will we work towards new transportation options to assure global mobility? In the United States, the conversation today is about whether or not four years of university education is the best way for those at the lower rungs of our socioeconomic ladder, which have been growing over the last few decades, to move forward in the United States an ever-changing economy. Today, there are many conversations about non-degree programs, short degrees, work- integrated learning, stackable modular education for six or perhaps more years to reach which today is done in four. How will we think about that type of learning and international education? Will international institutions adapt to the economic needs of American students, or will American students be out of luck? I think for some of us, we are hoping for the development of a higher education culture that perhaps mirrors the high-tech world where API now has become the connector point between software programs so that you can virtually take data from almost any software program to another software program through API. We need to develop a higher API so that a student in one country can do well in stackable credentials, can move to another country and do a second stackable credential, can move to a third country into a third stackable credential, and perhaps move back home and do a fourth stackable credential and end up with a degree seamlessly moving from institution to institution. These questions of carbon and flexibility are existential for higher education in the long term. The last and perhaps most difficult to address is the global rise of right-wing politics in the

United States that manifests itself in closing borders. It manifests itself in the scapegoating of immigrants. It manifests itself in the scapegoating of international students. I see right-wing politics rising in Europe; I see right-wing politics rising in Africa; I see right-wing politics rising in Australia and Asia. The scourge of right-wing politics is a serious threat to international education. And if we don't address it, I fear that the next generation will repeat the last.

Thank you!

(By Mathew Johnson, President of Albion College).

## **2. Learning from the Pandemic Experience – Lessons for the Future of Legal Education in Ireland**

Mark Poustie

I come from a slightly diverse background. I'm not an Irishman but a Scotsman. It's great to hear Mathew taking students to Scotland among many other countries in the past. I ended up working in China, and I'm now leading a law school in Ireland, so I have kind of experience of globalization in education.

Let me give you a little bit of the context of higher education in Ireland, which may be similar to many states.

Public funding for higher education in Ireland is about 40%, less than a decade ago. Nonetheless, the Irish government has a policy intending to make Irish higher education the best in Europe. Funding is necessary to achieve that, and there are movements such as Save Our Spark, which argues for significant additional investment in education in Ireland. Also, in Ireland, there is money, for example, in the National Training Fund, but obviously, COVID-19 has reached some havoc on public finances. Traditional solutions to the Irish situation are internationalization improvements and more international students. Mathew has already highlighted some of the challenges for that. I suppose legal education in Ireland doesn't depend so much on international students but more on the European domestic market. But schools such as business schools are much more dependent on internationalization, and that's the challenge. Philanthropy is well-developed in the United States but much less developed in Europe. It's not a thing we need to try to rely on to get additional funds. Pandemic provides us with an opportunity to reflect on how we can provide the higher education and learn some lessons from what we've done over the past year.

So just to give you some context of the university stage of legal education in Ireland. Different from the United States, the legal education here is largely comprised of undergraduates. We do have an LL.B. program, which to some extent is equivalent to J.D., but the students would be sitting in class with undergraduates at the same time. We don't tend to use the Socratic method, to have 200 people in a compulsory class and perhaps little interaction. But the United Kingdom system has small group teaching tutorials which present participation and use the Socratic method.

Around a year ago, we were given about six hours' notice to close the institution, and all classes on the campus were moved online. The response I think, went incredibly well. We closed on a Thursday. There were online exams conducted by other schools the next day, and all the lectures switched to online from the following Monday. So, I think one of the things we have learned in this crisis is that we are adaptable and agile in legal education. We managed to switch very quickly to new ways of doing things. Faculty, students, and technology will prove to be pretty resilient. Our students' performance has improved. Some might argue that because there are fewer distractions, but at the same time, there are obviously significant problems for students. Isolation, lack of social contact, difficult home-environment, and so on are all

particularly problematic. Libraries have faced a lot of funding problems. That is the real challenge because many publishers charge incredible prices for those paper copies. And I think one thing we have learned is that the online world is much more tiring and intense than the face-to-face world, with no micro-breaks or kind of things, so both faculty and students are very intense.

So, what worked and what didn't? We've used M.S. Teams, and people are using Zoom. The legal profession in Ireland is largely using Zoom, but at the university level. Teams are mostly used. Teams have worked very well, and the predominant lectures are delivered with live synchronous lectures. That couples with the chat function and has encouraged students to participate much more in lectures than they would do traditionally. That is a good thing but also a challenge for the faculty member to be able to respond to the questions. We ended up actually in some of the larger classes team teachings where one person is doing the delivery, and another person who shares the teaching would answer questions and chat through the lecture. That's obviously not a particularly sustainable model. It is very resource-intensive. Students have not been particularly keen on prerecorded lectures unless there are opportunities for a live Q & A. And one of the huge challenges thinking of teaching in the online world is illustrated on my slide. Normally if my colleagues give a lecture, you can see faces, you can see how people are responding or whether they're playing on their phones, or whatever you know. When giving lectures on Team, it is difficult to gauge whether people understand or whether they're even still there or are looking through something on another device. You can tell them to concentrate, but that's not the same. You're only getting a small indication of what's going on, and we've recorded everything that I think is fantastic and is a great solution to students' activity problems. We can go to the recording at a time and get engaged with it, but there are also limits to what you can record. I mean, we have a variety of clinical modules for students to work with law firms and so on, and the nature of the material is such that you can't record it confidential, so there are potential limits.

My final two slides are about opportunities and challenges. Certainly, the future is likely to involve a hybrid approach. It might involve a mix of some classes being only face-to-face and some being entirely online, but I think there will be quite a number of that trying to produce a form of hybridization that could be, for example preserving the chat function from teams the class is delivered face-to-face. And there are potential benefits of this, which may be that people actually do want to come and join in our case. Besides, there are possibilities of engaging more with different student audiences, those who are carrying responsibilities, mature students, and possibly some of those international students who would have trouble traveling. It's also true to say that legal professionals are likely to be working much more online in the future. Actually, ensuring that students are capable of working in the online environment is a good thing. But one of the biggest challenges for having this kind of hybrid class is that you deliver the lectures live, but the quality of that kind of recording is much lower. So, the actual lecture theaters may need to be reconfigured to have more appropriate video technology, which can follow the lecture on the stage rather than being pointed at a fixed point. But that obviously involves resources, and as I said in Ireland and many other countries universities don't necessarily have these resources.

I think that involving a live lecture, the possibility for live Q & A, and combining with the chat function that we have on teams would be an ideal solution. But how can we manage that in a big class? I also teach the first year in the graduate class of the 200 students. I try to answer chat questions, but it's not easy. So having team teaching might be a possibility. It doesn't necessarily involve additional stuff, but it may involve considerable changes to the workload model. Considering disciplines with only one expert, they might have a teaching assistant or Ph.D. student who can answer questions. We're not spending anything on travel. We're not spending anything on accommodation. There are elements of objects throughout

schools and universities that can be redeployed on a one-off to actually help achieve this kind of thing. In terms of libraries, the biggest challenge is to secure sustainable sources of funding. We now have to meet the costs of getting on for 50,000 Euros a year for E-books, which we didn't have previously. So, where did that come from? This could be a target for philanthropy. In terms of libraries, the biggest challenge is to secure sustainable sources of funding. We now have to meet the costs of 50000 euros a year for E-books, which we didn't have previously. So, this could be a target for philanthropy. That might be possible in the Irish context and more possible in the United States context, but it is much more difficult for those less developed countries.

Just come to the end of my presentation. I do see innovation through COVID-19. Thus, it might be an opportunity for doing things differently and engaging with students in new ways. In the future, maybe one of the possibilities there is different types of partnerships.

Thank you!

(By Mark Poustie, Dean and Professor of University College Cork School of Law).

### **3. Challenges of Online Education in Less Developed Countries: A Case Study of Pakistan/Gomal University Dera Ismail Khan**

Aisha Rasool

Before I go with my paper, if you allow, I would like to introduce a little bit of myself with the introduction of my area.

I'm from South Waziristan Agency in Pakistan, which is part of Federally Administered Tribal Areas. This is one of the most beautiful mountainous areas, with the most delicious food, with the most amazing dry fruit, the most beautiful lush green mountains, beautiful water street, no Internet, no electricity, no gas, and are only very basic facilities.

Prior to 2018, there was not even a state law or formal justice system there. It was regularly done by the British-introduced regulation Frontier Crimes Regulation, from 1901 up to 2018. What it means is that tribes themselves did all the affairs and social dealings. There was no state or no laws, and only after 2018, these areas are merged into Pakistan territories, and there were rules by Frontier Crimes Regulation. What it means is that during more than 117 years, there were only four crimes.

Now let me a little bit explain the crime in that context which does not mean killing like a murder. A murder was committed by a murderer of another tribe. Other killings were not a crime. Any man could kill his wife, sister, cousin, or any woman of the family, accusing her of having either affair of liking somebody else or even talking to somebody. After 2018, the state has taken court and police there, but you know there's still awareness that people are not familiar with the court system and people are not familiar with the state law. As a law college, we are working online voluntarily educating people about basic concepts of laws. Obviously, we cannot educate them on all of the laws, you know. It takes five years for a normal graduate to learn the law. How can we expect them to learn it in one day? But we are basically telling Frontier Crimes Regulation for regulating crimes related to the state. The situation in the tribal area prior to 2018 was that all superior powers and magistrates were in the tribal leader's command. He had the administrative power and executive power over another one's crime. His daughter, wife, and brother, or all the family could be confined for as long as they want.

In 2018, the regulations were abandoned and nullified. The areas are now part of the state, and there are many districts. We hope things will improve. In January, our prime minister has announced electricity, etc., so you see how the situation could be prior to that.

I'm very thankful to my father. We used to travel 4 miles to walk to school. Then he worked hard to move to the city and joined the local government services. I'm very proud to



be his daughter. He supported all his daughters in the study. He supported me to get a scholarship from the United States, where I was a student of an exchange program. And I'm fortunate enough to get another scholarship to study Ph.D. at the University of the United Kingdom. This is important because the motive behind my joining Gomal University after coming back from the United Kingdom was that it is the nearest university to my area, and there is no university in Waziristan. Gomal University is particularly important to me because I want to go back and work to develop education in my area, while Gomal University was the only closest university where I could work. I'm very fortunate that I got the job of administrative position where I can actually contribute.

Now I'd like to go to my paper, Challenges of Online Education in Less Developed Countries: A Case Study of Gomal University, Pakistan. COVID-19 was declared as a pandemic on March 11, 2020, by World Health Organization. After spreading to many countries and contracting more than 118 thousand people, none of the nations had geared up for a draw or experience to follow operating procedures. It was a newly introduced challenge faced by the whole world standing on the same queue in 2020. But from where this paper stands, there is a difference in the magnitude of the challenges based on the developed, developing, or under-developed nations, especially in the academic aspect. Historically emergencies are likely to be most devastating for less developed countries like Pakistan, with already low learning outcomes and low hygiene to the shocks.

COVID-19 spread across the globe in a short time, and Pakistan was no exception to the challenge. All educational institutions in Pakistan were closed by March 2020. The challenges to compensate and replace classroom education with online education were mighty facilities. On the one hand, teachers and students lack social acquaintance with information technology and education, while on the other hand accessing the Internet has been a challenge.

However, an outbreak of COVID-19 and lockdown at the national level necessitated the emergent use of educational technology for distance learning. The Federal Government started a national TV channel to disseminate basic educational content for grade one to two classes. Institutions started online classes. On the one hand, the pandemic deepened inequalities since the digitally divided between developed and other developing countries. However, on the other hand, it offered new opportunities for education administrators and policymakers who introduce new learning modes that can reach everyone to prepare for emergencies and to learn from the experience of others to make the system more resilient. Just like other developing nations, Pakistan also has faced a series of challenges pertaining to curricular activities. About more than 5 million students were subject to e-learning. Reasons behind this challenge differ from cyber areas to tribal and less urbanized ones. Challenges also differ from students' to teachers' perspectives. Gomal University in Dera Ismail Khan is situated in the latter one that is less organized areas. It is basically situated in the conjunction of three provinces. Many countries adopted home learning for their students to continue their education by video, calls, and textual communication with teaching faculty, which proved to be obviously the best and only alternative for many universities. The challenges as mentioned about faced by Gomal University with limited geographical and technological resources are comprised of four dimensions including:

- (1) absence of Internet facilities in tribal areas as I mentioned before;
- (2) social economic factors of student;
- (3) unwillingness of students and faculty who teach online classes;
- (4) people's disclaimer about COVID-19.

I'm going to explain these. With 78 million broadband and 76 million mobile Internet connections, Pakistan's Internet Access Service System stands out of 35% for a population of more than 220 million. It ranks 76 out of 100 worldwide, according to the inclusive Internet index 2019, let alone students who were not prepared for stimulation or practices beforehand

for the newly introduced setup. The even bigger issue faced by a major proportion of Gomal University students is the non-existence of the Internet in tribal areas and Balochistan. It is quite unfortunate to say that from Bajaur to South Waziristan, about 600 kilometers long areas have been deprived of the fortune for Net facilities. In April 2020, Islamabad High Court ordered the government to restore Internet on a petition filed by a student named Syria Mohammed against deferment of Internet facility in the zone and believed that the Interior Ministry had suspended Internet access to former fodder due to security concerns, according to reports in local media. About 32 districts of Balochistan still have no Internet facilities. The state of Pakistan usually excuses the lack of Internet facilities with security issues and tribal areas, and separatist insurgency in Balochistan. The greater problem had arisen when students were denied the online education system on the grounds mentioned that. They had no Internet access in the area. They boycotted against online classes and demanded fee waiver from the government of at least one semester passed during the pandemic. Including well-educated citizens, most of the people denied the existence of COVID-19. People were in a state of disbelief. They thought there is no horror. So obviously, how can one be expected to follow the online-class policy when he doesn't have faith in COVID-19? Does the closure of the institution the only option left with the government of Pakistan? A very vast proportion of Gomal University students, equating to 34%, belong to these areas. They demonstrated protests against online classes but were coercively countered by the government on the grounds of their getting violent.

Universities being the peaceful foundation, tried to violate the circumstances and figure out the best possible solutions. Gomal University is getting more effective than any other university in Pakistan because it is crammed with students from these areas and has adopted different policies to continue academic activities. The difficulty of learning online was a new thing and a waste of time for them. The bigger the gap in capital activities is, the more time would be taken to arrange the examination and graduation. During the time, an educational institution was closed by the Ministry of Education, Pakistan. Gomal University was the first-ever university in Pakistan to switch to online classes, and prior problems were early diagnosed. This module nearly solved half of the first issue by delivering online lectures to the students having Internet access and sending recording lectures with the written material to the students deprived of Internet access. The students could travel to any other places, ensuring the availability of the Internet to download those lectures and written material. The formula worked well and was followed by many sister universities in the country.

The time of closure was prolonged more by the government for the next semester, and at this time, Gomal University expects to solve the lack of facilities whereby the students from remote areas raise examinations on campus with a strict assurance of Nucleic Acid Testing. Thus, the university maintained its standard and quality of education during them.

Another big issue of students' e-learning was social-economic problem. Most students of Gomal University belong to lower- or middle-class families with limited resources. A huge proportion of them are affected by the new policy. When all forms of delivery agents were restricted to a standard operating procedure, most of the students in such period had limited or no technological devices supporting the online education system. Gomal University collaborated with the Higher Education Commission of Pakistan. Most of the students were waived off their semester fees and given a monthly stipend to cover their studies while learning at home.

What can't be neglected is teachers' role in delivering lectures to those who have reliable Internet access. Online teaching is obviously a new phenomenon for teachers as well. Some researchers show that e-learning can be more effective than attending the classroom physically as each student reads 25% to 60% more material online than 8% to 10% in the classroom. It is also debated that students can learn faster as e-learning requires 40% to 60% less time than to

learn in traditional classroom settings because students can learn at their own pace, revisiting the lecture or rereading the material. However, prior to COVID-19, teachers of Gomal University were not familiar with online lectures except for using multi-media and giving home assignments to students for sectional marks. That challenge proved to be a blessing in disguise, as all of the teachers were provided compulsory training on online classes using Google Classroom and Zoom for academic meetings. Google Classroom was used for teaching students, and Zoom was used for academic meetings. As you know, faculty meetings are actually audience meetings with the vice-chancellor on the issues or something to discuss. So, the university tackled the issue by giving training to teachers, and after those compulsory training, teachers were able to give more proper online lectures. All these lectures were recorded so students who could not join online in time could see these recorded lectures and materials when they had an Internet facility. Teachers were required to provide a written material during the lecture as well as send that to students. The trial was tiresome, but where the pandemic brought stress, people worked and emphasized more with each other than before. It made teachers work even harder on a multi-level. It made policymakers think of solutions out of the box and it taught students to appreciate education and learn more than ever before. Most importantly, it taught all of us to look beyond the national borders and that only with mutual collaboration, cooperation, and learning from each of the experiences can we get through hard times like this.

Thank you!

(By Aisha Rasool, Professor of Principal Law College Gomal University).

#### **4. Investing in Youth in the Coronavirus: Building Back Better from the Young Africa Leadership Experience**

Alonzo Wind

Cooperation and assistance programs in a globalizing world were easily captured by elites and communities with better political and socio-economic connections, and arguably the tentative efforts to curb these tendencies were never enough. Sometimes this reality of resources captured by developing country elites became even a justification for retaining control and decision making offshore in the donor countries and government agencies since they saw any assistance decision by host country bureaucracies would be hopelessly compromised by the elites in those developing countries.

Words have power. In my recent book “Andean Adventures: An Unexpected Search for Meaning, Purpose, and Discovery”, I quote a recent article by Ann Hendrix-Jenkins on the Opendemocracy.net website that raised the demand, “It’s Time to Put an End to Supremacy in International Development.” Among other things, she asked, “Don’t the words we use in aid agencies and NGOs draw imaginary lines between ‘us’ and ‘them’?”

Comparable concerns were, in fact, voiced at the very beginning of the Obama administration. President Obama himself, aware of his own unique position from his background and as an exponent of generational change, suggested in a number of critical speeches that it was, in fact, time overdue to start addressing “the messy politics of change.” He spoke first in Cairo, in June 2009, questioning the status quo in the Muslim world and development and young people later on: “... And this is important because no development strategy can be based only upon what comes out of the ground, nor can it be sustained while young people are out of work. Many Gulf states have enjoyed great wealth as a consequence of oil, and some are beginning to focus it on broader development. But all of us must recognize that education and innovation will be the currency of the 21st century—and in too many Muslim communities, there remains underinvestment in these areas.”

In August 2009, Obama told the young people of Ghana in remarks at the Parliament: “I do not see the countries and peoples of Africa as a world apart; I see Africa as a fundamental part of our interconnected world—as partners with America on behalf of the future that we want for all our children.... We must start from the simple premise that Africa’s future is up to Africans.... Above all, it will be the young people—brimming with talent and energy and hope—who can claim the future that so many in my father’s generation never found.

These were lofty sentiments but difficult to translate into practical and meaningful policy actions, particularly with a recalcitrant political opposition. The Young African Leaders Initiative was launched in 2010 and intended to be the United States government’s significant effort to invest in the next generation of African leaders. Things did not fully take shape, though, until Obama’s re-election in 2012 and the beginning of his second term.

The Mandela Washington Fellowship for Young African Leaders was introduced as the flagship program of the Young African Leaders Initiative. The Mandela Fellowship offered a scholarship program to bring outstanding young leaders of promise and diversity to universities across the United States to build practical skills during a 2-3-month program, including a potential practicum afterward and a capstone project bringing each group together with President Obama and the State Department officials.

It proved to be far more revolutionary than initially imagined. Interestingly, the design and procedures in the same ways mirrored some scholarship and personal development programs that Obama had witnessed with his mother as a boy in Indonesia and other countries and stories he had learned from family members and contacts in Kenya.

I participated myself with selection committees in South Africa, and there were many conscious efforts in the marketing and promotion, applications, and interviews to expand recruitment to go far beyond the usual suspects and elites.

Since 2014, nearly 4,400 young leaders from every country in Sub-Saharan Africa have participated in the Mandela Washington Fellowship. Due to the current global pandemic, the State Department postponed the 2020 Fellowship until summer 2021. The realities of the Coronavirus, or pandemic world, put a temporary halt to the Fellows program given the constraints of international travel. In 2021, however, the Fellowship will once again provide 700 outstanding young leaders from Sub-Saharan Africa with the opportunity at an American college or university.

But the value of the Young African Leaders Initiative has meant much more than just that. Even before the pandemic, Young African Leaders Initiative also involved a strong online network, providing now hundreds of thousands of self-selecting youth members with invaluable opportunities to connect with other leaders in their community and to learn from experts in their field. This has continued without interruption in the pandemic and will likely serve as an additional accelerant for change in the post-COVID world. I include a sample of different Young African Leaders Initiative Network initiatives in the fuller handout.

In addition, a separate Young African Leaders Initiative program managed by a series of grants from the United States Agency for International Development has led to a half dozen Young African Leaders Initiative Regional Leadership Centers located at higher education institutions in sub-Saharan Africa and offer leadership training programs to young leaders between the ages of 18 and 35, a younger cohort than the Mandela Washington Fellowship. By providing in-person and online training, networking, and professional development opportunities, Young African Leaders Initiative Regional Leadership Centers serve as a place for regional collaboration driven by young leaders. Young African Leaders Initiative Regional Leadership Centers are a project in close partnership with the MasterCard Foundation and other private sector partners, such as Dow, Microsoft Africa, Atlas Mara, and many others. Each Young African Leaders Initiative Regional Leadership Center is managed as an explicit public-private partnership to draw in corporate and multinational support. Each Young African

Leaders Initiative Regional Leadership Center capitalizes on the dynamism and industry expertise of the private sector, the knowledge of African and American institutions, and the programmatic and educational resources of the United States government. I have seen the effect of these corporate and private sector partnerships, and they have meant that things are not run as the usual past government development assistance programs, with faceless bureaucracies. Corporate partners, both from across Africa as well as multinationals, have contributed significant resources and thus have an important say. One early supporter of the Young African Leaders Initiative was Ashish Thakker, the billionaire entrepreneur and innovator of the Atlas Mara Group, a Pan-African conglomerate and author of the book “The Lion Awakes: Adventures in Africa’s Economic Miracle.” He, as well as leaders at Standard Bank, Microsoft Afrika, and Dow, have worked with Young African Leaders Initiative alumni and the Mara Foundation to support business incubators and entrepreneurial start-up labs reaching thousands. These private sector resources and initiatives were catalyzed by the public sector-supported program of development cooperation and assistance.

There are four main Young African Leaders Initiative Regional Leadership Centers in Accra, Dakar, Nairobi, and Johannesburg, offering training throughout the year. There are additional satellite Young African Leaders Initiative Regional Leadership Centers in Nigeria and in Maputo Mozambique, the latter for the Portuguese-speaking countries. Since 2015, they have now graduated over 25,000 participants in the Young African Leaders Initiative Regional Leadership Centers with a more compact four-week curriculum in the focus areas of Business and Entrepreneurship Development, Civic Leadership, and Public Management and Governance.

A remarkable thing happened with the Young African Leaders Initiative Network and Young African Leaders Initiative Regional Leadership Centers during the years before the COVID-19 pandemic, which I’m unsure was fully expected by the political leadership in Washington. They were almost wholly co-opted by the African youth participants themselves. The youth from the start began to re-shape and individualize the program content, program partnerships, and areas of focus. Contemporary African issues such as HIV/AIDS, gender diversity and equality, race and minority populations, responsible leadership, climate change, and technology were infused into the program to develop young and transformative African leaders. It’s worth noting that on some levels, we were lucky that the Young African Leaders Initiative survived under the radar with the past Trump administration. It was insulated to a great degree from the ideologues implanted within the State Department and USAID.

The Mandela Washington Fellows was temporarily scaled back a bit even before the COVID-19 pandemic because it was a bit more visible in the States. But the two or three dozen university partnerships across the United States provided them additional political support and cover when needed. Young African Leaders Initiative Regional Leadership Centers, being implemented through mostly fully funded grants by the end of the Obama administration, were less easy to dismantle and had their own large constituencies of support that allowed them to survive the former Administration. I believe the Biden administration, the new Secretary of State Antony Blinken, the new United Nations Ambassador Linda Thomas-Greenfield, and the hopefully soon-to-be-confirmed United States Agency for International Development Administrator designate Samantha Power all to understand the potential power and transformative effect of one of President Obama’s most successful and heartfelt international initiatives. The explicit investment in youth and the encouragement of diverse youth leadership is one of the more powerful tools to help build back better the impact of development cooperation and assistance in Africa. It might have the potential to serve as a model in other parts of the world. During the first year of the Trump Administration, there were calls from a number of Indian Ocean states to adopt the Young African Leaders Initiative experience to South Asia. The lack of funding and political support made that a non-starter in 2017, but it

could be potentially reopened in 2021 and 2022 for the post-COVID world. How interesting would it be to see this take shape as a potential partnership between the United States, Africa, and the development initiatives of the China International Development Cooperation Agency, drawing on the strengths, the reserves, the innovation, and the potential for dynamic change from both great nations?

Thank you!

(By Alonzo Wind, Former Senior Foreign Service Officer of United States Agency for International Development).

## **5. International Legal Education and the COVID-19 Pandemic: Challenges, Innovation, and the Path Forward**

Rosa Celorio

Now I just want to start briefly by saying that International and Comparative Law is really one of the hardest pillars the George Washington Law School does. We have more than 50 courses specialized in International and Comparative Law. We have a very wild number of faculty. I'm very honored to be the dean of the program.

One thing very interesting when you attend the George Washington Law School is that the faculty has full knowledge in academic as well as full experience in practice. A lot of our faculty members have presided over the American Society of International Law. They have served as commissioners and judges of international commissions and courts. They led processes of distinct departments at the United Nations and the Organization of American States. We also have students from more than 40 countries. I think it's probably one of the most important aspects of studying International Law at the George Washington Law School. That students come from all regions of the world is something with real value in terms of their personal, educational experience. And, of course, I learned a lot from my students.

Another thing interesting is that we have a lot of alumni that are in the area of international law all over the world. For example, we have judges and law clerks at the International Court of Justice, the European Court of Justice, and the European Court of Human Rights. We have commissioners and attorneys in the regional protection system of America. And we have many partners in law firms, particularly in the area of international arbitration and international trade. We also have many alumni that lead processes at the State Department, and the Department of Justice and other United States government entities.

The third interesting thing about the law school is its location in Washington D.C. We are very close to a lot of the decision-making that is very key in the area of international law. We get to feel very close when there is a change in the United States administration like the Supreme Court or any sort of policy issue that's related to international affairs. We are very close to the State Department, International Monetary Fund, World Bank.

One brief thing I'd like to talk about is that we cover all areas of International Law in all curricula. We have courses on Public International Law that study the deep relation between states as well as those international organizations. We have Private International Law, which governs actions of crossing international borders. We also have Comparative Law which compares different legal regimes. When we talk about the impact of COVID-19, all these areas have been impacted in some ways, not only International Law but the United States legal issues in our classrooms as well. In terms of LL.M. Certificate, besides International Comparative Law, students can also specialize in Human Rights Law and International Arbitration. We also have J.D. Certificate right now in International Comparative Law.

In terms of COVID-19, I'd like to talk a little bit about what the past year looked like for faculties and students and the opportunities that the pandemic has bestowed on us, an academic

institution. Law schools have been closed for almost a year. The educational model for students has been completely virtual. We have to adjust all of the class schedules in many ways to make sure that they respond to the different systems and time frames when it comes to specific regions of the world. But probably the most challenging part has been handling the transition to virtual teaching. How do we guarantee the teaching quality? How do we guarantee the approaches for students?

All year-round, we have had many online events in the George Washington Law School. We organized symposia, panels, website chats, receptions, and international investigations. Proudly we received from many speakers all over the world, giving us space for discussing contemporary issues. I think it is one of the areas we have learned that we do need to inhabit this virtual world for most of the activities.

We've also seen a changing administration of the United States that has deeply impacted our students who are very concerned about what is happening about the United States government and policies. They try to identify how to move forward with issues of our time, like climate change, the environment, and any other issues that have been mentioned today. Teachers also have to change a lot in the way they teach since an attorney should have not only great legal skills and analytical skills and great sensitivity to what's happening around them and understanding those complex social issues.

One of the most important impacts of the pandemic is that it made the world stuck in many ways and has also forced us to re-imagine the world or re-conceptualize the world, especially what will happen in the post-pandemic world. We go back to common education in person. So how do we incorporate all of the lessons learned into the new world? It's a historical chance that we never thought we were going to have. Our students are thinking about how to move on and how the future is. With that re-imagination, world views like institution diversity, gender equality, freedom from discrimination, freedom from violence, and human rights are very important. It doesn't matter which field our students are working in. We just want to guide them to a lot of legal education. Basically, underscoring the cores of all the racism in the way we set for future lawyers are going to have.

Another important opportunity is the full use of a virtual world to connect with others internationally. I think last year isn't a good emergency-response year. We had to suddenly adapt to virtual events to impart all this information and to identify ways of collaborating without really thinking. Now we have time to reflect on the best use of digitization, but along with this comes another big challenge: how to balance the virtual world with personal experiences. Online education is the structure of law school teaching in the future. It's not whether we're going to have it but how we're going to have it.

Also, one thing enlightening is how to best learn from the current pandemic. We have a big role here in how to document our experience and how to identify prodigies that can handle future pandemics. This pandemic is impossibly the last one. So how do we best equip our young attorneys to be able to use those law degrees to really help society, to deal with time's crisis, and bring the whole society peace and wellness?

Thank you so much for listening today!

(By Rosa Celorio, Associate Dean for International and Comparative Legal Studies at the George Washington University Law School).

## **6. The Status of Legal Research Courses**

Xujiang Zheng

As is well-known, law research is at the core of the practice of the law. It is the process of identifying the law governing activities and finding materials that explain or analyze the law. And I will talk about the topic in the following three parts.

The first part is to describe the status of legal research courses in the Chinese Mainland. Firstly, I find the increasing importance of legal research in the Chinese Mainland. I've made this judgment due to three judicial interpretations of the Supreme People's Court of the People's Republic of China. The first one is the Implementation Opinions on Further Fully Implementing the Judicial Accountability System by the Supreme People's Court (2018). The second one is the Fifth Five-Year Reform Outline by the Supreme People's Court (2019-2023). These judicial interpretations provided that we needed to improve the working mechanism for compulsory search reports of similar cases and new types of cases. As we all know, the Chinese Mainland belongs to the civil law system, but this interpretation asks us to learn something from the case law system. The third one is the Guiding Opinions on Uniform Law Application and Enhanced Search of Cases. Among these three interpretations, I confined that the courts in Chinese Mainland require us that if we handle cases under one of the following circumstances and should conduct searches for similar cases: (1) It is proposed to be submitted to a professional (presiding) judge meeting for discussion; (2) Lack of clear refereeing rules or uniform refereeing rules have not yet been formed; (3) The president of the court or the chief division conducts a search of similar cases according to the requirements of the jurisdiction of trial supervision and management; (4) Other cases that need to be searched for category cases.

Secondly, the necessity for conducting legal research courses will sustain for a long time in the Chinese Mainland. The first reason is that the awareness and skills of legal research professionals in our country need to be improved. The following false documents have been used for a long time. The first one is the Measures for the Administration of Seals of the Ministry of Public Security. The second one is the Interim Opinions on Trial of Cases on Construction Project Contract Disputes by the Supreme People's Court. The last one is the Opinions on the Handling of Certain Procedural Issues Involving Criminal Offenses in the Trial of Civil Dispute Cases by the Supreme People's Court of the People's Republic of China. Actually, many lawyers and judges have used these false documents in court judgments and lawyers' litigation for years, so it's really important for us to do legal researches in the Chinese Mainland.

Thirdly, legal artificial intelligence (AI) technology is not enough to replace manual legal research. A lot of companies are going to invest vast money to make some breakthroughs on this technology. But the legal language itself is complex and the factual boundaries involved in the application of the law in individual cases are ever-changing. So, it is difficult for AI technologies to do some perfect legal research.

The second part is to report my experience and feedback on online legal research courses after the epidemic. Firstly, according to some online research, we can find that the most satisfying function is the stay-back function. Because of this function, many students can have opportunities to learn it again and again, just like Zoom software. Not everyone can have the chance to record the video but many students gave some feedback about this requirement. Also, students should raise their awareness and ability of self-study. I found that lots of them pay much attention to some skills about legal research online but do not show their ability to self-study.

Secondly, environmental factors are more likely to affect students than hardware factors. 92.86% of the students said they would be affected by the home environment, and only 10.97% of the students thought the impact of the hardware is greater. So, if the students can have a greater environment, they may have a better online experience.

Thirdly, the interaction between teachers and students during online classes should be strengthened. According to some online research or investigation, 74% of the students were



reported problematic inattention, which means only 26% of the students are willingly and actively taking part in online learning interaction.

The third part is to express prospects and suggestions for online legal research in the Chinese Mainland. I think these courses require the cooperation and efforts of all parties to achieve the ultimate goal. As for students, they need to create the best learning environment for themselves and reduce external interference. They also need to adapt to online learning and select network resources actively. As for teachers, many of them are unable to use much software, so they need to change educational concepts and improve teaching skills, reform the teaching model, use teaching resources skillfully, and improve teaching efficiency. As for colleges, universities, and even governments or countries, they need to fully recognize the fundamental role and practical value of legal research courses. They can cooperatively build an online course structure pursuant to the advantages of each school combined with the characteristics of online teaching disciplines. These are what I want to share about my experience and feedback in the legal research area.

Thank you!

(By Xujiang Zheng, Deputy Director of the Law Department at Zhejiang Sci-Tech University).

## **7. Continued Resilience for YPS Action: National Implementation of Youth, Peace & Security Agenda**

Mridul Upadhyay

The major dominant narrative for young people is that they are either the victims of violence so they need to be supported, or the perpetrators so they need to be stopped. When we don't consider young people as key peace-builders to decent communities, we will not include them in decision-making since why do we include victims or perpetrators in decision-making? If we don't include young people in decision-making, they won't do much work because of unrecognition. Then the loop gets forced again because of this therapy. Young people started feeling these bases even more, and that's what happens in 2008, 2009, and 2010.

Young people started feeling that they're not needed. But they are neither victims nor perpetrators. They are needed by the communities, so we need a global consensus among this. UNOY, Search for Common Ground, Government of Jordan are binding these young people together. This is the first-ever resolution to recognize the positive and important role played by the young people in peace-building. Before that, there was no such understanding among the member states. They support the young in participation and production, and mention that finance needs to be included on these bases. People like us need to do a lot of work.

I'd like to mention specific youth-led peace-building organizations. We organized 399 youth organizations worldwide, and 97% of the staff are unpaid volunteers. I'd like to bring your attention to those facts because Foundation for Law and International Affairs is also one kind of that organization, where all of us contribute as unpaid staff. While the organizations are doing wonders, we need to know how under-resourced those unpaid volunteers are. Another thing is that there is a gender balance. These youth-led peace-building organizations are built of 53% males and 45% females.

Funding is the major problem since the organizations are operating with limited funding. 49% of the youth-led peace-building organizations are operating under USD5,000 per annum. And that's why young people's voices haven't arrived; why young people's amazing world we can't see. In reality, we have done a lot of work, but that's not enough to push such a large number of motions and amazing force.

Another thing is about some debunking myths that young people may be concerned with. First, it is sometimes considered that youth bulge contributes to more violence. They take it for granted that violence number is in proportion to youth number. But there is no clear relationship between the two factors. Second, many young migrants, refugees, and internally displaced people, are not threats to the host communities. Instead, they are contributors to peace-building activities. Moreover, many people consider young people to be drawn to violence simply because of a lack of employment or education, but there is also no evident relationship between youth engagement in violence and their employment status or education. Another myth is that hard-fisted law enforcement and security approaches are counter-productive, so they alienate young people from engaging in democratic decision-making. These have been really important myths that need debunking.

After the release of resolution 2035, now we're talking about partnering with youth in all phases and diversifying youth participation. It is time that we analyzed what has been in this relationship and the continued resilience required to push these facts.

Thank you!

(By Mridul Upadhyay, Asia Coordinator of United Network of Young Peacebuilders).

## **8. The Year of Online Classes: Lessons and Ideas from the Papers of East China University of Political Science and Law Students before and during the Pandemic, History of Distance and Online Education, Ideas for Its Optimization and for Taking Advantage of the Pandemic, Normalizing It for a Post-COVID World where More Scholars, Students and Practitioners are Given Access and Voice**

Asen Velinov

I would like to discuss about contextualizing the conversation about globalization and education, the importance of diversity, understanding, and awareness when designing future education methods, and models and the future of international education and giving voice to heretofore underrepresented actors.

I want to emphasize that when the key drivers of mutual understanding -- international travel and education exchanges have come to an involuntary standstill -- “vocabulary” and word choice matter, and so does rediscover past shared history. Complex global interconnectedness is extremely obvious in the context of the global pandemic. It is monetarily desirable and has a long history itself, which shows that the modern world-system was shaped by interconnectedness and exchanges. In that sense, distant and remote education also have a long history, and while developments in the past year have made it the go-to mode, problems with it and discussions on how to optimize it have been discussed for a very long time.

I also want to emphasize that older researchers’ and students’ opinions indicate that the “one size fits all” approach is not feasible and desirable, and while education is disrupted, perhaps it would be optimal to further disrupt it by addressing these differences and addressing the individual needs and characteristics of student learning styles and differences in the subject matter. He illustrated it with his own ongoing research addressing the characteristics of Chinese lawyers and law students as determined by taking the HPTI tool test, indicating that there are significant differences between them and their United Kingdom and European counterparts. For example, they scored lower on Conscientiousness, Adjustment, and Ambiguity Acceptance, meaning that they might be less goal-oriented and self-motivated, more prone to anxiety and worry in new situations, and more in need of clear-cut answers and solutions. The implications of this study for optimizing education are not clear cut but merit discussion and further study.

Furthermore, with the future of work being potentially also online, it is important that students are prepared for that possible reality. There are some conflicting interests in international education, with traditional target universities and countries resisting long-term disruption. Chinese students who can afford have been among the most desirable demographics, potentially in conflict with post-COVID needs and realities.

I consider the pressing need for communication, minimizing cultural differences and unnecessary “noise,” awareness of knowledge blind spots, and diversity in international teams. Online education platforms and initiatives might be the right way to achieve those.

Thank you!

(By Asen Velinov International Counsel, Co-Effort Law Firm; J.S.D. Candidate, Shanghai Jiao Tong University; Guest Lecturer, East China University of Political Science and Law)

## **9. Global Citizenship and Sustainability Competencies in Education: Integrating the SDGs into Curricula in the Post-COVID World<sup>2</sup>**

Xirong Liu

Globalization can be understood as a process of increasing connectivity and integration towards a shared future. The easier mobility and higher interaction among countries and regions led by globalization accelerate the transmission of the COVID-19 between different areas. However, the interdependence of globalization is never the direct culprit for the outbreak and widespread of the pandemic. The contagious virus itself is one major factor for easy transmission. Yet, the lack of preparedness, the negligence of regional institutions, and the noncooperation among different agencies contribute largely to making the pandemic out of control for such a long time. Therefore, globalization will not be reversed or terminated but undergo some transformations in terms of forms, scopes, and methods after the pandemic. One lesson learned from the COVID-19 is that countries and regions need to improve global governance capabilities with further collaboration for a sustainable future. As the youth are an important driving force and power to shape the future world, educators need to integrate the Sustainable Development Goals into curricula to foster students’ sustainable competencies with a global vision to create a better tomorrow with more possibilities.

The presentation is composed of six parts. The first part looks into the fate of globalization after the pandemic, tracing its history and mechanism, analyzing the crisis and dilemma of globalization, probing into the implications on globalization posed by the COVID-19, and arguing that globalization is a historical trend that cannot be reversed, but the transformation will be made to achieve a sustainable future. The second part presents the blueprint of the future drawn by the United Nations, namely the Sustainable Development Goals, analyzing its origins, development, and current difficulties. The third part focuses on the necessities of integrating the Sustainable Development Goals into higher education. The fourth part examines the difficulties and challenges in practicing the Sustainable Development Goals in classes. The fifth part explores the possible pathways to better integrate the Sustainable Development Goals into curricula. The sixth part is a case study of *A History of Western Civilization and the SDGs*. This study can serve as an example of promoting students’ global citizenship and developing sustainability capabilities to better cope with the uncertainties and ambiguities in this modern world.

(By Xirong Liu, Assistant Professor of School of Foreign Studies of East China University of Political Science and Law).

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<sup>2</sup> The abstract of presentation was submitted by Assistant Professor Xirong Liu.

## **10. Youth Engagement in Global Internet Governance after COVID-19**

Jinhe Liu

We live a digital life before, during, and after COVID-19. According to the data provided by China Internet Network Information Center, netizens in China show significant growth from December 2016 to December 2020, whose proportion reached 70.4%. From the perspective of the world, the amount of global digital population is a large proportion. The pandemic brings us to a digital world.

But who runs the Internet? Actually, not any person, company, organization, or government runs the Internet. The Internet itself is a globally distributed computer network comprised of many voluntary interconnected autonomous networks. Similarly, its governance is conducted by a decentralized and international multi-stakeholder network of interconnected autonomous groups drawn from civil society, the private sector, governments, academic and research communities, and national and international organizations. They work cooperatively from their respective roles to create shared policies and standards that maintain the Internet's global interoperability for the public good.

The first layer is economic and social, including manufacture and trade, entertainment, education, finance, healthcare, economic and social development, etc. In the first level, digital governance actors are Internet Governance Forum (IGF), World Economic Forum, the Internet Society, and other inter-state and non-state organizations. The second layer is the logical level, which is considered the middle level of digital governance, including root services, domain names, IP addresses, and protocol parameters. Taking Internet Corporation of Assigned Names and Numbers as a typical example, it is a nonprofit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. At the bottom is the layer of infrastructure, which includes undersea cables, satellites, and wireless systems, ruled by the International Telecommunication Union and nation-states. In different layers, there has different actors and governance models. But in all the Internet governance involves all the stakeholders in, of course, the youth.

Here I would like to share some youth engagement experience in Internet governance. Internet Governance Forum is a global multi-stakeholder platform that facilitates discussing public policy issues pertaining to Internet governance. Youth Internet Governance Forums are specially organized forums that discuss the issues pertaining to the Internet arena from the youth's point of view. There are 22 independently Youth Internet Governance Forums process all around the world in 2020. The slogan of the Youth Internet Governance Forum is "We must do, the Internet Needs Us," which implies that Youth Internet Governance Forums Movement is not about a school, conferment, or a one-off event.

There are four models to display the campaigns held by Internet Governance Forum. Module 1: Youth Internet Governance Forum initiatives organized by the national, regional, and subregional Internet Governance Forum initiatives; Module 2: Independently organized youth Internet Governance Forum initiatives; Module 3: Integration of youth-focused programs into national, regional, and sub-regional IGF initiatives processes; Module 4: Additional projects to build youth participation in Internet governance.

Internet Corporation of Assigned Names and Numbers holds a very open mind for young people to participate in their things. However, some young people may think it very difficult to participate. In fact, the Internet Corporation of Assigned Names and Numbers holds conferences three times a year and recruit young people worldwide. I once participated in the

Internet Corporation of Assigned Names and Numbers Fellow Program in Barcelona, where young people got together to be a team, trained and offering wisdom. Another program held by the Internet Society for youth is Internet Governance Forum Youth Ambassadors Program. Internet Society is a very critical organization for Internet governance, which helps young adults from all around the world build capacity through training and fosters a new cadre of young Internet leaders who are motivated to learn, engage, and act within their region or beyond.

We are in the age of digital interdependence, especially under the influence of COVID-19. We need to bring more diverse voices to the table, particularly from developing countries and traditionally marginalized groups, such as women, youth, indigenous people, rural populations, and elderly people. Given the lack of youth in Internet governance stakeholders like the academy, private sector, civil society, etc., we should get the youth involved, as the youths are the future of digital life. Even more action and participation are needed to contribute to Internet governance due to the situation nowadays where Internet governance is still treated as a tiny part of digital life. Utilizing the Internet, everyone has equal access to global engagement. The multi-stakeholder model and the openness of Internet governance enable young people to be stakeholders for the digital future. From the youth's perspective, they need to put themselves as stakeholders.

Thank you!

(By Jinhe Liu, Postdoctor Researcher of Tsinghua University)

## **11. An Introduction to the Inclusive Diplomat Program**

Shaoming Zhu

In September 2020, Foundation for Law and International Affairs (FLIA) initiated a new program called “Inclusive Diplomat” and started its non-public invitation. FLIA’s “Inclusive Diplomat” Program takes “Manifesting a Beautiful World with Inclusiveness” as its vision and is committed to discovering and training 10,000 inclusive diplomats for the world. It assists them in bringing the concept of inclusiveness to solve various problems in all parts of the world and all fields, improve the overall effect of global governance, and dissolve the false boundaries to connect our mutual world.

Why Inclusive Diplomat? Many problems of our current world lie in false boundaries and opposing mindsets that are created by human selves. From my own experience, I was born and raised in China, but my worldview and self-value orientation were reshaped when I was studying abroad and working with international colleagues from all over the world and FLIA.

There exist many things we don’t know. These are boundaries and barriers in front of us, keeping us from being better ourselves and creating a better society. In this rapidly evolving and changing world, we need to create an open and resilient future through awakening the power of people’s inclusive mindset.

While many people are becoming more self-interest-oriented and creating more divisions and exclusions, many others are working against this trend. They believe that inclusive governance is fundamental to the development of the world, and that’s not just the government’s job. They are willing to make a real difference in improving the welfare of more people by disseminating inclusive paths, methods, perspectives, and opinions. This group of people is endowed with a new name—Inclusive Diplomats. We want to build a more open future.

FLIA need people who can bridge different communities and groups, who can understand the standpoints, interests, and goals of diverse stakeholders in specific projects and situations, who can effectively promote communication and cooperation regardless of what positions others take, who can demonstrate and apply inclusive thinking, awareness, and ability in their

work, who can be cross-regional, cross-cultural, cross-disciplinary, and cross-sector, and who can ultimately improve local and global governance through their inclusive actions. They not only represent their own countries but also negotiate with other countries. This group of people is inclusive diplomats.

FLIA's "Inclusive Diplomat" hopes to call together and help people who are already practicing the idea of Inclusive Diplomat across the globe and cultivate civic leaders who are aspiring to become inclusive diplomats. The Program consists of two divisions: Support & Application Division and Training & Empowerment Division.

Support & Application Division supports the existing inclusive diplomats with all sorts of resources and helps to make their proposals and plans of dissolving false boundaries come true. Training & Empowerment Division empowers and equips the rising inclusive diplomats with international vision, comparative mindset, corresponding knowledge, perspectives, and skills to help them be able to effectively serve and engage with all stakeholders.

FLIA offers Weekly Online Courses, A Monthly Inclusive Diplomat Speaker, Tour Study, Buddy Program, Community Sense Workshops, One-on-one Career Vision Mentor Support, Annual conferences with Inclusive International Negotiation Competition & the Inclusive Social Governance Solution Designing Competition, Associated Support from other FLIA programs, Lifelong Feedback System, Advance to the Support and Empowerment Division in the training & empowerment division.

Why Foundation for Law and International Affairs? FLIA has more than 5 years of experience in law and international affairs with partnerships across the globe. FLIA has a trustworthy team, consisting of research teams, online community teams, public relationship teams, regional director teams, associated programs teams, and teaching and mentor teams.

What's coming next? In the near future, FLIA intends to call for ideas to break down false boundaries, publish the stories of some inclusive diplomats and research outcomes. At the same time, delivering a global tour of presentations and accepting inclusive diplomats to join our online community are included to improve popularity.

FLIA's Vision is to "Create an Inclusive World that Benefits All of Us." FLIA is looking forward to working with more participants on this journey!

(By Shaoming Zhu, Founder and President of Foundation for Law and International Affairs).

## Closing<sup>1</sup>

Mark Poustie

It's my pleasure to work with panelists. I'm building on some of the things that I raised earlier. International students do need support in this current situation, and schools need to take a variety of steps to try and engage more actively with students. By Zoom and Teamwork, we can conduct our conference today. The same for the international students, the only way they can engage is actually online. We've been trying to devise face-to-face engagement outdoors small scale, but the government rules here just don't allow it at the moment, so that's a real challenge going forward. Staff training is also a big issue for the adoption of new technologies since not all schools are fortunate enough to have an effective backup. However, I'm optimistic about the prospects of internationalization in the longer term. I think there will be a return for people to travel and experience other cultures. Finally, University College Cork will actually be excited to participate in the "Inclusive Diplomat" program. Happy to respond to other panelists. I'll stay on.

Thank you!

(By Mark Poustie, Dean and Professor of University College Cork School of Law).

Aisha Rasool

I'm certainly very interested in the "Inclusive Diplomat" program. I didn't jump directly from university to a formal governmental role. I've worked for a couple of decades in a civil society's non-governmental and international organization before ultimately taking on a formal role as a diplomat working within the agency for international development. I have seen examples that were positive, as well as examples that were very counterproductive and not particularly constructive for a more formal approach to diplomacy. The concept of an inclusive diplomat is a very positive one. We need to be able to offer the youth a means of encouragement, vision, and optimism. We need to really champion civil society and look for ways to build an expanded dialogue, as Mark just mentioned. So, it's something I certainly hope that we're going to have a channel for being able to enjoy a continuing conversation.

Thank you!

(By Aisha Rasool, Professor of Principal Law College Gomal University).

Asen Velinov

Thanks to all the professors. I cannot wait to include and empower the students and give them tools to think critically about what they want and the ability to express. We should pay attention to a couple of events on legal education, like how to narrow the gap, what common law tool is, and how to apply legal education to English education and cultural awareness. We shouldn't prevent the wheel because the problems at hand are new. We should keep building what we've been working on for years and years.

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<sup>1</sup> This content was transcribed by Ziqiong Deng from East China University of Political Science and Law.

We've gone through disruptions like retreating from globalization and learned that something bad might be an opportunity. Also, that western kind of cliché actually works, at least in the safe environment of university education, empowering the next generation.

Propaganda will always have a place in politics or kind of things. Western societies don't really care about China so much. That's why they can present whatever they want to the general public. Some of these are on purpose and vice versa. We should avoid these. Incidentally, stakes are kind of low now, on which we don't have very high expectations, but we're giving ourselves a pat on the back to be able to continue.

(By Asen Velinov, International Counsel, Co-Effort Law Firm; J.S.D. Candidate, Shanghai Jiao Tong University; Guest Lecturer, East China University of Political Science and Law).

### Lijue Song

I'm so delighted and honored to be here and enjoy the conference. First of all, I really want to give my thanks to all the panelists and our students. I also want to thank Professor Suqing Yu, who stayed attentive the whole night. I want to express my great appreciation for those great efforts and those hard workings throughout the whole day. I really learned a lot, especially about globalization and education. The COVID-19 pandemic has really caused an unprecedented crisis in all areas, including the field of education. Especially, this emergency has led to the massive closure of face-to-face activities in educational institutions. We have to find some new ways. One of the very important things is how to combine globalization and localization together. And I think I have found the answer from today's conference. The end of the symposium is not a closure, but a new beginning, just like the very late night today is the start of a new day.

(By Lijue Song, Vice Dean of School of Foreign Studies, East China University of Political Science and Law).

### Shaoming Zhu

Thanks for giving me the opportunity. We've pointed out that all students should be inclusive diplomats. If everyone opened their minds and hearts to try to understand people with different perspectives, interests, and points of view, we would have been much easier. I feel everyone here attending this symposium is an inclusive diplomat already because we're all sharing our own perspectives and trying to understand other people's points of view. Students who want to be dedicated to academia should look up in the future. Academic societies are being connected within different countries. Mr. Alonzo Wind has been working in different countries and empowering different generations, especially the younger kids, to understand why international development is so important. We can't cover everything here in such a short time, but my great attitude to everyone is that I hope you just watch us, guide us, supervise us and help us to do better with this program and make a real contribution to the global society. We are so determined to make it better.

Thank you!

(By Shaoming Zhu, Founder and President of Foundation for Law and International Affairs.)



# The Execution of the International Public Contract at the Era of the COVID-19 Pandemic

Mohamed Gomaa<sup>1</sup>

**Abstract:** Confirmed cases of COVID-19 have soared over 118,000 worldwide with fatalities crossing the threshold of 4291, which has led the World Health Organization to upgrade the COVID-19 outbreak from a “public health emergency of international concern” to a “pandemic” (hereinafter referred to as “the COVID-19 Pandemic”) on 11 March, 2020. Different industries have been hard hit by the aggressive measures imposed by the authorities worldwide, and working from home is not an option for labor, except for certain activities. These measures have disrupted many businesses, supply chains, operations, and different contractual relationships. Therefore, there are many voices calling for the necessity of declaring the COVID-19 Pandemic as a “Force Majeure”. Many questions arose about the impact of the COVID-19 Pandemic on contracts and legal agreements. Additionally, there is a responsibility on the legislator, on the one hand, to insert explicit provisions that can deal with those cases in the national legislation, and on the other hand, there is also a responsibility on the contractual parties to include in a contract some articles which could deal with disaster and Force Majeure cases, and other articles to define the rights and obligations of each party in these cases. In all cases, the political considerations and the circumstances surrounding each contract must be taken into account separately. Therefore, it becomes necessary to clarify the effect of the pandemic on the execution of the international administrative contract. Is it considered a Force Majeure? What are the rights of each party during the period of the pandemic?

**Keywords:** COVID-19 Pandemic; Force Majeure; Contract; Right; Obligation

## 1. Introduction

In fact, most civil law jurisdictions apply a different regime and rules to public or administrative contracts entered into with the state or a public agency and private contracts between private parties. Moreover, disputes are resolved by administrative courts for public contracts, and civil or commercial courts for private contracts.

International public contracts or the state contracts are considered administrative contracts. Those types of contracts can be defined as “contracts where one of the parties is a public person”. Administrative contracts are qualified as such either by virtue of a specific legal attribution, or because they concern a public service or contain a highly unusual clause (clause exorbitant). They are examined by the administrative court unless otherwise agreed upon.

In order for a contract to be considered as an “administrative” one, it must fulfill the following conditions:

- 1) One of the parties thereto must be a public authority.
- 2) The administrative judicial authorities must have jurisdiction to look into such contracts.
- 3) It must be related to public service or be classified by the law as an administrative contract.

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<sup>1</sup> Mohamed Gomaa, Judge, Council of state of Egypt, LLM, Ph.D., YICC and Arbitration Academy member. Email: [muhgomaa71@gmail.com](mailto:muhgomaa71@gmail.com).

4) It must include an “onerous” clause or condition from the public law.

Actually, the pandemic effects are based on its classification. All over the world, it was found that the approach followed or adopted, by the legislator, in dealing with the legal effects of the COVID-19 Pandemic is different.

It has become more complicated; therefore, the author would like to clarify the situation of each country in dealing with the COVID-19 Pandemic. Additionally, the rights and obligations of each party will be assessed, according to the following:

- 1) How does the COVID-19 Pandemic qualify as Force Majeure, in both common and civil law countries, and its consequences? The analysis includes France, Italy, Germany, Spain, England, Netherlands, Sweden, Egypt, and International Law.
- 2) Numerous questions have arisen clarifying the rights of the contracting parties.

## **2. The COVID-19 Pandemic as Force Majeure, in both Common and Civil Law Countries, and Its Consequences**

It will be explained how domestic legislation, in many countries, deals with this matter as follows.

### **2.1 In France**

Already before, on February 29, 2020, Bruno Le Maire,<sup>2</sup> Minister of the Economy and Finance, indicated that, according to him, COVID-19 was a “case of Force Majeure for companies”, in particular in public procurement state, justifying. He thus justified the inapplicability of penalties in the event of late performance of contractual services.

#### **2.1.1 Force majeure**

Article 1218 of French Civil Code stipulates “There is Force Majeure in matters relating to a contract when an event, beyond the control of the debtor that was not foreseeable at the time of the contract and whose effects could not be avoided by appropriate means, prevents the debtor from performing his obligations.”

French courts have established that to consider an event as Force Majeure, it has to be:

- 1) **Unforeseeable**: The event could not have been reasonably foreseen at the time of the contract and French courts expected an experienced contractor to foresee most events that could negatively impact the works;
- 2) **Irresistible**: It had to be beyond the control of the contractual parties and could not be prevented or avoided by adequate steps;
- 3) **External**: The occurrence of the event did not have any connection with the parties.<sup>3</sup>

#### **2.1.2 Concerning the burden of proof**

The party seeking to invoke Force Majeure (typically the party who stops

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<sup>2</sup> Bruno Le Maire (born on April 15, 1969) is a French politician and former diplomat serving as Minister of the Economy and Finance since 2017. He previously served as Secretary of State for European Affairs from 2008 to 2009 and Minister of Food, Agriculture and Fishing from 2009 to 2012.

<sup>3</sup> See Carole Champalaune, *Les grands traits de la réforme*, in Philippe Stoffel-Munck, *Réforme Du Droit Des Contrats Et Pratique Des Affaires*, Dalloz, pp.7-15 (2015).

performing the contract duties) must prove that these conditions are met. Such party will typically need to show a causal link between the Force Majeure event and the failure to perform contractual obligations.<sup>4</sup>

It should be noticed that French jurisprudence, in earlier decisions, has been reluctant to admit that epidemics (such as Ebola, SARS or the H1N1 flu) could qualify as Force Majeure. The COVID-19 Pandemic is, however, unprecedented not only as a deadly global outbreak but also in consideration of the government's radical measures taken as an attempt to control its spread.

However, the Court of Appeal of Colmar decision, rendered on 12 March, 2020, has already ruled the COVID-19 Pandemic is Force Majeure event. It might be assumed that this case is the first one issued in France.<sup>5</sup>

Actually, the application of Force Majeure will always be assessed by the French judge to determine whether the COVID-19 Pandemic constitutes a Force Majeure event on the basis of the facts, and in particular with regard to the possibility of implementing appropriate measures to prevent or avoid adverse effects on the performance of the contract (e.g., using other sites for production).

This is probably not the ideal outcome for contractors facing substantial additional charges as a result of the COVID-19 Pandemic.

Therefore, another legal concept generally referred to as "Hardship" has been created, which may provide to the contractor an alternative way to claim compensation or to ask for a renegotiation of the onerous terms of a contract in order to avoid termination. This will be the case if the exceptional event resulted in unforeseeable difficulties that disrupt the economic balance of the contract.<sup>6</sup>

### 2.1.3 Hardship in France

The legal term of "hardship" (*théorie de l'imprévision* in French) has derived from the jurisprudence of the council of state. In addition, Article 1195 of the French Civil Code provides:

- If a change of circumstances, unforeseeable at the time of the contract, renders performance excessively onerous for a party who has not agreed to bear the risk, therefore, such party is entitled to ask the other party for a renegotiation of the contract. It will however continue to perform its obligation during the renegotiation period.
- In case of refusal or failure of the renegotiation, the parties may agree to terminate the contract at a date and with the effects of their choice. Alternatively, they may mutually agree to ask the judge of the contract to adjust it. If the parties fail to reach agreement within a reasonable period, either party may ask the judge of the contract to pronounce its termination at a date and with the effects to be determined by the

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<sup>4</sup> See Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 1(1) Transnational Dispute Management 1, 4 (2004); Hubert Konarski, *Force Majeure and Hardship Clauses in International Contractual Practice* (2003), (noting that force majeure clauses 'constitute ordinary commercial safeguards as a means of protecting the parties against an unexpected turn of events'), [https://www.researchgate.net/publication/284968473Force\\_Majeure\\_and\\_Hardship\\_Clauses\\_in\\_International\\_Contractual\\_Practice](https://www.researchgate.net/publication/284968473Force_Majeure_and_Hardship_Clauses_in_International_Contractual_Practice) (accessed on June 15, 2021).

<sup>5</sup> See Fages Barbier, *Effets du contrat: Même pour respecter l'équilibre contractuel, le juge ne peut modifier le contrat*; Note sous Cour de cassation, troisième Chambre civile, 66(1) Trimestrielle De Droit Civil 528, 529 (2009).

<sup>6</sup> See Konrad Zweigert & Hein Kötz et al., *An Introduction to Comparative Law*, Clarendon Press, p.518 (1998).

judge.

Basically, if the occurrence of an unforeseeable event makes it very difficult or substantially more onerous for the contractor to continue the performance of its obligations as agreed in the contract, hardship may be invoked by the contractor of a public contract. Additionally, the contractor is entitled to seek compensation and/or to ask for a renegotiation of the onerous terms of the contract in the event the economic balance of the contract is likely to be disrupted by some 30% or more.<sup>7</sup>

The rationale behind such an administrative-legal term is to ensure the continuity of public service as a priority over and above the sanctity of contracts.

It is noted that “hardship” would open a new path to contractors who would rather continue performance of their contracts at economically acceptable conditions, rather than rely on Force Majeure and the limited relief of an extension of time or an early termination without compensation. Therefore, on March 25, 2020, the French government adopted Ordinance No. 2020-306 on the extension of time limits and adaptation of legal procedures during the period of the public health emergency (Article 4).

#### **2.1.4 Second hypothesis**

A party to a contract ceases to perform its obligations by invoking the COVID-19 Pandemic when neither the conditions of Force Majeure nor those of unforeseeability are characterized. What can his or her co-contracting party do?

Assuming that neither a case of Force Majeure nor a case of unforeseen can be characterized, the creditor can take a number of sanctions against his or her defaulting co-contractor. These sanctions can be non-judicial (i) or judicial (ii).

##### **(i) Non-judicial sanctions**

There are three types of non-judicial sanctions available to the creditor: (a) he or she can refuse to perform or suspend the performance of his or her own contractual obligations; (b) unilaterally terminate the contract; or (c) request a reduction in the price he or she must pay.

##### **a) Exception of non-performance**

In the event of non-performance by the debtor of his or her obligation, the creditor may refuse to perform, even if it is payable, provided that the non-performance he or she accuses his or her co-contractor is sufficiently serious (Article 1219 of the French Civil Code).

He or she can also suspend the performance of his or her obligation, even if his or her co-contractor is not yet in a situation of contractual non-performance, as soon as it is clear that he or she will be (Article 1220 of the French Civil Code).

##### **b) Unilateral resolution**

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<sup>7</sup> See Egidijus Baranauskas & Paulius Zapolskis, *The Effect of Change in Circumstances on the Performance of Contract* (2009), <https://www.google.com/search?q=The+Effect+of+Change+in+Circumstances+on+the+Performance+of+Contract&aq=chrome..69i57.287j0j15&sourceid=chrome&ie=UTF-8> (accessed on June 15, 2021); Antonios Karampatzos, *Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law*, 13(2) European Review of Private Law 144, 144 (2005).

In the event of non-performance by the debtor, the creditor may terminate the contract by implementing the termination clause in the contract. In the absence of such a clause, the creditor can still terminate the contract by notifying its resolution unilaterally to the debtor in the event that the non-performance is sufficiently serious (Article 1224 of the French Civil Code), being then understood that this resolution would be done “at its own risk”. In this regard, several judgments have admitted that the creditor could unilaterally terminate the contract even in the event that the contract contains a termination clause provided that the conditions provided for in Article 1224 of the French Civil Code are met.<sup>8</sup>

In the event of the termination clause being brought into play, the parties must however take note of the provisions of Article 4 of Ordinance No. 2020-306 of March 25, 2020 relating to the extension of deadlines expired during the period of the termination. State of health emergency established by law No. 2020-290 of March 23, 2020<sup>9</sup> provides resolute clauses, when their purpose is to “penalize the non-performance of an obligation within a determined period”, are deemed not to have started or taken effect, if this period has expired between March 12, 2020 and at the expiration of a period of one month from the date of the end of the state of health emergency, i.e. expiration of a period, to date, of one month after May 24, 2020. These clauses will therefore take effect after this date if the debtor has not performed his or her obligation by time.<sup>10</sup>

#### c) Price reduction

In the event of imperfect performance of the service, and if he has not yet paid all or part of the service, the creditor has the option of requesting a revision of the price (Article 1223 of the French Civil Code) by notifying within the as soon as possible to its debtor its decision to reduce the price of the service proportionately. The debtor’s acceptance of the creditor’s price reduction decision must be in writing.

If he or she has already paid the price and failed an agreement between the parties, the creditor can apply to the judge to request a reduction in the price.

Case seems hostile to referral to the interim judge in order to obtain a price revision due to a contractual breach, insofar as such an action presupposes an interpretation of the contract which falls within the competence of the subject judge.<sup>11</sup>

In order to prevent the proliferation of the COVID-19 Pandemic, the Ministry of Justice announced the closure of the courts as of March 16, 2020. It will therefore be necessary to wait for the end of the state of health emergency to initiate an action at the bottom to revise the price. If, on the other hand, there is an emergency and the summary

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<sup>8</sup> See Bakouche, *L’articulation des résolutions unilatérale et conventionnelle*, JCP 2014, p.414; French Court of Cassation, Civil Chambre, Decision No. 99-21.480, *Revue trimestrielle de droit (RTD)*, p.731, para.7 (2004); French Court of Cassation, Civil Chambre, Decision No. 08-14.524, p.44 (2009).

<sup>9</sup> Circular presenting the provisions of Title I of Ordinance No. 2020-306 of March 25, 2020 relating to the extension of deadlines expired during the health emergency period and the adaptation of procedures during this same period. See more at: <https://aappe.fr/wp-content/uploads/2020/03/Circulaire-presentations-ordonnance-delaies-definitive.pdf> (accessed on August 23, 2020).

<sup>10</sup> See Article 4 of Ordinance No. 2020-306 of March 25, 2020 relating to the extension of deadlines expired during the period of health emergency and to the adaptation of procedures during this same period.

<sup>11</sup> See Riom Court of Appeal, France, Decision No. 15-01895, October 26, 2015; see Amiens Court of Appeal, Decision No. 09-00726, September 8, 2009. However, it was possible to allow the intervention of the judge in summary proceedings in certain special contracts such as the lease contract, in order to pronounce a reduction in the amount of rents when the clauses of the contract were very clear and did not require any interpretation of the from the judge (Nîmes Court of Appeal, January 5, 2017, No. 16-02924).

judge is competent to hear the request, it can be brought immediately before the courts, as part of the continuation plan put in place by the courts for litigation on so-called “essential” disputes.<sup>12</sup>

## **(ii) Judicial sanctions**

The creditor of the unfulfilled obligation can ask: (a) the judge to continue the forced execution in kind of the service; (b) pronounce the judicial resolution of the contract; (c) and/or grant him or her damages in compensation for the damage suffered due to non-performance.

### **a) Forced execution**

The obligee of the unperformed obligation may demand from the obligor the compulsory performance in kind of his or her obligation, after prior notice to the defaulting obligor, unless this performance is impossible or if there is a manifest disproportion between its cost for the debtor in good faith, and his or her interest for the creditor (Article 1221 of the French Civil Code). The creditor may prefer, within a reasonable time and at a reasonable cost, to have the obligation perform itself or, with the prior authorization of the judge, to destroy what has been done in violation of it (Article 1221 of the French Civil Code).

### **b) Judicial resolution**

In a situation of contractual non-performance by the debtor, the creditor has the option of asking the judge to pronounce the judicial termination of the contract, provided that he demonstrates that the non-performance is serious (Article 1227 of the French Civil Code).

As the case notes, action for judicial resolution due to a contractual breach exceeds the jurisdiction of the temporary judge,<sup>13</sup> because the subject of such a request touches on the merits of the law. On the other hand, if the creditor wishes only to have the acquisition of the resolutive clause noted and this does not encounter any serious dispute, the summary judge will be competent.<sup>14</sup>

As part of the fight against the COVID-19 Pandemic, a business continuity plan has been put in place within French jurisdictions. As such, the courts may be seized of disputes requiring emergency management. This is particularly the case for summary hearings before the President of the Judicial Court or the President of the Commercial Court.<sup>15</sup>

### **c) Implementation of the contractual liability of the debtor and recovery of damages**

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<sup>12</sup> In particular, the following disputes are considered essential: correctional hearings for measures of pre-trial detention and judicial control, immediate appearances, presentations before the investigating judge and the liberty and detention judge, hearings by the judge the application of sentences, those of the juvenile court and the juvenile judge, hearings for the management of emergencies, or even the prosecution service. See <https://www.cours-appel.justice.fr/montpellier/info-coronavirus-COVID-19-fonctionnement-de-la-cour-dappel-et-des-tribunaux-judiciaires> (accessed on September 9, 2020).

<sup>13</sup> See Cass. Court., October 13, 1998, Decision No. 96-15.062: Juris Data Decision No. 1998- 003810; Colmar Court of Appeal, 1st Civil Chamber, section A, May 14, 2014, Decision No. 13-04821.

<sup>14</sup> See Poitiers Court of Appeal, 2nd Civil Chamber, January 31, 2017, Decision No. 16-02298; Bordeaux Court of Appeal, 5th Civil Chamber, April 10, 2012, Decision No. 10-7639.

<sup>15</sup> See the case for summary hearings, <https://www.greffe-tc-paris.fr/actualites/COVID-19-conditions-d-acces-au-tribunal-et-mesures-sanitaires> (accessed on October 2, 2020).

Any contractual breach engages the civil liability of the defaulting debtor. Indeed, the debtor is condemned, if necessary, to the payment of damages either because of the non-performance of the obligation, or because of the delay in the performance, if he does not justify that the execution was prevented by Force Majeure (Article 1231-1 of the French Civil Code).

However, such action can only be taken at the end of the state of health emergency since it does not fall into the category of disputes considered to be “essential” for which the courts have put in place a management plan of continuation.

## 2.2 In Italy

Italy was one of the first and most affected European countries which faced the COVID-19 Pandemic and led the government to adopt drastic measures, such as the closure of non-core economic activities and the restriction of the free movement of people and goods.<sup>16</sup>

In front of the obvious effects of these measures on the economy, the government provided an initial response with Decree-Law No. 9 of March 2, 2020, stipulating the terms for contractual obligations would be suspended from February 22 to March 31 of this year for those who worked in the cities affected by the pandemic.<sup>17</sup>

Additionally, the government intervened again with Decree-Law No. 18 of March 17, 2020 (introducing the new paragraph 6, Article 3 of Decree-Law No. 6 of February 23, 2020),<sup>18</sup> providing “Compliance with the containment measures referred to in this decree is always considered for the purposes of exclusion, pursuant to and for the effects of Article 1218 and Article 1223 of the Italian Civil Code, of the debtor’s liability, also with regard to the application of any forfeiture or penalties connected with delayed or failed performance”.

Those measures did not consider the COVID-19 Pandemic as Force Majeure explicitly, but rather they applied procedures that guarantee the rights of the damaged party.<sup>19</sup>

However, Article 1467 of the Italian Civil Code, called “synallagmatic contracts”, applies in the context of contracts for continuous, periodic or deferred execution (i.e., “duration” contracts such as typically leases) and provides that, when one of the services of the parties has become excessively onerous due to the existence of an extraordinary and unforeseeable event not falling within the debtor’s sphere of control (such as the coronavirus and the regulatory provisions adopted to contain its dissemination), the obligated party to perform this service may take legal action to request the termination of the contract, subject to proving that the service has become excessively expensive and that it arises from the extraordinary and unforeseeable events which have taken place.

## 2.3 In Germany

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<sup>16</sup> See Jenny. Avocat, *COVID-19 pandemic: impact on business contracts in Italy*, para.7 (2020), [https://www.multilaw.com/Multilaw/Documents/Italy\\_COVID19\\_impact\\_on\\_business\\_contracts\\_in\\_Italy.pdf](https://www.multilaw.com/Multilaw/Documents/Italy_COVID19_impact_on_business_contracts_in_Italy.pdf) (accessed on June 15, 2021).

<sup>17</sup> See Article 10 of Decree-Law No.9.

<sup>18</sup> See Speranza, Decree of the President of the Council of Ministers, Art.5 (2020).

<sup>19</sup> See Procedures that Guarantee the Rights of the Damaged Party, [file:///C:/Users/mohamed/Downloads/2020-03-COVID19%20GPP%20Europe%20overview%20\(1\).pdf](file:///C:/Users/mohamed/Downloads/2020-03-COVID19%20GPP%20Europe%20overview%20(1).pdf) (accessed on October 2, 2020).

In order to face the COVID-19 Pandemic, Germany has passed “The Law on Mitigating the Consequences of the COVID-19 Pandemic in Civil, Bankruptcy and Criminal Procedure Law”.<sup>20</sup>

With regards to contract law, the legislator provides by the new and temporary Article 240 §1 of the German EGBGB, a “right to refuse performance” for consumers and micro-businesses (and a maximum of EUR 2 million as an annual turnover) until June 30, 2020. These apply to essential long-term contracts which have been concluded before March 8, 2020. This includes, particularly, contracts for the supply of electricity and gas or telecommunications services, and for water supply and disposal.

According to this article, contractors who are unable to fulfill their contractual obligations (due to the COVID-19 Pandemic) are granted the right to temporarily refuse or cease their performance without being subject to legal responsibility. This also excludes liability for damage caused by delay and an obligation to pay interest. In spite of the moratorium was limited to June 30, 2020, an extension option (up to a maximum of September 30, 2020) has already been created in the law.

However, the exercise of the right to refuse performance is excluded if the contractual creditor cannot be reasonably expected to exercise it. In this case, the micro-entrepreneur has the option of being released from the contract.<sup>21</sup>

It should be mentioned that if the parties have agreed on the applicability of the VOB/B, Section 6 (7) VOB/B must be observed, according to which both parties can terminate the construction contract if an interruption of the construction project lasts longer than three months. If the contractor is not responsible for the interruption, the provision also stipulates that the costs of clearing the construction site must be remunerated, insofar as they are not included in the payment for the services already performed.

In times of a pandemic, the regulation could possibly be inappropriate from the principal’s point of view of the client, for example because the deadline is too short or because the bearing of costs does not seem appropriate in view of the fact that the client is not responsible for the Pandemic either.

## 2.4 In Spain

The Additional Provision 4th of the Royal-Decree 463/2020 (BOE March 14, 2020) is the procedure issued by the Spain government to handle the COVID-19 Pandemic’s effect. It declares the State of Alarm, stipulating the suspension of the statute of limitations and expiration of any actions and rights during the validity of the state of alarm.

The jurisprudence decides this lack of legal support does not imply the COVID-19 Pandemic situation and the state of alarm do not affect the ordinary contractual obligations, and to solve the arising issues, reference is to be made to the following Spanish law principle “pacta sunt servanda” (the obligation to comply with what has

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<sup>20</sup> For example, Germany has already made the COVID-19 Pandemic specific changes to the Introductory Law to the German Civil Code which permits consumers and small businesses to withhold performance in certain circumstances. These changes are currently set to expire at the end of June 2020 (see Article 240, §1 “Moratorium”).

<sup>21</sup> See Introductory Law to the German Civil Code, Article 240, §1(1) and (2). For a brief analysis, see M. Schmidt-Kessel & C. Möllnitz, *Coronavertragsrecht – Sonderregeln für Verbraucher und Kleinstunternehmen*, NJW 1103 (2020), <https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Fnjw%2F2020%2Fcont%2Fnjw.2020.1103.1.htm&anchor=Y-300-Z-NJW-B-2020-S-1103-N-1> (accessed on June 15, 2021).



been agreed),<sup>22</sup> which must be balanced with the Fortuitous Event and Force Majeure principles.<sup>23</sup>

The Supreme Court indicates that in order to apply Force Majeure, it must be a matter of circumstances “totally unpredictable at the time of contracting and that by themselves prevent the provision”. On the other hand, the Supreme Court also requires “good faith in the contractual field”.

## 2.5 In England

Like the United States, England statutes do not cover this issue which means that the Force Majeure is a creature of contract and not out of the common law system. The general rule applicable here is “where a party does not perform its obligations under a contract, this would give rise to liability towards the other party.”<sup>24</sup>

However, if a contract does not include a Force Majeure clause, the contract could potentially still be terminated on the grounds of frustration. That “something occurs after the formation of the contract, which renders it physically or commercially impossible to fulfil the contract” is a case of frustration. If a contract has been frustrated, it is automatically discharged and the parties are excused from their future obligations.

Otherwise, taking into consideration the unprecedented nature of the COVID-19 Pandemic and/or the actions of governments around the world in response, most jurists expect that COVID-19 will constitute a Force Majeure event, under Force Majeure clauses which are mentioned above,<sup>25</sup> which will lead to excusing the contractor from its obligations and/or liability under the contract, without any damages being payable, extension of time, suspension of time, or termination in case of non performance.

## 2.6 In Nederland

In the Dutch legal system, there are no specific laws that regulate the fate of contractual obligations that are not enforceable due to the effects of the coronavirus emergency and no provision to consider it as Force Majeure. However, the Dutch government has taken measures to help businesses that are affected by this crisis.

For example, the government will award a compensation of EUR 4.000 to business sectors that have been hit hardest by the mandatory closing until April 6.

## 2.7 In Sweden

In Sweden “Force Majeure” is not regulated in statutory law and there is a case of lack legislative, because the Swedish Parliament, contrary to some other European countries, has not issued any specific laws or regulations regarding contractual obligations during the period of pandemic.

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<sup>22</sup> See Article 1.091 and Article 1.256 CC.

<sup>23</sup> See Article 1.105, Article 1.602, Article 1.625, Article 1.777, etc.

<sup>24</sup> See Clifford Stott & Owen West et al., *A Turning Point, Securitization, and Policing in the Context of COVID-19: Building a New Social Contract Between State and Nation?*, 14(3) Policing 574, 574-8 (2020).

<sup>25</sup> See Douglas Stevenson, *Shutdown, Frustration & Property Contracts*, 1(1) Northern Ireland Conveyancing and Land Law 23, 25-6 (2020).

It can be speculated that, if contractual parties have agreed on a Force Majeure clause, this clause will determine whether or not a specific situation can be classified as Force Majeure.

Additionally, in order to determine if a party is relieved from responsibility for not being able to perform according to contract with reference to Force Majeure, it is necessary to analyze the agreed Force Majeure clause and the specific circumstances of the particular case.

It is notable that, Article 4 of Ordinance No. 2020-306 of March 25, 2020 imposes a moratorium on the application of any penalty measure, penalty, resolution or forfeiture resulting from non-compliance with a contractual deadline throughout the period. The so-called “health emergency” period decreed by Law No. 2020-290 of 23 March, 2020 increases by one month (the “moratorium period”) and has been set for June 23, 2020.

Ordinance No. 2020-427 published on April 15 amends Article 4 to provide certain essential details relating to the modalities of implementation of the moratorium. The previous version did not indicate the rules applicable to the resumption of the price of sanctions after the end of the freeze period. On the basis of the text as previously drafted, the creditor was therefore in a position to enforce the penalties or periodic penalty payments or even to exercise the means of resolution from the day after the expiry of the moratorium period with regard to deadlines expired during said period. In addition, the version of March 25 did not take into account the issue of sanctions relating to expiry dates subsequent to the moratorium period with regard to contracts concluded before or during this period and the execution of which has been prevented or hindered by restrictive measures linked to the health emergency. The amending order of April 15 sheds light on these points while commenting on the imperative nature of the mechanism established during the moratorium period.

At what point will the sanctions relating to deadlines that have expired during the moratorium period begin to run?

It is specified that the penalties incurred are postponed, at the end of the moratorium period, “for a period calculated after the end of this period, equal to the time elapsed between, on the one hand, March 12, 2020 or, if it is later, the date on which the obligation arose and, on the other hand, the date on which it should have been performed”.

Clearly and as specified in the report to the President of the Republic: “If a deadline was expected on March 20, 2020, that is to say eight days after the start of the legally protected period, the penal clause sanctioning non-compliance with this deadline will not take effect, if the obligation is still not fulfilled, until eight days after the end of the legally protected period. Likewise, if a termination clause resulting from an obligation born on April 1 should take effect, in the event of non-performance on April 15, this 15-day period will be postponed to the end of the legally protected period”.

The moratorium period thus acts as a period of suspension where the passage of time is neutralized for the debtor. If the initial order only provided for a freeze on the application of sanctions, this amending order therefore would intervene on the time limits themselves.

#### **What about deadlines expiring after the moratorium period?**

This suspension of contractual time also extends to periods expiring after the end of the moratorium period. For these deadlines, the date on which the sanctions may apply is “postponed by a period equal to the time elapsed between, on the one hand, March 12, 2020 or, if it is later, the date on which the obligation was born and, on the other hand, the end of this period”.

This means that if an agreement concluded on March 20 provides for the delivery of equipment or the completion of a service on July 1, this obligation can only be sanctioned after a period equivalent to the time elapsed between March 20 and the end of the moratorium period. If the latter remains fixed for June 23, 2020, the new starting point for the application of sanctions will therefore be September 26, 2020. It is important to specify, however, that this rule does not apply to obligations of paying a sum of money, which remain payable and liable to sanction on the scheduled date.

There is no doubt that the implementation of this rule will give rise to many debates in the context of the deployment of projects, all the more so concerning those, such as certain IT projects, whose execution has not been strictly prevented by emergency health measures.

### **What about the penalties for deadlines that have expired before March 12, 2020?**

The course of penalties and the application of penal clauses which took effect before March 12, 2020 are suspended during the moratorium period. Although the text does not specify it, it is logical to estimate that at the end of this period, the application of these penalties and the penalties will resume automatically. It should be noted that termination or forfeiture is not mentioned by the relevant paragraph. In theory, for bonds maturing before March 12, 2020, these sanctions could apply. The issue is particularly sensitive for debtors given formal notice before March 12, 2020 to comply within a certain period or risk of resolution insofar as the time limit set by the formal notice will not therefore be interrupted.

## **2.8 In Canada**

The rapidly evolving COVID-19 Pandemic is creating new, unprecedented challenges for the construction industry. For example, on March 23, 2020, the government authorities of Quebec and Ontario ordered the closure of any “non-essential” business for a minimum period of three weeks (Quebec) or two weeks (Ontario) in an effort to limit the spread of the virus. Although they cannot all be identified to date, these announcements will undoubtedly have serious impacts for all stakeholders in the construction industry.

Most construction contracts contain provisions for dealing with events that delay or disrupt construction, including provisions for changes, delays and Force Majeure.

Force Majeure clauses, which are found in most construction contracts in Canada, are likely to be invoked by the parties in order to deal with the impacts of the COVID-19 Pandemic and the closure or suspension of construction sites. Such clauses generally operate by allowing one of the contracting parties to obtain compensation for the damage it suffers, when an event beyond its control makes the performance of its obligations impossible.

Regarding Force Majeure, the CCDC-2 contract does not specifically refer to a pandemic or an epidemic. Nonetheless, General Condition 6.5.3 contains an “omnibus clause” which states that if a delay is caused by “any cause beyond the control of the contractor except a cause resulting from default by the contractor or breach of contract by the contractor”, there will be an extension for “a reasonable period of time which the professional decides in consultation with the contractor”.

## **2.9 In India**

The concept of Force Majeure finds its genesis under the Indian Contract Act, 1872. When it is relatable to an express or an implied clause in a contract, it is governed by Chapter III dealing with contingent contracts, and more particularly, Section 32 thereof. A Force Majeure event which occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Indian Contract Act. Section 56 of the Indian Contract Act deals with the agreement to do an impossible act or to do acts, which afterwards become impossible or unlawful.

The approach of the courts has been to examine the issue based on the facts of each case and relief has been granted to parties accordingly.

## 2.10 In Egypt

As a rule, for reasons of Force Majeure or the public interest, the public administration has the right to declare the suspension of a contract or even revoke the contract; because of acts of God, Force Majeure or the public interest. The suspension or the termination of the administrative contract, here, is unilateral.

The government declared the case of national emergency due to the COVID-19 Pandemic.

In addition, the Egyptian legislator, by Article 147 of the Egyptian Civil Code, provides “When, however, as a result of exceptional and unpredictable events of a general character, the performance of contractual obligations, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive.”<sup>26</sup>

Moreover, the Supreme Administrative Court classifies the COVID-19 Pandemic as Force Majeure.<sup>27</sup>

The Supreme Administrative Court in its decision of June 9, 1962 ruled that the increase in the price of mercury is considered to be Force Majeure which prevents the execution of the contract. But it is an unforeseeable fact during the signing of the contract which led to increase in charges on companies, companies’ bearing large losses, and finally the imbalance of the contract.

## 2.11 International Law

It is a fact that there are no European regulations or international conventions governing such issues. However, support may be provided by the United Nations Convention on Contracts for the International Sale of Goods (1980) and by International Institute for the Unification of Private Laws.

According to Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (1980), “failure to perform a contractual obligation which is caused by an impediment (like Force Majeure), beyond the debtor’s control, and not foreseeable at the time the contract was signed, is not a source of the contractor liability.”<sup>28</sup>

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<sup>26</sup> See Dentons, “*Unforeseen circumstances*” and *force majeure* in an Egyptian context, <https://www.lexology.com/library/detail.aspx?g=0a1432b8-9889-4884-950b-d8b1c729cff8> (accessed on October 8, 2020).

<sup>27</sup> See Supreme administrative court, decision no.2489/63, session 15/01/2020.

<sup>28</sup> It provided that “(1) A party is not liable for a failure to perform any of his obligations if he proves

More generally, the principles of International Institute for the Unification of Private Laws provide (Article 6.2.2) that “If an unforeseeable and uncontrollable event threatens the fundamental balance of the contract (either by reducing the value of the performance or increasing its cost), the disadvantaged party is entitled to ask the other party to renegotiate the terms of the contract and, in the alternative, to ask for the termination the contract.”<sup>29</sup>

### **3. Numerous Questions Clarifying the Rights of the Contracting Parties according to the Egyptian Law**

#### **Can a contractor ask for a contract suspension due to the COVID-19 Pandemic?**

Yes, the contractor can request the suspension of a contract due to Force Majeure or fortuitous event. However, it is up to the public administration to decide if the request is granted or not.

#### **In which phase the contract can be suspended due to the COVID-19 Pandemic?**

The suspension of the contract can be declared once the contract is effective and during its execution.

#### **What is the maximum term in which the execution of the contract can be suspended?**

Six months is the maximum term for the suspension of the execution of the contract, which can be extended for another equal term.

#### **What are the required procedures to declare the suspension of the contract?**

The suspension should be notified by writing and indicating the following:

- The part of the contract that has already been executed until that moment and its current status.
- Who is responsible for safeguarding the part that has already been executed.
- Measures that will be taken to guarantee the financial balance of the contract.
- The date in which the contract execution will restart, which should also be notified in written, before the date in which the suspension comes to an end.

#### **What are the effects of contract suspension with respect to the rights and obligations of the parties?**

The suspension of the contract implies the suspension of all obligations and rights of the parties, and, therefore, entails the suspension of the contract’s term as well. However, it is possible that the term for the execution of the contract is suspended and the contract’s obligations remain according to the Egyptian law.<sup>30</sup>

#### **What happens if the contractor does not receive any notification of the suspension of the contract?**

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that the failure was due to an impediment beyond his control and that he couldnot reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.....”. See more at <https://iicl.law.pace.edu/cisg/cisg> (accessed on November 7, 2020).

<sup>29</sup> See International Institute for the Unification of Private Laws Principles of International commercial contracts, Article 6.2.1, Article 6.2.2 and Article 6.2.3 (2010).

<sup>30</sup> It stipulated that “A different thing occurs when the suspension of the term for the execution of the contract operates without the suspension of the contract. As a matter of fact, it is possible that the term for the execution of the contract is suspended and the contract’s obligations remain. It is also possible that a partial suspension of the execution term is declared, for example, of a certain obligation, without having any effect over the execution term of the other obligations included in the contract”.

In this situation, the contractor should continue executing the contract, under the terms and conditions previously agreed upon.<sup>31</sup>

**Is the contractor entitled to compensation in case of contract suspension due to the COVID-19 Pandemic?**

In case of contract suspension, the administration should recognize the following economic compensation to the contractor:

- Compensation for the part of the contract that has already been executed.
- Damage compensation due to contract suspension.<sup>32</sup>

**Is the contractor entitled to claim for “recognition of lost profit” caused by the contract suspension due to the COVID-19 Pandemic?**

Since contract suspension due to the COVID-19 Pandemic originates from Force Majeure or fortuitous event and not in a unilateral action of the public administration, on principle, there is no right of the contractor to claim lost profits. However, each case should be analyzed in the light of the surrounding circumstances.

**What will happen if the contractor does not restart contract implementation/execution on the agreed upon date?**

If this happens, the procedures of termination of the contract should be adopted by the administration, unless the public interest reasons require immediate execution of the contract.<sup>33</sup>

**Force Majeure: in duo with good faith?**

The question of whether or not this is a case of Force Majeure must always be examined in the light of the principle of the good faith execution of agreements. The good faith execution of agreements consists in fact for the parties to fulfill their respective obligations honestly towards each other. There is also a matter of interpretation here.

**Force Majeure: what consequences?**

The impossibility of performance caused by Force Majeure may be final. In this case, the debtor is released from his or her obligation.

The impossibility of performance caused by Force Majeure may also be temporary. In this case, the enforceability of the performance is suspended by the debtor only until the impossibility is lifted.

**Force Majeure: to whom the proof?**

It is precisely the debtor who claims to be prevented from fulfilling his or her obligation by a case of Force Majeure to provide proof thereof.

## **4. Conclusion**

Finally, regarding the COVID-19 Pandemic and Force Majeure, it can be founded, in common law countries, that Force Majeure exists only as a contractual concept. This

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<sup>31</sup> If the contractor doubts whether to carry on executing the contract or has difficulty doing so, the author advises to deliver a written inquiry to the administration or directly requesting suspension of the contract. However, as long as the administration has not expressly authorized contract suspension, the contractor must continue with execution its contractual obligations.

<sup>32</sup> The author recommends that the contractor registers and justifies every additional cost that it paid with a note for reference, so that it can be used to determine its price using objective parameters.

<sup>33</sup> See V. TGI Strasbourg, January 5, 2016, Decision No. 15-00764; LEDB, March 2016, Decision No. 048, p.6; Gaz. Pal, June 7, 2016, Decision No. 267b3, p.64; RD bancaire & TGI Montpellier, June 9, 2016, Decision No. 11-16-000424; SCP Grappin Adde-Soubra, July 5, 2016, Decision No. 25, p.19. See more at <https://www.lexbase.fr/revues-juridiques/34599452-jurisprudence-esprit-de-finesse-et-de-geometrie-des-taux-d-interet-negatifs> (accessed on June 1, 2021)

means “in the absence of a Force Majeure clause in the contract or if such clause is inadequate to address the devastating effects of the COVID-19 Pandemic, the affected contractor will have to seek relief otherwise.”

That has led to the fact that, unless the contract expressly states otherwise, Force Majeure in such jurisdictions may entitle the contractor to an extension of time or to termination without fault but not to compensation for extra costs and losses. In brief, Force Majeure may entitle the contractor to time and exemption of liability but not to money.<sup>34</sup>

By contrast, some civil law countries acknowledge Force Majeure as a legal concept, which is generally enshrined in codified law and expanded upon by case law. However, such legal concepts will differ from one jurisdiction to another and also evolve over time within the same jurisdiction.<sup>35</sup>

Additionally, it can be concluded that, with the rapid spread of the COVID-19 Pandemic and the expansion and escalation of government measures taken to combat and contain the outbreak, more cases of parties declaring Force Majeure are likely to be seen.

The party being unable to perform due to the COVID-19 Pandemic may, on the basis of Force Majeure, suspend its obligations or even terminate the contract by notification.

If the contract has become manifestly unfair or its objective can no longer be achieved, it can, instead, request a judicial amendment or termination. It is not, however, certain that one can suspend his or her obligations pending the judge’s decision; to require that the modification be retroactive appears to be a relevant alternative solution.

The party who suffers the consequences of the unforeseen event—in this case, the excessively onerous consequences of the health and economic crisis of the COVID-19 Pandemic—must propose a renegotiation of the terms of the contract to its partner. The latter remains free to accept or refuse such renegotiation.

In the event of refusal or failure of negotiations, the parties are free to decide on the termination of the contract. Failing that, a judicial phase is likely to be opened during which the judge will have the power to revise the contract or to terminate it, on the date and under the conditions that he or she fixes.

During all of the amicable and judicial phases, the parties remain under the obligation to continue the execution of the contract, failing which their contractual liability could be engaged.

It is imperative to consult the notifications of the Supreme Court relating to the COVID-19 Pandemic, which will guide the popular courts in the application of these mechanisms.

As the applicable law is not perfectly clear and the distinction between Force Majeure and unforeseen circumstances is sometimes tenuous, it can be recommended that a precise strategy be established upstream.

Additionally, the author recommends that affected companies should review the Force Majeure Provisions in their contracts carefully and consider the implications if such Force Majeure Provisions are to be invoked. Companies may also consider drafting their Force Majeure clauses more broadly in the future to clearly include epidemics and public health emergencies, without the need to rely on a Force Majeure certification.

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<sup>34</sup> See Alexis Albarian, *L’avènement de la doctrine de la frustration en droit anglais des contrats grâce à la décision Taylor v. Caldwell: une belle leçon d’ “œcuménisme juridique”*, 4 *Droits Revue Française De Théorie, De Philosophie Et De Culture Juridiques* (2009).

<sup>35</sup> See Muriel Chagny, *La généralisation des clauses abusives, Réforme Du Droit Des Contrats Et Pratique Des Affaires*, Dalloz, pp.47-59 (2015).

# Legal Enforcement and Trust Mechanism in Rumor

## Governance of Public Crisis

Hongjie Chen & Ge Ou<sup>1</sup>

**Abstract:** In the unofficial social information network, people often continuously deliver “hearsay” to their secondary audiences because they believe in the relationship through which they obtain information. Conversely, people are actively involved in transmitting versions of information that differ from those released by official authorities because “people distrust or question information published by the government, and then make up for the information ‘vacuum’ and psychological imbalance created by distrust of the government by listening and spreading rumors”. In this regard, people do not really believe in the so-called “hearsay”, but are actively expressing distrust of the government. If the government cannot earn the trust of the public, falsehoods about the situations such as epidemic and rumors of a public crisis can overflow in social networks linked by interpersonal ties. Thus, the key to the governance of rumors lies in the reconstruction of social trust structure, rather than the punishment of the general public who spread unverified information with the indiscriminate exercise of power “in the name of the law”. Such punishment can only result in people’s fear of the government, rather than trust in the government.

**Key words:** Information Control; Freedom of Speech; Constitutional Rights; Power and the Rule of Law; Social Trust

### 1. Logic of Government Governance of Rumors in the Epidemic

When confronted with the risk of infectious diseases outbreak, ordinary people with a certain sense of social responsibility will take it for granted that timely transmission of early warning information will help others to better take various preventive measures and emergency plans to avoid various social crises induced by the spread of the epidemic.<sup>2</sup> However, the government which is responsible for public crisis managements tends to attach more attention to economic growth and social order.<sup>3</sup> For example, local governments in Chinese Mainland consider economic growth and socio-political stability, which ensures economic growth, as core policy objectives.<sup>4</sup> In the event of public issues such as infectious diseases, the government’s instinct is

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<sup>2</sup> See Lan Xue & Qiang Zhang, *SARS and the Construction of China’s Crisis Management System*, 18(4) Journal of Tsinghua University (Philosophy and Social Sciences) 1, 1-6 (2003).

<sup>3</sup> See Yefei Hu, *Information Disclosure of Chinese Government from Three Major Public Crises*, 23(12) Shandong Social Sciences 155, 157 (2009).

<sup>4</sup> The performance of the economic take-off during the reform and opening-up period and the tremendous improvement in people’s living standards have also led the ruling party to follow the established trajectory and rebuild its legal foundation through the “miracle” of economic development. See Xueguang Zhou, *The Institutional Logic of Governance in China: An Organizational Approach*, SDX Joint Publishing Company, p.82 (2017).



desalination measures aiming at not affecting economic growth, tourism and business activities.<sup>5</sup> It is on the basis of this policy logic that, the People's Government of Guangzhou Municipality, in spite of the risk of severe acute respiratory syndrome coronavirus (hereinafter referred to as SARS) outbreak and the rule of the spread of the epidemic, stuck to hosting the 2003 China Import and Export Fair Canton Fair.<sup>6</sup>

In order to prevent social panic from interfering with the implementation of the government's decision-making objectives, the government has strong incentive to control information regarding breaking through the resistance of the media and trying to report the outbreak publicly as a "mess",<sup>7</sup> and then show the arrogance of abusing power. On February 11, 2003, at a press conference broadcast by the People's Government of Guangzhou Municipality, a reporter asked director of Guangzhou Municipal Health Commission, "Is it true that atypical pneumonia is caused by avian influenza virus?" And the subconscious reaction of the secretary was, "You should be responsible for this sentence."<sup>8</sup>

Of course, it doesn't mean that the government is irresponsible, but rather reflects that the government has its own management logic in the case of public crisis, which is commonly referred to as "internal tightness and external looseness". On one hand, it tends to issue instructions only within the government system when problems appear, and take self-considered effective prevention and control measures in an orderly way;<sup>9</sup> on the other hand, the government considers there is certain information which ordinary people do not need to know, and it will make information control a "live in peace" picture.<sup>10</sup> For example, in the SARS outbreak, when Beijing had evolved from "imported cases" to "primary cases", Xuenong Meng, mayor of Beijing at the time, was still very optimistic: "For Beijing, a population of more than 13 million people, 22 cases are not a large proportion and all have been effectively controlled. There is no need to worry at all." Wenkang Zhang, minister of National Health Commission of the People's Republic of China in that period, was also very confident in his commitment, "Working, living and traveling in China are safe." and "It's safe to wear a mask or not."<sup>11</sup> However, as soon as Wenkang Zhang said, the World Health Organization listed Beijing as an affected area on April 6, 2003. But Chinese Mainland's media did not follow up in time.<sup>12</sup>

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<sup>5</sup> See Shoulong Mao, *The SARS Incident and Governance Reform*, 19(9) South Reviews 36, 38 (2003).

<sup>6</sup> See Guoqing Zhang, *Public Crisis Management and Government Responsibility: Taking SARS Epidemic Management as an Example*, 19(12) Management World 42, 50 (2003).

<sup>7</sup> In the traditional social speech system, the information from the bottom to the top is very scarce, which is often suppressed as improper speech. See Ping Jin, *Rumor: Rethinking its Definition and the Enlightenment to Modern Society*, 26(1) Journal of North University of China (Social Science Edition) 22, 26 (2010).

<sup>8</sup> See Lidan Chen, *People's Right to Know and Social Stability: From the Information Disclosure of the SARS Epidemic*, 20(7) News Research 16, 17 (2003).

<sup>9</sup> See Fangye Yu, "Tight Inside and Loose Outside" is the Root of the Spread of Fuyang City Epidemic, <https://comment.dbw.cn/system/2008/04/29/051237228.shtml> (accessed on February 8, 2020).

<sup>10</sup> In the early stage of the crisis, people are often faced with the incompleteness and asymmetry of knowledge and information. If official information cannot be obtained from mainstream information channels, all kinds of information will spread rapidly through "informal" channels. In this case, the spread of information is often untrue, amplified and fast, which is easy to aggravate people's panic. See *supra* note 2.

<sup>11</sup> See Yi Lou, "Finance" Cover Article 2: *Beijing Archives*, <http://finance.southcn.com/picture/200304210194.htm> (accessed on February 11, 2020).

<sup>12</sup> See Chuanxin Zhang, *The Reason for Spreading Rumor of SARS and Its Revelation*, 36(6) Journal of Shandong University (Philosophy and Social Sciences) 74, 77 (2003).

Similar situation occurred in the Explosion Accident in Tianjin Binhai New Area in 2015.<sup>13</sup> After the accident, traditional media coverage of the blast was tightly controlled, and few official explanations of the cause and the rules of the blast were available to the public for a long time afterward. In the information void, various versions of explanations for the explosion were offered as speculation on social media. The major focuses of public speculation were, however, the environmental and health damage, corruption issues, and the government's mismanagement of the crisis. The proliferation of such unofficial information eventually led to the government's harsh crackdown on the spread of rumors.<sup>14</sup> As a result, more than 50 websites were shut down,<sup>15</sup> more than 300 social media accounts in Chinese Mainland were suspended.<sup>16</sup>

Since the government has an extraordinary political need for the public expectations of maintaining the "stability" of the society, the government not only regards the media as "troublemakers", but also does not allow the existence of "rumors" that deviate from the expectation of "stability".<sup>17</sup> There is a view that it is common for public power to suppress Internet speech, either out of public order, or out of local interests or even the private interest of individual officials.<sup>18</sup> Government's public service broadcasting policy has been motivated more by the pragmatic needs of securing social stability and cohesion than by moral or humane concerns for the development of citizens.<sup>19</sup>

In the outbreak of the novel coronavirus (hereinafter referred to as COVID-19) pandemic, which began fermenting in late 2019, eight citizens sent the early warning message that "viruses can spread widely from person to person" to the surrounding population early in the outbreak, based on their own information channels.<sup>20</sup> Unfortunately, the local government, for "stabilization" and many other considerations, exercised an "inner tight while external loose" institutional inertia, even when the outbreak began to climb the slope of the spread in January 2020. The official announcement had been emphasizing the new type of pneumonia "preventable and

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<sup>13</sup> On August 12, 2015, a fire and explosion accident occurred in the dangerous goods warehouse of "Ruihai" company, located in Tianjin Port, Binhai New Area, Tianjin, causing 165 deaths, 8 missing, 798 injured (58 seriously injured and 740 slightly injured), 304 buildings, 12428 commercial vehicles and 7533 containers were damaged. See Wei Zhang, *Investigation Report on Special Major Fire and Explosion Accidents in Tianjin Port's "8-12" Ruihai Company Dangerous Goods Warehouse*, [http://www.gov.cn/foot/2016-02/05/content\\_5039788.htm](http://www.gov.cn/foot/2016-02/05/content_5039788.htm) (accessed on February 11, 2020).

<sup>14</sup> See Jing Zeng & Chung-hong Chan et al., *How Social Media Construct "Truth" Around Crisis Events: Weibo's Rumor Management Strategies After the 2015 Tianjin Blasts*, 9(3) Policy & Internet 297, 320 (2017).

<sup>15</sup> See Cyberspace Administration of China, *The State Cyber Information Office Investigated and Dealt with 50 Rumor Websites Related to Fire and Explosion Accidents in Tianjin Port According to Law*, [http://www.cac.gov.cn/2015-08/15/c\\_1116265229.htm](http://www.cac.gov.cn/2015-08/15/c_1116265229.htm) (accessed on February 11, 2020).

<sup>16</sup> Ibid.

<sup>17</sup> On March 28, 2003, a ministerial official from Chinese Mainland attended an investment seminar in Chinese Hong Kong and made the following remarks to the local media: "The media should not just report how many people are sick. If half a million out of 6 million people are sick, I think it's normal to feel panicked. But now there are only more than 300 infected people. It's wrong to make a fuss." See supra note 8.

<sup>18</sup> See Rong Xiao, *The Status of Network Speech in the Realization of the Balance of Citizens' Basic Rights*, 57(5) Law Science 75, 81 (2012).

<sup>19</sup> See Yik Chan Chin, *Public service broadcasting, public interest and individual rights in China*, 34(7) Media, Culture & Society 898, 910 (2012).

<sup>20</sup> Among the 8 citizens, the most representative were medical workers in Wuhan. Knowing the virus samples received by the hospital from several pneumonia patients were similar to SARS, they released early warning information in their medical communication WeChat group.

manageable”, “low risk of human transmission”.<sup>21</sup> Even on the eve of “Minor Lunar New Year” on January 18, confronted by many concerns about the risk of the epidemic, the local government still decided to hold the “Grand Community Dinner” activity,<sup>22</sup> with more than 10,000 residents in Baibuting community as scheduled.<sup>23</sup>

It is on the basis of the decision-making logic of “stability”<sup>24</sup> that it is certainly necessary for the government to deal seriously with the “false information” disseminators who spread rumors and create social panic.<sup>25</sup> Government’s control of online information is often imposed by social media platforms in the name of “rumor management”.<sup>26</sup> This led to a widely concerned event: “Eight people who spread rumors of Wuhan pneumonia were investigated and disciplined according to the law.”

According to the briefing made by the official Weibo of Wuhan Public Security Bureau, “Eight people spreading rumors of pneumonia in Wuhan were investigated in accordance with the law”,<sup>27</sup> which was published in the article “Peaceful Wuhan” at 14:13 on January 29, 2020. On December 31, 2019, Wuhan Municipal Health Commission issued a briefing on the pneumonia epidemic.<sup>28</sup> Subsequently, a number of netizens reported that some people spread false information on the Internet. In order to get the picture, Wuhan Public Security Bureau carried out investigation and verification of eight citizens. According to the investigation, the eight people had transmitted “X hospital has many confirmed cases of SARS”, “confirmed 7 cases of SARS”, “Y hospital received a family of three from a continent, and then suspected SARS” and other unverified information. According to the Law of the People’s Republic of China on Penalties for Administration of Public Security, Wuhan Public Security Bureau conducted education and criticism respectively because the circumstances of the above-mentioned eight people were particularly minor.

Here, the government’s rumor control had the basis of facts and legal confirmation of “lawful investigation”. It seemed that everything was so impeccable. The only flaw

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<sup>21</sup> See *The Latest Situation of New Coronavirus Infection Pneumonia and Expert: Preventable and Controllable, Low Risk of Continuous Human-to-Human Transmission*, <http://tv.cctv.com/2020/01/20/VIDEcXVq3sDiqrfbCqu7j18D200120.shtml?spm=C22284.PSFUqYbOTDbJ.0.0> (accessed on February 12, 2020).

<sup>22</sup> “Grand Community Dinner” is an activity organized by Baibuting community in Wuhan. In the Minor Chinese Lunar New Year, thousands of community residents gather to provide a dish for each family, or several families make dishes at home and then send them to the venue. The neighbors gathered around to taste dishes, appraise awards and celebrate the new year. See Xinhuanet, *Celebrating the Minor Chinese Lunar New Year at the “Grand Community Dinner”*, <https://baijiahao.baidu.com/s?id=1656105650238683821&wfr=spider&for=pc> (accessed on February 12, 2020).

<sup>23</sup> See Zonghe Sun, *Wuhan Baibuting Community: Residents Cook Dishes to cheer for a Better Life*, [http://difang.gmw.cn/hb/2020-01/19/content\\_33495078.htm?s=gmwreco2](http://difang.gmw.cn/hb/2020-01/19/content_33495078.htm?s=gmwreco2) (accessed on February 12, 2020).

<sup>24</sup> According to the theory of maintaining social stability, restricting the freedom of expression in order to maintain social stability can only backfire, that is, it secretly encourages the forces challenging the society. See Shuqing Zhen, *On Freedom of Expression*, Social Sciences Academic Press (China), p.168 (2000).

<sup>25</sup> In the long run, suppressing different opinions will hinder social stability. See Liu Di, *An Overview of the Legal System of Modern Western Journalism*, China Legal Press, pp.9-10 (1998).

<sup>26</sup> See *supra* note 14.

<sup>27</sup> See Official Weibo of Wuhan Public Security Bureau, “Peaceful Wuhan” Information Report, <https://www.weibo.com/2418542712/IrISGCgs6?type=comment> (accessed on February 12, 2020).

<sup>28</sup> Recently, some medical institutions have received many cases of pneumonia. At present, all cases have been treated in isolation. Preliminary analysis showed that the above cases were viral pneumonia. So far, no obvious human to human phenomenon has been found, and no infection has been found in medical staff. See Wuhan Municipal Health Commission, *Report of Wuhan Municipal Health Commission on the Current Situation of Pneumonia in Our City*, [http://k.sina.com.cn/article\\_614528391316e49974902000y7wy.html](http://k.sina.com.cn/article_614528391316e49974902000y7wy.html) (accessed on February 12, 2020).

was that the government insisted the epidemic risk could be prevented and controlled. However, due to inadequate responsive measures and the general public's carelessness, it had missed the time window of epidemic prevention, resulting in a public health crisis affecting the whole country.<sup>29</sup> This time, people suddenly realized how precious the early warning messages sent by the "rumor spreaders" who had been "investigated and punished according to law" was. In the feeling of regrets, people could not help but ask, "In the name of the law, what kind of legitimacy boundaries should the government's rumor management follow?"

## 2. The Legal Logic of Rumor Governance

### 2.1 Interpretation of Wuhan Rumor Incident

In order to alleviate the legitimacy of the public doubt, the Supreme People's Court of the People's Republic of China issued an article on January 28, 2020 about the Wuhan Rumor Incident:

In the case that "South China Fruit Seafood Market Confirmed 7 SARS Cases", to mechanically understand and apply the law, it was reasonable to say that the emergence of SARS in Wuhan was a fabrication of false information, given that the new type of pneumonia was not SARS. Moreover, the information had caused confusion in the social order. In accordance with the law, to fabricate and disseminate false information and give it an admonition or administrative punishment or even a criminal penalty is justifiable.

However, it turned out that, although the new type of pneumonia was not SARS, the content published by the accused citizens was not completely fabricated. If the public had listened to this "rumor" and taken measures such as wearing masks, strict disinfection and avoiding going to the wildlife market in the face of the SARS scare, it would have been a blessing for us to better prevent and control the new type of pneumonia today.

Therefore, in the face of false information, law enforcement agencies should fully consider the subjective degree of malignancy of information publishers and disseminators, as well as their cognitive ability. As long as the information is basically true, the publisher and the spreader have no ill will, and the behavior objectively does not cause serious harm, the public should maintain a tolerant attitude towards such "false information".<sup>30</sup>

Taking the matter on its merits, the opinion of the Supreme People's Court of the People's Republic of China could be regarded as a "reputation restoration" for the eight "rumor spreaders". But the problem was not really solved, and according to the Supreme People's Court of the People's Republic of China's interpretation logic, the eight early warnings of "spreading false information" were able to obtain legal tolerance because "if the public had listened to this 'rumor' and taken timely self-prevention measures

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<sup>29</sup> On February 27, 2020, at the special news conference on epidemic prevention and control held by the Information Office of Guangzhou Municipal Government, Academician Nanshan Zhong said: "If we had taken strict prevention and control measures in early December or even early January last year, the number of patients would have greatly reduced." See Guangzhou Internet Information Office, *Zhong Nanshan's Latest Statement Conveys a lot of Important Information*, <https://baijiahao.baidu.com/s?id=1659745730224424284&wfr=spider&for=pc> (accessed on February 28, 2020).

<sup>30</sup> See Official Weibo of the Supreme People's Court of the People's Republic of China, *This Article Has Made It Clear about the Rumor Control of New Pneumonia*, <https://weibo.com/ttarticle/p/show?id=2309404465698775629865> (accessed on February 12, 2020).

based on panic about SARS”, it would be a good thing for outbreak prevention and control. Therefore, the Supreme People’s Court of the People’s Republic of China believes that the elements of legal exemption for the dissemination of “false information” should include the following three elements: “(1) The information is basically true; (2) The publisher and the propagator are not subjectively malicious; and (3) The conduct objectively does not cause serious harm.”<sup>31</sup> Conversely, if the new coronavirus is not as contagious as SARS as the official initially stated, and has a limited human-to-human risk, and its infectious consequences are only equivalent to ordinary influenza, then early warning information will be treated as “basically unreal”. In view of its “unprovoked” outbreak panic, then law enforcement agencies can still be fully justified in accordance with the form of the Supreme People’s Court of the People’s Republic of China in the first paragraph of the interpretation of the logical logic. Even if, in this case, the outbreak information issued by the early warning is actually basically true, and the government’s strategy of “tightening inside and loosening outside” is really preventing the spread of the epidemic, then, based on the “good result” which has a positive effect on government governance behavior, it’s still out of imagination that eight “rumors” will have the opportunity to obtain “reputation restoration” through public opinion.

## 2.2 Legal Text Interpretation

According to Article 25 of the Law of the People’s Republic of China on Penalties for Administration of Public Security, the logical elements of administrative punishment for rumor-mongers are “spreading rumors, making false reports of dangerous situations and epidemic situations or raising false alarms or by other means”.<sup>32</sup> Obviously, the dissemination of false epidemic warning information does not necessarily meet the subjective intent of the actor to “deliberately disturb public order” (the so-called “rumoring” in the Wuhan Rumor Incident was clearly intended only to remind the surrounding population to do a good job of self-protection, rather than “deliberately disturbing public order”).<sup>33</sup>

That is to say, based on the text interpretation, even if the actor disseminates false warning information, it cannot apply the corresponding administrative penalties as long

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<sup>31</sup> In judicial adjudication, the court tends to identify the Internet rumors from the perspective of “consequentialism”, that is, as long as the Internet statements made by the parties are proved to be not objective and untrue in the results, they can be regarded as spreading rumors. See Fanzhuang Meng, *Judicial Department of Disrupting Public Order through the Online Rumor: Centered on Judicatory application of Item 1 of Article 25 of the Law on Public Security Administration and Punishment*, 39(4) Political Science and Law 71, 80 (2020).

<sup>32</sup> Article 25 of the Law of the People’s Republic of China on Penalties for Administration of Public Security states a person who commits one of the following acts shall be detained for not less than 5 days but not more than 10 days and may, in addition, be fined not more than 500 yuan; and if the circumstances are relatively minor, he shall be detained for not more than 5 days or be fined not more than 500 yuan: (1) intentionally disturbing public order by spreading rumors, making false reports of dangerous situations and epidemic situations or raising false alarms or by other means.

<sup>33</sup> For example, on December 30, 2019, Dr. Wenliang Li released a message about “seven cases of SARS confirmed in the seafood market in South Wuhan” in his university class group, reminding his fellow clinicians to “let family members and relatives pay attention to prevention”. On January 3, 2020, he was warned and admonished by the local police station for “publishing false statements on the Internet”. See National Supervision Commission of the People’s Republic of China, *A Briefing on the Investigation of the Situation Involving Dr. Wenliang Li as Reflected by the Public*, <https://baijiahao.baidu.com/s?id=1661590789756187623&wfr=spider&for=pc> (accessed on March 19, 2020).

as it does not have subjective intent to disturb public order, or the law enforcement departments cannot prove that the actor has such subjective intent.<sup>34</sup>

According to the modern theory of the rule of law, the above-mentioned interpretation can be traced back to “freedom of speech”, which is the fundamental right of citizens declared in the Constitution of the People’s Republic of China. To be specific, Article 35 of the Constitution of the People’s Republic of China states “Citizens of the People’s Republic of China shall enjoy freedom of speech, the press, assembly, association, procession and demonstration.” And Article 51 states “When exercising their freedoms and rights, citizens of the People’s Republic of China shall not undermine the interests of the state, society or collectives, or infringe upon the lawful freedoms and rights of other citizens.”

That is to say, under the premise of “no harm to others” and not violating the prohibitions of the law, the essence of freedom of speech is that citizens can say what the authorities may not like to hear and reveal the truth that the authorities are not willing to disclose, thus safeguarding the democratic values and truth-seeking spirit especially cherished by modern civilized society and enhancing the subjectivity of human beings. If citizens are required to conduct self-censorship and undertake the obligation of “verification” according to certain absolute standards of “correctness” and “authenticity” in all kinds of speech and expression involving personal or social public affairs, they will bear adverse legal consequences and “then the society can only be as silent as the grave.”<sup>35</sup> Freedom of speech is significantly important. Suppressing it restrains people from speaking their minds. Without free flow of ideas, important information could be lost, never being voiced or considered.<sup>36</sup> Thus, freedom of speech should not only protect mainstream comments and suggestions, but also the minor, marginal, unorthodox and even wrong opinions.<sup>37</sup> The system of freedom of expression has practical significance only if it recognizes the right for citizens to say the wrong thing.<sup>38</sup> It can be said that freedom of speech is a prerequisite for public choice, with a logical precondition.<sup>39</sup> Freedom of speech augments stability by providing a safety valve for tensions and social pressures.<sup>40</sup>

## 2.3 The Practice

Thus, it will be found that interpretation from the Supreme People’s Court of the People’s Republic of China about the events is in fact an inappropriate “restriction” on

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<sup>34</sup> Rumors punished by the law should be for malicious purposes or intended to degrade the personality and reputation of others or intended to disrupt social order or endanger public safety. See Zhongle Zhan & Junjie Gao, *On Legal Regulation of Rumors on Internet*, 21(1) Jianghai Academic Journal 1, 151-9 (2014).

<sup>35</sup> See Dayong Li, *Rumors, Freedom of Speech and Legal Regulation*, 37(1) Law Science 100, 106 (2014).

<sup>36</sup> See Emmons Shauna, *Freedom of Speech in China: A Possibility or a Prohibition*, 23(1) Loy-ola of Los Angeles International & Comparative Law Review 249, 295 (2001).

<sup>37</sup> See supra note 35.

<sup>38</sup> Supreme Court of the United States said that “in order to protect freedom of speech, we need to protect false statements” and “it is necessary to defend errors committed in good faith.” See *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974).

<sup>39</sup> See Li Su, *The Story of Ju Qiu, Qiu’s Rat Poison and Freedom of Speech*, 31(3) Chinese Journal of Law 65, 79 (1996).

<sup>40</sup> See supra note 36.

citizens' constitutional rights.<sup>41</sup> This interpretation requires that the warning information must be in line with "basically true" information control logic, which makes it more reasonable for the law-enforcement departments to apply public security punishment to the early warning people who spread false information. Relevant cases published by local governments are as following:

On the evening of January 23 in Zhejiang Yunhe, a netizen in a WeChat group published "You all have to be careful. The government is fully armed and has begun to rescue because Yunhe has had one case already". Then rumors were retweeted. On January 23 at 10:00 p.m., the Yunhe county public security bureau put the rumor-monger Lin under legal control custody. After investigation, on January 23 at 7:00 p.m., Lin accompanied his wife to see a doctor in Yunhe County People's Hospital. Only because they saw the medical staff wearing protective clothing, they posted false information in the WeChat group. According to Article 25 of the Law of the People's Republic of China on Penalties for Administration of Public Security, Lin had been administratively detained 3 days for suspicion of fictitious Facts to disturb public order.<sup>42</sup>

On January 25, a piece of false information stating that "Our Xu Dean said Dawukou has found five cases of this epidemic" appeared in a resident of Dawukou District WeChat group, causing the public security agencies' being alert. On January 26, the district police station received an order of 110 and immediately used a verbal summons to take the rumor spreader Yang to the investigation. Upon investigation, Yang confessed to his illegal act of publishing false information in a WeChat group. Yang said, "The WeChat group only has 16 relatives. The main purpose is to remind them of paying attention to hygiene, doing a good job of protection, not going to places with large numbers of people, and no other malice." For this reason, the civilian police just admonished Yang and made him fill out the guarantee of admonition;<sup>43</sup>

On January 31, 2020, many WeChat groups spread the news that an employee of Liansheng Supermarket had been confirmed to be infected with the new coronavirus. After investigation by relevant departments of the government, the information turned out to be untrue. On January 31, netizen Ye heard that someone was infected with the virus at Hukou Liansheng Supermarket. Then he sent the message in the WeChat group for classmates, releasing the information that "A cashier at the supermarket has been identified as infected, so don't go to the supermarket", and then someone spread the news on the Internet, causing a certain social impact. Later Ye was punished by the public security organ;<sup>44</sup>

In the early hours of January 25, 2020, Wang read a WeChat group message when playing mobile phone at home: "The car whose license plate number is Zhejiang BL0535 just returned from Wuhan. I hope you to pay attention to this license plate number and send this message to various groups and circles of friends, in case more

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<sup>41</sup> In judicial practice, some courts follow the logic of "order supremacy" and deviate from the "three elements" of illegality. In some cases, the expanded interpretation of Internet rumors and public order results in excessive restrictions on citizens' freedom of speech. See supra note 31.

<sup>42</sup> See Chunju Luo, *All Over the Country are Cracking Down on Spreading Rumors of Epidemic Situation, and Many People have been Dealt With!*, <https://new.qq.com/omn/20200124/20200124A07QOE00.html> (accessed on February 12, 2020).

<sup>43</sup> See Yonglei Shi, *66 People have been Punished in Ningxia for Spreading Rumors of Epidemic Situation*, [http://www.yinchuan.gov.cn/xwzx/mrdt/202001/t20200129\\_1935135.html](http://www.yinchuan.gov.cn/xwzx/mrdt/202001/t20200129_1935135.html) (accessed on February 12, 2020).

<sup>44</sup> See Hukou County Public Security Bureau, *Zero Tolerance! Two People in Hukou were Investigated and Dealt with by the Police According to Law for Spreading Rumors of Epidemic Situation*, [http://xw.jjxw.cn/jjsh/202002/t20200204\\_3094517.html](http://xw.jjxw.cn/jjsh/202002/t20200204_3094517.html) (accessed on February 12, 2020).

people get infected.” After seeing the news, Wang immediately posted the message to multiple WeChat groups without verifying the information. The message was then retweeted in large numbers by his friends, causing social concern. After Zhongxiang City Cyber Security Agency monitoring found that, Fengle police station punished Wang with a certain administrative detention in accordance with the law for three days for a malicious spread of rumors.<sup>45</sup>

From this point of view, all kinds of early warning, even if they do not have the subjective intention to disturb public order, and there is no substantial damage to public order, law-enforcement agencies still have sufficient reasons to punish them for their “false statements”, which is consistent with the law enforcement logic applicable to the eight “rumor spreaders” who were “investigated and punished in accordance with the law” in the Wuhan Rumor Incident.<sup>46</sup> And from our timeline, the interpretation issued by the Supreme People’s Court of the People’s Republic of China on January 28 did not change the above-mentioned law enforcement logic in any sense, but rather strengthened it to a certain extent. In the previous news report on January 31, the government can put forward the bottom line of “zero tolerance” for law enforcement more confidently, and this position is also the logic of rumor governance implemented by local governments so far. For example, on February 4, 2020, Baise City issued a notice that Baise City has implemented a 24-hour online inspection and monitoring mechanism since the launch of the I-level response to major public health emergencies, and has continuously increased efforts to detect and dispose of epidemic related rumors;<sup>47</sup> On February 5, 2020, Xi’an Municipal People’s Government issued the notice on resolutely cracking down on Internet rumors according to law and regulations, and said that so far since February 4, 229 information related to rumors of the epidemic had been found and 58 people had been handled in compliance with the law, 50 of which had been educated and 8 had been administratively detained.<sup>48</sup> On June 19, 2020, Hejian Xu, Deputy Minister of Propaganda of the Beijing Municipal Committee, said, “In the current prevention and control of the new crown pneumonia epidemic, there has been false information related to the epidemic. Even deliberately, fabricated rumors spread, seriously interfering with the overall situation of the epidemic prevention and control work. The Beijing police has always maintained zero tolerance and cracked down on illegal and criminal acts that fabricate and disseminate false information about the epidemic in accordance with the law.”<sup>49</sup>

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<sup>45</sup> See Long Chen, *Zhongxiang Public Security Bureau Detains Two People Who Spread Rumors of Epidemic Situation*, <http://www.cnhubei.com/jmzx/p/12648491.html> (accessed on February 12, 2020).

<sup>46</sup> During the SARS epidemic in 2003, Huoying Zhang, Deputy Secretary of the People’s Government of Guangzhou Municipality said in an interview on February 11, 2003: “Recently, it is said that plague and unidentified virus have been circulating in Guangzhou, and that dozens of people have died in Guangzhou. On these rumblings, I can solemnly, seriously and responsibly guarantee that they are rumors. We strongly condemn those who have ulterior motives or use rumors to raise prices and disrupt social and market order.” See Meiyi Li, *Using Rumors to Raise Prices Should be Strongly Condemned (Full Text of Zhang Huoying’s Speech)*, <http://news.southcn.com/gdnews/hotspot/gdfk/zg/200302120725.htm> (accessed on February 12, 2020).

<sup>47</sup> See Baise City Party Committee and Political and Legal Committee, *Cracking Down on Spreading Epidemic Related Rumors and Maintaining Public Opinion Stability*, <http://www.baisezfw.gov.cn/show.php?id=9480> (accessed on February 12, 2020).

<sup>48</sup> See Xi’an Cyber Information Office, *Xi’an Cracking Down on Network Rumors Related to Epidemic Situation*, <https://baijiahao.baidu.com/s?id=1657630451994823472&wfr=spider&for=pc> (accessed on February 12, 2020).

<sup>49</sup> See Xingyun Ying & Xing Gao, *Beijing is Cracking Down on Rumors Related to Epidemic Situation, hoping that the Public Will Not Spread, Believe and Spread Rumors*, <http://bj.people.com.cn/n2/2020/0619/c14540-34100410.html> (accessed on February 12, 2020).



## 2.4 Issue Review

As is mentioned earlier, government's behavior dominates that the governance of rumors has actually deviated greatly from the legal system logic track. In accordance with the previous interpretation of the text of Article 25 of the Law of the People's Republic of China on Penalties for Administration of Public Security, the law seeks to sanction and correct the "spreading of rumors" act of "deliberately disturbing public order", which is intended to "protect public order that may be disturbed by rumors". However, in all the cases listed in this article, as well as many other cases that have not been cited but involve similar circumstances, the starting point for these "rumor spreaders" is nothing but reminding the surroundings of reducing their travel and paying attention to self-protection, which is fully in line with the advocacy of the state during the outbreak. The additional social panic which may result from this is to allow the person who gets the news to snap up and stock up on some living materials in case of need. But in the context of the spread of the epidemic, many people will instinctively take similar measures even without any warning information. In view of this, these early warning rumors should not be considered "intentional" or "disturbing public order" if interpreted in accordance with strict legislative intent and text interpretation.

Thus, the government spares no effort to sanction these early warnings, as is listed, neither to apply the law mechanically and catch up in legal formalism, nor because the government really believes that the latter has deliberately disturbed public order.<sup>50</sup> The reason should be that the information which the latter is trying to convey is not consciously consistent with the government's "authoritative information", which makes the government feel that its own "authority" has been damaged. Then the government will certainly teach these people some lessons. As long as the public spread rumors against the government or the public, they will be regarded as "rumors". This also makes it easier for the judiciary to expand the scope of legal sanctions.<sup>51</sup> In this sense, the Supreme People's Court of the People's Republic of China's interpretation also seems to further strengthen the discretion of the government.

Specifically, in order to explain what kind of rumor must be severely combated, the aforementioned interpretation states: "There is no epidemic situation in a certain place and the information about the occurrence of an epidemic situation is fabricated, thereby causing social disorder." As for the intensity of the crackdown, the interpretation states: "Law enforcement agencies should comprehensively examine the subjective malice and the impact of objective behavior when investigating similar cases." If there is no major malice subjectively, the rumors will only spread in a small area, and the impact on social disorder will not be serious, considering that such rumors objectively have a positive impact on a certain range of groups of self-protection awareness, and it is easier to clarify such facts, so the fabricators and spreaders of such rumors should be mainly critically educated, and supplemented by administrative penalties, while criminal penalties in non-extreme circumstances should not be carried

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<sup>50</sup> Rumors are close to criticism, in that they essentially accuse the government of certain wrongdoings. Therefore, rebuttals have been a critical part of the Chinese authorities' struggle against rumors, in addition to censorship and the most recent crackdown. See Marina R. Zheltukhina & G. G. Slyshkin et al., *Role of Media Rumors in the Modern Society*, 11(17) International Journal of Environmental and Science Education 10581, 10589 (2016).

<sup>51</sup> See Lu Wang, *The Positive Analyzation of Legal Management of Rumors on Microblog on the Point of Legality and Rationality*, 31(4) Hebei Law Science 120, 127 (2013).

out.<sup>52</sup> This means that as long as the actor disseminates false information about the epidemic, even if there is no subjective material malice, the government has the discretion to decide on punishment measures from critical education to criminal penalty. And once the government can set aside the elements of imputation of “deliberately disturbing public order” and set “correct” and “true” as the right boundary of “epidemic warning/ speech expression”, citizens who are not allowed to “say the wrong thing” will lose their natural rights barrier and are exposed to public power of the state. This potential threat to civil rights will not only undermine the reasonable public order of speech, but also undermine the value identity and belief of members of society for the law.<sup>53</sup>

In summary, if interpreted in pure legal discourse, the current government-led behavior of rumor management would have deviated from the preset institutional logic of the law to some degree.<sup>54</sup> However, the Supreme People’s Court of the People’s Republic of China’s interpretation of the Wuhan Rumor Incident shows that based on the inertia of strong institutional thinking, relying solely on the institutional analysis of legal doctrine is not enough to correct the phenomenon of power alienation and legal instrumentalism that occur in the issue of rumor management. A deeper socio-psychological structure is needed to understand the mechanism behind public crisis rumors and the organizational sociological logic of rumor management.

### **3. The Occurrence Mechanism of Public Crisis Rumors and the Organizational Sociological Logic of Rumor Governance**

From the perspective of sociology, “rumors are the alienation of information”<sup>55</sup> and “rumors breed in an environment where information is scarce.”<sup>56</sup> For example, as the background of the Wuhan Rumor Incident, the public is in a state of information scarcity caused by the official information control measures, and the public has predicted the fact early that information is scarce.<sup>57</sup> Because on the same day that individuals issued early warning information on the outbreak, Wuhan Municipal Health Commission issued “Urgent Notice on Doing a Good Job of Treating Unexplained Pneumonia”, it also circulated on the Internet. The notice required strict information reporting, and stressed that “No unit or individual shall be allowed to release treatment information without authorization.”<sup>58</sup>

And while the version of the message delivered by the individual warner was completely different from the official authoritative release, the people around him

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<sup>52</sup> See supra note 30.

<sup>53</sup> See Yushuang Zheng, *Realizing Common Good through Good Law and Good Governance: A New Exploration of the Instrumentalist Conception of Rule of Law*, 38(3) *Global Law Review* 19, 32 (2016).

<sup>54</sup> In the written countries with high legislative level, the rules are highly detailed, and the task of judges is to strictly implement the legal rules. Only in special circumstances can people “transcend the law” by using dogmatic methods to solve individual cases. See Xiaoxia Sun, *Dualism of Legal Person’s Thinking and Discussion with Li Su*, 25(6) *Peking University Law Journal* 1105, 1136 (2013).

<sup>55</sup> See Junfeng Zhao & Taijun Jin, *On the Survival Logic of Rumors in Public Crisis: An Analytical Framework of Rumors*, 34(1) *Jiangsu Social Sciences* 130, 135 (2013).

<sup>56</sup> See Dezhi Wu, *Rumor, Crisis of Legal Confidence and Cognitive Logic*, 33(5) *Law Review* 69, 78 (2015).

<sup>57</sup> Rumors as unsubstantiated information exist in almost every society but can be particularly prevalent in authoritarian countries due to their restrictions on independent news media. See supra note 50.

<sup>58</sup> See Jianxing Qin & Yu Gao et al., *The “Whistleblower” Li Wenliang in New Coronary Pneumonia: The Truth Is Most Important*, <http://china.caixin.com/2020-02-07/101509761.html> (accessed on February 20, 2020).

apparently continued to spread the message outwards because they believed that his statement has some credibility.<sup>59</sup> Here, “institutionalized personal ties and informal rules of sincerity and honor provide a potential (but not always realistic) framework of trust.”<sup>60</sup> Thus, people reconstruct the trust network based on social behavior trajectories through various connections. When crisis rumors are embedded in it, it is transmitted through various connections, spread within the boundaries of the trust network, and embedded in the trust relationship between the characters.<sup>61</sup> That is, in the unofficial social information networks, people continue to deliver “hearsays” to the secondary audience because they believe in the relationship channel of information.<sup>62</sup> Conversely, people are actively involved in transmitting versions of information that are different from those released by official releases, essentially because “people do not believe or suspect information disclosed by the government, and thus make up for the information ‘vacuum’ and psychological imbalance created by distrustful government by listening to and spreading rumors.”<sup>63</sup> In this regard, people do not necessarily really believe in the so-called “hearsays”, but are actively expressing distrust of the government.<sup>64</sup> From the relevant cases listed above, the Wuhan Rumor Incident obviously caused a strong psychological hint to the public. For people in other areas who have not yet been affected by the epidemic, that the government did not release negative information does not mean good news. Under such concerns, people naturally become the makers and consumers of “hearsays”.<sup>65</sup>

By the way, if the government cannot obtain public trust, false epidemic information and all kinds of public crisis rumors will be parasitic in the social trust networks linked by personal ties.<sup>66</sup> This not only affects the image of the government, but also gives people with ulterior motives an opportunity to take advantage of it. Every emergency disposal is a great test of the government’s public opinion control, mishandling emergencies will affect the government’s image among the public, reduce the credibility of the government, and lead to a crisis of public trust in the government.<sup>67</sup>

People’s trust in the government depends on the arrangement of the political system and the degree of the rule of law in the country, and if the government’s behavior

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<sup>59</sup> The emergence of rumors not only shows that there are defects in normal social control, but also shows that the official information has declined, and the relevant authorities have failed to solve the doubts of the masses in time. At this time, people will rely on each other’s information to form a non-governmental communication network. See Guzheng Tan, *Sociological Analysis of Rumors*, 11(10) Journal of Social Sciences 30, 34 (1989).

<sup>60</sup> See Anthony Giddens, *The Consequences of Modernity*, translated by He Tian, Yilin Press, p.104 (2011).

<sup>61</sup> See supra note 55.

<sup>62</sup> See Yuanxin Shen, *Political Rumor: Definition, Survival Mechanism and Control*, 16(1) Probe 74, 77 (2000).

<sup>63</sup> See supra note 61.

<sup>64</sup> In real life, the public is generally suspicious of the government, and “attacking bureaucrats” has become a fashion. The general dissatisfaction of the public reflects the trust crisis of the government, as well as the doubt and challenge of government’s “legitimacy”. See Xuxia Zhang, *Modern Government Credit and Its Construction Countermeasures*, 14(11) Nanjing Journal of Social Sciences 60, 65 (2003).

<sup>65</sup> When the public crisis comes, if the government and authoritative media do not take on the responsibility of disseminating real information, then the non-governmental and informal means of communication will appear on the stage to occupy a dominant position. See supra note 35.

<sup>66</sup> In the strategy of preventing rumors, the most important and fundamental means is to improve the prestige of the government. See supra note 59.

<sup>67</sup> See Suxun Kuang & Tingjia Zhu, *On Government Response to Internet Rumors in Emergencies: Take the “Case of Taifu Middle School of Lu County” as an Example*, 34(8) Administration and Law 9, 17 (2018).

is not effectively bound by the law, people's trust in the government will be reduced.<sup>68</sup> This also means that the key to the governance of rumors lies in rebuilding the social trust structure, instead of punishing ordinary people who spread the so-called unverified information with indiscriminate punishment by the name of the law,<sup>69</sup> because the result of punishment can only be making ordinary people fear of the government, not making them trust the government.<sup>70</sup> In context of lack of trust, no matter how hard the government strives to "alert" society with all kinds of ways like "law-based investigation" or news exposure, it is still destined to face "rumors".

The ensuing question is, if trust is used as an entry point to re-understand the relationship between government and society, how can law act as an organizational medium to reconstruct the social trust structure?

In the 1960s, an American scholar interviewed 68 entrepreneurs or staff members from nine companies and law firms in order to understand the actual implementation of the company's contractual relationship. This study found an interesting phenomenon that companies spent a lot of effort to sign inter-company transaction contracts, but these contracts were put on the shelf after they were signed. In real life, people maintained these contracts through informal social relations. The researchers quoted a buyer as saying: "If anything happens, you can talk to the other person on the phone about solutions. If you still want to continue doing business with the other party, don't dwell on the terms of the specific contract. One's behavior must be reasonable. If you want to stay in the business world, you shouldn't go to a lawyer at will."<sup>71</sup> Take legal intervention in contract performance as an example: "In markets characterized by long-term, relational dealings between agents' legal intervention may be positively harmful to the effective performance of contracts. Information costs again provide an explanation for this: where the courts are unlikely to have the necessary knowledge or expertise with which people make an accurate judgment of the merits of disputes, the parties may make provision for third party expert arbitration to which the court should, in principle, defer. In such situations, there will be no advantage in court enforcement of loose and informal commitments between parties, given the high likelihood for courts to misunderstand the nature of the assumptions that underlies the agreement and the potential power of the non-legal sanctions attached to them; excessive legal enforcement would undermine the agreement on which the relationship depends."<sup>72</sup> That is to say, in a cooperative social interaction situation, legal mechanisms and trust mechanisms are in fact intrinsic tensions that are unavoidable. If people try to use the trust mechanism to maintain the cooperation between the two sides, they cannot use the legal mechanism to sanction some non-essential violations of the other side, the law is more suitable as a cover clause to avoid the risk of dissent.

Similarly, on the issue of rumor management, rational government should also realize that cooperative relations based on mutual trust between the government and society are particularly critical: from the perspective of meeting community's trust, the public will inevitably turn to other means to seek relevant information in order to

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<sup>68</sup> See Weiying Zhang, *Information, Trust and Law*, SDX Joint Publishing Company, p.14 (2003).

<sup>69</sup> Every functioning social system requires some basis of epistemic confidence. See Gary Alan Fine, *Rumor, Trust and Civil Society: Collective Memory and Cultures of Judgment*, 54(1) *Diogenes* 5, 18 (2007).

<sup>70</sup> *Ibid.*

<sup>71</sup> See *supra* note 4.

<sup>72</sup> See Simon Deakin & Christel Lane et al., *Trust or Law? Towards an Integrated Theory of Contractual Relations between Firms*, 21(3) *Journal of Law and Society* 329, 349 (1994); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104(2) *Harvard Law Review* 373, 467 (1990).

establish their own channel of trust, and rumors are an attachment to the channel of trust.<sup>73</sup> If the government expects the society to trust its own “authoritative release” and hopes that members of the community “do not believe in rumors and do not spread rumors”, then, in addition to strengthening the construction of public information networks, the government should ensure that government information is open, transparent, timely and effective.<sup>74</sup> Under a trust-based mechanism, even if members of a society do spread false information because of information asymmetries, the reasonable way of the government should correct it through timely and effective information communication, rather than simply and brutally using the legal sanctions mechanism.<sup>75</sup> After all, government action is important for rebuilding trust, because the government controls all the institutional environment in which trust is formed.<sup>76</sup> In fact, the credibility mechanism is a lower-cost mechanism for maintaining transaction order than the law.<sup>77</sup> As the example of the American business community shows, “Trust is not a one-way belief indoctrination or wishful thinking, but a psychological mechanism of two-way interaction.”<sup>78</sup> In the context of repeated games, “Trusted citizens are more willing to give trust.”<sup>79</sup>

Of course, this also raises another question worth discussing: Why faced with the same underlying need for cooperation, that entrepreneurs in the United States business community naturally adopt a trust mechanism in face of slight breaches by their partners, while Chinese entrepreneurs are always subconsciously importing “confrontational” legal mechanism in the face of social behavior that disseminates false information?

This is not because American entrepreneurs are extraordinarily tolerant, but more because blindly importing legal mechanisms not only undermines mutual trust and cooperation, but also requires taking on additional operational costs and risks, so it is not a cost-effective option. But for governments that have both law enforcement power and a greater voice, seeking social trust is a more costly option, which not only requires greater efforts to build a more in-depth government information disclosure mechanism, but also, in many cases, the traditional governance logic that thoroughly discloses information and the path the government has formed to rely on are contradictory.<sup>80</sup> This time, “investigating and punishing” an insignificant “rumor maker” according to the law is an easy job. Objectively enough, it is not easy to change this game pattern, which requires both the government to change the concept of governance and the law to truly become a strong backing for the protection of civil rights. As is discussed earlier on the

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<sup>73</sup> See Xiangwu Lai & Zhanhua Zhao, *Internet Rumor Management: From Cultural Consciousness to Social Trust*, 19(29) Youth Journalist 20, 22 (2012).

<sup>74</sup> There is a view that the responsible person does not take the initiative to perform the duty of information disclosure in major public events, no matter whether it causes rumors or not, they need to bear the corresponding responsibility, so as to give full play to the preventive role of information disclosure for rumors as far as possible. See Xinyu Zhang, *Administrative Regulation and Improvement of Internet Rumors*, 33(3) Studies in Law and Business 63, 69 (2016).

<sup>75</sup> However, while public power is actively extending its influence on the Internet, it also shows a high degree of vigilance and “distrust” of online speech. See *supra* note 18.

<sup>76</sup> See *supra* note 68, at 22.

<sup>77</sup> See Weiying Zhang, *Reputational Foundation of the Legal System*, 27 Economic Research Journal 3, 5-13 (2002).

<sup>78</sup> See Hongjie Chen, *Judicial Trust Crisis and Its Countermeasures from the Perspective of Modernity*, 31(4) Studies in Law and Business 64, 71 (2014).

<sup>79</sup> See Piotr Sztompak, *Trust: A Sociological Theory*, translated by Shengli Cheng, Zhonghua Book Company, p.191 (2005).

<sup>80</sup> Credit must depend on information, so how to provide this information becomes very important. If a society does not have enough tools to provide information, then there is no credit system in this society. See *supra* note 68, at 256.

issue of “freedom of expression”, the legal logic of speech protection does not actually support the governance logic adopted by the current government to express borders by “right/wrong”.

According to the Systems-theory point of view, the legal autonomy of modern society is symbolic autonomy which is the infrastructure of “legal/illegal” binary code as the infrastructure of “legal communication”,<sup>81</sup> in order to avoid the alienation of the symbolization mechanism of law becoming an instrumental means of diminishing civil rights and freedoms, “especially to be alert to the arbitrary change of legal meaning under the guise of social interests, collective interests, national interests, people’s demands, etc.”<sup>82</sup> It is because of the vigorous development of civil rights activities in the past 30 years, especially in recent years, that the ruling party has realized the importance of civil rights and interests to its ruling position, which will also promote the ruling party to speed up the pace of returning power to the people.<sup>83</sup> Only through the resolute action of citizens fighting for rights to increase the external legal cost of government behavior can the corresponding pattern better promote the government to adopt the governance logic of mutual trust with society.

#### 4. Reflection on Law and Trust

In modern society, the law plays an important role in the relationship of mutual trust between the government and society, and “when the rulers can be forced to abide by legal rules, they are most trusted.”<sup>84</sup> That is to say, from the perspective of social trust, as the basic connotation of the modern principle of rule of law emphasizes that the government should abide by the law, all acts of public power should be bound and dominated by the normative interpretation framework which has universal effect and is widely recognized by society. According to Chinese President Xi Jinping, power should be kept in the cage of rules. It also means that, even in face of political opportunism, the law should give full protection to civil rights and freedoms and sanction public power violations of institutional commitments in accordance with the principles of the rule of law and procedural due process.

From the perspective of institutional comparison, in the context of democratic politics, in order to ensure the universal and fair implementation of laws, most political communities need a legitimacy criticism mechanism based on the premise of loyal opposition, and presuppose an institutionalized mechanism of distrust of the power system, thus providing an empirical safeguard mechanism for members of society willing to pay for trust, as well as a correction mechanism for breaches of trust. Among sociologists, this mechanism of trust is called the first paradox of democracy: the more institutionalized distrust there is, the more spontaneous social trust there is.

At present, our government’s rumor management behavior also fully shows that, although it has always been stressed that public authorities should have the ethical spirit and responsibility to serve the people and this is a fine tradition the people’s government has always maintained, relying solely on the ethical spirit of bureaucrats is obviously not enough to ensure that individual citizens can be free from the rough treatment of government agencies, which requires a social mechanism, so that people can be

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<sup>81</sup> See Hongjie Chen, *The Practice of “Rule of Law”: The Legal Philosophy Inquiry of “Rule by Lawyer”*, 4 *Journal of Modern Rule of Law* 1, 20 (2019).

<sup>82</sup> See Jinzhao Chen, *The Conservatism of Legal Person’s Thinking: Judge Ideology in the Construction of Harmonious Society*, 30(1) *Study & Exploration* 99, 104 (2008).

<sup>83</sup> *Ibid.*

<sup>84</sup> See *supra* note 79.

protected from the government's public power and rough treatment of the possibility. For example, the right to monitor public opinion derived from the right to freedom of expression belongs to such a social mechanism. The reason why the Wuhan Rumor Incident can be reversed subversively is precisely because the strong pressure of public opinion forces the government to respond positively to it. At the same time, it must also be seen that the government, in order to cope with the pressure of public opinion and link the corresponding social platforms, business websites and information dissemination channels, carries out a variety of public opinion control measures (such as deletion, restriction of forwarding, sensitive word filtering, etc.). This is obviously also an improper response to the right to social supervision.

In this regard, on one hand, Chinese authority should, under the logic of the rule of law, regulate all kinds of improper interference in citizens' freedom of expression, which includes both governmental actions and related acts carried out by business platforms under governmental pressure. While perfecting the legislation, Chinese authority should also fully open the channels for citizens to obtain effective judicial relief, and even encourage public interest litigation led by social intermediary organizations, so as to form a strong restriction on the public power agencies. But on the other hand, the public should also realize that, the government's opportunistic attitude towards the law and instrumentalist use is actually a key factor leading to the Wuhan Rumor Incident. In the context of the political and legal system, it is actually difficult to counter the institutional stress of "politics being able to impose its own understanding on the law" in the true sense, simply by relying on the logic within the law.<sup>85</sup> This requires further construction and implementation of institutionalized mistrust mechanisms at the political level of top-level design, which, from the general experience of the common practice of modern democracies, mainly includes, but is not limited to, the following institutional principles:

First, China shall continuously deepen and promote the degree of democratization. The essence of democratic politics is the innate distrust of any power, which requires the government power to consolidate its legitimacy foundation through the deepening and advancing democratization mechanism. From the election of government officials, the formulation and implementation of major decisions, and the accountability for responsible events, government power should be supported by a democratic mechanism that reflects public participation. Thus for the sake of raising generalized trust, or fighting against historically ingrained distrust, the most conducive policy is to build democratic institutions and safeguard their consistence. This would influence trust from both sides: from the side of the government, raising their accountability and hence their interest in trust worthiness; and from the view of the public, providing them with insurance against breaches of trust, and hence raising their readiness to risk trust in courageous bets.<sup>86</sup>

Second, the government shall strengthen the division of power under the rule of law. The price of over-concentration on power is bound to lead to arbitrariness, so it is necessary to limit and balance the transactional permissions of public institutions and bureaucrats through corresponding empowerment, decentralization and power-limiting mechanisms, so as to avoid arbitrary, expansion and abuse of power.

Third, politics and law functionally differentiate. The function of politics emphasizes the realistic control of action. The government's rumor management

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<sup>85</sup> See supra note 78.

<sup>86</sup> See Piotr Sztompka, *Trust, Distrust and Two Paradoxes of Democracy*, 1(1) European Journal of Social Theory 19, 20-32 (1998).

behavior often very clearly reflects the political function logic. Once any rumor or negative information affects social harmony and stability, the government's first reaction is often to use various means to avoid the spread of so-called "rumors". The main function of law is to stabilize the behavior expectation, which also means that law has a completely different time concept from politics. What law focuses on is to make appropriate judgment on the rights and obligations of the actor based on the principle of due process, no matter how urgent the issue is in politics. In the context of the political and legal system, in order to solve the problem in the short term, politics may distort the operational logic of the law in order to achieve its own functional logic, and even risk breaking the law. But as some scholars have pointed out incisively: "Only when the logic of law is different from the logic of state power, and with a certain degree of justice can it be competent to defend the state."<sup>87</sup> In this regard, only under the premise of the division of political and legal functions when the law is faced with political opportunism can the rights and freedoms of the parties be fully guaranteed according to its own functional logic, thus effectively enhancing the trust of the social community in power.

Fourth, individuals value citizenship and social support. In order to restrict public power, it is important to institutionally support the rights of citizens to adopt the rights and freedoms of expression, publication, assembly, association, procession and demonstration permitted under the rule of law in order to confront the public authority that has crossed the boundary of power in the eyes of citizens. At the same time, the principle of social support provides the necessary public opinion and operational support for the development of civic initiative against bureaucracies through voluntary civic coalitions, civil society organizations and various types of public welfare institutions. This is because in the face of strong public authorities and bureaucratic groups, only resorting to a mutual aid network with a broad base of social solidarity can be possible for individual citizens to increase their action bargaining chip, thereby guaranteeing every member of the community a sense of "I am not alone." This, in turn, can facilitate the willingness of citizen groups to place their trust in the institutions of power and to take the risks that such trust entails.

Fifth, government affairs should be open and transparency. Openness and transparency are not only the best constraints on power, but also the most intuitive means for public authorities to earn the trust of the public. When problems arise, trying to censor ideas under the high-pressure strategy of political correctness and restricting free expression can only be counterproductive in a pluralistic society. Only by tolerating dissenters, allowing multi-neutral third-party information media to intervene in time for full information disclosure, opening discussion of existing problems in the public domain in a sincere way, and guiding rational communication, can public decision-making of power organs obtain the broadest social consensus base and enhance their social credibility. The defense of tolerance, open debate, pluralistic and independent media is necessary to safeguard the fundamental operational principle of democracy which is the search for truth, compromise or consensus. The existence of the fourth power of the media, and protection of its autonomy, provide a powerful check against abuses of power, biases and prejudices.<sup>88</sup>

## 5. Conclusion

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<sup>87</sup> See supra note 56.

<sup>88</sup> See supra note 86.



That people actively get involved in transmitting information differing from official releases is essentially a reflection of distrust of the government. The government subconsciously adopts a “confrontational” legal regulations in rumor governance, which seems to maintain good social order and public security. In essence, the government improperly restricts citizens’ freedom of speech under the traditional logical of state governance. This act of blindly adopting legal mechanisms not only undermines mutual trust and cooperation, but also undertakes additional operational costs and risks.

However, based on the strong institutional thinking inertia, relying solely on the institutional analysis of legal doctrine is not enough to correct the phenomenon of power alienation and legal instrumentalism that occurs in the issue of rumor management. This requires a social mechanism on which people can have the possibility to protect themselves from the rough treatment of public power. All in all, the political, legal, and social organizational mechanism within a community can provide the necessary consensus basis and trust mechanism guarantee for the harmonious and stable development of a society on the premise of equal exchange and full communication only with normative certainty, the balance of power system and social responsibility, as well as the expected guarantee of the behavior of the members of the community, the tolerance of dissent and institutionalization.

# Global Community of Health for All: What, Why and How

Yong Wang & Qingqing Zhou<sup>1</sup>

**Abstract:** The COVID-19 virus continues to ravage the world and seriously endangers human life and health. After successfully bringing the pandemic under control, China proposed the idea of building a Global Community of Health for All to the international community. This is a Chinese plan for international reference and shows China's active participation in the global public health governance. International law is at the core of building a Global Community of Health for All. Building this community has rich connotations of achieving health equality, maintaining health safety, promoting health development, persisting in openness and inclusiveness, creating a healthy environment and is of great significance to the development of international law. The establishment of the Global Community of Health for All has a relatively solid legal foundation and international practice foundation, and thus has the legitimacy of international law. It is undeniable that constructing a Global Community of Health for All still has some dilemmas in the legal system and specific systems of international law in the construction of the human health and health community, which need to be resolved in order to build a strong international legal defense line for the ultimate victory over the new crown epidemic.

**Key words:** Global Community of Health for All; International Law; Public Health

## 1. Introduction

The pneumonia pandemic caused by the novel coronavirus (hereinafter referred to as COVID-19) continues to ravage the world. As of December 25, 2020, COVID-19 has infected more than 55 million people worldwide and caused about 1.74 million deaths, and these numbers are still increasing rapidly. In addition to these major health crisis, COVID-19 also has a huge impact on the global economy.<sup>2</sup> Since the outbreak of the

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<sup>2</sup> Over one in six young people surveyed have stopped working since the onset of the COVID-19 crisis. Among them, the unemployment rate of young women is even as high as 31.1%. See International Labor Organization, *ILO Monitor: COVID-19 and the World of Work. Fourth Edition*, [https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/briefingnote/wcms\\_745963.pdf](https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/briefingnote/wcms_745963.pdf) (accessed on May 27, 2020).

The growth impacts of the virus used for the unemployment estimates suggest an additional 8.8 million people in working poverty around the world than originally estimated (i.e. an overall decline of 5.2 million working poor in 2020 compared to a decline of 14 million estimated preCOVID-19). Under the mid and high scenarios, there will be between 20.1 million and 35.0 million more people in working poverty than before the pre-COVID-19 estimate for 2020. See International Labor Organization, *ILO*

pandemic nearly a year ago, international organizations represented by the United Nations and World Health Organization have launched a large number of COVID-19 assistance projects to aid the countries and people affected by the pandemic, especially underdeveloped countries and the poor. Some countries, including China, have already brought the spread of the virus under control. At the same time, however, developed countries that are generally considered to have lower risk of infection failed to withstand COVID-19, and some of those developed countries have even become the main affected countries.<sup>3</sup> Their world-leading medical capabilities have not been able to protect the health of the citizens. The world is now stuck in this pandemic, and the international health governance is in urgent need of new ideas.

After relatively succeeding in controlling the domestic epidemic, China has actively participated and contributed its own schemes in the global governance of COVID-19. In the phone conversation with French President Emmanuel Macron on March 21, 2020, Chinese President Xi Jinping initiated the proposal of “Building a Global Community of Health for All”. Chinese President Xi Jinping pointed out that public health security is a common challenge that the human race is facing, and China is willing to make concerted efforts with France to enhance international cooperation in epidemic prevention and control, support the United Nations and World Health Organization playing a leading role in improving global public health governance, and build a community of common health for mankind.<sup>4</sup> On May 18, 2020, in his speech delivered at the opening ceremony of the 73rd World Health Assembly via video link, Chinese President Xi Jinping pointed out that international solidarity and cooperation is essential for the sake of people’s lives, and called for all the countries to work together to build a Global Community of Health for All.<sup>5</sup> On June 7, 2020, the Information Office of the State Council of the People’s Republic of China issued a white paper titled “Fighting COVID-19: China in Action”. In the white paper, China calls for creating an efficient, sustainable global public health system for all, fortifying defenses for the lives and health of all, and building a Global Community of Health for All.<sup>6</sup> On September 8, 2020, Chinese President Xi Jinping delivered a speech at the meeting to commend role models in the country’s fight against COVID-19. In the speech, Chinese President Xi Jinping stated that China will continue to enhance international collaboration in pandemic control, support World Health Organization playing a leading role in the global fight against the disease and promote the establishment of the Global Community of Health for All.<sup>7</sup> To sum up, building a Global Community of Health for All has become an epitomization of China’s active participation and its resolute contribution to the global public health governance.

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*Monitor 1<sup>st</sup> Edition: COVID-19 and the World of Work: Impact and Policy Responses*, [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms\\_738753.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_738753.pdf) (accessed on March 18, 2020).

<sup>3</sup> See World Health Organization Coronavirus Disease (COVID-19) Dashboard, <https://COVID19.who.int/table> (accessed on December 26, 2020).

<sup>4</sup> See Lifang Qiu, *Chinese President Xi’s phone call with French President Emmanuel Macron*, [http://www.xinhuanet.com/2020-03/21/c\\_1125748121.htm](http://www.xinhuanet.com/2020-03/21/c_1125748121.htm) (accessed on December 21, 2020).

<sup>5</sup> See Chinese President Xi’s statement at the 73rd World Health Assembly, *Fighting COVID-19 Through Solidarity and Cooperation Building a Global Community of Health for All*, [http://www.xinhuanet.com/politics/leaders/2020-05/18/c\\_1126001593.htm](http://www.xinhuanet.com/politics/leaders/2020-05/18/c_1126001593.htm) (accessed on May 19, 2020).

<sup>6</sup> See Sheng Zhong, *Take Moral Responsibilities and Promote Unity and Cooperation*, <http://world.people.com.cn/n1/2020/0612/c1002-31743799.html> (accessed on June 12, 2020).

<sup>7</sup> See Chinese President Xi, *The Speech at the Meeting to Commend Role Models in the Country’s Fight against COVID-19*, [http://www.xinhuanet.com/politics/leaders/2020-09/08/c\\_1126467770.htm](http://www.xinhuanet.com/politics/leaders/2020-09/08/c_1126467770.htm) (accessed on September 9, 2020).

International law can maintain international security with systems, promote international justice with norms, and promote international development with consensus. International rule of law is also an effective way to maintain the order of the international society and is a relatively suitable governance tool in the globalization era. The establishment of the Global Community of Health for All must be carried out within a normative system with high value consensus, relatively stable order, and predictable action evaluation. Therefore, international law is the core of building the Global Community of Health for All. In order to build this community, a series of questions should be conducted and solved in order to consolidate this community and at last establish a strong defense line of the international rule of law when dealing with the COVID-19 virus and similar global pandemics. These questions include: What's the meaning of this Global Community of Health for All and its meaning to the development of international law? What foundation of international law is needed to build this global community of health for all? When building this global community of health for all, what dilemmas still exist in terms of the basic theories and specific systems of international law and how should these be fixed?

## **2. Global Community of Health for All: Response to the Call for International Law in Dealing with Public Health Threats**

### **2.1 Connotation: What is the Global Community of Health for All?**

The Global Community of Health for All refers to the health of all humanity as an organic whole to ensure the common health and well-being of all. Among them, the word “All” clarifies the scope. No one dominates or manages alone. It's a universal practice and universal benefits for all human beings. The word “Health” clarifies the goal. It's not to take consideration of political or economic benefits, but to maintain health and well-being. The word “Global” clarifies the pathway. It isn't an isolated, conservative self-government, but an organic whole that collaborates together.<sup>8</sup> The Global Community of Health for All represents the beautiful vision of all humanity for the pursuit of health, proposes a set policy propositions and actions to improve the governance of international health. It also has a rich connotation of international law, which is mainly reflected in the five aspects below:

The first is to achieve health equality. Health is the common pursuit of all humanity, and health equality is the basic goal and purpose of international health governance. The preface of the Constitution of World Health Organization states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. Bridging the health divide has been a priority in the European over the past decade. Significant progress has been made—today nearly one billion people can expect to live to the age of 78 on average. Despite this, significant health inequities within and between countries still exist.<sup>9</sup> Achieving health equality is an extension of the principle of the peaceful ideology that the Global Community of Health for All contains. Its

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<sup>8</sup> See Angang Hu, *How will China Secure a Decisive Victory in Building a Moderately Prosperous (2000-2019 Year): System Assessment and Important Enlightenment*, 40(6) Journal of Xinjiang Normal University (Edition of Philosophy and Social Sciences) 54, 58 (2020).

<sup>9</sup> World Health Organization, *Five conditions must be met to achieve health equity*, <https://www.euro.who.int/en/media-centre/sections/press-releases/2019/five-conditions-must-be-met-to-achieve-health-equity,-says-who> (accessed on December 6, 2020).

purpose is to minimize or eliminate injustice in the distribution or access of health resources among different countries and different social groups.<sup>10</sup>

The second is to maintain health and safety. Health and safety are the prerequisite and basis for achieving health goals. Since the end of the Cold War, the international community's consideration of security has gradually shifted from traditional National Security to a broader non-traditional security. In 1994, the United Nations Development Program pointed out in the Human Development Report that security symbolized protection from the threat of disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards.<sup>11</sup> The report identified disease as a security threat for the first time in history. Before this pandemic, the United National Security Council had already passed resolutions on the issue of infectious diseases three times and view outbreaks of infectious diseases as a threat to international peace and security.<sup>12</sup> Maintaining health and safety is an extension of the principles of the Global Community of Health for All. It requires all countries to strengthen international mutual trust and collaboration and establish a common, comprehensive, cooperative, and sustainable security concept.<sup>13</sup> At present, the key to promoting global health security lies in breaking the politicization of security issues, prompting countries to shelve political disputes on health security, work together to defend and face global health threats, and take responsibilities of maintaining health security as members of the global community.

The third is to promote health development. Health development is the material foundation of the Global Community of Health for All, as well as the material guarantee for health equality and health safety. At present, human beings are far from conquering infectious diseases or other health problems, and the scarcity of health resources is still to various degrees hindering people from all over the world in pursuing health goals. Right now, at least half of the people in the world cannot get the health services they need. About 100 million people are pushed into extreme poverty each year because of out-of-pocket spending on health.<sup>14</sup> To change this situation, more and better health resources should be provided to meet the needs of people all over the world so that everyone can have access to the health resources at the time and place they need, and establishing and developing a powerful health care system is the fundamental way. In order to preserve the health and safety rights for the nation's citizens, it is necessary for governments of various countries to improve the overall level of the international community's health development through international cooperation. Meanwhile, international cooperation for the well-being of all mankind is not only a moral responsibility or a choice of interests, but also an obligation and responsibility in international law.

The fourth is to embrace openness and tolerance. The Global Community of Health for All upholds the open and inclusive principle of humanity's future, allow individuals to choose their own suitable development paths and governance methods, as well as respect, understand and learn from each other. Different countries have developed their

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<sup>10</sup> See Duanying Cai, *Conceptual Analysis of Health Inequality*, 18(21) Chinese General Practice Nursing 2646, 2647 (2020).

<sup>11</sup> See United Nations Development Programme, *Human Development Report 1994*, Oxford University Press, p.22 (1994).

<sup>12</sup> See United Nations Security Council, *Resolution 1308*, July 17, 2000, p.2; See United Nations Security Council, *Resolution 2177*, September 18, 2014, p.1.

<sup>13</sup> See supra note 8.

<sup>14</sup> See World Health Organization, *Universal Health Coverage*, <https://www.who.int/health-topics/universal-health-coverage#tab=tab1> (accessed on December 12, 2020).

own health management methods in long-term practice based on their own cultural traditions, social systems, economic development stages, and many other scenarios. Although different governance methods may have their own strengths and weaknesses, there is no system that is objectively better or worse. In fact, effective health governance is often based on specific social foundations and specific analysis of specific issues. Therefore, the Global Community of Health for All is an organic whole built on the basis of the respective health governance systems of all countries in the world, and is the result of the practices and wisdom of all humanity.

The fifth is to create a healthy environment. A clean and beautiful natural environment is an inevitable requirement for achieving health goals. Humans and nature coexist. Harming nature will ultimately harm human beings in return.<sup>15</sup> Consistently performing green and low-carbon practices and building a clean and beautiful world is another grand goal of a community of a common destiny,<sup>16</sup> and is also a part of building a Global Community of Health for All. Health and environmental issues are closely related and affect each other. There are also many interactions between international health rights and international environmental law. On one hand, pursuing health rights requires the country to create a healthy public environment. It should not only provide medical care services, but also guarantee the basic factors determining the health right,<sup>17</sup> including natural environmental factors such as clean air and drinking water necessary to maintain health. On the other hand, although international environmental law has multiple goals, the protection of human health is one of its most important goals, and there is a deep connection between the two.<sup>18</sup>

## **2.2 Significance: Why is the Global Community of Health for All Important for International Law**

Proposing the Global Community of Health for All not only provides new theoretical and practical guidance for the international community to overcome the current COVID-19 pandemic and improve the global health governance system, but it is also an inevitable requirement to promote major-country diplomacy with Chinese characteristics in the new era and enhance China's right to speak in the international law system. It is also of great significance to the development of international law.

First, the construction of the Global Community of Health for All shows the way forward for international law related to health, which is, international law should develop in the direction of establishing community awareness, strengthening international cooperation, and promoting the humanization of international law in the field of health. The humanization of international law means that ideas, values, principles, rules, regulations and systems continue to pay more attention to the establishment, maintenance and realization of the legal status of individuals as well as their rights and

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<sup>15</sup> See Chinese President Xi Jinping, *Work Together to Build a Community of Shared Future for Mankind, Speech at United Nations Office at Geneva*, [http://www.china.com.cn/news/2017-01/19/content\\_40133917.htm](http://www.china.com.cn/news/2017-01/19/content_40133917.htm) (accessed on December 12, 2020).

<sup>16</sup> See "Community of Common Destiny and International Law" research group, *The international Law Construction of the Community of Common Destiny*, 16(1) *International Law Review of Wuhan University* 1, 22 (2019).

<sup>17</sup> See Jingshu Wang, *Guaranteeing the Right to Health in Public Health Emergency: Centering on The International Covenant on Economic, Social and Cultural Rights*, 22(3) *Journal of Southwest University of Political Science and Law* 71, 72 (2020).

<sup>18</sup> See David P. Fidler, *International Law and Global Public Health*, 48(1) *University of Kansas Law Review* 38, 38-9 (1999).

interests.<sup>19</sup> The traditional humanization concept of international law is mainly based on the capitalist theory of “innate human rights”,<sup>20</sup> and looks at international relations with a single sovereign state as the center. However, the current globalization trend, especially the trend of health issues beginning to transcend national boundaries, narrows the perspective of the theory. The concept of a Global Community of Health for All discusses community issues from the perspective of the entire human race and represents the common interests of all humanity. Compared with the traditional theories, it is easier to be accepted by socialist or developing countries. Therefore, the concept of the Global Community of Health for All is conducive to promoting international law in the field of health care for the health rights of all human beings, and can further promote the humanization of the legal system of international health.

Second, the Global Community of Health for All provides methodological guidance for international law related to health, which is, development of international law should adhere to the principle of extensive consultation, joint contribution and common shared benefits. In addition, all countries should negotiate on an equal basis, jointly assume international responsibilities, and share the benefits. Currently, there are still certain obstacles in international cooperation relating to health matters. For example, World Health Organization, which plays a key role in the field of health, is influenced by political factors. Some developed countries alienate the simple transactional issue of funding by incorporating their own interests and political demands as conditions to funding since the outbreak of the COVID-19 pneumonia pandemic, in order to divert the social and public opinion pressure caused by the ineffective domestic epidemic prevention. Some countries have begun to blame World Health Organization. The previous United States administration had even announced that it would halt funding to World Health Organization and withdraw from World Health Organization at one point.<sup>21</sup> These have all had a negative impact on the development of the international health legal system. the Global Community of Health for All upholds the principle of extensive consultation, joint contribution and common shared benefits, and especially the leadership of World Health Organization. It is not only conducive to the solution of health issues through consultation, co-construction and sharing among all countries, but can also rely on relevant professional opinions of experts and the consultation mechanism to form an international law system that is in line with the world health conditions. In doing so, related international obligations can be fully implemented to better develop the international law system in the field of health and encourage countries to fulfill their obligations and share the benefits.

Third, the Global Community of Health for All provides a new impetus for the development of international law related to health, injects new momentum into solving international public health legal problems, and offers feasible solutions for promoting global public health. On one hand, the Global Community of Health for All requires the strengthening of global public health governance and international cooperation through the construction and improvement of corresponding systems to promote the emergence of an international health legal system with the goal and purpose of protecting human health. The legal system not only includes an independent international legal system

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<sup>19</sup> See Lingliang Zeng, *Trends towards Humanization in Contemporary International Law*, 28(1) Chinese Social Sciences 89, 90 (2007).

<sup>20</sup> See Zheng Wan, *Research on the Humanization of International Law*, Ph.D. Dissertation, Wuhan University, pp.60-2 (2014).

<sup>21</sup> See Xiang Gu, *The United States officially withdraws from World Health Organization*, <https://baijiahao.baidu.com/s?id=1671583864000855740&wfr=spider&for=pc> (accessed on December 8, 2020).

related to health, but also includes the existing international legal system related to the right of human health. A systematic international health legal system can avoid conflicts between goals, purposes and provisions to the greatest extent, thereby avoiding member states from getting into a dilemma. On the other hand, the concept of a Global Community of Health for All emphasizes the philosophy of people-oriented and life first. Therefore, it is a concentrated expression of the common interests of all humanity. Practicing the concept of a Global Community of Health for All and protecting the safety of lives for all humanity are important to both sovereign states and individuals. Driven by common interests and common concerns, all countries will inevitably better improve international law in the field of health.

### **3. Legitimacy of the Global Community of Health for All**

The proposal of the concept of a Global Community of Health for All not only conforms to the general development trend of the international law system by extending and developing the concept of a community with a shared future for the human race, but also refines and strengthens the principles of international cooperation based on the current international law system. It has legitimacy in international law.

#### **3.1 The Origin of the Theory of the Global Community of Health for All**

##### **3.1.1 The idea of a human community with a shared future**

Since 2013, when Chinese President Xi Jinping first announced the initiative of building a Human Community with a Shared Future to the world in Moscow,<sup>22</sup> the idea has been widely recognized and discussed by the international community and written into multiple United Nations resolutions.<sup>23</sup> In 2018, the amendment of the Constitution of the people's Republic of China officially incorporated "promoting the building of a Human Community with a Shared Future" into the state's fundamental law and became the supreme legal declaration and overall goal of the Great Power Diplomacy with Chinese characteristics.<sup>24</sup> The community of common destiny, as the name implies, is that the future and destiny of each nation and each country are closely linked. People should be on the same line and share glory and shame, strive to make the planet where they were born into a harmonious family, and turn their yearning for a better life into reality.<sup>25</sup> In terms of international law, the community of common destiny means sovereign states using the common interests of mankind as a link to work together to create an open, tolerant, clean, beautiful, peaceful, secure, and prosperous world. This

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<sup>22</sup> See Nan Su, *Chinese President Xi's speech at the Moscow State Institute of International Relations*, <http://politics.people.com.cn/n/2013/0324/c1024-20892661.html> (accessed on December 20, 2020).

<sup>23</sup> See Xiangli Xu & Yan Li, *Why is "Building a Human Community with a Shared Future for All Mankind" Written into the UN Resolution?*, <http://politics.people.com.cn/n1/2019/1011/c429373-31394646.html> (accessed on December 21, 2020).

<sup>24</sup> See *supra* note 16.

<sup>25</sup> See Chinese President Xi, *Hand in Hand to Build a Better World—a keynote speech at the high-level dialogue meeting between the Communist Party of China and political parties in the world*, <http://theory.people.com.cn/n1/2017/1208/c40531-29693317.html> (accessed on December 21, 2020).



would be done through individual efforts and mutual assistance and collaborations with the concept of “one family in the world” and the purposes and principles of the Charter of the United Nations in mind and on the basis of fairness, justice and legal rules.<sup>26</sup>

The concept of Global Community of Health for All is developed from the theoretical foundation of Community of Common Destiny and is an extension of that idea. The fundamental purpose and goal of building a Global Community of Health for All is to achieve health goals for the whole of humanity and is included in the concept of the Community of Common Destiny which is to turn people’s yearning for a better life all over the world into reality. Health is a necessary guarantee for survival, and a necessary prerequisite and requirement for economic, cultural, and social construction. As an integral part of the idea of a Human Community with a Shared Future, the community of health for all also adheres to the path of the community of common destiny which insists on negotiation, co-construction, sharing, win-win cooperation, exchanges and mutual learning, and green and low-carbon living. It also includes peaceful, secure, prosperous, tolerant, open, clean and beautiful goals.<sup>27</sup> It contains peace, development, fairness, justice, democracy, freedom and other common value pursuits of all mankind.<sup>28</sup> In short, the community of common destiny, being the concrete embodiment of the Global Community of Health for All, blends the international society’s development goal of the achievement of the highest standards of health and the provision of health protection for the entire population,<sup>29</sup> expands the connotation that “everyone deserves the highest health standards” established by the International Human Rights Law,<sup>30</sup> and includes decades of practical wisdom that promotes the governance of the international health from countries worldwide.

### **3.1.2 The principle of international cooperation**

As one of the basic principles of international law, international cooperation means that countries should communicate with each other in economic, political, scientific, technological and cultural aspects, conduct extensive cooperation in peaceful coexistence, and pursue common development in international cooperation.<sup>31</sup> Under the provisions of the Charter of the United Nations, a programmatic document of international law, the 1970 Declaration on Principles of International Law clearly stipulated international cooperation as the obligation of all countries. The 1974 Charter of Economic Rights and Duties of States reaffirmed in the preamble that countries

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<sup>26</sup> See supra note 16.

<sup>27</sup> See supra note 16, at 11.

<sup>28</sup> See supra note 16, at 9.

<sup>29</sup> See United Nations, *Declaration on Social Progress and Development*, Proclaimed by General Assembly Resolution 2542 (XXIV) of December 11, 1969.

<sup>30</sup> Article 25 of Universal Declaration of Human Rights provides that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services”. Article 12 of International Covenant on Economic, Social and Cultural Rights provides that, “the States Parties to the present Covenant recognized the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

<sup>31</sup> See Huhua Wang, *Public International Law*, Peking University Press, p.63 (2015).

should strengthen international cooperation in maintaining international peace and security, developing friendly relations among nations, and solving international problems in the economic and social fields. All countries have the responsibilities to cooperate in economic, social and scientific aspects to promote the economic development and social progress of the entire world, especially in developing countries. As a result, international cooperation has been established as one of the basic principles of international law, and it runs through all of its fields, including health.

Furthermore, the current international health laws have clearly stipulated the principles of international cooperation. The preamble of the Constitution of World Health Organization states that the health of all people is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and states. The entire document mentions the cooperation of World Health Organization, countries, United Nations specialized agencies and other organizations, groups and individuals up to 16 times. The International Health Regulations (2005), as the main source of international law for global health governance, reiterates that the 58th World Health Assembly “urges Member States to...in accordance with the relevant provisions of the International Health Regulations (2005)” in its preamble. Specific regulations about the responsibilities of the international cooperation between World Health Organization and the states are made in Article 13, Article 14, and Article 44. The regulations require countries to cooperate on facing and surveillancing infectious disease under the leadership of World Health Organization and help developing countries build, maintain, and strengthen the core capabilities of governing infectious diseases in ways like raising funds and providing technology.

In today’s globalized world, health governance needs international cooperation in order to be effectively implemented. Take the treatment of infectious diseases as an example. In today’s world where the virus is only one flight away, the border quarantine system established in the steam-powered era cannot prevent the international spread of the virus anymore. Even for those countries with advanced sanitation facilities and technologies, it’s hard for them to cope with disease invasions on their own. They must work together with other countries to prevent and face the invasions. In response to COVID-19, the United Nations and World Health Organization have repeatedly reiterated the need for international cooperation in the form of soft laws such as resolutions, initiatives, and recommendations. On January 30, 2020, World Health Organization announced that the COVID-19 virus constitutes a Public Health Emergency of International Concern, and made recommendations on international response, including emphasizing that the only way to overcome this pandemic is that all countries cooperate with each other under the spirit of unity.<sup>32</sup> On April 2, 2020, the 74th General Assembly of the United Nations adopted a resolution entitled United Response against Global Health Threats: Combating COVID-19, calling for intensified

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<sup>32</sup> See World Health Organization, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) (accessed on December 13, 2020).

international cooperation and multilateral efforts in handling disease outbreaks.<sup>33</sup> On December 10, 2020, the General Secretary of the United Nations Guterres emphasized in his keynote speech on World Human Rights Day that effective measures to deal with the pandemic must be based on solidarity and cooperation.<sup>34</sup>

The concept of the Global Community of Health for All is a response to the requirements of international cooperation in the field of health. Since the outbreak of COVID-19, Chinese President Xi Jinping has stated on many international occasions that China is willing to fight against the pandemic with other countries together with its basic attitude of mutual assistance and sharing the weal and woe. China has taken the initiatives to cooperate with the United Nations, World Health Organization, and countries worldwide in pandemic information notification, vaccine and drug development, and medical assistance. China is proving with practical actions that building a Global Community of Health for All is an inevitable requirement in the disease governance of the international cooperation principles.

### 3.1.3 The common concerns of mankind on health matters

Since the late 20th century, as concerns about the common interests of mankind have become increasingly prominent, some matters traditionally considered to be under domestic jurisdiction have become the objects of international law.<sup>35</sup> While the state enjoys sovereignty over related matters, it also bears the liabilities of international law for the interests of the international community as a whole. As a result, the concept of common concerns of mankind first appeared in international environmental law.<sup>36</sup> Judging from the existing rules of environmental law, the establishment of common concerns of mankind has three legal meanings: (1) Matters are related to the common interests of mankind; (2) Related matters are originally from the scope of the jurisdiction of national sovereignty; (3) The legal adjustment of related matters should achieve coordination between the protection of the common interests of humanity and the exercise of national sovereignty.<sup>37</sup>

Health matters are typical common concerns of humanity. As early as 2001, the Fifty-fourth World Health Assembly responded to infectious diseases and related factors in saying the globalization of infectious diseases is not a new phenomenon and emphasizing infectious diseases in one country are potentially a concern for the entire world. The Fifty-fourth World Health Assembly also proposed the establishment of

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<sup>33</sup> See United Nations, *The UN's resolution emphasizing international cooperation in combating COVID-19*, <https://www.unmultimedia.org/avlibrary/asset/2542/2542384/> (accessed on December 20, 2020).

<sup>34</sup> See United Nations, *Human Rights Must be the Top Priority of Anti-epidemic Measures and Recovery Methods*, <https://news.un.org/zh/story/2020/12/1073352> (accessed on December 13, 2020).

<sup>35</sup> See Tainbao Qin, *A Preliminary Study of the New Concept of International Law "Matters of Common Concern of Mankind"*, 26(5) *Law Review* 96, 99 (2006).

<sup>36</sup> In the resolution No. 43/53 *Protection of Global Climate for Present and future Generations of Mankind* adopted in 1988, the General Assembly of the UN recognized for the first time that climate change is a common concern of mankind since climate is an essential condition which sustains life on earth.

<sup>37</sup> See *supra* note 35.

global health security-epidemic alert and response system.<sup>38</sup> Meanwhile, the General Assembly of the United Nations, the United National Security Council, and the Third Committee (Social, Humanitarian & Cultural Issues) have issued many health-related documents despite not regarding health as their major jurisdiction. People gradually realize that health is the common core in many fields of international law, and health issues have therefore become the central issue of multilateralism.<sup>39</sup> Secondly, health matters come from the scope of the jurisdiction of national sovereignty. Traditionally, health matters are subject to domestic jurisdiction. Although they are regulated by international law because they are of great significance to the common interests of the entire international community, they do not exclude the sovereignty of the state in health matters. In fact, health issues under the international legal system could only be addressed through the domestic governance of countries. National sovereignty is a necessary guarantee to the protection of the common interests of human health. Finally, health matters are regulated and adjusted by international law. As countries realize that they can no longer accomplish health goals through mere domestic governance and border control, international law has thus gained a fundamental impetus to expand and develop into matters under national jurisdiction.<sup>40</sup> On the basis of national sovereignty recognition, the current international law has made certain restrictions on the exercise of national sovereignty on health matters in various fields such as health, human rights, and trade. Health matters have changed from traditional national internal affairs to dual adjustment targets of domestic law and international law. The International Health Regulations (2005) formally regulates the country's internal health governance in the form of a treaty and is an important symbol of this development process. The regulations clearly stipulate the countries should strengthen the core capacity of monitoring and responding to public health events within a certain period of time so that they can meet the designated standards of the international law obligations. The regulations emphasize a vertical governance mechanism in international law that differs from the traditional one in health.

Building a Global Community of Health for All is a direct manifestation of the common concerns of health issues of mankind. The core value of the Global Community of Health for All should not only have distinctive Chinese characteristics of “people and life are the most supreme” in international governance, but also contain the common value of all humanity, taking life and health rights as basic human rights and building a healthier world together as a common goal to pursue. The basic concept of building a Global Community of Health for All includes the recognition of the common concerns of humanity and the international law obligation that countries shall safeguard the common interests of all. Building a Global Community of Health for All also provides an important path for the international community to jointly fulfill the obligations of international law.

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<sup>38</sup> See World Health Organization, *Global Health Security-Epidemic Alert and Response*, A54/9, April 2, 2001, paras.2-10.

<sup>39</sup> See Allyn L. Taylor, *Global Health Governance and International Law*, 25(1) Whittier Law Review 223, 256 (2003).

<sup>40</sup> See Allyn L. Taylor, *Governing the Globalization of Public Health*, 32(2) Journal of Law Medicine and Ethics 500, 501-2 (2004).

## **3.2 The Legal Basis for Building a Global Community of Health for All**

The legal basis for building a Global Community of Health for All is mainly reflected in United Nations Charter and resolutions, international health and human rights legal documents, international environmental legal documents, and international economic and trade legal documents.

### **3.2.1 The direction implicated in Charter of the United Nations and important United Nations resolutions**

First of all, the Charter of the United Nations contains provisions to promote international public health cooperation in 1945. Article 1 and Article 3 advocate for the development of international public health cooperation in the purpose and goal of the charter. Article 13 clearly sets forth the principles of international cooperation. Article 55 stipulates the United Nations shall promote solutions for international health and related problems. According to Article 57, the various specialized agencies established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments in health and related fields, shall work with the United Nations. As far as specialized agencies are concerned, Article 62 stipulates the Third Committee (Social, Humanitarian & Cultural Issues) may make or initiate studies and reports with respect to international health and related matters and may make recommendations with respect to any such matters to the General Assembly of the United Nations and to the specialized agencies concerned.

Secondly, some important United Nations resolutions also have provisions on promoting health. For example, the Declaration on Social Progress and Development passed by the General Assembly of the United Nations in 1969 proposed the achievement of the highest standards of health and the provision of health protection for the entire population, if possible free of charge.<sup>41</sup> This is the first time the United Nations has determined the status of human health in the development agenda in the form of a declaration. On September 12, 1978, the United Nations Children's Fund and World Health Organization called on countries to sign the Declaration on Social Progress and Development at International Conference on Primary Health Care held in Alma Ata. The Declaration on Social Progress and Development stipulates the main social target of governments, international organizations and the whole world community in the coming decades should be the attainment by all peoples of the world by the year 2000 of a level of health that will permit them to lead a socially and economically productive life. It strongly reaffirms that health, which is not merely the absence of disease or infirmity, is a fundamental human right,<sup>42</sup> and governments have a responsibility for the health of their people.<sup>43</sup> In September 2019, the General

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<sup>41</sup> See United Nations, *Declaration on Social Progress and Development*, Article 10(d), December 11, 1969.

<sup>42</sup> See World Health Organization, *Report of the International Conference on Primary Health Care*, Alma-Ata, USSR, September 6-12, at Article I (1978).

<sup>43</sup> *Id.*, at Article V.

Assembly of the United Nations held a high-level meeting on universal health coverage. This meeting approved the Political declaration of the high-level meeting on universal health coverage. The Declaration on Social Progress and Development recognizes that health is towards the full realization of human potential, and significantly contributes to the promotion and protection of human rights and dignity as well as the empowerment of all people.<sup>44</sup>

In summary, the Charter of the United Nations and some important United Nations resolutions provide directional guidance for building a Global Community of Health for All.

### **3.2.2 The foundation composed of international health legal documents**

First, the preamble of the Constitution of World Health Organization stipulates the health of all peoples is fundamental to the attainment of peace and security, is dependent upon the fullest cooperation of individuals and States, and the achievement of any State in the promotion and protection of health is of value to all. Therefore, the fact that World Health Organization takes the protection of the health of all humanity and the promotion of cooperation among countries worldwide as important goals to pursue in health and safety is consistent with the general direction of the Global Community of Health for All. Meanwhile, Article 2 stipulates World Health Organization has tasks to assist governments upon request in strengthening health services. By doing this, government isolationism in the international society was changed to some extent. It is conducive to helping countries with relatively backward levels of public health governance to improve. Furthermore, Articles 19 to Article 22 stipulate the World Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization, and, in the case of acceptance, each member agrees to take an annual report to the Director-General in accordance with Chapter XIV of the Constitution of World Health Organization. The articles also stipulate regulations adopted pursuant to Article 21 shall come into force for all members after due notice has been given of their adoption by the World Health Assembly except for such members as may notify the Director-General of rejection or reservations within the period stated in the notice.

Secondly, there are two major internationally legal instruments adopted by World Health Organization in accordance with the Constitution of World Health Organization, International Health Regulations (2005) and World Health Organization Framework Convention on Tobacco Control. International Health Regulations (2005) was adopted at the 58th World Health Assembly on May 23, 2005 and entered into force on June 15, 2007. The purpose and scope of the regulations of International Health Regulations (2005) is to prevent, protect against, control and provide a public health response to the international spread of disease in ways that commensurate with and limit public health

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<sup>44</sup> See the General Assembly of United Nations, *Political Declaration of the High-level Meeting on Universal Health Coverage*, [https://www.un.org/zh/documents/view\\_doc.asp?symbol=A/RES/74/2&Lang=E](https://www.un.org/zh/documents/view_doc.asp?symbol=A/RES/74/2&Lang=E) (accessed on October 10, 2020).

risks, and avoid unnecessary interference with international traffic and trade.<sup>45</sup> It is currently the most important international legal instrument concerning global health security, and has specific regulations on a number of procedures to be followed in the case of an outbreak of public health emergency.<sup>46</sup> Currently, International Health Regulations (2005) is binding to 196 countries.<sup>47</sup> World Health Organization Framework Convention on Tobacco Control was adopted by the World Health Assembly on May 21, 2003. It aims to promote the control of tobacco by member states to eliminate or reduce tobacco consumption, nicotine addiction and exposure to tobacco smoke by reducing the supply, demand and the harms of tobacco and promote the health of nationals.<sup>48</sup> The treaty, which is now closed for signature, has 168 signatories.<sup>49</sup>

In summary, international health legal documents are the most important legal basis for building the Global Community of Health for All.

### **3.2.3 The human health right set by international human rights legal documents**

First, the Universal Declaration of Human Rights (1948) stipulates the obligations of sovereign nations to protect basic human rights and freedoms through international cooperation and defines the scope and specific forms of human rights to a certain extent. Article 25 of the Universal Declaration of Human Rights (1948) stipulates everyone has the right to enjoy the standard of maintaining the health and welfare of oneself and their family, which includes medical care and necessary social services. To protect the health of an individual is to protect the individual's right to life and health. Thus, the construction of a Global Community of Health for All is consistent with the basic human rights emphasized in the Universal Declaration of Human Rights (1948).

Secondly, the International Covenant on Economic, Social and Cultural Rights (1966) made a certain interpretation to the human rights related to health. Article 7 of the International Covenant on Economic, Social and Cultural Rights (1966) stipulates the obligation of the state parties to the present Covenant to recognize the right of everyone to enjoy just and favorable conditions of work, which are safe and healthy, and emphasizes the right that workers enjoy health and hygiene. Article 10 prohibits state parties from allowing enterprises within their jurisdiction to engage children and young persons in work that is harmful to their mental and physical health, dangerous to life, or likely to hamper their normal development. Article 12 emphasizes the state parties to the present Covenant recognize the right of everyone to enjoy the highest attainable standard of physical and mental health. This article initiatively confirms that mental health should also be included in the scope of human health rights.

Thirdly, on July 1, 2016, the United Nations Human Rights Council adopted the resolution Access to Medicines in the Context of Everyone's Right in Enjoying the

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<sup>45</sup> See World Health Organization, *International Health Regulations*, at Article II (2005).

<sup>46</sup> International Health Regulations (2005) defines the detailed rights and obligations of countries in infectious disease prevention and control.

<sup>47</sup> See World Health Organization, *International Health Regulations-Overview*, <https://www.who.int/health-topics/international-health-regulations#tab=tab> (accessed on December 1, 2020).

<sup>48</sup> See World Health Organization, *Framework Convention on Tobacco Control*, at Article I (2003).

<sup>49</sup> Ibid.

Highest Standard of Physical and Mental Health which reaffirms the right of everyone to enjoy the highest attainable standard of physical and mental health is a human right.<sup>50</sup> Thus, the resolution firmly calls on countries to incorporate the accessibility of medicines into human rights protection mechanisms. This emphasizes the accessibility of medicines, as a basic human right, should take precedence over international trade, investment and intellectual property systems.

In summary, international human rights legal documents have laid right basis for building a Global Community of Health for All.

#### **3.2.4 The health condition required by international environmental legal documents**

Firstly, the Declaration of the United Nations Conference on the Human Environment (1972) declares that man has the fundamental right to freedom, equality and adequate conditions of life in an environment that permits a life of dignity and well-being. States shall also take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea. An environment of a quality that permits a life of dignity and well-being shall be interpreted as a living environment with a higher level of hygiene and less environmental pollution. This principle should be regarded as one of the related specific forms of human health-related rights. On the other hand, the declaration also points out that marine pollution may endanger human health and requires countries around the world to take measures to prevent human health from being damaged by the deteriorating marine environment.

Secondly, after the Declaration of the United Nations Conference on the Human Environment (1972), a considerable number of international environmental legal documents put emphasis on the relationship between human health and environmental protection more or less. For example, Principle 14 of the Rio Declaration on Environment and Development (1992) stipulates states should effectively cooperate to discourage or prevent the relocation and transfer to other states any activities and substances that cause severe environmental degradation or are found to be harmful to human health. Article 4 of the United Nations Framework Convention on Climate Change (1992) made it clear that all parties shall minimize adverse effects on the economy, public health and the quality of the environment of projects or measures undertaken by them to mitigate or adapt to climate change.

In summary, international environmental legal documents have created favorable conditions for building a Global Community of Health for All.

#### **3.2.5 The exception clauses in international economic and trade treaties**

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<sup>50</sup> See United Nations Human Rights Council, *Access to Medicines in the Context of the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/195/99/PDF/G1619599.pdf?OpenElement> (accessed on December 18, 2020).



The provisions of the international economic and trade legal documents in relation to the establishment of a Global Community of Health for All are mainly in the exception clauses. These may exempt state parties from the international obligations or national responsibilities arising from the taking of necessary restrictive measures for international trade or investment that may seriously endanger certain specific interests of the party, given the party fully guarantees the freedom of international economy and trade. For example, Article 20 of General Agreement on Tariffs and Trade stipulates nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... (b) necessary to protect human, animal or plant life or health. This provision exempts contracting party from liabilities for taking certain public health measures that violate General Agreement on Tariffs and Trade obligations under certain circumstances. In addition, the preamble of Technical Barriers to Trade; the preamble, Article 2, Article 3, and Article 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures; Article 14 of the General Agreement on Trade in Services; and the second paragraph of Article 27 of Agreement on Trade-Related Aspects of Intellectual Property Rights also stipulates exceptional measures can be taken to protect the life or health of humans, animals and plants.

In summary, the relevant exceptions clauses of international economic and trade legal documents also reflect the attitude of various countries to promote economic and trade development in harmony with the protection of health.

### **3.3 The Practical Basis for Building a Global Community of Health for All**

International practice is an important driving force of the development of international law. The concept of the Global Community of Health for All has a rich foundation in international practice. It is not only an introspection and response to the actual dilemma of global health governance, but also a refinement and sublimation of effective practices and beneficial experiences that the international community has explored for decades to achieve health goals.

#### **3.3.1 The leading role of international organizations**

Since the late 20th century with the development of globalization, the challenges of global governance have quietly initiated the global administrative space. Some international organizations started to undertake public administrative functions in global governance similar to those of the administrative institutions.<sup>51</sup> In global health governance, international organizations such as the United Nations and World Health Organization have been engaged in a lot of leading and coordination for a long time. In fact, they have become the leading role of international governance within their respective functional scope, showing the embryonic form of governance in a community

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<sup>51</sup> See Xiaohong Liu, *The Dimension of International Law in the Global Governance of International Public Health Security*, 64(4) Law Science 19, 20 (2020).

model.

As the main carrier of the contemporary international multilateral system, the United Nations has played an important leading and guiding role in health governance.<sup>52</sup> Since the standing of the health issues in the development agenda was recognized for the first time in the Declaration on Social Progress and Development adopted by the General Assembly of the United Nations in 1969,<sup>53</sup> the relevant contents of health and safety governance have been an important part of agendas like the International Development Strategy formulated by the United Nations every ten years,<sup>54</sup> Agenda 21 (1992), and United Nations Millennium Declaration (2000).<sup>55</sup> Since the beginning of the 21st century, specialized agencies such as the United Nations Security Council and the Third Committee (Social, Humanitarian & Cultural Issues) have successively adopted resolutions and issued opinions on the threat of Acquired Immune Deficiency Syndrome and the realization of the right to health.<sup>56</sup> The United Nations Commission on Human Rights also established a special rapporteur on the right to health in April 2002 that is responsible for monitoring the status of the health rights around the world and promoting the realization of the health right.<sup>57</sup> A series of practices adopted by the United Nations and its specialized agencies demonstrate that it has obtained a certain degree of vertical regulating power in the field of health and safety, such as leadership and supervision.

World Health Organization is the main international organization that assumes the leading and coordination functions of global health governance. The scope of World Health Organization's management has been expanded through a series of practices. Some practices include the proposal of the global health governance goal of Health For All in the Almaty Conference in 1978,<sup>58</sup> the proposal of a complete set of actions plans for the global health governance in the Ottawa Declaration on Health Promotion adopted by the First Global Health Promotion Conference in 1986, the taking of the leading role advancing the Universal Health Coverage agenda as a sub-goal of the Sustainable

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<sup>52</sup> See Jiyong Jin, *G20 and Global Health Governance*, 16(3) China International Studies 57, 74 (2020).

<sup>53</sup> See United Nations, *Declaration on Social Progress and Development*, Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969, at Articles 10, 11, 19.

<sup>54</sup> See supra note 52.

<sup>55</sup> See United Nations, *Millennium Declaration*, Agenda 21, Charter 6, paras.19, 20, 28.

<sup>56</sup> In 2000, the United Nations Committee on Economic, Social and Cultural Rights adopted General Comment No. 14 of International Covenant on Economic, Social and Cultural Rights. The General Comment affirms that health is a fundamental human right. The United Nations Security Council plays an important role in maintaining global health security. The United Nations Security Council adopted resolutions in July 2000 and June 2011, emphasizing that Acquired Immune Deficiency Syndrome may pose threats to international stability and security and calling for state political commitment to respond to the threats of Acquired Immune Deficiency Syndrome raised in the resolutions. In 2013, the United Nations Security Council adopted two more resolutions requiring all state parties to take responding actions to the Ebola epidemic in West Africa.

<sup>57</sup> See the United Nations Human Rights Office of the High Commissioner, *Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, <https://www.ohchr.org/en/issues/health/pages/srrihealthindex.aspx> (accessed on December 18, 2020).

<sup>58</sup> See supra note 42.

Development Goals,<sup>59</sup> and the significant contributions in leading and promoting international anti-epidemic cooperation during the past epidemics of infectious diseases.<sup>60</sup> Through decades of practice, World Health Organization has in fact become the leading organization in global health governance.

In addition, some other international organizations have also played a key role in leading and coordinating matters related to health governance within their respective scope of function. For example, in response to the COVID-19 pandemic, the World Bank launched a \$12 billion assistance program to fund the purchase and deployment of the COVID-19 vaccines considered safe and effective to developing countries. The International Monetary Fund provided countries with suggestions on fiscal policies to adopt during and following the pandemic. The International Labor Organization recommended countries take measures to protect workers in the workplace, to stimulate the economy and employment, to fund employment and income, and other measures to deal with the massive unemployment situation caused by the pandemic.<sup>61</sup>

The leading and coordinating power of international organizations in health governance is fundamentally derived from the grant and transfer of the state nations. It reflects the consensus of countries worldwide on the global governance in the field of health and makes it a common exercise for global health governance. It also provides institutional foundation for building a Global Community of Health for All.

### 3.3.2 Unity and cooperation of countries

Since the establishment of World Health Organization, global health governance has gradually formed an umbrella with World Health Organization as the pillar and two international laws, the Constitution of World Health Organization and the International Health Regulations, as surfaces.<sup>62</sup> International cooperation thus has been greatly expanded.<sup>63</sup> Since the beginning of the 21st century, globalization has brought more dynamic interactions among the international community in health governance, and the solidarity and cooperation between countries have become a common practice in the field.

On one hand, the prevention and control of infectious diseases has become the most active area of multilateral and bilateral international cooperation on a global scale.<sup>64</sup> During the outbreak of viral diseases like the avian influenza, Middle East Respiratory Syndrome, tuberculosis, Acquired Immune Deficiency Syndrome, Ebola, and Zika,

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<sup>59</sup> See Michael H. Merson, *International Public Health, Diseases, Programs, Systems and Policies*, Jones & Bartlett Learning, p.6 (2020).

<sup>60</sup> See supra note 5.

<sup>61</sup> See the World Bank official website on topic of coronavirus, <https://www.shihang.org/zh/news/factsheet/2020/02/11/how-the-world-bank-group-is-helping-countries-with-covid-19-coronavirus> (accessed on April 9, 2021).

<sup>62</sup> See Xiumei Wang & Shaojun Lu, *International Cooperation Mechanism of Infectious Disease Prevention and Control and Its Evolution*, 25 Journal of Henan College of Political Science and Law Management 68, 69 (2010).

<sup>63</sup> See Yingjian Chen, *Research on International Legal System of Global Public Health Cooperation*, Shanghai Academy of Social Sciences Press, p.13 (2010).

<sup>64</sup> See Guang Zeng: *New Thinking on Prevention and Control of Infectious Diseases and International Cooperation*, 36(6) International Journal of Epidemiology and Infectious Disease 361, 361(2007).

many countries have taken the initiatives to adopt international cooperation to fight the pandemics. For example, during the Ebola pandemic in West Africa, the European Union invested more than 3.9 million euros in assisting the medical treatment of the affected areas. The United States successively sent more than 1,400 medical personnel to the affected countries in West Africa. China, Japan, South Korea and other countries have also provided various forms of assistance to the affected countries respectively.<sup>65</sup>

On the other hand, in the field of international health governance, specific regional cooperation and multilateral cooperation models have gradually formed, and multilateral conferences and other platforms are used for national cooperation, including health agenda setting, health technology exchange, and health policy coordination.<sup>66</sup> For example, the first meeting of health ministers of the Group of Twenty issued the Berlin Declaration titled “Cooperate to Build a Healthy Future”. To further develop the global health governance agenda, the Group of Twenty Health Working Group was also established in the meeting.<sup>67</sup> During the coronavirus pandemic, the Group of Twenty Finance Ministers and Central Bank Governors published a Communique titled “the Group of Twenty Action Plan —Supporting the Global Economy through the COVID-19 Pandemic” proposing the guidelines and specific commitments of the Group of Twenty policy action.<sup>68</sup>

In summary, the solidarity and cooperation between countries is a long-term universal practice in the field of international community health governance, and it provides a strong and realistic impetus for building a Global Community of Health for All.

### 3.3.3 China’s practice as a reference case

China is the first country to detect and report COVID-19. From the end of 2019 to the beginning of 2020, after arduous efforts, China effectively reversed the pandemic situation and successfully got the pandemic under control. The country received high regard from World Health Organization.<sup>69</sup>

China’s domestic practice in combating COVID-19 highlights the significant advantages in governance of the Global Community of Health for All, and provides a practical paradigm for building a Global Community of Health for All. After the outbreak of COVID-19 in places like Wuhan, the Chinese government decisively adopted quarantine measures against the affected areas. From January 24 to March 8,

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<sup>65</sup> See Cui Huang & Haixia Ma et al., *Global countermeasures against Ebola virus disease and enlightenment on preventing and controlling fulminating infectious diseases in China*, 42(10) *Military Medicine* 786, 787 (2018).

<sup>66</sup> See Qingjiang Kong, *The Coronavirus Pandemic: International Cooperation Obligation in the Field of International Public Health*, 2(2) *Journal of International Law* 1, 5 (2020).

<sup>67</sup> See *supra* note 52.

<sup>68</sup> See the video of Liu Kun attending the ministerial video conference of the Development Committee of the World Bank spring conference, [http://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/202104/t20210416\\_3687208.htm](http://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/202104/t20210416_3687208.htm) (accessed on December 19, 2020).

<sup>69</sup> See World Health Organization, *Calls on the World to Learn from China’s Three Major Anti-epidemic Measures and the Response of the Ministry of Foreign Affairs of the People’s Republic of China*, <https://baijiahao.baidu.com/s?id=1677264797878693892&wfr=spider&for=pc> (accessed on December 19, 2020).

2020, China deployed 346 national medical teams, 34,600 medical personnel, and more than 900 public health personnel to support Hubei province. By the end of April, more than 200 million non-medical N95 face masks and more than 5 million medical N95 face masks were deployed to the affected areas. Over 4 million community workers and more than 8.81 million volunteers nationwide were devoted to the front-line work combatting the virus. Over 38.9 billion yuan and about 990 million pieces of items were donated nationwide.<sup>70</sup> The highly united and coordinated anti-epidemic practice of the entire government and Chinese society as a whole is a typical practice of the Global Community of Health for All.

The anti-epidemic practices of China embody the maintenance of the common interests of all humanity and takes the lead to build a Global Community of Health for All. To fight against COVID-19, China promoted the convening of a Special China-ASEAN Foreign Ministers' meeting on the novel coronavirus pneumonia, the fifth Lancang-Mekong Cooperation Foreign Ministers' meeting, and the special videoconference among foreign ministers of China, Japan and South Korea. They also established joint prevention and control cooperation mechanisms with neighboring countries. China has also taken the initiatives to provide assistance to other countries. By the end of May, 29 medical expert teams have been sent to 27 countries and epidemic prevention materials have been exported to 200 countries and regions. Meanwhile, China has actively participated in and implemented the Group of Twenty debt relief initiative and announced 77 developing countries suspend debt repayment.<sup>71</sup> Meanwhile, China also signed an agreement with the Global Alliance for Vaccines and Immunization to join the Coronavirus Pneumonia Vaccine Implementation Plan, solemnly pledging to make vaccines developed and deployed by China a global public good.<sup>72</sup> These practices all reflect a strong sense of community.

To sum up, the construction of a Global Community of Health for All has relatively solid theoretical, legal and practical foundations, fully reflecting a strong case to make concerning parties voluntarily obey and abide by the law based on legitimate reasons.<sup>73</sup> Thus, the legitimacy of its international law is demonstrated.

## **4. The Realistic Dilemma of the Global Community of Health for All**

### **4.1 The System of International Health Law has not yet been Established**

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<sup>70</sup> See *Illustration: 18 Sets of Data for Quick Reading of China's Pandemic Combating White Paper*, <http://www.ce.cn/xwzx/gnsz/gdxw/202006/07/t2020060735063212.shtml> (accessed on December 19, 2020).

<sup>71</sup> See Liyan Yang, *The Influence of ASEAN Community on the Integration of South China Sea Policy and China's Countermeasures*. 1(1) *Foundation for Law and International Affair Review* 65, 67 (2020).

<sup>72</sup> See Yong Li & Mu Qing et al., *China Officially Joined the Coronavirus Pneumonia Vaccine Implementation Plan, Assisting in Global Vaccine Distribution*, <https://www.sohu.com/a/423568267162522> (accessed on December 19, 2020).

<sup>73</sup> See Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in international Law: An Interactional Account*, Cambridge University Press, p.30 (2010).

The current international laws and regulations on health are scattered in the Charter of the United Nations and related resolutions, and legal documents such as International Health Law, International Human Rights Law, International Environmental Law, International Trade Law, International Investment Law, etc. Each of the above rules only regulates how the state nations protect the health right of their citizens in one certain aspect, and there are some obvious drawbacks.

First of all, the existing rules of international law about health lack a unified purpose and goal. The purpose and goal of the Charter of the United Nations is to maintain peace, promote development and protect human rights. The purpose and goal of International Health Law is to protect the health of all mankind. For International Human Rights Law it is to protect human rights. For International Environmental Law it is to protect the global environment. For International Trade Law it is to protect and promote trade freedom. Finally, for International Investment Law, it is to promote investment freedom and protect investor rights.

Secondly, although International Health Law is a major component of the existing international health law rules, the existing international health law rules are far from meeting the requirements of the international health legal system. To begin with, there are currently three main legal binding documents about health adopted by World Health Organization: the Constitution of World Health Organization, Framework Convention on Tobacco Control and International Health Regulations. These three legal documents are related to the prevention and control of infectious diseases and the regulation on tobacco production, usage and sales in countries. However, the work of building a Global Community of Health for All not only includes the above actions, but also involves improving the level of treatment of major diseases, providing medical services for different groups of people, and conducting public health education activities. The regulations on these activities are still missing. Secondly, soft laws such as World Health Organization recommendations or notifications are not compulsory and there is a certain degree of non-compliance by contracting nations.<sup>74</sup> Finally, the existing International Health Law has not yet regarded non-state entities such as non-governmental organizations and private entities as legal subjects. However, these private entities have participated extensively in the practice of international health governance. Thus, the system does not meet the requirements of the international health law system in terms of the number of specific rules, the degree of perfection, and the comprehensiveness of the subject.

Thirdly, there are already some conflicts between the existing rules of international law and a unified coordination mechanism is needed. Taking some past international investment disputes as an example, there have been precedents in which a government adopted measures to restrict investments to protect citizens' health rights, but the arbitral tribunal considered it as violation of the bilateral investment agreement and arbitrated

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<sup>74</sup> Take COVID-19 as an example, after Director-General Tedros reiterated on February 4, 2020 that China should not adopt trade and travel restrictions, 133 countries still adopted entry controls against China. These measures include, but not limited to, compulsory isolation, entry bans, and specific inspections of passengers from China. See National Immigration Administration of the People's Republic of China, *Reminders on recent national immigration control measures*, <https://www.nia.gov.cn/n741440/n741542/c1245203/content.html> (accessed on December 3, 2020).

huge fines.<sup>75</sup> The occurrence of such kind of cases can restrict states in balancing interests when taking measures to protect citizens' right to health and may place this right behind other obligations under international law. It is essentially exchanging certain benefits at the cost of the health of citizens, which is inconsistent with the concept of respecting, protecting and developing human rights. Overall, due to the overlapping and conflict of the rules of international law in different fields, the international law related to health is showing a state of fragmentation, disharmony and inefficient expansion.<sup>76</sup>

## 4.2 The Dilemma of Specific Institutions

### 4.2.1 The dilemma of soft law

Although health governance runs through all areas of international laws, international health laws are still undoubtedly the main basis for health governance. Containing a large number of soft law is one of the salient features of the existing international health legal system.

There is no universally accepted definition of soft law in international law. However, it is usually used to refer to any international document that includes principles, norms, standards or other statements of expected behavior outside of treaties.<sup>77</sup> Compared with international treaties, a large number of soft laws in the field of health are more flexible in content and formulation procedures. They are easily stipulated and modified, and also keep pace with the latest scientific findings. They are also conducive to specific analysis of specific situations. While playing a greater role in practices, they also play a role in promoting the formation of international legislation and customary international law to a certain extent.<sup>78</sup> Therefore, the existing of soft law in international health law has its rationality and relative advantages. However, soft law lacks legal binding force. The effectiveness of soft law relies on the voluntary compliance of the parties of international law. In practice, it is often arbitrarily applied or even ignored. Taking World Health Organization's recommendations as an example, Articles 15 to Article 18 of the International Health Regulations (2005) stipulate that World Health Organization can issue temporary or long-term Recommendations on public health emergencies of international concern. But these Recommendations do not have the binding status of treaty obligations. In 2009, when the United States and Mexico discovered the H1N1 influenza pandemic within their territory, they immediately notified the international community. Although World Health Organization does not recommend trade and traffic restrictions on the United States and Mexico, the two countries still suffered from a series of travel and trade restrictions by other countries, and many countries imposed stricter restrictions on Mexico.<sup>79</sup> With

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<sup>75</sup> See Guang Zhang, *Research on the Protection of Public Interest in International Investment Law*, Law Press, p.113 (2016).

<sup>76</sup> See *supra* note 39.

<sup>77</sup> See Malcolm D. Evans, *International Law*, Oxford University Press, p.166 (2003).

<sup>78</sup> See Xiangqian Gong, *An Analysis of Soft Law in International Law -- Taking Soft Law of WHO as an Example*, 21(2) Social Scientist 98, 100 (2006).

<sup>79</sup> See Alexander H. Kuehling, *The Strategy of Swine Flu: A Perspective on State Action during a Global Pandemic*, 14(1) Quinnipiac Health Law Journal 175, 188 (2011).

COVID-19, China also experienced the same.<sup>80</sup> The existence of a large number of soft laws has not really guided state behaviors seriously impairing the effectiveness of the international law.<sup>81</sup>

The above-mentioned recommendations adopted by World Health Organization in the field of health is only an example of the many soft laws. In reality, the fact that soft laws don't have legal binding force makes them less effective than expected at the beginning and has become one of the institutional dilemmas that constrains health governance.

#### **4.2.2 The dilemma of the responsibility distribution rule**

The principles and rules of traditional international law largely reflect the economic interests and requirements of developed countries, and are the product of international economic relations in the old era.<sup>82</sup> The same applies to international law in the field of health. Developed countries exploit their strong position in treaty negotiations and the advantages of their negotiating power brought about by their relative advances in economy and technology to make their interests better reflected in the treaty, establishing favorable conditions for them. The rules of international law, while ignoring the needs and demands of developing countries, have led to the inequitable distribution of international legal responsibilities for health governance among countries, thereby further exacerbating inequities in the field of health.

The provisions of the International Health Regulation (2005) are the main source of international health laws. The regulations on international cooperation and assistance are very general and not mandatory. The third and fourth paragraphs of Article 13 of the Regulation stipulate the International Health Organization can carry out international assistance and cooperation after announcing a public health emergency of international concern. However, on one hand, the entity that holds major obligations is World Health Organization, while no obligations of international cooperation or assistance are carried by nation states. On the other hand, the aforementioned obligations are vague and not mandatory. In addition, the same problem exists in Article 44 on Cooperation and Assistance. These shortcomings cause the above clauses to stay in a kind of soft empowerment, and their enforcement power in reality is relatively weak, and thus cannot play the role of imposing and implementing obligations. Some scholars pointed out sharply that while scientific and technological progress has brought people better life, it has also gradually eroded people's concern for public health issues in developed countries. This change is particularly obvious in the field of infectious diseases governance, when the developed countries have the ability to deal with infectious diseases independently in most cases.<sup>83</sup> This phenomenon hinders the appropriate and

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<sup>80</sup> See National Immigration Administration of the People's Republic of China, *Reminders on recent national immigration control measures*, <https://www.nia.gov.cn/n741440/n741542/c1245203/content.html> (accessed on December 20, 2020).

<sup>81</sup> See Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96(2) *Georgetown Law Journal* 423, 438 (2008).

<sup>82</sup> See Zewei Yang, *Evolution of the New International Economic Order: Political and Legal Analysis*, Wuhan University Press, p.9 (1998).

<sup>83</sup> See *supra* note 18.



reasonable distribution of international legal responsibility in the field of health between developed and developing countries. However, COVID-19 has again sounded the alarm to remind people that no country can remain aloof from the threat of infectious diseases. Every country should take full responsibility to protect the interests of the entire international community while protecting its own interests.

The international community is not completely unconscious about this problem. In November 2001, countries issued the Doha Declaration on Agreement on Trade-Related Aspects of Intellectual Property Rights and Public Health at the Fourth Ministerial Conference of the World Trade Organization. This allowed World Trade Organization members to adopt compulsory licensing of intellectual property rights for pharmaceutical products, in accordance with the flexible clauses in the Agreement on Trade-Related Aspects of Intellectual Property Rights, to maintain public health security and solve the health problems faced by developing countries.<sup>84</sup> However, the practical results of the Doha Declaration have not been satisfactory. On one hand, developed countries often force poor countries to open markets to their products during negotiations, regardless of whether the product is harmful to their health or not. On the other hand, developed countries may impose strict sanitation standards that are beyond the reach of poor countries when importing products from poor countries.<sup>85</sup> Meanwhile, more and more countries have imposed “TRIPS+” measures through free trade agreements, making the Doha Declaration impossible to implement.<sup>86</sup> In addition, the same problems of responsibility distribution among countries are also being faced in the fields of human rights and environment issues, which are closely related to health. Obviously, developed countries still abide by their own interests and are unwilling to take more responsibilities to safeguard the common interests of the international community. It seems unrealistic to rely solely on countries that volunteer to change the status.

In summary, the current responsibility distribution system for health governance is no longer sustainable in the context of modern globalization. The goals of health equality and security contained in the construction of a Global Community of Health for All require a fairer, more reasonable, scientific and effective establishment of a responsibility distribution system.

#### **4.2.3 The dilemma of the dispute settlement mechanism**

The field of health has always been an area where international disputes frequently exist. The beginning of the international community’s attempt to implement health governance in accordance with international law was derived by the fact that different countries’ quarantine and isolation measures caused a large number of international

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<sup>84</sup> See Xiaoyong He, *International Intellectual Property Protection from Doha Declaration to General Council resolution*, 48(6) Law Science 105, 106 (2004).

<sup>85</sup> See Kelli K. Garcia & Lawrence O. Gostin, *One Health, One World - The Interesting Legal Regimes of Trade, Climate Change, Food Security, Humanitarian Crises, and Migration*, 1(1) Laws 4, 11 (2012).

<sup>86</sup> *Id.*, at 4.

disputes.<sup>87</sup> In the last two centuries, although the concepts and rules of health governance have made tremendous progress, an effective dispute settlement mechanism has not yet been established.

Firstly, the dispute settlement mechanism in international health law has never been worked out. According to Article 75 of the Constitution of World Health Organization and Article 56 of the International Health Regulations, if international disputes arising from the interpretation or application of this treaty cannot be resolved through negotiation or any other means, it could be solved by judicial settlement through the International Court of Justice or the Permanent Court of Arbitration. However, in reality, this mechanism has not yet been utilized. There are two main reasons for this. On one hand, both the jurisdictions of the International Court of Justice and the Permanent Court of Arbitration require the explicit consent of the parties involved in the dispute, which is difficult to apply in reality. On the other hand, the field of health in international law also has its own problems like liabilities vaguely defined and hard to allocate. Therefore, although international health laws do provide a settlement mechanism for the above-mentioned disputes, the mechanism hasn't yet been operated in reality.

Secondly, although the dispute settlement mechanism recognized as “the most unique contribution” of the World Trade Organization<sup>88</sup> has facilitated the effective settlement of some health-related disputes,<sup>89</sup> it still deals with international trade issues rather than health issues. The World Trade Organization's proposition on health governance is that the solutions to the health problems can be accomplished by providing cheaper consumer goods including medical resources and services through promoting trade growth and economic development, reduction in poverty and expansion in social security.<sup>90</sup> This concept makes it often possible to place trade goals ahead of health goals. In the case of disputed countries invoking public health exception clauses for defense, very few can successfully invoke them.<sup>91</sup> Some scholars believe that this phenomenon is also related to the lack of health technical expertise among members of the World Trade Organization Dispute Settlement Body.<sup>92</sup>

The predicament of the dispute settlement mechanism also breeds chaos and blame-shifting in the field of health. During the COVID-19 pandemic, some countries not only failed to actively fulfill their responsibility for managing the epidemic in their own countries, but also shifted the responsibility of their own ineffective control of infectious diseases to other countries. After China being the first to detect and report on the pandemic, the United States government did not take effective domestic prevention and control measures. It missed the two-month window and shifted the blame for the

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<sup>87</sup> See Fan He, *Globalization of Infectious Diseases and International Cooperation of Its Prevention*, 47(3) Academic Monthly 34, 35 (2004).

<sup>88</sup> See Naigen Zhang, *Several Major International Law Issues of WTO Dispute Settlement Mechanism*, 15(10) Journal of Law Application 13, 13-6 (2001).

<sup>89</sup> See Xiangqian Gong, *Studies on International Legal Issues on infectious disease control*, Law Press, p.116 (2011).

<sup>90</sup> See Meri Koivusalo, *World Trade Organization and Trade-Creep in Health and Social Policies*, 6(2) Journal of Health Services Research & Policy 65, 66 (2001).

<sup>91</sup> See *supra* note 89, at 117.

<sup>92</sup> See *supra* note 89, at 117.

sharp increase of domestic diagnoses and deaths to China. President Trump even made a discriminatory “Chinese Virus” statement. Although his remarks have been criticized by many parties,<sup>93</sup> including World Trade Organization, the United States government has neither assumed responsibility to China in international law for this, nor has it strengthened domestic pandemic prevention and control efforts, which has caused COVID-19 to spread and become a threat to global security. Not only did American citizens pay a heavy price in their lives and health, but the international community has also suffered greatly from the spread of the pandemic. How to identify and pursue the responsibility of international law in this chaos is still full of unknowns.

#### **4.2.4 The dilemma of enforcement and sanctions mechanism**

Another important limitation of current international law in the field of health governance is the lack of supervision and sanctions for countries’ violation of international law obligations. This leads to legally binding international treaties being widely violated by various countries, which seriously hinders the effective advancement of global health governance.

First of all, the core capacity building obligations required by the International Health Regulations (2005) have been widely violated. Articles 5 and Article 13 of the International Health Regulations (2005) stipulate each state party shall possess or develop the minimum core capabilities of public health required by the Regulations within the prescribed time limit. However, as of December 28, 2020, state party core capacity statistics show that the average of all World Health Organization regional capacities was 58% in 2010, 63% in 2011, 66% in 2012, 70% in 2013, 73% in 2014, 76% in 2015, 77% in 2016, 72% in 2017, 61% in 2018, and 64% in 2019. The average of all World Health Organization regional capacities were degraded to their level from five years ago. The average capacity of the African region in 2018-2019 was only 42% and 44%, and the average value of the Southeast Asia regional capacity was 56% and 61%. Two of the six major World Health Organization regions have lower core capacities than the previous year. The global average data is sufficient to show that a considerable number of countries have insufficient core capabilities.<sup>94</sup>

Secondly, the International Health Regulations (2005) have repeatedly violated the procedural requirements for extra health measures implemented by countries that significantly interfere with international traffic. According to Article 43 of the International Health Regulations (2005), the state party’s additional health measures shall be based on scientific principles, scientific evidence or existing information when the evidence is insufficient, or World Health Organization’s guidance or recommendations, and shall be reported to World Health Organization 48 hours after such measures are taken. However, the implementation of this clause is not ideal. State parties often ignore the director’s recommendations and even violate the restrictions

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<sup>93</sup> See Yi Wang & Panpan Wang, *Trump’s China Virus Theory has been Criticized by Many Parties*, <https://www.fx361.com/page/2020/0318/6447893.shtml> (accessed on March 18, 2020).

<sup>94</sup> See World Health Organization, *Average of Capacities*, [https://extranet.who.int/e-spar/#capacity - Progress](https://extranet.who.int/e-spar/#capacity-Progress) (accessed on December 28, 2020).

imposed by the regulations on the implementation of additional measures through imposing excessive punitive and unsubstantiated restrictions on trade and travel. During the Ebola epidemic in Congo and the Plague of Madagascar in 2017, some state parties took additional measures that caused significant interference to international traffic affairs in response to the pandemic and did not report these measures to World Health Organization.<sup>95</sup> During the COVID-19 pandemic, more than 100 countries implemented additional health measures against China,<sup>96</sup> and at least two thirds of them did not report to World Health Organization.<sup>97</sup>

In summary, the health section of international law has fallen into a serious implementation dilemma. This phenomenon is closely related to the lack of effective implementation and sanctions of the current international law in this field, which seriously hinders the effective health governance. Building a Global Community of Health for All still has a long way to go in supervising and implementing various international legal obligations.

## **5. The Demanded Development of International Law for Building a Global Community of Health for All**

### **5.1 To Establish a Sound System of International Health Law**

The international community must adopt a unified purpose and principle to build an international health legal system before anything. The construction of a Global Community of Health for All is not only the result of the operation of international health law, but also the result of the joint operation of all related legal systems, which requires a health-value-based development path in global governance and international law.<sup>98</sup> It should be clear in terms of purpose and goal that the international health legal system is to protect and promote the physical and psychological health status of all humanity, embodying the people-oriented concept of the Global Community of Health for All. The international health legal system should follow the five basic principles of achieving health equality in terms of legal principles: maintaining health safety, promoting health development, persisting in openness and inclusiveness, and creating a healthy environment.

Secondly, World Health Organization will take the lead to further improve the international health legal system. Its first step should embody the role of World Health Organization as the organizer and leader in improving the international health legal system. Given that World Health Organization has played a leading role in the prevention and control of global infectious diseases and the International Health

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<sup>95</sup> See Supra note 89.

<sup>96</sup> See National Immigration Administration of the People's Republic of China, *Reminders on Recent National Immigration Control Measures*, <https://www.nia.gov.cn/n741440/n741542/c1241630/content.html> (accessed on December 20, 2020).

<sup>97</sup> See Roojin Habibi & Gian Luca Burci et al., *Do not violate the International Health Regulations during the COVID-19 outbreak*, published online February 13, 2020, [https://doi.org/10.1016/S0140-6736\(20\)30373-1](https://doi.org/10.1016/S0140-6736(20)30373-1) (accessed on December 20, 2020).

<sup>98</sup> See supra note 85, at 5.

Regulations (2005) are widely accepted, World Health Organization should take the lead in further improving the international health legal system. For example, World Health Organization can promote more effective and coordinated international health cooperation through agenda setting, coordinate and manage legal affairs in the field of public health by participating in treaty conclusion actions of other platforms in an appropriate way, or lead global health governance with codification of the international health laws.<sup>99</sup> Moreover, World Health Organization should actively utilize its legislative power and continuously expand the scope of legislation on health matters. Not only should they further improve the current relevant laws and regulations in the field, but also vigorously improve the laws and regulations related to public health such as poverty, trade, environment, bio-security, and even human reproduction, human cloning, and organ transplantation. In view of the complexity of health problems, as some scholars have suggested, signing a global convention framework may be a feasible way to manage it.<sup>100</sup> Again, World Health Organization should establish and improve international law rules for non-governmental organizations or private institutions to participate in the protection and promotion of health.

Thirdly, the coordination mechanism between the international health legal system and other international law rules must be established and improved. When dealing with the relationship among other international law rules, it can clearly be stipulated that when the international health law rules and other international law rules conflict in terms or concepts, the philosophy of “People-oriented, Life first” in the Global Community of Health for All should be prioritized in application because it promotes the level of the international Health laws and regulations.

## **5.2 To Develop Specific Institutions**

### **5.2.1 To harden the soft laws**

Building a Global Community of Health for All requires the establishment of effective international laws and regulations on a global scale. Although Soft Law has played an important role in health governance, the lack of a legal binding force has become the main obstacle to effectively perform its regulation. In fact, when countries tend to agree on relevant policy choices, or when they can foresee possible situations and have a clear consensus on how to deal with them, bringing in rigid and binding rules is a feasible choice.<sup>101</sup> The “soft law” becomes a more realistic and feasible choice only when the opinions of different countries are quite different or the situation is unpredictable. Soft law is sometimes just a last resort, an auxiliary matter to coordinate with hard law for regulation and should not become the main means of international law governance.<sup>102</sup> The current international legal system has already had the basis for establishing more rigid regulations related to health issues, and the international

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<sup>99</sup> See supra note 39, at 259.

<sup>100</sup> See Lawrence O. Gostin, *Global Health Law Governance*, 22(3) Emory International Law Review 35, 37 (2008).

<sup>101</sup> See supra note 51.

<sup>102</sup> See supra note 89, at 88-9.

community should take action to harden some of the existing “soft laws” in order to better adjust and coordinate the health governance behaviors of countries.

First, World Health Organization should make better use of the legislative power granted by the Constitution of World Health Organization to sort out the soft laws that have been adopted and complied with in practice. They then should use these soft laws as content to amend the International Health Regulations or add them to the hard law system as an annex to the regulations, thereby creating clear rights and obligations in international law. This would increase the predictability of international relations and lay a solid institutional foundation for building a Global Community of Health for All.

Secondly, World Health Organization should learn from the successes of initiating the Framework Convention on Tobacco Control to better play its coordination function and platform role. World Health Organization’s attempt on the tobacco control framework shows that it has a tendency to innovate its own cultural traditions and to conduct health governance by means of international law.<sup>103</sup> In order to facilitate the treaty, World Health Organization needs to maintain its sensitivity to problems about health governance, conduct effective organization and coordination as much as possible, and provide adequate professional technical support and legal services to fully stimulate and mobilize the willingness and enthusiasm within countries to sign the treaty.

In summary, Soft Laws, being an auxiliary means of governance, should be hardened when conditions are favorable. In order to harden the soft law, World Health Organization should play an active role and use its legislative power and coordination functions to promote the revision and the conclusion of international treaties.

### **5.2.2 To improve the responsibility distribution rule**

The establishment of a Global Community of Health for All requires countries to strengthen international cooperation and to take the responsibility of safeguarding the common interests of the international community as much as possible. The introduction of the common but differentiated responsibility principles into the field of health will help to establish compliance with the construction of a more fair, reasonable, scientific and effective responsibility distribution rule.

The common but differentiated responsibility principles originated from international environmental law and has become one of the basic principles of international environmental law, constituting the cornerstone of international environmental cooperation.<sup>104</sup> The common but differentiated responsibility principles has been established in the environmental field because the global ecosystem is an indivisible and unified whole with internal organic connections. Therefore, the interests of countries around the world are highly interrelated and highly integrated. However, economic development and environmental protection have practical contradictions in economic development. The environmental damage caused by developed countries in this stage is the main cause of the current environmental crisis. Developing countries

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<sup>103</sup> See supra note 39, at 228.

<sup>104</sup> See Li Kou, *Common-but-differentiated Responsibilities: Its Evolution, Attributes and Functions*, 31(4) Science of Law (Journal of Northwest University of Political Science and Law) 95, 95 (2013).

that are still committed to solving the problems of survival and food and clothing neither should nor cannot afford environmental protection obligations that are inconsistent with its national conditions.<sup>105</sup> Health and the environment are interconnected. First of all, both health threats and environmental threats relate to all countries, especially for some health threats such as infectious disease pandemics. Thus, the cooperation between countries is the only way to provide possible effective response and governance. This constitutes the background and cornerstone of introducing “common” responsibilities. Due to differences in the development level of economy, technology, etc., as well as the inevitable uncertainty of human beings facing health threats, the ability of countries to take responsibility under specific circumstances is different. These factors highlight the need to introduce the idea of “different responsibilities”.

Health and safety also have the uniqueness that is different from environmental aspects. The “differentiated responsibilities” in terms of environmental factors are mainly divided into the responsibilities of developed countries and the responsibilities of developing countries according to the country’s economic development level. This division of responsibility is determined by the long-term and slow nature of the evolution of environmental issues. In contrast, health problems not only include long-term problems such as the lag in basic health care, but also emergencies such as infectious disease pandemics and biochemical attacks. Any country may get into trouble during a health emergency and become a country in need. Therefore, the specific content of the common but differentiated responsibility in health and safety systems include, regardless of country size or development level, the responsibility to manage global health issues. That being said, developed countries should bear more responsibilities. Countries with strong governance capabilities should also take more responsibilities. In countries where the epidemic occurs, no matter whether they are developed or developing countries, all countries have the obligation to give it assistance. This emphasizes that when a country needs urgent help, all countries have the obligation to give it assistance.

In summary, the improvement of the health and safety responsibility distribution rule should introduce the principle of common but differentiated responsibilities and adjust the specific application of the principle based on the characteristics and actual conditions of health and safety factors. One must establish the responsibilities for the global health status among all countries and build a benign mechanism of solidarity and mutual assistance based on actual needs and capabilities.

### **5.2.3 To improve the dispute settlement mechanism**

The establishment of a Global Community of Health for All requires the establishment of an effective dispute settlement mechanism to clarify right and wrong, determine responsibilities, and resolve disputes when they occur. Article 75 of the Constitution of World Health Organization and the International Health Regulations (2005) provide multiple solutions including negotiation, mediation, submission to the

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<sup>105</sup> See Xiaoli Wang, *On the Principle of Common but Differentiated Responsibilities*, 21(1) Hubei Social Sciences 157, 158 (2008).

World Health Assembly or the Director-General of World Health Organization and submission to the International Court of Justice for disputes over the interpretation or implementation of this treaty. Among which, non-judicial solutions such as negotiation and mediation are the preferred methods, and international judicial adjudication is the complementary method. The above-mentioned treaty provisions reflect the general wills of the contracting states to resolve disputes related to health and safety matters through diplomatic channels such as negotiation. Thus, the improvement of the dispute settlement mechanism in the field of health should respect the wishes and practical choices of countries and focus on improving the dispute settlement mechanism based on diplomatic channels.

First of all, World Health Organization can actively play the role of negotiation platform. Although the dispute settlement provisions of the Constitution of World Health Organization and the International Health Regulations (2005) all require contracting parties to submit disputes as a condition for initiating the dispute settlement mechanism, they do not prevent World Health Organization from complying with the assigned functions of Article 2 in its Constitution, which is to provide guidance and coordination on international health work. Therefore, World Health Organization can use its coordination function to actively build a platform for the dialogues between disputing countries, thereby promoting dispute settlement.

Secondly, World Health Organization can take the initiative to express professional opinions on the issues involved in the dispute. According to the provisions of Article 2 of the Constitution of World Health Organization, World Health Organization has the aforementioned guidance and coordination functions, and it should assist in cultivating the correct public opinion of the people of all countries on health issues.<sup>106</sup> Many international disputes related to health care matters actually are arguing around some highly professional factual issues. For example, during this COVID-19 pandemic, the United States, Australia and other Western countries violated the guiding principle of World Health Organization, the World Organization for Animal Health, and the Food and Agriculture Organization of the United Nations that without scientific judgments. The naming of viruses should not involve geographic location, animals, individuals or groups of people,<sup>107</sup> let alone discriminately use the term “Chinese Virus” to blame the source of the virus and the spread in China.<sup>108</sup> In this dispute, the origin of the virus and the method of naming the virus are the focus of controversy. World Health Organization has sufficient capacity and authority to make judgments or clarifications on both issues. In this case, although the relevant country did not submit the dispute to the World Health Assembly or Director-General of World Health Organization, it does not prevent World Health Organization from issuing targeted opinions based on its own functions and rules of international law, thereby practicing the role of clarifying facts and distinguishing right and wrong.

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<sup>106</sup> See World Health Organization, *Constitution of World Health Organization*, Article 2, <https://www.afro.who.int/publications/constitution-world-health-organization> (accessed on June 25, 2021).

<sup>107</sup> See Xinzhou Yang, *New crown virus naming: SARS-CoV-2 or COVID-19, which one is more accurate?*, <http://news.kedo.gov.cn/c/2020-03-13/1022834.shtml> (accessed on June 25, 2021).

<sup>108</sup> See Yu Han, *Anger! Trump Actually Used the Word “China Virus”*, <https://baijiahao.baidu.com/s?id=1661376356910166278&wfr=spider&for=pc> (accessed on December 25, 2020).



Finally, other international organizations such as the United Nations should also actively promote the settlement of international disputes related to health issues in accordance with their own functions. Disputes in the health field can easily lead to a series of secondary disputes in politics, economy, and security. Some examples are economic disputes caused by international transportation and trade bans and security threats caused by the spread of infectious diseases. In this case, the World Trade Organization, the United Nations Security Council and even General Assembly of the United Nations can play a coordinating and guiding role within their own capabilities to promote the mechanical settlement of the disputes. For example, in order to reconcile the conflict between trade and health, the World Trade Organization rules adopts a “scientific paradigm”, that is, scientific standards are taken to judge the trade and traffic restriction measures. However, in practice, there’s still some way to go to ensure the paradigm achieves the design objectives.<sup>109</sup>

In summary, World Health Organization and other international organizations should play their role in the improvement of the mechanical dispute settlements related to health matters. The relevant international organizations should carry out guidance and coordination within their own functions, build a communication platform between disputing countries, present opinions based on the facts of the dispute, make professional judgments, and at last prompt countries to effectively resolve disputes through negotiation and other forms.

#### **5.2.4 To strengthen enforcement and sanctions mechanism**

The establishment of a Global Community of Health for All requires countries and international organizations to follow the principle that Treaties Must Be Abided. The establishment a rule-oriented international legal governance system is also needed. Therefore, the implementation of treaty obligations and sanctions systems should be improved, and countries should be urged to implement treaty provisions.

The health field of international law is in a serious implementation dilemma, which is closely related to the lack of effective enforcement and sanctions in this field. Under the current system, states that violate the provisions of the treaty will not face any consequences. On the contrary, the state that strictly abides by the treaty may suffer losses due to its performance of the treaty obligations. Scholars have even pointed out that judging from the current realistic situation, international law seems to be punishing countries that report the pandemic in an honest and trustworthy manner and those who are unable to stop the spread of the pandemic.<sup>110</sup>

In order to change this, it is urgent to improve the implementation and sanctions mechanism for treaty obligations. It is recommended that World Health Organization set up a special agency of performance monitoring to intervene in the country’s violations of the treaty’s provisions. The organization can adopt a variety of methods including inquiries, reminders, notifications, and investigations to urge the country to implement

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<sup>109</sup> See David P. Fidler, *Trade and Health: The Global Spread of Diseases and International Trade*, 40 German Yearbook of International Law 300, 314-5 (1997).

<sup>110</sup> See *supra* note 79.

the contract and insist on unjustified reasons for violations.

For countries that do not implement the treaty, the World Health Assembly will make a resolution to impose certain sanctions to achieve the effect of urging the implementation of the treaty. However, given that some compliance behaviors do inevitably bring losses to the country's own interests, such as reporting infectious disease outbreaks in accordance with treaty provisions or proactively reporting possible public health events, other countries often issue trade measures such as travel bans, causing them to suffer economic losses that they could have avoided. In the current situation where adopting additional health measures is still prevailing, it is possible to consider paying special funds to compensate countries that are subject to the additional health measures and use economic methods to adjust compliance and default the interests driving the behavior, forming a positive incentive for the implementation of the treaty.

In summary, improving the enforcement and sanctions mechanism is a necessary move to improve the governance of matters related to health in international law. It is recommended to urge and promote countries to fulfill their treaty obligations by using sanctions for breach of contract and incentives for performance to make international law rules effective.

## **6. Conclusion**

The construction of a Global Community of Health for All is a concentrated manifestation of China's anti-coronavirus governance plan. It not only involves rich connotations, but also points out the direction for the development of matters in international law related to health and safety, provides new methods and injects new momentum. International law is the core of building a Global Community of Health for All. On one hand, building a Global Community of Health for All has a relatively solid foundation of international law, including theoretical foundations, legal foundations, and international practice foundations. On the other hand, the establishment of a Global Community of Health for All also has some limitations in the legal system and other specific systems of international law. These must be addressed to build a strong international legal defense line for the ultimate victory over COVID-19.

# Metanarratives of International Environmental Law and Science in the Anthropocene Era: The Ontological and Epistemological Incompatibility

Douglas de Castro<sup>1</sup>

**Abstract:** Transboundary environmental phenomena are considered challenges to states in the international system, especially considering those that pose existential threats to humankind. The Eurocentric ontology and epistemology of International Environmental Law lead to exclusionary stances due to the totalizing propositions in metanarratives, in which tradition and other worldviews are not part of the modernist project that ultimately will lead human beings to happiness thru reason and development. As such, this article presents the case in favor of the Transnational Environmental Law as an alternative to the shortcomings of International Environmental Law and Local Law in regulating the transboundary issues, which in nature are regional. The hypothesis in this paper is tested in the biodiversity case, in which the research technique applies the critical analysis of discourses as developed by Norman Fairclough 2013.

**Keywords:** International Environmental Law; Biodiversity; Metanarratives; Transnational Environmental Law; Critical Analysis of Discourses

## 1. Introduction

The regime of International Environmental Law (hereinafter referred to as IEL) is illegitimate.<sup>2</sup> This premise is assumed by observing the birth of IEL as a mutation of the traditional international law to deal with the raising concerns with transboundary environmental issues.<sup>3</sup>

Although IEL developed new legal concepts to regulate transboundary environmental phenomena, such as soft law, and umbrella treaties, and its proximity with natural sciences, it remains a stance of the Eurocentric international legal system, thus, coping with the failure of the modernity's project of endless happiness thru reason and development.

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<sup>2</sup> This is a paraphrase of the quotation "The regime of International Law is illegitimate" in proceedings of the Annual Meeting. See Makau Mutua & Antony Anghie, *What Is TWAIL?*, 94 American Society of International Law 31, 40 (2000).

<sup>3</sup> International lawyers tend to agree that the historical markers of the IEL are the United Nations Conference on the Human Environment (Stockholm, 1972) and the United Nations Conference on Environment and Development (Rio, 1992).

In this sense, metanarratives or totalizing mega-discourses sustain the international legal order, providing the basis for action/judgment in all situations, disregarding stances in both the social and natural worlds.<sup>4</sup> Citation style is not right, please fix also, the existing metanarratives in international law are performative utterances, which are part of discourses directed to specific actions and purposes, which in this case, the universality narrative presents the argument of the inexistence of temporal or physical constraints in the social construction of meanings in the world, thus, the exclusion of alternative worldviews is legally justified.<sup>5</sup> The same applies to the narrative presenting science as the superior form of acquiring knowledge, which excludes traditional or indigenous knowledge.

Therefore, the so-called new legal concepts that emerge with IEL are part of an updating process of the metanarratives of international law to survive in the passage from the Holocene to the Anthropocene paradigm, in which “[...] humans are now a major geological and environmental force, as important as, or more important than, natural forces.”<sup>6</sup> Within this new paradigm, nature cannot be a mere object in which human beings observe to understand and dominate within the boundaries of the social, but their experiences in developing and sustaining order in the natural world produce existential threats (Vidas et al. 2015;<sup>7</sup> Thomas 1996;<sup>8</sup> Foster 1999<sup>9</sup>).<sup>10</sup>

The increasing natural extreme events happening all over the world are becoming sources of great concern among humankind, which “[...] in recent years there has been a growing concern over thresholds or tipping points in nature”.<sup>11</sup> Unfortunately, the same concern cannot be observed in the international political arena, which lately has striven to address the environmental challenges (Bernardin, Chiuso, and Lesage 2015;<sup>12</sup> Gonzalez 2017;<sup>13</sup> Alam et al. 2016).<sup>14</sup>

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<sup>4</sup> See Lyotard & Jean-Francois et al., *Postmodern Condition: A Report on Knowledge*, University of Minnesota Press, p.4 (1984).

<sup>5</sup> See J. L. Austin, *How to Do Things with Words*, Martino Fine Books, pp.10-2 (2018).

<sup>6</sup> See Richard T Corlett, *The Anthropocene Concept in Ecology and Conservation*, *Trends in Ecology & Evolution*, 30(1) ScienceDirect 36, 36 (2015).

<sup>7</sup> See Davor Vidas & Ole Kristian Fauchald et al., *International Law for the Anthropocene? Shifting Perspectives in Regulation of the Oceans, Environment and Genetic Resources*, 9 *Anthropocene* 1, 13 (2015).

<sup>8</sup> See Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500-1800*, Oxford University Press, p.15 (1996).

<sup>9</sup> See John Bellamy Foster, *The Vulnerable Planet: A Short Economic History of the Environment*, Monthly Review Press, p.22 (1999).

<sup>10</sup> Chakrabarty suggests that the concept of Anthropocene has been introduced for the first time by the Soviet geochemist Vladimir Vernadsky in the book *The Biosphere* but gained traction in 2000 with Paul Crutzen and Eugene Stoermer published in the newsletter of the Geosphere-Biosphere Programme, <http://www.igbp.net/globalchange/anthropocene.4.1b8ae20512db692f2a680009238.html> (accessed on November 4, 2020).

<sup>11</sup> See Lester R Brown, *Plan B 4.0: Mobilizing to Save Civilization*, W.W. Norton & Company, p.1 (2009).

<sup>12</sup> See Pascal Bernardin & Diogo Chiuso et al., *O Império Ecológico*, 1a. Vide, pp.3-4 (2015).

<sup>13</sup> See Carmen G. Gonzalez, *Global Justice in the Anthropocene*, <https://papers.ssrn.com/abstract=2929042> (accessed on June 1, 2021).

<sup>14</sup> See Shawkat Alam & Sumudu Atapattu et al., *International Environmental Law and the Global South*, Cambridge University Press, p.142 (2016).

Considering the arguments presented, by no means, it is said that IEL is not a relevant area of study. As stated by Kotzé,<sup>15</sup> a nihilist approach towards IEL serves no one; however, a new way or approach of regulating the interactions between human and natural realms is imperious:

The new globalized reality of the Anthropocene entails that environmental lawyers will have to revisit these orthodox, and often archaic, social constructs that have been designed as institutional responses to less complicated or complex regulatory issues that existed during the Holocene epoch, which in turn might require a wholesale review of current regulatory interventions leading to proposals to reconceptualize and redesign our law and governance constructs.

Accordingly, two questions are put forward. Are science, nature, reason, and international law deterministic ontologies and epistemologies that resist time and history? Is it justified to think that the natural world is distinct from the construction of social interactions, especially the ones built on the premise of the endless expansion of capitalism? (Tomas 2010;<sup>16</sup> Walker 2009).<sup>17</sup>

It is hypothesized that there is an incompatibility between the tenets of international law and modern science (based on universalism and rationality respectively) in the Anthropocene as the impacts over the environment are mostly local, while, the proposed solutions and regulations are in the international dimension, thus, far from other worldviews and perceptions on how to act towards the environment. Therefore, the role of Transnational Environmental Law (hereinafter referred to as TEL) as the diffusion of ideas that make sense in diverse social and natural environments and local epistemological stance embedded with values, culture, ideas, and norms are essential to present a viable alternative to deal with the environmental challenges the world faces. Both present the primary tenets of human existence in terms of the social construction of societies: the dimension historical-cultural of humankind (Benoist 2015).<sup>18</sup>

The hypothesis is tested in the biodiversity international regime, which is the representative case for the relation of international law and science that is analyzed in this study, is subject to the process of reification, which for Horkheimer and Adorno “all reification is a forgetting,”<sup>19</sup> a normalizing state of things that discharges the need of further relationship between the object and subject, thus, making the first fixed in time and space (Honneth 2012).<sup>20</sup> Also, the drivers for biodiversity loss are connected to social variables at local and regional levels, such as poverty, gender inequality, and systemic corruption.<sup>21</sup>

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<sup>15</sup> See Louis J Kotzé, *Rethinking Global Environmental Law and Governance in the Anthropocene*, 32(2) Journal of Energy & Natural Resources Law 121, 156 (2014).

<sup>16</sup> See Keith Thomas & João Roberto Martins Filho, *O homem e o mundo natural*, Companhia de Bolso, p.15 (2010).

<sup>17</sup> See Rbj Walker, *After the Globe, Before the World*, Taylor & Francis Group, p.12 (2009).

<sup>18</sup> See Alain de Benoist, *Identità e comunità*, Guida, p.2 (2015).

<sup>19</sup> See Max Horkheimer & Theodor W. Adorno, *Dialectic of Enlightenment*, edited by Gunzelin Schmid Noerr, translated by Edmund Jephcott, Stanford University Press, pp.13-4 (2007).

<sup>20</sup> See Axel Honneth, *Reification: A New Look at an Old Idea*, Oxford University Press, p.3 (2012).

<sup>21</sup> See UNEP - UN Environment Programme, *Global Environment Outlook 6*, <http://www.unenvironment.org/resources/global-environment-outlook-6> (accessed on June 1, 2021).

Considering that the primary goal is to challenge the metanarratives of IEL in the biodiversity case, as well as presenting TEL as an alternative for its shortcomings, the methodological strategy consists of applying the model of critical analysis of discourses (Fairclough 2013;<sup>22</sup> Bhaskar 2010).<sup>23</sup> The model seeks to identify (1) the social problem with a semiotics aspect; (2) the obstacles in approaching the problem; (3) the social order in which the problem emerges - the network of social practices; (4) forms to overcome the problem; and (5) implications upon a critical reflection over the previous steps.

## **2. Social and Natural Realms - the Construction of the Social Meaning of the Biodiversity**

There is enough evidence that sustains the claim that the changes in the environment are an existential threat to humankind. A representative instance of this argument is the recent Global Environment Outlook (2019), which state that the biodiversity:

[...] is in crisis. There is well-established evidence indicating an irrevocable and continuing decline of genetic and species diversity and degradation of ecosystems at local and global scales. Scientists are increasingly concerned that, if anthropogenic pressures on Biodiversity continue unabated, human-beings will risk precipitating a sixth mass extinction event in Earth history, with profound impacts on human health and equity.<sup>24</sup>

Although an existential threat (it extended to climate change and freshwater, for instance), the lack of active international institutions to deal with the problem is disconcerting and worrisome. As such, in this part of the paper, this problem will be addressed by the proposed hypothesis and methodology.

### **2.1 Reification and Metanarratives of Biodiversity**

The world is a place of objects and a forum for actions according to the Jungian psychology tradition. The scientific realm seeks to isolate the subjectivity embedded in the actions concerning the object of inquiry, which for the object, the empirical manifestations of its qualities produce validation, while, for the action, the sensorial apprehension is in the world of the spirit in which the moral meaning is not verifiable or falsified.

The perception of the world was different before Descartes and Bacon, who gave birth to the scientific experimental phase of the inquires. However, before the experimental phase, many societies flourish and function according to the rules and traditions of their epoch but are embedded with dense content and dynamism. It was a world in which natural phenomena were explained in terms of myths and meanings

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<sup>22</sup> See Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*, Routledge, pp.1-2 (2013).

<sup>23</sup> See Roy Bhaskar, *Reclaiming Reality*, Routledge, p.16 (2010).

<sup>24</sup> See supra note 19.

according to tradition.<sup>25</sup> As stated by Horkheimer and Adorno: “On their way toward modern science human beings have discarded meaning. The concept is replaced by the formula, the cause by rules and probability.”<sup>26</sup> Is it possible that humankind has lost the ability to recognize that tradition might be right by entering the scientific paradigm?<sup>27</sup>

As stated by Escobar, “[...] the act of naming a new reality is never innocent.”<sup>28</sup> In this sense, international law and modern science are Western institutions that interpret the world. The ontological premise of international law is the construction of a homogeneous and civilized moral grammar based on a European sense of the universality of law, and sciences produce the metanarrative of rationality, which is the epistemological stance towards the truth, therefore, excluding other epistemologies.<sup>29</sup> As social constructs, both are intended to establish order, which “[...] are ethically flexible: what some perceive as a bad order can persuasively narrate as good order, and vice versa.”<sup>30</sup>

The epistemology of science helps to understand the nature of the object itself, while international law establishes rules on how the object should be. In this sense, Natarajan and Dehm (2019) present this dissociation:<sup>31</sup>

Notwithstanding the notions of stewardship that gave rise to international environmental law, the environment is more than the object of our protection. It is the foundation of all human life and endeavor, including, among other things, the basis for all economic activity. International law characterizes the latter aspect as natural resources, which are the objects not of protection but of free commerce.

As such, the reification of nature as a feature for both IEL and science presents a severe challenge as humanity enters the Anthropocene period of the earth, in which human activity becomes the primary driver for environmental changes (Schwägerl and Crutzen 2018;<sup>32</sup> Chakrabarty 2018).<sup>33</sup> In this sense, the Anthropocene “[...]”

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<sup>25</sup> See Paul Ricoeur, *Memory, History, Forgetting*, translated by Kathleen Blamey and David Pellauer, University of Chicago Press, p.56 (2006).

<sup>26</sup> See supra note 17.

<sup>27</sup> Regarding the tradition and meanings in interpreting the world, Peterson poses disconcerting questions: “Is it not more likely that we just do not know how it could be that traditional notions are right, given their appearance of extreme irrationality? Is it not likely that this indicates modern philosophical ignorance, rather than ancestral philosophical error?” See Jordan B. Peterson, *Maps of Meaning: The Architecture of Belief*, Routledge, p.8 (1999).

<sup>28</sup> See Arturo Escobar, *Whose Knowledge, Whose Nature? Biodiversity, Conservation, and the Political Ecology of Social Movements*, 5(1) *Journal of Political Ecology* 53, 82 (1998).

<sup>29</sup> See Anderson Vichinkeski Teixeira, *Teoria pluriversalista do direito internacional*, WMF Martins Fontes, p.4 (2011).

<sup>30</sup> See Jelena Cupac, *Narratives, Emotions, and the Contestations of the Liberal Order*, <https://www.e-ir.info/2019/05/16/narratives-emotions-and-the-contestations-of-the-liberal-order/> (accessed on June 1, 2021).

<sup>31</sup> See Usha Natarajan & Julia Dehm, *Where Is the Environment? Locating Nature in International Law*, <https://twailr.com/where-is-the-environment-locating-nature-in-international-law/> (accessed on June 1, 2021).

<sup>32</sup> See Christian Schwägerl, *The Anthropocene: The Human Era and How It Shapes Our Planet*, Synergetic Press, p.13 (2018).

<sup>33</sup> See Dipesh Chakrabarty, *Anthropocene Time*, 57(1) *History and Theory* 5, 32 (2018).

emphasizes the acceleration of the degradation of the biosphere in recent decades and concludes that humanity has already abandoned the previous period of stability.”<sup>34</sup>

The international community started in the 1970s to deal with the adverse effects of human activities and to address the potential international regulation of the environment (Stockholm 1972 is considered the historical marker for IEL).

In regards to the biodiversity dimension, the backbone of the international regime from its inception is the Global Biodiversity Strategy (WRI/IUCN/UNEP 1992) and the Convention on Biological Diversity.<sup>35</sup> According to Santos (2009),<sup>36</sup> the regulation of the environment is one of the pillars of modernity, which challenges the regulation of an earlier concern of countries: the economic dimension.<sup>37</sup> The pillar of regulation of the biodiversity gears towards assessing the significance of the biodiversity loss to the proper functioning of the ecosystems and making sure that regulation addresses the relation between biodiversity and the “services” that the ecosystems provide (Laird 2002;<sup>38</sup> Argyrou 2005<sup>39</sup>).<sup>40</sup>

The legal and natural dimensions of modernity converge to metanarratives that Bernard<sup>41</sup> refers to as “The Game of the Just and the Game of the True.” Metanarratives are more extensive explanations of the reality, which defines the world views or at least part of it.<sup>42</sup> Thus, metanarratives of international law as a body of rules conducting to ultimate justice and fairness and science as the only epistemological stance of real knowledge, thus, capable of emancipating the man from archaic traditions (in IEL, the incorporation of the scientific knowledge is an essential premise).

Thus, modern metanarratives are forms of legitimation of normativity and knowledge through performativity.<sup>43</sup> In this sense, the intentional language of the international law in regulating biodiversity is instrumental.<sup>44</sup> —In this vein, Mutua and Anghie: “Neither universality nor its promise of global order and stability makes

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<sup>34</sup> See Matías Franchini & Eduardo Viola et al., *The Challenges of the Anthropocene: From International Environmental Politics to Global Governance*, 20(3) Ambiente & Sociedade 177, 202 (2017).

<sup>35</sup> See World Resources Institute, *Global Biodiversity Strategy*, <https://www.wri.org/research/global-biodiversity-strategy> (accessed on June 1, 2021).

<sup>36</sup> See Boaventura De Sousa Santos, *Critical Legal Sociology: For a New Common Sense in Law*, Trotta Editorial S A, p.45 (2009).

<sup>37</sup> As posed by Natarajan and Dehm (2019): “The very origins of international law lie in doctrines put forward to allow private actors from the North to exploit natural resources in the South, whether in the arguments of Vitoria for free commerce in the Americas or Grotius’ defense of the liberties of the Dutch East India Company in its untrammelled pursuit of exploiting colonial labor and resources.”

<sup>38</sup> See Sarah A Laird, *Biodiversity and Traditional Knowledge*. Sterling, Routledge, p.3 (2002).

<sup>39</sup> See Vassos Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality*, Berghahn Books, pp.14-5 (2005).

<sup>40</sup> This is the approach adopted by several governmental and non-governmental organizations. As a representative evidence “Valuation and accounting of island ecosystem services is fundamental to our ability to achieve sustainable green growth”, <http://wedocs.unep.org/handle/20.500.11822/9341> (accessed on November 4, 2020).

<sup>41</sup> See Gaëlle Bernard, *On the “Postmodern” Crisis of Legitimation and the Confusion of Reasons*, 45 Cités 87, 101 (2011).

<sup>42</sup> See supra note 4.

<sup>43</sup> See supra note 5.

<sup>44</sup> See Martti Koskeniemi, *Entre a apologia e a utopia: a política do Direito Internacional*, 15(1) Revista de Direito Internacional 5, 29 (2018).



international law a just, equitable, and legitimate code of global governance for the Third World.”<sup>45</sup>

As stated by Escobar,<sup>46</sup> the biodiversity discourse:

[...] has thus resulted in an increasingly vast institutional apparatus that systematically organizes the production of forms of knowledge and types of power, linking one to the other through concrete strategies and programs. International institutions, Northern NGOs, botanical gardens, universities and research institutes in the first and third worlds, pharmaceutical companies, and the great variety of experts located in each of these sites occupy dominant sites in the network.

Therefore, it is observed that the biodiversity is construed intentionally and instrumentally by international institutions to secure the expansion of capitalism, which nowadays has become itself a metanarrative in the economic domain, or in other words, the only economic system viable to fulfill the dream of development.<sup>47</sup> However, how to conciliate a never-ending economic system that operates under the premise of expansion with the finitude of the natural world? As stated by Stark:<sup>48</sup>

The metanarrative of economic development describes a similarly desperate situation, but it has a very different focus. It is a story of growing economic polarization, in which the poorest fifth of the world’s population subsists on less than five percent of the world’s resources, while the top five percent consume twenty-five percent of these resources.

## 2.2 Economic Versus Natural Dimensions of Biodiversity

There is a failure at the international level to conciliate the colliding interests of taking care of biodiversity and the economic demands according to the liberal model that is embedded in international institutions.<sup>49</sup>

The relation between trade and environment has received little attention until 1991 when it came to the public the General Agreement on Tariffs and Trade (GATT) Tuna-Dolphin Disputes (I and II), which placed in evidence the opposing positions between traders and environmentalists, especially the arguments in favor of environmental protection, development, and trade (Schoenbaum 1997<sup>50</sup>).<sup>51</sup> As posed by Rosendal,<sup>52</sup> a proliferation of environmental treaties have been observing in recent decades, which “[...] have been negotiated without explicit measures to resolve the frequently conflicting goals of overlapping economic regimes.” That is true, for instance, by

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<sup>45</sup> See supra note 2.

<sup>46</sup> See supra note 26.

<sup>47</sup> See Bo Stråth & Martti Koskeniemi, *Historical Teleologies in the Modern World*, Bloomsbury Academic, pp.6-7 (2015).

<sup>48</sup> See Barbara Stark, *Sustainable Development and Postmodern International Law: Greener Globalization?*, 27(1) William & Mary Environmental Law and Policy Review 136, 192 (2002).

<sup>49</sup> See Sundhya Pahuja, *Decolonising International Law*, Cambridge University Press, p.8 (2011).

<sup>50</sup> See Thomas Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91(2) American Journal of International Law 268, 313 (1997).

<sup>51</sup> For an inventory of the arguments for both sides in academia, <https://www.ictsd.org/gatts-tuna-dolphin-case> (accessed on November 4, 2020).

<sup>52</sup> See G. Kristin Rosendal, *Impacts of Overlapping International Regimes: The Case of Biodiversity*, 7(1) Global Governance 95, 117 (2001).

comparing the Convention on Biological Diversity and the Agreement Trade-Related Aspects of Intellectual Property Rights (TRIPS), as the first possess a voluntary, vague, and aspirational language while the second is mandatory and enforceable by the World Trade Organization, and World Intellectual Property Organization.

Whether at national, regional, or international levels, the conciliation of conflicting interests rests on the governance stance, which is the dislocation of the contradiction from the economic realm to the political one. Although the movement is not natural, it is expected from governments and/or international institutions as part of their mission to conciliate in the public arena the contentions. That is what Doeleman<sup>53</sup> refers to government failure, as the “[...] dominant theme of the environmental literature concerns the incidence of market failure as evidenced in unwanted levels of pollution, urban congestion, land degradation, resource depletion, or loss of wilderness and wildlife.”

The international community perceives the failure to address the environmental challenges rather than an issue of an existential threat but a matter of environmental externalities that need to be addressed by the sustainable development principle. As stated earlier, the emergence of the concept of sustainable development is the survival strategy of the metanarrative of development. For that matter, there is an observable imbalance in international institutions, which nowadays is a reflex of the political shift towards the ultraliberal and nationalist projects in many countries worldwide that places economic demands upfront environmental protection, and a proliferation of green economy or green growth that promises to resolve environmental problems, which presents no empirical evidence of the veracity of the claim (Bieber 2018;<sup>54</sup> Barsalou and Picard 2018;<sup>55</sup> Hickel and Kallis 2019).<sup>56</sup>

The phenomena are not restricted to political circles, as in academia people are still grasping for improving their understanding of the ontologies and epistemologies of the fields. For instance, see the lack of debate on what Dehm calls “survival emissions” from emerging countries and “luxury emissions” from rich countries,<sup>57</sup> thus, confirming the need for a more critical approach in dealing with such hot and contradictory issues.

## 2.3 International Institutions as Reproducers of Colonial Violence

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<sup>53</sup> See Jacobus A Doeleman, *Democracy and Environment*, 24(1) International Journal of Social Economics 105, 127 (1997).

<sup>54</sup> See Florian Bieber, *Is Nationalism on the Rise? Assessing Global Trends*, 17(5) Ethnopolitics 1, 22 (2018).

<sup>55</sup> See Olivier Barsalou & Michael Hennessy Picard, *International Environmental Law in an Era of Globalized Waste*, 17(3) Chinese Journal of International Law 887, 906 (2018).

<sup>56</sup> See Jason Hickel & Giorgos Kallis, *Is Green Growth Possible?*, 25(4) New Political Economy 469, 486 (2020).

<sup>57</sup> See Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a Twail Perspective*, 33(2) Windsor Yearbook of Access to Justice 129, 161 (2016).

The background condition for exploring the hypothesis is imperialism. As stated by Young:<sup>58</sup>

The term ‘empire’ has been widely used for many centuries without, however, necessarily signifying ‘imperialism’. Here a basic difference emerges between an empire that was bureaucratically controlled by a government from the center, and which was developed for ideological as well as financial reasons, a structure that can be called imperialism, and an empire that was developed for settlement by individual communities or for commercial purposes by a trading company, a structure that can be called colonial.

As such, the concept of imperialism is grounded on the exercise of power “[...] either through direct conquest or (latterly) through political and economic influence that effectively amounts to a similar form of domination: both involve the practice of power through facilitating institutions and ideologies.”<sup>59</sup>

The critical point in this discussion involves performing actions towards spreading institutions and ideologies that propagate social and political structures as a form of domination and discrimination for imperial purposes; thus, a sort of violence itself.

As such, Žižek calls symbolic the hidden aspects of violence, in which ontology presents the subjective and objective dimensions.<sup>60</sup> The subjective dimension of violence is the one that brings undesired perturbation to the normal functioning of the state-of-affairs or *status quo* of the institutions. The objective violence is the one imposed unilaterally to define and set the parameters of the ordinary or smooth functioning of the institutions, which manifest itself in a specific form of language and actions towards domination or imposing a predefined universal meaning.

Going further into the analysis of the forms that violence might assume, it is reasonable to say that the possession of the material conditions is only one spectrum of the goal to make international institutions to operate in the normal mode. There is the additional need to build this by propagating a universal set of meanings so powerful that it becomes an ideology, thus, shaping the social reality and world views within the boundaries of the dominant group.<sup>61</sup>

Therefore, contesting the model presented by institutions or presenting an alternative view of the reality is a perturbation of what is considered reasonable by the international community or by the countries that consider themselves the rightful representatives of universal moral values. This is what Chimn refers to:<sup>62</sup>

There is the old idea, which has withstood the passage of time, that dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised. Force is only used when absolutely necessary, either to subdue a

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<sup>58</sup> See Robert J. C. Young, *Postcolonialism: An Historical Introduction*, Blackwell Publishing, p.11 (2016).

<sup>59</sup> See supra note 56.

<sup>60</sup> See Žižek & Slavoj, *Violence: Six Sideways Reflections*, Picador, p.7 (2008).

<sup>61</sup> See Terry Eagleton, *Ideology: An Introduction*, Verso, p.11 (2007).

<sup>62</sup> See B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8(1) International Community Law Review 3, 27 (2006).

challenge or to demoralize those social forces aspiring to question the “natural” order of things.<sup>63</sup>

To point out the real violence embedded in international institutions, TWAIL helps to deconstruct the tenets of international law, not to destroy it, but to unfold its essence to discover real intentions in the construction of the world legal order and present an alternative based on values and social aspects of non-European countries.

In the early days of international law, the colonial confrontation was not between two sovereign states, but between one sovereign European state and one non-European state that, according to the positivist jurisprudence of the time, was lacking in sovereignty. Such a confrontation poses no conceptual difficulties for the positivist jurist who resolves the issue by arguing that the sovereign state can do as it wishes concerning the non-sovereign entity, which lacks the legal personality to assert any legal opposition.<sup>64</sup>

Since then, imperial domination has become subtle in the construction of the world’s legal order after the II World War. For the Great Powers that emerged winners from the World War, the need to build a new international order to restore peace, security, and cooperation were premised on (1) the recognition that non-European powers possess the right to self-determination, which was a direct repudiation to colonization; and (2) states were to be governed by human rights. As a direct result, the hegemony of world affairs was transferred from Europe to the emerging powers that allotted permanent seats in the UN Security Council.<sup>65</sup>

In the economic sector of world affairs, the Third World countries were targeted by the Bretton Woods institutions and the rapid expansion of transnational corporations. Therefore, the old forms of advancing towards new territories and resources were substituted by the international institutions and law.<sup>66</sup>

Therefore, for the maintenance of hegemony of the institution in the international arena, it is necessary to consider any deviance from the universality of international law or from reason an attack on the modernity project, thus, should be rejected. It is to say that local resistance and specificities are not compatible with the universal project, thus, instrumental to undermine the resistance and accommodate the need for a development project based on values and principles exogenous to local communities, so they might reach the modernity era by abandoning traditional and outdated practices and values. There was no place for such competing worldviews in modernity.

Along with Hicks,<sup>67</sup> it is understood that a nihilistic approach to IEL as posed today, even though embedded with imperialistic rationale, serves no one. It is a responsibility of postmodernists not just to deconstruct the social institutions but identify what is good and what needs to be changed to regulate the social interaction with nature but also ensure the emancipation of the human being before itself and nature.

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<sup>63</sup> See Ugo Mattei, *Pilhagem*, WMF Martins Fontes, p.13 (2013).

<sup>64</sup> See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, p.34 (2007).

<sup>65</sup> See supra note 62.

<sup>66</sup> See supra note 42.

<sup>67</sup> See Stephen Hicks, *Explaining Postmodernism: Skepticism and Socialism from Rousseau to Foucault*, Connor Court Publishing Pty Ltd, p.4 (2019).

For that reason, considering that IEL needs to evolve to a more effective regulation, which in the case of biodiversity dislocates from international to local/regional, it will be argued in the next part of the paper.

## 2.4 Transnational Environmental Law as the Alternative

The anthropogenic pressures over the environment lead the international community to react by transferring to the international forum the largest part of debates and agency to protect nature. It was a reaction seemingly rational due to the growing use of the sovereignty's shield to justify the indiscriminate use of natural resources within their territories (waves of nationalism of left, right, and whatever in between were responsible for that and are nowadays).

However, the remedy applied to the illness has the potential to kill the patient. The adjudication of international institutions to regulate and protect nature produced metanarratives that transformed nature as one "thing" formed by biodiversity, climate change, and so forth, thus, disregarding the enormous diversity.

Considering both extremes of regulation, it has become common sense that most of it are not working as observed in the world an increasing number of diverse natural events that are tormenting humankind. As stated earlier in this paper, a critical stance to face the problem needs the deconstruction to understand what is working and what is not, but most important is to present alternatives. As such, if the growing legal body of IEL is not being responsive to the crisis, what is the alternative?

Drawing from the first debates in the 1950s, the formation of transnational legal orders that might account for the regional problems, peculiarities, and actors is essential to deal with the growing environmental issues in the Anthropocene.<sup>68</sup> As well stated by Natarajan and Dehm,<sup>69</sup> humans have to switch from a predominantly command-control ontology, which is proper of international institutions to an interconnection approach in which ideas, culture, tradition, and many other values excluded from IEL are brought to the table to contribute. This is what Franchini et al.<sup>70</sup> have in mind as suggesting that: "[...] most of the actors of the international system operate in a conservative way, pursuing only sovereign and short-term selfish interests, when the logic of the governance of the Anthropocene requires commitments to the universal good and the long term."

The environmental challenges posed to the international community requires a new approach that 'breaks the frames' of IEL and local law, in which boundaries for regulation and legal theory formation are expanded to include contemporary environmental issues under a critical stance that goes beyond the 'in' and 'out' of the nation-state in terms of law to incorporate to the principle of sovereignty aspects of the nature and participation of constituencies and communities, accountability and

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<sup>68</sup> See Priscila Pereira de Andrade, *A Emergência Do Direito Transnacional Ambiental*, 13(3) *Direito Transnacional* 18, 29 (2017).

<sup>69</sup> See supra note 31.

<sup>70</sup> See supra note 34.

legitimacy in deciding the pathways of regulating the environment according to local and regional experiences.<sup>71</sup>

Therefore, to consider TEL as an alternative to IEL and local law, not excluding both as mentioned but in ways of complementary fashion, the tenets of the proposed transnational law need to be understood, which emerges due to societal demands for a more just, equitable and democratic international legal orders vis-à-vis the idiosyncrasies of national law in terms of regulating transboundary phenomena.<sup>72</sup>

The starting point of the discussion should be the seminal work of Philip Jessup, in which he proposes that transnational law is a body of law that deals with actions or events that transcend national frontiers but do not reach the entire world to the point of being the object of international law.<sup>73</sup> The application of this notion to transboundary events such as the ones involving the causality of natural events that pose regulatory challenges. It provides a better alternative for regional space in which most of the countries share the environmental space, thus, being a logical step in the governance of the environment, or in other words, a necessary intermediary regulatory space between the local and international ones.<sup>74</sup>

As such, TEL is not the mere incorporation to the traditional IEL of the private or economic international dimensions as suggests Andrade,<sup>75</sup> as the responsibility of the transnational corporations, as well as their private business regulation or the more general terms of the contemporary *Lex Mercatoria* is already incorporated into the ontology of IEL.<sup>76</sup>

Therefore, it is not a mere ontological and epistemological transformation of IEL, as occurred with the traditional international law to deal with the environmental issues or in other words a discrete disciplinary specialization, but a reconfiguration of the relations between nature and law that take into account local expectations and world views that do not conform with the modernity's project based on Western values.<sup>77</sup>

Natarajan and Dehm<sup>78</sup> provide an inventory of entities/initiatives that are challenging and stretching the both international and domestic law's tenets that might be considered the push for TEL cases: (1) the peasant movements in Ecuador (*La Via Campesina*); (2) the ruling by the Supreme Court in the Philippines granting to future generations the right to the way of life for future generations;<sup>79</sup> (3) the Phulbari strike

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<sup>71</sup> See Peer C. Zumbansen, *Transnational Law, Evolving*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1975403](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975403) (accessed on June 1, 2021).

<sup>72</sup> See Peer Zumbansen, *Transnational Legal Pluralism*, 1 *Transnational Legal Theory* 141, 149 (2010).

<sup>73</sup> See P. C. Jessup, *The Concept of Transnational Law: An Introduction*, 3(1) *Columbia Journal of Transnational Law* 1, 1 (1963).

<sup>74</sup> Zumbansen presents a deeper conceptualization of transnational law by offering the concept of transnational legal pluralism, which draws theoretically from Jessup's concept but adds sociological and anthropological dimensions considering the complexity of the relationship between social and natural realms (2010).

<sup>75</sup> See supra note 68.

<sup>76</sup> Such as the Forest Stewardship Council, Roundtable on Sustainable Biofuels, and International Standards Organization, just to mention a few.

<sup>77</sup> See Peter Sloterdijk, *Critique of Cynical Reason*, University of Minnesota Press, p.91 (1988).

<sup>78</sup> See supra note 31.

<sup>79</sup> See Republic of the Philippines, Supreme Court, Manila, EN BANC, G.R. No.101083, July 30, 1993.

in India, which mobilized tribal communities against extractivist industry;<sup>80</sup> (4) the law reform in Bolivia to assert the rights of Mother Earth;<sup>81</sup> and (4) the massive environment protests in China, which were unthinkable a couple of decades ago.<sup>82</sup> In addition to this inventory, for this study, it is necessary to incorporate the Catholic Church, already an important agent in International Relations, that assumes a central role in the debate as states the words of Pope Francis in the preparatory documents for the Special Assembly of the Synod of Bishops for the Pan-Amazon Region:

Already in the biblical stories of creation it emerges that human existence is grounded in “three fundamental and closely intertwined relationships: with God, with neighbor, and with the earth itself. [...] These three vital relationships have been broken, both outwardly and within us. This rupture is sin”.<sup>83</sup>

An addition empirical stance of the emergence of TEL is the case Huaraz in which in 2015, Saúl Luciano Lliuya a Peruvian farmer from Huaraz, Peru, sued before a German court the company RWE (the largest energy producer in German) asking for damages due to the contributory actions of the company to climate change. Although the rejection by the lower court of the claim based on it lacks proof of linear causality, the Appellate Court has received the appeal alleging that the claim has the standing to continue.<sup>84</sup> As stated by Frank et al.:<sup>85</sup>

The lawsuit raises the issue of responsibility of large energy companies for climate change in terms of liability for nuisance and losses and damages. It may act as a model for similar lawsuits in other countries. The acceptance of the case and its entering in the evidentiary phase itself has already written legal history, says lawyer Roda Verheyen: The OLG Hamm confirmed its vote of the oral hearing on November 13, 2017: Major emitters of greenhouse gases can be held liable for protective measures against climate damages. The decision establishes a solid argument for legally relevant causality in cases that were not accepted before, notably in reference to a negative ruling of the Federal Supreme Court on acid rain in 1987. Now it can be proved in a concrete case that RWE contributed and continues to contribute to the risk of a local glacier outburst flood in Huaraz.

This inventory helps us out to perceive the myriad of transformative approaches that are located within the scope of the TEL, thus, helping to provide the necessary

<sup>80</sup> See Aaron, *Facts from the Phulbari-And Why We Strike*, <https://globalclimatestrike.net/facts-from-the-phulbari-and-why-we-strike/> (accessed on November 4, 2020).

<sup>81</sup> See Morales Ayma, *Ley de Derechos de la Madre Tierra*, <https://bolivia.infoleyes.com/norma/2689/ley-de-derechos-de-la-madre-tierra-071> (accessed on November 4, 2020).

<sup>82</sup> See Literary Hub, *Can Environmental Activism Succeed in China?*, <https://lithub.com/can-environmental-activism-succeed-in-china/> (accessed on November 4, 2020).

<sup>83</sup> See Preparatory Document for the Synod on the Pan Amazon Region, <http://www.sinodoamazonico.va/content/sinodoamazonico/en/documents/preparatory-document-for-the-synod-for-the-amazon.html> (accessed on November 4, 2020).

<sup>84</sup> For a complete description of the case the author suggests the Columbia University dataset, <http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/#:~:text=Summary%3A,RWE%2C%20Germany's%20largest%20electricity%20producer.&text=On%20November%2030%2C%202017%2C%20the,as%20well%2Dpled%20and%20> (accessed on November 4, 2020).

<sup>85</sup> See R. Mechler & L. M. Bouwer et al., *Loss and Damage from Climate Change: Concepts, Methods and Policy Options*, Springer International Publishing, pp.475-82 (2019).

theoretical and empirical coverage to explain and understand the current environmental events not covered by the fields of international law and relations.<sup>86</sup> It presents what Estupinã-Silva refers to as “State ways of fighting”,<sup>87</sup> which means the existence of a State apparatus in which civil society might use to resist assaults against the local and regional environment. Also, she presents the ‘transnationalization of ways of fighting’, which connects the local ‘State ways of fighting’ in a robust network of agents, ideas, cultures, and world visions, all with important implications on the limits of regulating nature.

The application of these premises to biodiversity provides further understanding and explanation to the transnational approach of the Anthropocene as the possible response considering the apathy and shady features of the international institutions.

The biodiversity conceptualization is formed by its rational and discursive dimensions. As stated by Escobar,<sup>88</sup> the biodiversity discursive dimensions have:

[...] thus, resulted in an increasingly vast institutional apparatus that systematically organizes the production of forms of knowledge and types of power, linking one to the other through concrete strategies and programs. International institutions, Northern NGOs, botanical gardens, universities and research institutes in the first and third worlds, pharmaceutical companies, and the great variety of experts located in each of these sites occupy dominant sites in the network.

The competitive interests over biological goods have directed the regulation, both international and local to the management model, which looks to it as a resource, which implies to other subsets of discourses that include conservation under the natural sciences auspices, sustainable development, and the sharing of benefits thru intellectual property rights. In this vein,

[...] critics are adamantly opposed to both biotechnologies as a tool to maintain diversity and to the adoption of intellectual property rights as the mechanism for the protection of local knowledge and resources. Instead, they advocate for forms of collective rights that recognize the intrinsic value and the shared character of knowledge and resources (Escobar 1998).<sup>89</sup>

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<sup>86</sup> See Douglas de Castro, *Climate Justice: Building Opportunities for Women’s Participation and Leadership in the Climate Change Regime*, <https://www.emerald.com/insight/content/doi/10.1108/S2058-880120190000008010/full/html> (accessed on June 1, 2021).

<sup>87</sup> See Rosemerlin Estupinã-Silva, *Desafíos y Respuestas Transnacionales Frente a Los Crímenes Ambientales*, <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/4379> (accessed on June 1, 2021).

<sup>88</sup> See supra note 26.

<sup>89</sup> Although ontologically connected to the traditional IEL, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) provides a fresh look into the matter: Visionary and unprecedented, it is an agreement reached by and for Latin America and the Caribbean, reflecting the ambition, priorities and particularities of our region. It addresses key aspects of environmental management and protection from a regional perspective, regulating access rights to information, public participation and justice in matters as important as the sustainable use of natural resources, biodiversity conservation, the fight against land degradation and climate change, and building resilience to disasters. It also includes the world’s first binding provision on human rights defenders in environmental matters in a region where sadly they are all too often subject to attacks and intimidation, <https://www.cepal.org/en/escazuagreement> (accessed on November 4, 2020).





### 3. Findings

The review of the literature and data collected allows us to present the findings as summarized below (see Table 1 below). It presents a new perspective to TEL, allowing it to increase in ontological and epistemological independence from IEL, which as stated before, it possesses virtues, however, due to its proximity to traditional international law, it becomes more of the same with new features (soft law, and umbrella treaties for instance). Also, it promotes a more comprehensive regulatory coverage as compared to the limitations of local law and broadness of IEL, which often do not present appropriate regulatory coverage due to the block roads raised by States.

TEL in the Anthropocene is the response to the shortcomings of modernity at the same time is a response to post-modernists that are eager to deconstruct for the sake of deconstruction but offer no option to the demolished institutions as proposed.

**Table 1: Critical Analysis of Discourse (Fairclough 2013)<sup>94</sup>**

<b>Research Technique Steps</b>	<b>Empirical Evidence</b>	<b>Implication(s)</b>
<b>Social problem with a semiotics aspect</b>	Reification and metanarratives of biodiversity at international and domestic law	-Exclusion of local/regional realities/perceptions about biodiversity -Cultural exclusion -Manipulation of discursive stances to legitimize to use of biological agents
<b>Obstacles to address the problem</b>	-International institutions with strong economic cleavage -Local elites	-Normalizing and standard discourses of development
<b>Social order in which the problem emerges</b>	-Imperial practices -Ontological dissociation between social and natural orders	-Developers X Non-developers (us against them) -Exclusion of social movements
<b>Forms to overcome the problem</b>	-Local practices towards biodiversity -Transnational Environmental Law	-Litigation using various stances of the law - Innovative legislation -Networks to connect agents for public concerns/awareness and action -Regional social movements and innovative environmental litigation

<sup>94</sup> See supra note 22.

# The United States' Withdrawal from the Paris Agreement: Interpretation from Neo-Classical Realism

Xiaolong Zou, Sihan Xin & Jieruo Li<sup>1</sup>

**Abstract:** As the world enters into a new era of “great powers competition” and “great uncertainty”, the global attention has focused on how the US-China relation would proceed under the current trajectory. As the world’s two largest economies and greenhouse gas emitters, their climate positions and attitudes could consolidate or sabotage the hard-won international consensus on climate change of the Paris Agreement, which was already shaken by President Trump’s withdrawal in 2017. This paper offers an in-depth analysis of the domestic factors that influence the United States’ climate policies from four aspects, namely presidential preference, partisanship, civil society, and special interest groups, to account for and make sense of the United States’ climate policy of the Trump Administration. Furthermore, it discusses the potential implications for China regarding its climate position in the post Paris era to get some new insights for relevant policy makers and stakeholders.

**Keywords:** Climate Change; The United States; Paris Agreement; Neo-classical Realism

## 1. Introduction

The successful adoption of the Paris Agreement (hereinafter referred to as PA) in 2015 celebrated a hard-won global consensus on tackling climate change, which was then dramatized by the United States’ announcement of withdrawal on June 1, 2017. It appears that the biggest challenge for some countries to reduce their greenhouse gas (hereinafter referred to as GHG) emissions lies not in the scientific debates but in the politicization of such global issues that pertain stakes for vetted interests.<sup>2</sup> As the historically largest and currently second largest GHG emitting country, the position of the United States on climate change and commitment to carbon emission reduction play a pivotal role in global climate governance.

As a signatory party to the United Nations Framework Convention on Climate Change (hereinafter referred to as UNFCCC), the success of the convention partially attributes to the active participation of the United States. However, during subsequent conferences of parties (hereinafter referred to as COPs), the United States failed to assign or rectify any legally binding climate agreement (such as Kyoto Protocol) until

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<sup>2</sup> See Jianying Ma, *Domestic Structure and Institutional Impact: Impact of International Climate System in China and the United States (1990-2010)*, Ph.D. Dissertation, Fudan University, p.276 (2011).

President Obama, who exercised his presidential power by passing the Congress and signing PA. Then, history repeated itself again for President Trump who denounced it.

Climate governance is a cross-disciplinary subject that is multi-approachable. Scholars have thus tackled this issue from various facets including political-economic, international politics and domestic politics. Peter Newell developed a political economy that accounts for global governance of contemporary environmental politics in terms of its potentials and barriers for effective reforms;<sup>3</sup> Deere-Nirkbeck articulated that risk parameters (social, economic, political and environmental) need consideration and addressing to combat climate change;<sup>4</sup> Zhuang et al. enlisted three aspects of willingness to explain the games between countries regarding fairness and efficiency in the international climate governance;<sup>5</sup> Li emphasized that climate change profoundly affected the world economic and social development, and therefore the transformation towards a low-carbon economy had become a rational choice for human society;<sup>6</sup> In Harris' book "Climate Change and American Foreign Policy", the author makes an ethical evaluation of the United States' climate policy and discusses controversies caused by the Congress of the United States regarding climate change issues.<sup>7</sup>

With the United States' withdrawal from PA, scholarship has been the most vocal on analyzing its cause-and-effect, normally from an established set of variables or factors. For example, Betsill depicts President Trump's perceptions towards climate change that leads to his decision of withdrawal.<sup>8</sup> Zhang et al. discuss the potential impacts of the United States' absence in the global climate governance to the international society.<sup>9</sup> Some other scholars also address this topic from policy impacts<sup>10</sup> and implications for other countries.<sup>11</sup>

Abundant studies have analyzed the reasons, effects and possible influences of the United States' withdrawal. Here the authors systematically review and summarize the major domestic factors that lead to the inconsistent positions of the United States' climate policy in the international community. As denoted by Cox that "Theory is always for someone and for some purpose."<sup>12</sup> In this paper, the authors build analysis using the neoclassical realism (hereinafter referred to as NCR) theory for domestic factors' interpretations, shedding more light on the factors that influence the making of the United States' climate policy, and its implications for China.

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<sup>3</sup> See Peter Newell, *The political economy of global environmental governance*, 34(3) Journal of Review of International Studies 507, 507-29 (2008).

<sup>4</sup> See Carolyn Deere Birkbeck, *Global Governance in the context of climate change: the challenges of increasingly complex risk parameters*, 85(6) Journal of International Affairs 1173, 1173-94 (2009).

<sup>5</sup> See Guiyang Zhuang & Xianli Zhu et al., *Global Environment and Governance*, Zhejiang People's Publishing Corp, pp. 207-11 (2009).

<sup>6</sup> See Huiming Li, *Ecological Modernization and Climate Governance-A study on European Union's Position in International Climate Negotiation*, Social Science Academic Press, p.166 (2017).

<sup>7</sup> See Paul G. Harris, *Climate Change and American Foreign Policy*, Palgrave Macmillan, p.302 (2010).

<sup>8</sup> See Michele Betsill, *Trump's Paris withdrawal and the reconfiguration of global climate change governance*, 15(1) Journal of Chinese Journal of Population Resources and Environment 1, 2-3 (2017).

<sup>9</sup> See Yongxiang Zhang & Qingchen Chao et al., *The withdrawal of the U.S. from the Paris Agreement and its impact on global climate change governance*, 8(4) Journal of Advances in Climate Change Research 213, 213-9 (2017).

<sup>10</sup> See Haibin Zhang & Hancheng Dai et al., *U.S. Withdrawal from the Paris Agreement: Reasons, Impacts and China's Response*, 8(4) Journal of Advances in Climate Change Research 220, 220-5 (2017).

<sup>11</sup> See Xiaolong Zou & Yue Cui, *the United States Withdrawal for the Paris Agreement: Reasons, Impacts and China's Response*, 34(2) Journal of North University of China (Social Science Edition) 59, 60 (2018).

<sup>12</sup> See Robert O. Keohane, *Neorealism and Its Critics*, Columbia University Press, pp.204-54 (1986).

## 2. Theoretical Framework

Given the track record of the United States' climate policy position on climate treaties, it is conspicuously clear that the major influencers lie in the domestic domain. Therefore, the authors emphasize the domestic factors that influence the United States' policy-making of climate governance, because of the core roles they play, rather than the systematic changes.<sup>13</sup>

As a relatively new IR theory, NCR was first coined in 1998 by Gideon Rose in a review paper published in *World Politics*, which primarily served as an analysis tool of state foreign policy and has gained attention ever since. It provides explanations for foreign policy considering domestic variables, such as political culture, leaders' perceptions and societal factors. Like other realist theories, neoclassical realism focuses on relative material power. It argues that the foreign policy making is driven by the state's position in the international system which largely depends on the material power it acquires. Though acknowledging the influence of systematic factors, it also emphasizes the intervening variables on the unit-level, which distinguish itself from other realist theories.

Neoclassical realism explains individual states' behaviors and their different actions because it takes the domestic intervening variables into consideration, as is articulated by Randall Schweller, "complex domestic political processes act as transmission belts that channel, mediate, and (re) direct policy outputs in response to external forces (primarily changes in relative power).<sup>14</sup> Hence, states often react differently to similar systemic pressures and opportunities, and their responses may be less motivated by systemic-level factors than domestic ones." The common intervening factors according to Ripsman, Taliaferro and Lobell are leaders' image, strategic culture, state-society relation, and domestic institutions.<sup>15</sup>

The authors acknowledge the original four variables. However, to better interpret the case, the authors have changed the intervening variables to better explain the case. The authors keep the first-level as they analyze a leader's individual perception in the policy outcome. And the authors merge the political institution and partisanship together because they significantly affect policy-makers' performances and their stands on policy-making. At last, the authors bring the civil society and interest group to replace the state-society relations and domestic institution. Since how government mobiles the civil society and how much the civil society supports the government policy proposal are complimentary which to a large extent decide whether a policy will be eventually finalized. In other words, the authors find civil society as a bridge of the two original variables.

### 2.1 Leaders' Image and Perception

Despite the fact that states have various political systems, a leader is the person who makes the final decision, and without exception, it always makes the final choice from limited numbers of options. Therefore, it is important to know how the most

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<sup>13</sup> See Glen Sussman, *The USA and Global Environmental Policy: Domestic Constraints on Effective Leadership*, 25(4) *Journal of International Political Science Review* 349, 349-59 (2004).

<sup>14</sup> See Randall Schweller, *Unanswered Threats: A Neoclassical Realist Theory of Underbalancing*, 29(2) *Journal of International Security* 159, 159-201 (2004).

<sup>15</sup> See Norrin M. Ripsman & Jeffrey W. Taliaferro et al., *Neoclassical Realist Theory of International Politics*, Oxford University Press, pp.178-93 (2016).

important individual decides. As for the person who makes the final decision, it is important to know what role the leader plays.<sup>16</sup> To begin with, all the individuals have personalized, or even biased cognition towards the world based on their history and experience. Because one has different value with the other, the individual values serve as a cognitive lens when seeing things and processing given information. This is the reason why leaders may react differently even when facing the same situations. Besides, individual personalities can be one of the variables. Some are more risk-taking than others. Again, NCR believes that Foreign Policy is driven by the state's relative power. Then there is an important distinction needs making: the difference between the actual power that one state acquires and the perception a state's leader believes his state acquires.

## 2.2 Political Institution and Partisanship

Political parties are organized by different goals and ideologies. As is mentioned above, a broader concept of strategic culture is about the norms and values and their influence on foreign policy. Party members share the same belief, which, however, differs them from the other party. Political polarization has been divided based on identity but not on issues. Conservative Republicans, comparing to the liberal democrats, are more pessimistic on the effectiveness in actions about climate change. Liberal Democrats believe climate change brings severely negative effect on the environment and daily life, and they maintain a positive attitude towards actions in addressing the issue. However, Republicans do not believe that human activities are the cause for climate change, even with prevailing scientific proofs. They believe scientific findings are driven by scientists' desire and career plan.<sup>17</sup>

## 2.3 Civil Society and Interest Group

The harmony between the central government and economic/societal groups decides whether the state can use the national resources when need. Foreign policy making is not only about elites but also the civil society which plays an important role during the process. Civil society is a broad and vague concept in this research. The authors understand it as civil institutions which are organized voluntarily, for example, NGOs, religious groups, mass media, and others. The civil society brings demands to the government, especially for social collective interest like climate change. Interest group is one actor of the civil society, and it also plays a significant role in influencing the output.<sup>18</sup> They either engage in the policy making process by political activities or establish the contacts directly to the legislation.<sup>19</sup> For instance, the Israel lobbying group played a determinant role in the 2003 Iraq invasion of the United States.<sup>20</sup>

The authors select Neoclassical realism as the theoretical framework for two considerations. First, NCR takes domestic variables into consideration; second, NCR can explain both short-term foreign policy and long-term international politics. As is

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<sup>16</sup> See Margaret Hermann & Joe. Hagan, *International decision making: Leadership matters*, 110(110) Journal of Foreign Policy 124, 124 (1998).

<sup>17</sup> See Pew Research Center, *The Politics of Climate*, para.17 (2016), <https://www.pewresearch.org/science/2016/10/04/the-politics-of-climate/> (accesses on June 23, 2021).

<sup>18</sup> See Robert Trice, *Foreign Policy Interest Groups, Mass Public Opinion and the Arab-Israeli Dispute*, 31(2) The Western Political Quarterly 238, 238-52 (1978).

<sup>19</sup> See Abraham Holtzman, *Interest Groups and Lobbying*, Macmillan, pp.207-31 (1966).

<sup>20</sup> Ibid.

mentioned earlier, international politics is not foreign policy.<sup>21</sup> International politics is a framework that explains the systematic patterns which continuous and repeatedly occur. While Neorealism explains the pattern in the international system but does not explain the individual state's foreign policy, nor its predictions. NCR has the advantage of explaining both foreign policy and international politics. The authors believe that the United States' withdrawal from PA is a short-to-medium term foreign policy for the United States and a long-term political move. Without the United States' leading force, global politics on climate change will shift accordingly. NCR offers a comprehensive explanation of the individual state's foreign policy behaviour, and the future tendency.

### **3. Analysis and Discussions**

#### **3.1 Global Climate Change Governance and the Paris Agreement**

Climate change was first brought to the agenda of the international community at the World Climate Conference in Geneva in 1979. To curb GHG emission and cope with global warming, the international community began a long journey for climate negotiations. In 1992, the United Nations Conference on Environment and Development signed the world's first international convention, UNFCCC, to address climate change. In the sequent COPs, protocols, accords, and treaties have been negotiated and signed.<sup>22</sup>

The United States somehow offset the success of Tokyo Protocol in 1997's failure to rectify in Congress, tainted by Canada's denouncement for inability to fulfill its emission reduction targets, exacerbated by the unclear future of the second commitment period (2013-2020). Pessimism manifested in many of the subsequent COPs until December 12, 2015, when 197 Parties to the Convention convened in Paris to make concrete arrangements for the global response to climate change after 2020, and successfully adopted PA, according to which countries must take measures to control the global temperature rise caused by climate change within 2 degrees Celsius (3.6 degrees Fahrenheit) to avoid potential destructive consequences associated with sea level rise or extreme weather.<sup>23</sup> It is another water-shedding moment in climate governance and is made possible by the joint forces of the two biggest GHG emitters in the world, China and the United States.<sup>24</sup> When President Trump succeeded President Obama, however, he announced to withdraw from PA on June 1, 2017, and the rest is history.

#### **3.2 Interpretations of Domestic Variables of the United States' Climate Policy**

##### **3.2.1 Leader's image and perception**

President Trump, as a hard-core climate change skeptic, refused to acknowledge global warming and climate change, deeming it a "hoax". Despite the mainstream

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<sup>21</sup> See Kenneth N. Waltz, *International politics is not foreign policy*. 6(1) Security Studies 54, 54-7 (1996).

<sup>22</sup> See Kang Xiao, *Global Governance of Climate Change and China's Economic Transition: From the Perspective of Internalization of International Norms*, World Library Publishing, pp.502-17 (2014).

<sup>23</sup> See United Nations Framework Convention on Climate Change, Paris Agreement, 2015, Article 2.1(a).

<sup>24</sup> See supra note 10.

American scientific community's two major conclusions that climate change is taking place and mainly caused by anthropogenic factors, President Trump himself has never formally accepted these conclusions (Zhang, Dai, et al. 2017).<sup>25</sup> The Trump Administration believed that climate change was a matter of debatable science. Even during his presidential campaign, he proclaimed that global warming itself was a fraud, and repeatedly criticized President Obama's climate policy for seriously harming the United States' economy.

President Trump believed that PA was unfair and inefficient. Not only did he consider the terms of PA help other countries suppress the United States' economy, hinder the traditional energy sector prosperity and allow countries like China, India and EU countries to catch up, but he also assured that even if all the countries fully implemented PA, the global temperature was still expected to drop 0.2 degrees C. by 2100, and China's 14-day carbon emission would offset the entire efforts of the United States' emission target of 2030.<sup>26</sup>

The most importantly, President Trump believed that the emission reduction commitment for PA would severely hinder the United States' economy. Quoting data from National Economic Research Association, he claimed that "the United States will lose 2 million 700 thousand jobs in 2025... papermaking decreased by 12%, cement decreased by 23%, steel decreased by 38%, coal decreased by 86%, natural gas dropped by 31%... GDP will suffer nearly \$3 trillion in economic losses, and 6 million 500 thousand industrial jobs will be lost, while American household income will be reduced by \$7000..." (the United States Government 2017).<sup>27</sup> Therefore, both President Trump's image as climate change skeptic and his negative perceptions of climate treaties have shaped and affected profoundly the United States' position on climate policy.

In contrast, after winning the presidential election in 2020, President Biden immediately announced his plan to rejoin PA and regain the United States' international leadership in climate governance and other international organizations. In a sense, President Biden is strenuously following President Obama's climate positions and commitments, which also reflects the climate-friendly image of the two Democratic presidents.

### **3.2.2 Political institutions and partisanship**

#### **a. Checks & Balances**

A trademark feature of the United States' political institution lies in its separation of powers, also known as "checks and balances". The decision-making power of foreign affairs is shared between President-led executive branch and Congress-led legislation branch. The Supreme Court can also influence foreign policy making and enforcement through constitutional interpretation and judicial precedents. However, the constitutional illustration on diplomatic power is not only insufficient but also abstract and general, so that the power struggles between the President and the Congress in foreign policy manifests throughout the entire American history.

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<sup>25</sup> See supra note 10.

<sup>26</sup> See Bjorn Lomborg, *Impact of Current Climate Proposals*, 7(1) Journal of Global Policy 109, 109-18 (2016).

<sup>27</sup> See Office of the Press Secretary, the White House, *Statement by President Trump on the Paris Climate Accord*, <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord?from=timeline&isappinstalled=0> (accessed on June 2, 2019).



First, according to the Constitution, president of the United States is the head of the state, and is naturally the number one diplomat and the foremost decision-maker of foreign policy. While the Constitution vests in the president diplomatic representation, it also stipulates that the president must consult the Senate and get its consent (approvals from over 2/3 of Senate members) when negotiating and concluding an international treaty. Historically, Congress may fail the treaties signed by the presidents. A famous example of which is the rejection of the Treaty of Versailles signed by President Wilson.

Article VI of the the United States Constitution states that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”, which shows that international treaty has been granted with the same status as federal law if ratified at home. The obvious consequence is that the Senate is prudent in the examination and approval of international treaties, and in history, it has named the Congress the name of the “grave of the treaty” (Tan 2015).<sup>28</sup>

To pass an international treaty or any bill is a tag of war between different parties, ideals, and individuals of the Congress. Since the 1980s, a minority of senators have exercised long speeches or temporarily blocked procedures to prevent the majority of the party’s bills from rising in the Senate, making the legislative process and its results more unpredictable. Therefore, the design of the legislative system in the United States is to maintain the status quo, and rather difficult to legislate for a new policy, particularly regarding climate change policy. That is why the Congress of the United States rectified none of the binding climate treaties except UNFCCC with no specific binding emission reduction targets for the signatory countries.

#### b. Partisanship

For a long time, the differences between the two major political parties in the United States were rather less significant. However, a recent Pew study on contemporary party politics shows that the two major political parties are increasingly polarized.<sup>29</sup> On almost all major public policy issues, the Republican Party is becoming more conservative, while the Democratic Party manifest more consistent liberal position. The two parties have different stands not only in domestic affairs such as civil rights, race, culture and morality, religious belief but also in foreign-affair-related fields such as international defense and diplomacy.<sup>30</sup>

Regarding climate change threats, the Democratic Party and the Republican Party have great differences in their perceptions and positions. In 1997, 48% of Republicans believed that warming had happened and 52% of Democrats. The proportions were respectively 42% and 78% in 2008. In 1997, 27% of Democrats believed that media coverage of global warming was exaggerated. 37% of Republicans held this view in 2008, and the proportion was 17% and 59% respectively.<sup>31</sup> There are also significant differences between the two parties on whether the scientific consensus on climate change exists, whether climate change is human or natural or whether global warming poses a threat. The divergence between the two parties on climate change has slowed

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<sup>28</sup> See Yueyu Tan, *On the Domestic Origin of the U.S. Climate Policy*, 31(6) Journal of PLA Nanjing Institute of Politics 52, 52-60 (2015).

<sup>29</sup> See Pew Research Center, *Partisanship and Political Animosity in 2016*, para.21 (2016), <https://www.pewresearch.org/politics/2016/06/22/partisanship-and-political-animosity-in-2016/> (accesses on June 23, 2021).

<sup>30</sup> See Shardul Agrawala & Steinar Andresen, *Indispensability and Indefensibility? The United States in the Climate Treaty Negotiations*, 5(4) Journal of Global Governance 457, 482 (1999).

<sup>31</sup> See Pew Research Center, *More Say There Is Solid Evidence of Global Warming*, para.4 (2012), <https://www.pewresearch.org/politics/2012/10/15/more-say-there-is-solid-evidence-of-global-warming/> (accesses on June 23, 2021).

down and may be slightly reversed, but the differences between the two parties are still enormous.

The different positions of two parties on climate change have produced a series of negative consequences: firstly, the decision-making process on climate change policy is more likely to get entangled and suffer setbacks due to partisan politics; secondly, the separation of powers and the bicameral system of Congress make it necessary to have a great consensus to adopt any new legislation, and the climate change is less likely to research bipartisan consensus; thirdly, partisan differentiation strengthens political “rebellion” of the two parties and forms the so-called “what you agree is what I oppose, and what you oppose is what I agree” political mentality, affecting the formulation and implementation of policy.<sup>32</sup>

Politicization and partisanization of climate issues not only represent the positions of the party’s elites and political leaders, but also the differences in their votes’ views and perceptions of climate change. For certain controversial issue, the public normally supports the party candidate that share their values, and vice versa, these party members or local leaders will in turn constitute filters to disseminate information to their votes to influence their perceptions and opinions. Therefore, when the parties’ positions on some important issues like climate change are drastically differed by partisanship, the public will also have the same divisions, thus weakening public enthusiasm for dealing with climate change.

Despite the prevailing and compelling scientific evidence and consensus for global warming and climate change, the Republicans still question its authenticity. Even though President Obama and pre-climate Democrats claimed the moral high ground and gained environment-friendly voters by signing PA in 2016, a hard-core Republican president, backed with Republican-controlled Congress, eventually made the announcement to withdraw from PA in Rose Garden, on June 1, 2017.

### 3.2.3 Civil society

The authors take civil society not as its literal meanings of the third sector of society (according to Collins English Dictionary), but its normative concept of civil values for certain social groups. The authors further categorize these civil value groups into three subgroups: climate change skeptics, anti-environmental forces, and neo-conservative supporters.

#### a. Climate change skeptics

The Trump Administration’s cognitive bias toward PA is deeply rooted in climate change skeptical sentiment. A study shows that from 1972 to 2005, a total of 141 English-language books of environmental and climate skepticism were published, and over 92 percent of them were linked to conservative groups or think tanks.<sup>33</sup> These publications often deny climate change or its impact on humans and believe that the so-called climate change issue belongs to climate politics and carbon politics. Authors of these works use an uncertain, volatile, and repetitive nature of climate change to influence politicians and ordinary citizens’ understandings of climate change. These skeptical sentiments will intuitively influence a certain group of readerships. Besides President Trump who firmly denied climate change and global warming, Scott Pruitt, director of Environmental Protection Agency (hereinafter referred to as EPA) and

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<sup>32</sup> See Riley E. Dunlap & Aaron M. McCright, *A Widening Gap: Republican and Democratic Views on Climate Change*, 50(5) *Environment Science and Policy for Sustainable Development* 26, 26-35 (2008).

<sup>33</sup> See Peter J. Jacques & Riley E. Dunlap et al., *The organization of denial: Conservative think tanks and environmental skepticism*, 17(3) *Environmental Politics* 349, 385 (2008).

former Attorney General of Oklahoma state, is also a climate change skeptic.<sup>34</sup> He always questions the scientific nature of climate change and believes that the Obama Administration's Clean Energy Plan against fossil fuels has increased the unemployment rate in the United States; therefore the Trump Administration must change its policies to use manufacturing and coal mining to get jobs back.

b. Anti-environmental forces

"To every force, there is a counter force", so it is with the environmental protection force. Anti-environmental force in the United States is also an important group to be reckoned with. Claiming their rights of civic responsibility, they actively engage in anti-environmentalism political movements and seek to persuade the public that environmental and climate policy yield negative impacts.<sup>35</sup> These groups often become the spokespersons for certain interest groups in sectors of fossil fuels, steel, chemicals, automobile, power generation etc.

One of their major arguments is the so-called "cost theory", claiming that the annual costs spent on preserving environmental issues have stressed the United States' economy and added extra burdens to the already large financial budgets. For example, Georgia Power Company even claims that newly enacted environmental programs will pass on a burden of \$150-200 to every consumer per year. There are also those whose interests are hurt due to environmental restrictions like farms' application of pesticides and fertilizers, which then become anti-environmental forces.

c. Neo-conservatism Supporters

Neoconservatives mainly include conservative politicians, think tanks, mass media and social media, energy companies, lobbyists, public relations companies, bloggers and the so-called "pseudo-scientists". They believe that environmentalism is too much. Addressing climate change is just a political excuse to expand government functions, increase financial burden and waste economic resources. It will hinder the growth of core industries and increase the unemployment rate in the United States. Neo-conservatism originates from the Anti-Stalinist Left and American conservatism during the 1960s and 1970s, and have been active in various domains till present days.<sup>36</sup> They have eliminated a series of environmental regulatory policy bills and eliminated energy price regulation. After the Republican Party won the majority seats in the Senate and House of Representatives in the mid-term congressional elections in 1994, many neoconservatives, climate change skeptics, and anti-environmental forces joined forces. Since the election of the Congress of the United States in 2010, these three anti-revolutions to climate change forces have further gained the upper hand in both houses. The support and funding of the fossil energy industry have made neo-conservatism even more powerful. Neo-conservatism has taken advantage of United States voters and the federal government to bring the policy of opposing climate change to its peak.

### 3.2.4 Interest groups

Interest groups, also known as advocacy groups, lobby groups or special interest groups, are highly intertwined with American politics and society. Presenting certain groups' interests such as corporations or business, religious and social groups, they

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<sup>34</sup> See Liang Dong, *The Trump administration's decision to withdraw from the Paris Climate Agreement*, 15(3) Chinese Journal of Population Resources and Environment 1, 1 (2017).

<sup>35</sup> See Steve Charnovitz, *International Encyclopedia of Environmental Politics*, 2(3) Global Environmental Politics 128, 128-30 (2002).

<sup>36</sup> See Justin Vaïsse, *Neo-conservatism: The biography of a movement*, Harvard University Press, p.145 (2010).

attempt to influence the stakeholders or decision-makers in the legislature or targeted audiences to achieve their goals. Some of the most influential interest groups include the United States Chamber of Commerce, National Rifle Association (hereinafter referred to as NRA), Energy Lobby, an umbrella term for fossil fuel industries, American Israel Public Affairs Committee, known as the “most influential lobby impacting the United States’ relations with Israel”. Their influences directly affect the United States political atmosphere. For example, President George W. Bush’s 2004 re-election campaign is allegedly to be the most expensive one in the United States’ history, large corporations and industries financed his administration in the government.

The Intergovernmental Panel on Climate Change (hereinafter referred to as IPCC) has concluded that fossil fuel is the main reason for the increasing carbon dioxide in the atmosphere; therefore climate policy is, in a large sense, energy policy. For a long time, the the United States’ economy has been coupled with its energy development such as coal, crude oil and natural gas. Abundant and cheap oil once made American industries of automobile, steel and chemistry the powerhouse of the global economy, which explains the economic growth of the United States in the past century.<sup>37</sup> In 1913~2005, the oil imports increased by 300 times and the economic output of the United States also increased 300 folds. Therefore, capping or reducing carbon emission seriously damaged the fossil fuel energy sectors, thus hurting the stake-holding enterprises.<sup>38</sup> That is why these giant industries employ powerful groups such as “Energy Lobby” to influence the policies or legislation that are in their benefits or sabotage those that are not.

As a nation-wide association of American miners, the United Mine Workers is one of the 30 largest labor organizations in the country and plays an influential role in domestic policies. 26 of American states have coal mining industries, 52 of the 100 Senators come from coal-producing areas, where coal industries and coal workers constitute a fearsome part of the state’s labor force. This shows the 52 senators will definitely represent the well-being of these voters in their positions on carbon emission and climate change. Even the then-presidential candidate, Mr. Trump on Campaigns in the coal-rich states, promised the local votes to “bring their coal back” and so he did after taking the presidency. One of President Trump’s major critiques of the Obama era was the deterioration of the Coal mining industry for CPP regulations. He was often seen with proud coal miners by his side, saying “Our administration is to put an end to the war on coal”, while claiming he would replenish the lost jobs of the fossil industry.<sup>39</sup>

The characteristic of the energy structure in the United States, particularly the geographical dispersion and labor intensity of traditional energy industries, represented by these interest groups have produced impacts on the United States’ climate policy, despite the booming of renewable energy and the growing awareness of environmental friendliness.

### **3.3 The United States’ Withdrawal from the Paris Agreement**

President Trump announced on June 1, 2017 that the United States would withdraw from PA. In his official announcement, he said the staying in PA could cost the United States as much as \$2.7 million lost jobs by 2025. And by 2040, compliance with the commitments made by the previous administration would cut down production for

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<sup>37</sup> See supra note 28.

<sup>38</sup> See Deborah Lynn Guber, *A Cooling Climate for Cchange? Party Polarization and the Politics of Global Warming*, 57(1) *American Behavioral Scientist* 93, 93-115 (2012).

<sup>39</sup> See Juliet Eilperin & Brady Dennis, *Trump moves decisively to wipe out Obama’s climate-change record*, <http://www.kenet.com/broadcast/201703/494934.shtml> (accessed on June 29, 2020).

several sectors: Paper-down 12%. Cement-down 23%. Iron and steel-down 38%, his favored coal mining sector down 86% and natural gas (down 31%). The cost to the economy would be close to three trillion dollars in lost GDP and 6.5 million industrial jobs while households would have \$7,000 less income. But these losses would be avoided if the United States pulled out of PA, thus ensuring the United States economy's competitive advantages.<sup>40</sup> It might be noted that the National Economic Research Associates, an international consultancy group, provided these evaluations and estimation figures in President Trump's announcement.

As a signatory party to UNFCCC, the United States' commitment to curbing climate change has been strong, with a wide range of support, actions, and programs invested in tackling climate change despite its failure to ratify the Kyoto Protocol or any legally binding climate treaties in the Congress. Many large American businesses and hundreds of others have also supported the signing of PA. Besides that, in the statements released after the United States' withdrawal, the Secretariat of UNFCCC said it regretted the announcement by the President of the United States that his government would withdraw from PA. French President Emmanuel Macron called President Trump's decision "a mistake" for the United States and the planet. Leaders of France, Germany, and Italy issued a joint statement stating they regretted President Trump's decision to pull out of the agreement. It designed what avoided catastrophic levels of climate change fuelled by human activity.<sup>41</sup> It suggested that pulling out of PA would be an act of reckless disregard for the United States' credibility in the world.

However, the Trump Administration completely reneged the climate commitment made by Obama, who used the executive right to overpass Congress. It is understandable because the Congress won't pass PA anyway given its previous track records.<sup>42</sup> The core features of President Trump's climate change policy can be concluded as: (1) CPP damages Democrats and receives support from interest coalitions; (2) Energy production on federal lands increases; (3) Coal industry gets a reprieve; (4) Next-generation nuclear power surges forward; (5) Hydropower reverses its long decline; (6) Natural gas exports increase.<sup>43</sup> Hence, President Trump's climate change policy puts particular emphasis on conventional energy exploration, which exactly corresponds with his consistent neoconservative, climate-skeptical views, and is endorsed by powerful interest groups.

## 4. Implications for Sino-US Climate Governance

### 4.1 Trump Administrative Responses towards Climate Change Policies

President Trump vowed to reverse "every unconstitutional executive action, memorandum and order issued by President Obama" on his first day in office, 20

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<sup>40</sup> See the United States Government, *Statement by President Trump on the Paris Climate Accord*, para.3 (2017), <https://it.usembassy.gov/statement-president-trump-paris-climate-accord/> (accessed on June 29, 2021).

<sup>41</sup> See Alexandra Wilts, *Paris Agreement: Macron joins world leaders in vowing to 'make planet great again' after Trump quits climate accord*, para.4 (2019), <https://www.independent.co.uk/news/world/americas/us-politics/paris-agreement-trump-macron-no-plan-b-latest-news-updates-response-a7768306.html> (accessed on June 29, 2021).

<sup>42</sup> See Todd Stern, *Mr. Trump's climate decision*, Planet Policy, para.6 (2017), <https://www.brookings.edu/blog/planetpolicy/2017/03/06/mr-trumps-climate-decision/> (accessed on June 29, 2021).

<sup>43</sup> See James Taylor, *Trump's Energy Policy: 10 Big Changes*, <https://www.forbes.com/sites/jamestaylor/2016/12/26/trumps-energy-policy-10-big-changes/#625d80f37cd9> (accessed on June 28, 2020).

January.<sup>44</sup> Almost immediately after he sat in the oval office, President Trump started taking actions to obliterate his predecessor's climate legacy and environmental record, requesting his appointed staffers to rewrite key rules that would curb carbon emissions of states.<sup>45</sup> His newly appointed EPA director Scott Pruitt once commented, "I think measuring with precision human activity on the climate is something very challenging to do, and there is tremendous disagreement about the degree of impact. So the authors do not agree that it's "a primary contributor to the global warming that we see". His remarks have aroused a series of strong criticisms from the scientific community.<sup>46</sup>

Besides unraveling the legacies inherited from the Obama Administration and rebalancing the funding between basic and applied sciences, along with a budget cut of 31% for EPA by in the most recent budget proposal,<sup>47</sup> President Trump turned the cannons toward one of President Obama's biggest climate legacies, the Clean Power Plan (hereinafter referred to as CPP), which facilitates the implementation of the pledge made for PA in COP 21. Then President Obama pledged that the United States would cut its emissions by about 26% from 2005 levels by 2025, which was essentially tied to the successful execution of CPP.<sup>48</sup>

## 4.2 Core Advantages of the Trump Administration's Climate Change Policy

Core advantages of the Trump Administration's climate change policy can be concluded as follows: (1) Saying goodbye to CPP damages Democrats and receives support from interest coalitions; (2) Energy production on federal lands increase; (3) Coal industry gets a reprieve; (4) Next-generation nuclear power surges forward; (5) Hydro power reverses its long decline; (6) Natural gas exports increase.<sup>49</sup> Hence, President Trump's climate change policy puts particular emphasis on conventional energy exploration, which exactly corresponds with his consistent supporting view on coal and other fossil fuel industries.

President Trump announced on June 1 that the United States would withdraw from PA. In his official announcement, he said staying in PA could cost America as much as \$2.7 trillion by 2025. And by 2040, compliance with the commitments made by the previous administration would cut down production for a number of sectors: Paper-down 12%. Cement-down 23%. Iron and steel-down 38%, his favored coal mining sector down 86% and natural gas (down 31%). The cost to the economy at that time would be close to three trillion dollars in GDP lost and 6.5 million industrial jobs while households would have \$7,000 less income. But these losses would be avoided if the United States pulled out of PA, thus ensuring competitive advantages of the United States' economy. It might be noted that these evaluation and estimation figures in

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<sup>44</sup> See Lauren Morello, *Four ways Trump could unravel Obama's science legacy*, <https://www.nature.com/articles/nature.2017.21327.pdf> (accessed on June 28, 2020).

<sup>45</sup> See supra note 39.

<sup>46</sup> See Chris Mooney, *Scientists rebuke Scott Pruitt on climate change*, [http://littlegreenfootballs.com/page/323405 This ... Follows From the Basi](http://littlegreenfootballs.com/page/323405>This...Follows From the Basi) (accessed on June 28, 2020).

<sup>47</sup> See David Malakoff & Warren Cornwall, *Trump targets environmental science for cuts*, 355(6329) *Journal of Science* 1000, 1001 (2017).

<sup>48</sup> See Coral Davenport & Alissa J. Rubin, *Trump Signs Executive Order Unwinding Obama Climate Policies*, para.9 (2017), <https://www.nytimes.com/2017/03/28/climate/trump-executive-order-climate-change.html> (accessed on June 29, 2021).

<sup>49</sup> See supra note 43.

President Trump's announcement was provided by the National Economic Research Associates, an international consultancy firm.

### **4.3 Obama & Biden V.S. Trump on Carbon Reduction Policy**

The Obama Administration's pledge for the 2015 PA is to lower GHG emissions (in CO<sub>2</sub> equivalent) by at least 26% below 2005 levels by 2025. This is to be realized via CPP, which is President Obama's key regulation for GHG reduction by cutting emission from existing coal- and gas-fired power plants in the United States. It will have resulted in over 650 megatons of reduced carbon by 2025. This reduction alone will account for half of the pledged amount in PA. By 2030, the shift from coal-fired power stations alone will have reduced over 32% of CO<sub>2</sub> emissions from the power sector.<sup>50</sup>

Another major carbon reduction chunk from the Obama Administration is from the transportation sector, specifically emissions from automobile exhaust. This cleaner fuel standard would have ensured a major share of the Paris reduction target was met if carried out consistently. Under the direction of President Trump, however, EPA director Mr. Pruitt can review and loosen these standards that may in turn reduce the fuel efficiency requirements for autos and increase the carbon footprint of the whole transportation sector.

It is estimated by EPA that CPP of the Obama Administration will have an economic benefit of \$14-34 billion due to the avoidance of 3,600 premature deaths, 1,700 heart attacks, 90,000 asthma attacks, and of 300,000 lost work and school days annually. Without these, President Trump and his EPA director Mr. Pruitt will have a hard time justifying the overthrow of CPP to both the constituents and to the courts.<sup>51</sup>

As a firm believer of President Obama's climate policies, President Biden is also committed to consolidating America's climate leadership. In his climate plan, he stated that the United States will "produce carbon-free electricity by 2035 and achieve net zero emissions across the economy by 2050". He also asserted that "under his presidency, the United States will seek to work again with China on climate change, but will push Beijing to curb coal technology exports and reduce its carbon footprint of Belt and Road Initiative."

One of President Trump's major critiques of the Obama era is the deterioration of the Coal mining industry due to CPP regulations. He was often seen with proud coal miners by his side, saying "Our administration is putting an end to the war on coal", while claiming he would replenish the lost jobs of the fossil industry.<sup>52</sup> Recent statistics suggest a misalignment of priorities. However, when the coal mining industry employed roughly 66,000 miners in 2015, an estimated 3 million jobs were created by the clean energy sector.<sup>53</sup>

### **4.4 Consequences of President Trump's Withdrawal from the Paris Agreement**

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<sup>50</sup> See Nathan Hultman, *Trump's executive order on energy independence*, Planet Policy, para.7 (2017), <https://www.brookings.edu/blog/planetpolicy/2017/03/28/trumps-executive-order-on-energy-independence/> (accessed on June 29, 2021).

<sup>51</sup> Ibid.

<sup>52</sup> See supra note 39.

<sup>53</sup> See supra note 43.

Since as early as the Kyoto Protocol twenty years ago, the United States' commitment to curbing climate change has been strong, with a wide range of support, actions and programs invested despite the country's failure in ratifying the agreement. Many large American businesses such as DuPont, United Technologies, Exxon Mobil, General Mills, Hewlett Packard, Nike, Siemens, PG&E, Procter & Gamble, Unilever and hundreds of others have also supported the signing of PA. They have made clear their support for PA and climate action. Besides that, in the statements released after the United States' withdrawal, Secretariat of UNFCCC said he regretted the announcement by the President of the United States that his government would withdraw from PA. French President Emmanuel Macron called President Trump's decision "a mistake" for the United States as well as the planet. The leaders of France, Germany and Italy issued a joint statement stating they regretted President Trump's decision to pull out of the agreement, which was designed to avoid catastrophic levels of climate change fueled by human activity.<sup>54</sup> It suggests that pulling out of PA will be an act of reckless disregard for the United States credibility in the world.<sup>55</sup>

However, if the Trump Administration completely reneged on the climate commitment and did not honor PA made by the Obama Administration, which may still likely happen given his current trajectory with regard to climate policy, some of the global major GHG emitting countries might follow suit. For example, key emerging countries like China and India, the world's first and third largest CO<sub>2</sub> emitting countries, might have similar 'second thoughts' on committing to further carbon reduction if not pulling out of PA all together.

Another possible scenario, upon the absence of the United States leadership in PA, could lead to other countries' stepping in to fill the vacancy in global climate governance, and China will be one of the most qualified candidates. In some respects, China is poised to assume such a role, at least partially, due to its pledge made in PA. This pledge aligns China's urgent domestic needs for energy transformation with its declared sense international responsibility. In this climate change context, the United States under the Trump Administration may relinquish a pivotal role it used to occupy a rival power that had otherwise welcomed the United States facilitating international agreement.

## **4.5 The United States' Climate Change Policy & Target in the Obama Era**

The United States is one of the Annex 1 countries, but didn't ratify Kyoto Protocol. As a strong climate change supporter, in June 2013, President Obama announced his Climate Action Plan (hereinafter referred to as CAP), through which he attempted to adopt the Kyoto Protocol goals. This marked the start of the United States' aggressively and actively being involved in global climate-change cooperation with other countries. CAP consists of three goals: reducing domestic carbon pollution, preparing for climate change and leading international effort to address global climate change. The first goal of carbon reduction, according to a White House Report,<sup>56</sup> aims to cut net GHG emissions by 26-28% below 2005 levels by 2025. The Obama Administration finally announced a goal of 32% carbon reduction from 2005 levels by 2030 according to the

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<sup>54</sup> See supra note 41.

<sup>55</sup> See supra note 42.

<sup>56</sup> See Office of the Press Secretary, The White House, *U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation*, <https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c> (accessed on July 7, 2020).



Environmental and Energy Study Institute.<sup>57</sup> These settled targets founded a basis for the United States to get involved in PA and constitute the United States' National Determined Contribution.

## 4.6 China's Climate Change Policy & Targets since 2006

China's Twelfth Five-Year Plan carries on its clean energy mission to create a low-carbon society. Green development is one of the priorities of the Twelfth Five-Year Plan,<sup>58</sup> and focuses on both energy-savings and emission-reductions. It also serves as a guidebook to introduce incentives to promote resource conservation and reduce the consumption of coal and other fossil fuels.

In China's GHG Control Work Plan and Power Sector Development, the Twelfth Five-Year Plan, the targets and goals of emissions and environmental protection are summarized as a 16% reduction in energy intensity (energy consumed per unit of GDP), 17% cut in carbon intensity (carbon emitted per unit of GDP) and a boost in non-fossil energy sources to 11.4% of primary energy consumption by the end of 2015 (State Council 2011).<sup>59</sup> Besides the general targets for a national-wide average, the plan also adjusts the reasonable goals for different provincial areas. The provinces are classified into four groups: coastal developed, developed, central, and western.

China's GHG Control Work Plan and Power Sector Development, the Thirteenth Five-Year Plan released in early November 2016 is a sub-plan that focuses on controlling GHG emissions, environmental protection, and the development of power (State Council 2016).<sup>60</sup> This plan reaffirms that China will continue to commit and devote itself to combat global climate change. The primary goal of China in the next five years is to reduce China's carbon intensity (CO<sub>2</sub> emissions per unit of GDP) by 18% by 2020 compared to 2015. In order to specify and clarify China's goal, this work plan sets out several targets to control and reduce GHG emissions: increasing non-fossil energy to 15% and increasing forest stock volume and coverage to 16.5 billion cubic meters, or 23.04 %.

Compared with the Twelfth Five-Year Plan, the Thirteenth Five-Year Plan marks the first time that a target for coal consumption has been established, whereby by 2020 coal consumption has been restricted to around 4.2 billion tons. The GHG Control Work Plan also reiterates that the regions and cities where air pollution are severe, should continue to reduce their coal consumption. The specific reduction goal is 10% compared with 2015 by 2020 for Beijing, Tianjin, Hebei, Shandong, Henan and the Pearl River Delta; 5% for Shanghai, Zhejiang, Jiangsu, and Anhui. In all the regions and cities, the goal is a reduction by 140 million tons by 2020. In the recently published Fourteenth Five-Year Plan, China has committed new targets of further reducing carbon-intensity and reaching carbon emission peak by 2030. Chinese President Xi Jinping has also

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<sup>57</sup> See Environmental and Energy Study Institute, *Fact Sheet: Timeline of Progress Made in President Obama's Climate Action Plan*, <http://www.eesi.org/papers/view/fact-sheet-timeline-progress-of-president-obama-climate-action-plan> (accessed on July 9, 2020).

<sup>58</sup> See State Council of the People's Republic of China, *Recommendations of the Central Committee of the Communist Party of China on the formulation of the "Twelfth Five-Year Plan" of October 29, 2010*, [http://www.gov.cn/jrzq/2010-10/29/content\\_1733575\\_2.htm](http://www.gov.cn/jrzq/2010-10/29/content_1733575_2.htm) (accessed on June 29, 2021).

<sup>59</sup> Ibid.

<sup>60</sup> See State Council of the People's Republic of China, *Recommendations of the Central Committee of the Communist Party of China on the formulation of the "Thirteenth Five-Year Plan" of October 29, 2015*, [http://www.gov.cn/xinwen/2015-11/03/content\\_2959432.htm](http://www.gov.cn/xinwen/2015-11/03/content_2959432.htm) (accessed on June 29, 2021).

proclaimed that China will try to achieve carbon neutrality by 2060. All these ambitious goals and targets indicate the steadfast position of China's climate policies.

## 4.7 Comparison between China and the United States' Climate Policy

China and the United States have different configurations for using energy. China uses a large percentage of its fuel for developing industries, while the United States' carbon emissions come mainly from its transportation accounts, which is three times greater than China's. Therefore, it is reasonable for two countries to set different targets of their climate policy, especially with regard to carbon emissions goals. China focuses on reducing coal consumption and setting higher standards for industrial energy efficiency, particularly for power plants and factories. On the other hand, the United States focuses on how to reduce carbon emissions in the transportation sector (refer to Table 1).

**Table 1: Key Climate Policy Indicators Comparison between the United States and China**

	The United States	China
Peak of Emission	2025	2030
CO <sub>2</sub> Reduction	26-28% (32% by 2030)	20% (15% by 2020)
Non-Fossil Resources	19%	20%
Similarity	Neither country has plans to stop burning coal, yet both countries commit to reduce GHG emissions.	

Compiled by the author from government reports

Due to the different political systems in the United States and China, they have relatively converse ways of achieving these goals.<sup>61</sup> The United States system is a bottom-up method that heavily relies on state governments. Each state and other sub-national sectors have launched major targets to reduce carbon pollution. China, however, is a highly centralized governing system, and has a strong ability to enforce policies at all levels of government. To put it differently, China's top-down structure gives it a greater ability to implement its policies when compared with the federalist structure of the United States.

Both countries formulate policies in accordance with their own countries' development and political system. The United States and China are in different stages of development; the policy targets of the United States are ambitious but achievable, while China's goal is very conservative. The United States has already had a rapidly diminishing carbon footprint of about 10-15% compared with 2005, so achieving 26-28% by 2025 only requires the United States to facilitate existing trends. The implementation of policy in the United States, however, is becoming a problem as President Trump moved to undo President Obama's CPP. China's target of CO<sub>2</sub> reduction, on the other hand, is not difficult to achieve because it sets its supplementary goal at 15% by 2020. Therefore, it is not a huge burden for China to achieve an extra 5% in ten years from 2020 to 2030. In that sense, the national determined contribution targets made by China or the United States were feasible until President Trump announced the withdrawal and took no further steps.

<sup>61</sup> See Xianchun Tan & Henry Lee, *Comparative Assessment of China and U.S. Policies to Meet Climate Change Targets* (2017), <https://www.belfercenter.org/publication/comparative-assessment-china-and-us-policies-meet-climate-change-targets> (accessed on July 9, 2020).

## 4.8 Implications for China's Climate Position

China's position in dealing with global climate change has not only been consistent but also become incrementally stronger. Increasing energy efficiency and reducing carbon emission have been written into China's national policy development framework, known as Five-Year Plan. In the Twelfth Five-Year Plan, there is a 16% reduction of energy intensity (energy consumed per unit of GDP) and 17% carbon intensity (carbon consumed per unit of GDP) reduction. In the following Thirteenth Five-Year Plan, the Chinese government aims to have its carbon intensity reduced further to 18% by 2020 compared with 2015 levels, and increase non-fossil energy to 15% of the total energy matrix. Most recently, Chinese President Xi Jinping proclaimed at the World Economic Forum in Davos this January that PA is "hard won" and will remain in force. Chinese Premier Li Keqiang, in a joint press conference with his German counterpart Angela Merkel, said that tackling climate change has already become a global consensus, and China will continue to work steadfastly to implement the commitment of PA, by adopting a green, low-carbon and sustainable development strategy. Furthermore, Foreign Ministry spokesman of China remarked at a news briefing that China will stick to its pledges regardless of how other countries' climate policies change.<sup>62</sup>

Many people believe that China will seize the leading role in the climate change platform when the United States is out of PA. As was observed by Barbara Finamore, "China wants to take over the role of the United States as a climate leader, and it has been written into the five-year plans by the Chinese government." Ms. Hilton said "There are clear differences between the Chinese approach and the Trump Administration on climate change. While the Trump Administration seems to believe that action on climate change is a waste of money and threatens jobs in the United States, China sees investment in climate-related action as essential to secure a safe and prosperous future for Chinese citizens, as well as a strategic opportunity to develop and supply the technologies of the future."<sup>63</sup>

China's climate change pledge and determination aims at fulfilling domestic demands with the transformation of economic development pattern. Due to the heavy fossil-dependency of the energy matrix, by having a strong carbon reduction commitment, China can also impose more pressure on domestic energy transformation to cleaner forms, which would mitigate the already pressing air pollution problem in the many Chinese cities.

Energy transformation from high carbon to low carbon has already proven to be beneficial for China. For instance, China's coal consumption has declined for three years in a row with 2.9% in 2014, 3.7% in 2015, and 4.7% drop in 2016 according to governmental statistics. Though fossil energy still makes up 62% of China's energy matrix, renewable energy like solar and wind capacity has risen 82% and 13% respectively through to 2016. All these renewables contribute to nearly 20% of China's energy needs, and ultimately facilitate GHG emissions reductions.<sup>64</sup>

Additionally, many Chinese cities are choked by some of the worst air pollution in the world. The coined word "airpocalypse" is used to describe the scale and

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<sup>62</sup> See Edward Wong, *China Poised to Take Lead on Climate After Trump's Move to Undo Policies*, the New York Times, para.7, <https://www.nytimes.com/2017/03/29/world/asia/trump-climate-change-par-is-china.html> (accessed on March 21, 2020).

<sup>63</sup> Ibid.

<sup>64</sup> See Robert B. Jackson & Josep G. Canadell et al., *Reaching peak emissions*, 6(1) Journal of Nature Climate Change 6, 7-10 (2015).

seriousness during smog breakouts in mega-cities. In the winter of 2012-2013, over 70% of China's 74 largest cities saw their air pollutant (e.g. PM 2.5) levels rise out of the charts, and a thick smog breakout in the winter of 2013 was estimated to have contributed to at least 90,000 deaths and sickened hundreds of thousands or more.<sup>65</sup> It is found that the smog in the East China Plain has a positive correlation with global warming, so reducing CO<sub>2</sub> can be part of the solution to the air crisis haunting many Chinese cities, and the health concerns that come with it.<sup>66</sup>

Therefore, China has both domestic and international interests and tangible gains by continuing its Paris pledge despite the United States' action regarding PA. Needless to say, if by any change, the Trump Administration decided to continue with PA, the combination of the world's largest two carbon emitting countries and super economic powers would, without any doubt, contribute significantly to the global GHG emissions targets, which would eventually benefit the global community as a whole. Yet after President Trump's announcing of withdrawing from PA, China responded with a strong position on PA, which not only demonstrates China's determination on domestic energy and economy structure reform, but further showcases China, as the biggest carbon emitting country, shoulders its international responsibilities. To sum up, the core notion of China's climate change policy will be continuing towards transformation of economic development pattern, and under the commitment of PA, to promote its international reputation and position in the global climate governance.

## 5. Conclusion

Climate change is one of the biggest challenges that the world face today, there is and should be no escape from the "common but differentiated responsibilities" of all countries and peoples. Effective global climate governance particularly requires the major powers' engagement, participation, and commitment. However, in real life politics, it conflicts with national interests, political maneuvers and hegemonic competitions across the world. From the early 1990s to the present, despite the success of UNFCCC, Kyoto Protocol and the growing global consensus on climate change, the United States' climate position and policies have been torn apart by its domestic factors such as leaders' perceptions of skepticism, partisan struggles, certain civil society and interest groups, as indicated by the withdrawal from PA and its long-standing conservative values from the Congress. There are, arguably, economic benefits and political gains for President Trump's withdrawal proposals. However, there are also potential economic losses associated with the back peddling of President Obama's climate policy initiatives which could have provided larger energy scale and coverage through the renewable sectors and scientific communities.

Despite the many displays of faith by countries like China, France, Germany, Britain and India representing the majority of GHG emitting countries globally, it is difficult to foretell for certain a country's position and when there will be a conflict of interests or skepticism from its executive branch. Some people pinned their hope on the United States' presidential election in 2020 for a Democrat win. If it didn't deal with the fundamental influences of the United States' climate policy, PA withdrawal would always be on replay.

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<sup>65</sup> See Eli Kintisch, *Why is China's smog so bad?*, <https://www.sciencemag.org/news/2017/03/why-china-s-smog-so-bad-researchers-point-far-away-melting-arctic> (accesses on December 13, 2018).

<sup>66</sup> See Yufei Zou & Yuhang Wang et al., *Arctic sea ice, Eurasia snow, and extreme winter haze in China*, 3(3) Science Advances 1, 1-8 (2017).

However, hope is not yet lost. As the bottom-up requests for climate-friendly governance grow in the United States, and millennials incrementally make their voices heard, once enough synergies are generated between different environment-friendly stakeholders, citizens, civic groups and politicians, people's wish will be reflected in the United States, one of the biggest liberal democracy in the world.

The application of neoclassical realism theory provides a useful tool to analyze the factors that affect the United States' climate policies such as "leader image and perception", "political institution and partisanship", "civil society and interest group". In a way, the Biden Administration's current shifted-back climate position indicates the validity of the analyzed factors.

# Clean Energy Transition in Emerging Economies of Asia and Africa -- A New Concept of Transnational Collaboration in Nuclear Energy

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**Abstract:** In 2019, unprecedented extreme weather conditions occurred in several parts of the world as the temperature of the earth's surface hit a record high. This deterioration of environmental conditions can largely be attributed to rise in emissions resulting from high energy demand. Renewable energy sources and nuclear power met the majority of this growth in demand. Still, generation from coal and gas-fired power plants has increased considerably, continuing to ramp up emissions. While an effort globally is needed, developing nations are a critical part of reducing emissions. However, in many developing countries in Southeast Asia and Sub-Saharan Africa, the bigger question is to ensure electricity supply, as the nations in those regions go through rapid industrialization and population growth. When incorporated in the grid with renewable energy sources, nuclear energy offers a workable option. This paper seeks to demonstrate the importance of nuclear energy investment in these regions and highlight some of the barriers to the same. The goal of this paper is to emphasize the range of opportunities for collaboration between nuclear technology vendors in these regions for facilitating clean energy transition and to also highlight some of the legal barriers to implementation of nuclear power projects there.

**Keywords:** Climate Change; Energy Investment; Clean Energy Transition; Nuclear Energy; Renewable Energy; Sustainable Development

## 1. Introduction

Developing nations in Southeast Asia (Thailand, Philippines, Malaysia, Indonesia, and Vietnam) and Sub-Saharan Africa (Ghana, South Africa, Nigeria, and Kenya) have shown inclination to embark on their nuclear power programs to support growing energy demand and reduce emissions. However, while these nations have continued to show strong interest in nuclear energy, there are several barriers to incorporation of nuclear energy into their grids. Amongst these barriers are legal issues that affect implementation of nuclear power projects. This paper explains why emerging economies in Sub-Saharan Africa and Southeast Asia are looking to integrate nuclear energy in their grid, while also delving into the legal challenges to the same.

This paper offers two major arguments, firstly that nuclear energy has a significant role to play in the decarbonization of the energy sector, secondly that there are legal barriers, especially civil nuclear liability stand in the way of implementation of nuclear power projects. Lastly, this paper explores how the current legal framework on civil nuclear liability needs to evolve to adapt to provide for nuclear power projects in

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Southeast Asia and Sub-Saharan Africa. For this purpose, the first part of this paper seeks to review literature on the level of electricity access, the extent to which electricity generation in these regions is responsible for rise in emissions, and the significance of clean baseload sources like nuclear energy. The next section of this paper will study the development of the nuclear liability regime over the past half a century and how international legal instruments impact domestic nuclear energy policies, trade, and investment.

## 2. Nuclear Energy and Decarbonization of the Energy Sector

### 2.1 Deteriorating Environmental Conditions

The environmental conditions on earth are deteriorating, affecting ecosystems and even endangering the quality of life on earth. The threat of climate change is not merely a distant worry anymore but has started affecting the functioning of ecosystems, agricultural productivity and inhabitability of several regions.<sup>2</sup> There have also been several other serious consequences of climate change which have manifested themselves in the form of extreme weather conditions, unexpected natural disasters like devastating wildfires,<sup>3</sup> irreversible damage to biodiversity in the form of species extinction, etc.<sup>4</sup> Projections also indicate that extreme weather and temperature occurrences may well become the norm and render several areas irrevocably uninhabitable. This has amplified risks<sup>5</sup> to inhabitants of low-lying and coastal areas, millions<sup>6</sup> of whom have already faced displacement<sup>7</sup> as Pacific Island ecosystems can no longer sustain the communities dependent on them.<sup>8</sup> Fragile mountainous ecosystems of developing countries are amongst the most vulnerable to these overall

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<sup>2</sup> See United Nations Environment Program, *Climate Change and Human Rights*, pp.2-10 (2015), [https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate\\_Change\\_and\\_Human\\_Rightsclimate-change.pdf.pdf?sequence=2&isAllowed](https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightsclimate-change.pdf.pdf?sequence=2&isAllowed) (accessed on June 15, 2021).

<sup>3</sup> See Thomas Fuller & Kendra Pierre-Louis, *A Forecast for a Warming World: Learn to Live With Fire*, <https://www.nytimes.com/2019/10/24/climate/california-wildfires-climate-change.html> (accessed on February 15, 2021).

<sup>4</sup> See Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Global Assessment Report on Biodiversity and Ecosystem Services*, pp.66-8 (2019), <https://ipbes.net/global-assessment> (accessed on June 15, 2021).

<sup>5</sup> See the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, *Working Group II: Contribution to Climate Change, Part A: Global and Sectoral Aspects*, pp.368-70 (2014), <https://www.ipcc.ch/report/ar5/wg2/full-report-global-aspects/> (accessed on June 15, 2021).

<sup>6</sup> See Office of the United Nations High Commissioner for Refugees, *Human Mobility in the Context of climate change: Recommendations from the Advisory Group on Climate Change and Human mobility*, p.9 (2015), [https://www.iom.int/sites/default/files/migrated\\_files/pbn/docs/Human-Mobility-in-the-context-of-Climate-Change.pdf](https://www.iom.int/sites/default/files/migrated_files/pbn/docs/Human-Mobility-in-the-context-of-Climate-Change.pdf) (accessed on June 15, 2021).

<sup>7</sup> See supra note 2.

<sup>8</sup> See Amy Louise, *Climate Change and Migration Issues in the Pacific*, p.1038 (2017), <https://www.iilo.org/dyn/migpractice/docs/261/Pacific.pdf> (accessed on June 15, 2021).

adverse effects of climate change.<sup>9</sup> Apart from that, even businesses report risks<sup>10</sup> to them posed by climate change at almost USD 1 trillion with the possibility of many of them occurring within the next 5 years.<sup>11</sup>

## 2.2 Need for Decarbonization of the Energy Sector

This deterioration of environmental conditions can largely be attributed to rise in emissions driven by high energy demand. The concentration of carbon emissions in 2018 was at its highest level in over 800,000 years, at 413 parts per million driven by higher energy demand.<sup>12</sup> Energy, including electricity generation, transport, and industry accounts for 76% of global greenhouse gas emissions.<sup>13</sup>

Renewables and nuclear power met the majority of the growth in demand. Still, generation from coal and gas-fired power plants has increased considerably, continuing to ramp up emissions.<sup>14</sup> China, India, and the United States accounted for 85% of the net increase in emissions. In Asia, on average coal thermal power plants are only 12 years old, with almost two more decades of operation still remaining in their lifecycles.<sup>15</sup>

## 2.3 Emissions from Electricity Sector in Developing Countries

As discussed above, in 2018 global energy-related CO<sub>2</sub> emissions went to a historic high, and the energy sector contributed to about two-thirds of this growth in emissions. However, for a more informed analysis, it is important to look at other sectors that contribute to emissions as well.

Apart from electricity, transportation and land-use cause significant emissions. Agriculture and other land use accounted for about 26% in 2018,<sup>16</sup> and as of 2019, transportation was responsible for 24% of direct CO<sub>2</sub> emissions from fuel combustion.<sup>17</sup>

What makes energy in particular an important part of the problem is the rate of emissions growth from the sector. Between 1960 and 2014 emissions from electricity

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<sup>9</sup> See World Health Organization Discussion Paper, *Our Planet, Our Health, Our Future Human health and the Rio Conventions: biological diversity, climate change and desertification*, <https://www.who.int/publications/i/item/human-health-and-the-rio-conventions> (accessed on February 15, 2021).

<sup>10</sup> See Gianfranco Gianfrate, *Future-Proof Your Climate Strategy*, 98(3) Harvard Business Review 86, 97 (2019).

<sup>11</sup> See Daily CO<sub>2</sub> Reporter, *Carbon Disclosure Project - Global Climate Change Analysis*, <https://www.docin.com/p-2118983593.html> (accessed on February 15, 2021).

<sup>12</sup> See CO<sub>2</sub>-earth, *Daily CO<sub>2</sub>*, <https://www.co2.earth/daily-co2> (accessed on November 5, 2019).

<sup>13</sup> See the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, *Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014)*, <https://www.ipcc.ch/report/ar5/syr/> (accessed on June 15, 2021).

<sup>14</sup> See International Energy Agency, *Global Energy & CO<sub>2</sub> Status Report*, <https://www.iea.org/data-and-statistics/data-browser/?country=WORLD&fuel=CO2%20emissions&indicator=CO2BySource> (accessed on March 3, 2021).

<sup>15</sup> Ibid.

<sup>16</sup> See J. Poore & T. Nemecek, *Reducing Food's Environmental Impacts through Producers and Consumers*, 360(6392) Science 987, 992 (2018).

<sup>17</sup> See supra note 14.



generation nearly doubled, constituting about 49% of global emissions.<sup>18</sup> Between 2010 and 2018, as also mentioned above, increase in emissions was driven by higher energy consumption influenced by economic and weather conditions globally. In 2019 however, global energy-related emissions flattened at around 33 Gigatonnes, resulting in large part from reduction in emissions from the power sector in advanced economies as usage of renewable energy sources expanded, and dependence of coal reduced by switching to natural gas, as well as higher nuclear power output particularly in Korea and Japan.<sup>19</sup> Advanced economies mentioned here constitute developed nations that the International Monetary Fund in its World Economic Outlook has classified as advanced on the basis of mainly their per capita income, export diversification, and overall integration into the global financial systems.<sup>20</sup>

Yet, projections show that the demand for electricity will rapidly increase in emerging economies as they become more industrialized. Of course, it still remains to be seen what the global electricity demand will look like in the future as several economies have at the moment come to a standstill due to the COVID-19 pandemic and as a result electricity demand has declined.<sup>21</sup> In response to this decline in electricity demand due to the COVID-19 pandemic, global CO<sub>2</sub> emissions are expected to reduce by 8% to levels of 10 years ago, resembling a similar reduction from the 2009 financial crisis. However, the rebound in emissions may be larger than the decline, unless significant investment is made towards clean energy infrastructure as part of economic recovery efforts.<sup>22</sup>

While the United States, China and the Asia Pacific region as of 2017 were the biggest emitters, between 1998 and 2019 emissions from non-advanced economies grew about three-fold from 9.2 Gigatonnes to 22 Gigatonnes. Emissions from advanced economies only had slight fluctuations and remained the same as they were in 1990 at 11.3 Gigatonnes.<sup>23</sup> Further, between 2018 and 2019 while emissions from the power sector declined in European Union countries, Japan and the United States owing to a 1.3% drop in demand, they increased to about 400 Mt CO<sub>2</sub> in the rest of the world with almost 80% of the increase coming from Asia.<sup>24</sup> The concentration of emissions in these regions can be explained by their rapid economic development. Trends show that countries that have been successful in accelerating economic progress have also

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<sup>18</sup> See Hannah Ritchie & Max Roser, *CO<sub>2</sub> and Greenhouse Gas Emissions*, <https://ourworldindata.org/co2-and-other-greenhouse-gas-emissions#citation> (accessed on March 3, 2021).

<sup>19</sup> See supra note 14.

<sup>20</sup> See International Monetary Fund, *World Economic Outlook Database*, <https://www.imf.org/en/Publications/SPROLLS/world-economic-outlook-databases#sort=%40imfdate%20descending> (accessed on March 3, 2021).

<sup>21</sup> See Faith Birol, *The Coronavirus Crisis Reminds us that Electricity is more Indispensable than ever*, <https://www.linkedin.com/pulse/coronavirus-crisis-reminds-us-electricity-more-than-ever-fatih-birol> (accessed on March 3, 2021).

<sup>22</sup> See International Energy Agency, *Global Energy Review*, at p.4 (2020), <https://www.iea.org/reports/global-energy-review-2020> (accessed on June 15, 2021).

<sup>23</sup> See International Energy Agency, *Energy related CO<sub>2</sub> emissions, 1990-2019*, <https://www.iea.org/data-and-statistics/charts/energy-related-co2-emissions-1990-2019> (accessed on March 3, 2021).

<sup>24</sup> See International Energy Agency, *Change in energy related CO<sub>2</sub> emissions by region, 2018-2019*, <https://www.iea.org/data-and-statistics/charts/change-in-energy-related-co2-emissions-by-region-2018-2019> (accessed on March 3, 2021).

significantly increased their per-capita emissions in doing so.<sup>25</sup> These emerging economies, with rapidly developing industrial sectors and increased electrification, are expected to greatly contribute to higher energy demand at about 2% per year, and it is projected that between 2018 to 2050, purchased electricity will be the fastest growing fuel consumed in these countries primarily in the developing world.<sup>26</sup>

## 2.4 Growing Energy Demand and Sustainable Development

Mindful of the above, all member states of the United Nations in 2015 adopted the 2030 Agenda for Sustainable Development under auspices of the United Nations which includes 17 Sustainable Development Goals echoing the agenda adopted at the 1992 Earth Summit held in Rio de Janeiro. The sustainable development goals represent issues tackling what are essential to improve the quality of life globally such as poverty and health-care access. One of the 17 Sustainable Goals adopted is affordable clean energy.<sup>27</sup> Since 1992, the global energy access has risen from 76% to 88.84% and the level of energy access in Sub-Saharan Africa stands at 44% with just over two-fifths of the population in Sub-Saharan Africa having access to electricity.<sup>28</sup>

Addressing climate change while advancing global well-being is regarded as one of the key challenges of the twenty-first century, and clean energy production is vital for surmounting it.<sup>29</sup> Currently, about 840 million people remain without access to electricity.<sup>30</sup> In 2019, even with great advancements and innovation in clean energy technology, it is a grim statistic that about 10.5% of the global population still remains without electricity. Lack of energy access has far-reaching effects for both a nation's overall economic development, and for the environment since the population without electricity access ends up using polluting fuels like fuelwood, charcoal and kerosene to meet their needs, thus contributing to emissions.<sup>31</sup>

Developing countries in Asia and Africa account for about two-thirds of the global electrification deficit and four-fifths of the global deficit in access to non-solid fuels,

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<sup>25</sup> See Jan Christoph Steckel & Gregor Schwerhoff et al., *Enabling Low-Carbon Development in Poor Countries*, <https://link.springer.com/chapter/10.1007/978-3-319-48514-03> (accessed on March 4, 2021).

<sup>26</sup> See International Energy Agency, *World Energy Outlook 2019*, at p.438, <https://iea.blob.core.windows.net/assets/98909c1b-aabc-4797-9926-35307b418cdb/WEO2019-free.pdf> (accessed on March 4, 2021).

<sup>27</sup> See United Nations Population Fund, Preamble to Transforming Our World: the 2030 Agenda for Sustainable Development, United Nations General Assembly A/RES/70/1, <https://www.unfpa.org/resources/transforming-our-world-2030-agenda-sustainable-development> (accessed on June 15, 2021).

<sup>28</sup> See Blimpo Moussa P. & Cosgrove-Davies Malcolm, *Electricity Access in Sub-Saharan Africa Uptake, Reliability, and Complementary Factors for Economic Impact*, Africa Development Fund, World Bank 2019.

<sup>29</sup> See Stefan Bakker & Mark Zuidgeest et al., *Transport, Development and Climate Change Mitigation: Towards an Integrated Approach Transport Reviews*, 34(2) *Transport Reviews* 335, 355 (2014).

<sup>30</sup> See supra note 14.

<sup>31</sup> See supra note 11.

and account for nearly 80% of people across the world living without access to energy.<sup>32</sup> These nations are classified as high-impact countries by the International Energy Agency (hereinafter referred to as IEA),<sup>33</sup> and represent countries with the highest gaps in access to electricity and clean cooking. While progress in all countries is important, achievement of the global sustainability goals depends heavily on the progress made in high-impact countries that have a particularly large effect in aggregate global performance.

Achieving the goal of providing sustainable energy access demands energy investments to increase significantly.<sup>34</sup> A United Nations Sustainable Energy for All Initiative study shows that annual investment of USD 52 billion is needed to meet universal electrification by 2030. Yet, finance commitments for electricity in these high-impact countries has not increased sufficiently. Another Sustainable Energy for all Initiative study from a year later to the one mentioned above reveals that out of the USD 36 billion in total finance for electricity access in 2017, only USD 12.6 billion is estimated to support new access for households. This study also underlines the importance of making non-coal fired or fossil fuel power generation as bigger parts of the energy mix with increased investment in clean baseload sources of energy.<sup>35</sup>

In Africa, states grapple with grave power infrastructural deficit requiring over \$90 billion in investment. Together, 48 countries that form Sub-Saharan Africa have only 170 Gigawatts in installed capacity generation.<sup>36</sup> This renders approximately 600 million people in Africa without electricity. On the other hand, while in Southeast Asia energy access is much better, most of the grid comprises of polluting fossil fuels. This is because many developing countries face the tough decision of having to burn polluting fossil fuels to meet their energy demands while it is projected that their combined energy demand will increase by 45% and their share of global demand from 64% to 70%.<sup>37</sup> Philippines, India and Bangladesh are the top three countries receiving financing commitments for coal, with Kenya coming in fourth due to one large investment commitment up to \$1 billion between 2015 and 2016. While fossil fuel

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<sup>32</sup> See Federico Mazza & Chavi Meattle et al., *Energizing Finance: Understanding the Landscape, 2018: Tracking Finance for Electricity and Clean Cooking Access in High-Impact Countries*, Sustainable Energy for All and the Climate Policy Initiative, p.10 (2018).

<sup>33</sup> Afghanistan, Angola, Bangladesh, Burkina Faso, Congo (DR), Ethiopia, India, Kenya, Korea (DPR), Madagascar, Malawi, Mozambique, Myanmar, Niger, Nigeria, Philippines, Sudan, Tanzania, Uganda, and Yemen for electricity. Bangladesh, China, Congo (DR), Ethiopia, India, Indonesia, Kenya, Korea (DPR), Madagascar, Mozambique, Myanmar, Nepal, Nigeria, Pakistan, Philippines, Sudan, Tanzania, Uganda, and Vietnam for access to clean cooking.

<sup>34</sup> See J. Corfee-Morlot & P. Parks et al., *Achieving Clean Energy Access in Sub-Saharan Africa*, p.21 (2019), <https://www.oecd.org/environment/cc/climate-futures/Achieving-clean-energy-access-Sub-Saharan-Africa.pdf> (accessed on June 15, 2021); Chavi Meattle & Morgan Richmond et al., *Energizing Finance: Understanding the Landscape* (2020), <https://www.climatepolicyinitiative.org/publication/energizing-finance-understanding-the-landscape-2020/> (accessed on June 15, 2021); World Bank, *Tracking SDG 7: The Energy Progress Report*, p.7 (2019), <https://trackingsdg7.esma.p.org/> (accessed on June 15, 2021).

<sup>35</sup> Ibid.

<sup>36</sup> See United Nations Economic Commission for Africa, *Accelerating SDG 7 Achievement Policy Brief 18: Achieving SDG 7 in Africa* (2018), <https://sustainabledevelopment.un.org/content/documents/17565PB18.pdf> (accessed on June 15, 2021).

<sup>37</sup> See International Energy Agency, *International Energy Outlook 2018*, *Southeast Asia Energy Outlook 2019* and *Africa Energy Outlook 2019*.

energy-based projects contribute to increasing electricity supply into grids, they do not benefit those living away from the power lines, and these facilities lock in high-carbon assets for 30 years or more and have significant impact on the planet.<sup>38</sup>

## 2.5 Decarbonization through Grid Diversification

While renewables significantly contribute to decarbonization, they are intermittent in nature and need to be combined with a clean baseload source for meeting energy demand.<sup>39</sup> The IEA in its 2018 World Energy Outlook predicted power output to soar by 140 percent by the middle of the century. Currently, as aforementioned countries rely heavily on fossil fuels to satisfy their energy needs, which though cheap in monetary terms, impose a heavy cost on the planet. For example, the average estimated levelized costs per unit of output<sup>40</sup> of coal in India is 55.7 dollars per Megawatthour (hereinafter referred to as \$/MWh)<sup>41</sup> in comparison with other baseload sources like 70 \$/MWh for nuclear, and 95 \$/MWh for natural gas.<sup>42</sup> Given its low price, coal has continued to be India's largest domestic source of electricity generation.<sup>43</sup> However, as of 2017 regardless of being cheap, coal caused 14.57 billion tons in global carbon emissions accounting for around 40% in total of all fuel-based emissions.<sup>44</sup> Thus, like many other developing nations in Asia, India is rapidly moving to increase the share of renewable energy in its energy mix especially with solar which remains quite cheap in the nation at 45 \$/MWh.<sup>45</sup> Yet, unless a clean baseload source of energy is made part of the energy mix, it would not be possible to effectively decarbonize electricity generation.<sup>46</sup>

Literature on clean energy transition shows that nuclear energy as a zero-carbon baseload source of energy if made a greater part of the energy mix alongside

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<sup>38</sup> Ibid.

<sup>39</sup> See International Renewable Energy Agency, *Planning for the Renewable Future: Long-term Modelling and Tools to Expand Variable Renewable Power in Emerging Countries*, p.33 (2017), <https://www.irena.org/publications/2017/Jan/Planning-for-the-renewable-future-Long-term-modelling-and-tools-to-expand-variable-renewable-power> (accessed on June 15, 2021); Xing Luo & Jihong Wang et al., *Overview of current development in electrical energy storage technologies and the application potential in power system operation*, 137(1) Applied Energy 511, 536 (2015); Henrik Zsiboracs & Nóra HegedűsnéBaranyai et al., *Intermittent Renewable Energy Sources: The Role of Energy Storage in the European Power System of 2040*, 8(7) Electronics 729, 729 (2019).

<sup>40</sup> Levelized cost of electricity (LCOE) refers to the estimates of the revenue required to build and operate a generator over a specified cost recovery period.

<sup>41</sup> See International Energy Agency, *Levelised cost of electricity LCOE for solar PV and coal-fired power plants in India in the New Policies Scenario, 2020-2040*, <https://www.iea.org/data-and-statistics/charts/levelised-cost-of-electricity-lcoe-for-solar-pv-and-coal-fired-power-plants-in-india-in-the-new-policies-scenario-2020-2040> (accessed on March 10, 2021).

<sup>42</sup> See International Energy Agency, *World Energy Model (2019)*, <https://www.iea.org/reports/world-energy-model> (accessed on March 10, 2021).

<sup>43</sup> See International Energy Agency, *India 2020 Energy Policy Review*, at p.231 (2020), <https://www.oecd.org/publications/india-2020-9faa9816-en.htm> (accessed on June 15, 2021).

<sup>44</sup> See Hannah Ritchie & Max Roser, (2020)- "Energy", <https://ourworldindata.org/energy> (accessed on March 11, 2021).

<sup>45</sup> See supra note 39.

<sup>46</sup> See Energy Transitions Commission, *Reaching Net-Zero Carbon Emissions from Harder-to-Abate Sectors by Mid-Century*, <https://www.energy-transitions.org/publications/mission-possible/> (accessed on March 11, 2021).

renewables,<sup>47</sup> can help achieve decarbonization of energy, and also increase access to electricity. Over the past half a century, nuclear energy has helped avoid about 55 Gigatonnes of energy related emissions and in absence of more new projects or life-style extensions for nuclear facilities, emissions could rise about 4 billion tons.<sup>48</sup> As has also been seen from the recent example of Germany, where most of the energy deficit from scrapping nuclear was supported by increased coal usage which in turn resulted in increase in emissions.<sup>49</sup> Further, the fastest any country has ever managed to decarbonize outside of an economic collapse was at the rate of 4.5 percent per year, which France achieved during its nuclear energy buildup.<sup>50</sup> Countries like India, Turkey, China, Romania and the United Arab Emirates are therefore making significant progress to expand their civil nuclear power programs. Similarly, nations in Southeast Asia and Sub-Saharan Africa too are showing strong interest in embarking on their nuclear power program and are also taking concrete steps to further this goal as discussed below.<sup>51</sup>

### 3. Energy Investment in Southeast Asia and Sub-Saharan Africa

#### 3.1 Southeast Asia

Developing Asia is home to around 700 million without access to electricity. Further, about 2 billion people lacking clean cooking facilities. In total, around 2.6 billion people lack access to clean cooking facilities globally, relying instead on solid biomass, kerosene or coal as their primary fuel for heat and cooking.

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<sup>47</sup> See Evelyne Bertel & Joop Van de Vate, *Nuclear energy & the environmental debate: The context of choices*, IAEA Bulletin, pp.2-7 (1995); McMillan Colin A. & Boardman Richard et al., *Generation and Use of Thermal Energy in the U.S. Industrial Sector and Opportunities to Reduce its Carbon Emissions*, p.30 (2016), <https://www.osti.gov/biblio/1334495-generation-use-thermal-energy-industrial-sector-opportunities-reduce-its-carbon-emissions> (accessed on June 15, 2021); C. Bataille et al., *A review of technology and policy deep decarbonization pathway options for making energy-intensive industry production consistent with the Paris Agreement*, 187(3) Journal of Cleaner Production 960, 973 (2018); Stefan Lechtenbohmer & Lars J. Nilsson et al., *Decarbonising the energy intensive basic materials industry through electrification – Implications for future EU electricity demand*, 115(5) Energy 1623, 1631 (2016).

<sup>48</sup> See International Atomic Energy Agency, *Nuclear Power in a Clean Energy System* (2019), <https://www.iea.org/reports/nuclear-power-in-a-clean-energy-system> (accessed on March 21, 2020).

<sup>49</sup> See Stephen Jarvis & Olivier Deschenes et al., *The Private and External Costs of Germany's Nuclear Phase-Out*, National Bureau of Economic Research (2019), [https://www.nber.org/system/files/working\\_papers/w26598/w26598.pdf](https://www.nber.org/system/files/working_papers/w26598/w26598.pdf) (accessed on June 15, 2021).

<sup>50</sup> See Céline Guivarch & Stéphane Hallegatte, *2C or Not 2C?*, 23(1) Global Environmental Change 179, 192 (2013).

<sup>51</sup> See Reuters, *Russia's Rosatom, Rwanda sign deal to build nuclear science center*, <https://www.reuters.com/article/us-russia-rwanda-nuclear/russias-rosatom-rwanda-sign-deal-to-build-nuclear-science-center-idUSKBN1X32DV>; P. Burkhardt, *Russia's State-Owned Nuclear Giant Is Targeting Africa for its Growth*, <https://www.bloomberg.com/news/articles/2019-10-30/russia-s-rosatom-focuses-on-africa-for-its-nuclear-expansion>; Nechepurenko & A. Higgins, *Coming to a Country Near You: A Russian Nuclear Power Plant*, <https://www.nytimes.com/2020/03/21/world/europe/belarus-russia-nuclear.html>; The Moscow Times, *Russia Spreads Influence in Africa Using Nuclear Power— Reports*, <https://www.themoscowtimes.com/2019/08/29/russia-spreads-influence-in-africa-using-nuclear-power-reports-a67077>; S. Malo, *Russia and China back nuclear as a clean-power fix for Africa*, <https://news.trust.org/item/20190207065113-7swb3/> (accessed on March 21, 2020).

Countries in Southeast Asia have different levels of economic development, varying consumption patterns and resources. However, they share a common challenge of meeting their energy demand while also trying to reduce greenhouse gas emissions. Owing to rapid industrial growth and urbanization, Southeast Asia's energy demand has grown by 60% since 2000, at 6% each year which is fastest in the world. This increase in demand has been met largely by fossil fuel usage.<sup>52</sup>

Currently, despite the abundance of renewable energy potential, its share in Southeast Asia's energy mix remains low with Indonesia at 6.9%, Malaysia at 4.4%, Vietnam at 13.2%, and in the Philippines at 11.5%.<sup>53</sup> The energy mix in this region is dominated by oil contributing to 34% of energy production, gas at 22% and coal at 18%. Thus, about 80% of the aggregate energy mix of Southeast Asia consists of fossil fuels. While Southeast Asia is an important producer of oil, gas and coal, their domestic supply is declining, and it is projected that in 2040 this region will be spending about \$300 billion annually in importing their energy supply.<sup>54</sup>

It is also pertinent to note that Southeast Asia given its geographical position is one of the most vulnerable regions to the effects of climate change, especially its coastal nations. As a result of climate change, these coastal nations will experience increase in the average temperature, extreme rainfall events, ocean acidification and sea-level rise which can in turn lead to displacement of population.<sup>55</sup> Given this scenario, it's essential for Southeast Asia to explore non-polluting sources of baseload energy production. Hydropower is an important source of baseload energy for the region and while its output has quadrupled since 2000, Southeast Asia is still heavily dependent on energy related imports as demand for oil coal is projected to steadily increase.<sup>56</sup> For this reason, many nations in Southeast region are exploring their nuclear power programs.

The idea of nuclear energy is not entirely new to Southeast Asian countries. For example, Vietnam has been seriously considering embarking on its nuclear power plan since 1995 but financial constraints primarily have kept it from having its own nuclear

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<sup>52</sup> See International Energy Agency, *Southeast Asia Energy Outlook 2019*, p.89. [https://iea.blob.core.windows.net/assets/47552310-d697-498c-b112-d987f36abf34/Southeast\\_Asia\\_Energy\\_Outlook\\_2019.pdf](https://iea.blob.core.windows.net/assets/47552310-d697-498c-b112-d987f36abf34/Southeast_Asia_Energy_Outlook_2019.pdf) (accessed on June 15, 2020).

<sup>53</sup> See International Energy Agency, *Sustainable Development Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all*, <https://sdgs.un.org/goals/goal7> (accessed on March 21, 2020).

<sup>54</sup> See supra note 52.

<sup>55</sup> See Oppenheimer et al., *Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, International Panel on Climate Change Special Report on the Ocean and Cryosphere in a Changing Climate, p.321 (2019), <https://www.unep.org/resources/report/ipcc-special-report-ocean-and-cryosphere-changing-climate> (accessed on June 15, 2020); John Campbell & Olivia Warrick, *Climate Change and Migration Issues in the Pacific*, United Nations Economic and Social Commission for Asia and the Pacific (2014), <https://www.ilo.org/dyn/migpractice/docs/261/Pacific.pdf> (accessed on June 15, 2020); Justin T. Locke, *Climate Change-induced Migration in the Pacific Region: Sudden Crisis and Long-term Developments*, 175(3) *Geographical Journal* 171, 180 (2009); Koko Warner & Tamer Afifi et al., *Changing Climates, Moving People: Framing Migration, Displacement and Planned Relocation*, UNU-EHS Policy Brief, No.8 (2013), [https://i.unu.edu/media/migration.unu.edu/publication/229/Policybrief\\_8\\_web.pdf](https://i.unu.edu/media/migration.unu.edu/publication/229/Policybrief_8_web.pdf) (accessed on June 15, 2020); Carol Farbotko & Heather Lazrus, *The first climate refugees? Contesting global narratives of climate change in Tuvalu*, 22(2) *Global Environmental Change* 382, 390 (2011).

<sup>56</sup> Ibid.

power plant. Also, the Philippines now is strongly considering more nuclear on the grid and has been in talks with Russia about the same.<sup>57</sup>

The groundwork for expansion of civilian uses of nuclear energy in Southeast Asia was laid in 2009 when the International Atomic Energy Agency (hereinafter referred to as IAEA) began conducting its International Nuclear Infrastructure Review (hereinafter referred to as INIR) missions. These missions were aimed at evaluating and considering improvements to the national framework for introduction of nuclear power projects. This has now evolved into a promising trend of growing interest in nuclear energy in Southeast Asia and this was reflected in the signing of “Practical Arrangements” between IAEA and the Association of Southeast Asian Nations during IAEA’s yearly General Conference.<sup>58</sup> The Practical Arrangements lay out the framework for cooperation between these economies and IAEA on technical, legal and regulatory aspects of nuclear power projects. This may help resolve some major financial, regulatory and infrastructural issues that thwart the growth in civilian uses of nuclear energy.

Currently, Indonesia, Malaysia, Philippines, and Thailand are the frontrunners with sufficient infrastructure and financial capacity to bring nuclear energy into their mix. However, Malaysia, in spite of showing strong interest since 2012, recently abandoned its nuclear power plan.<sup>59</sup> The Philippines has on the other hand signed a Memorandum of Understanding with Rosatom in 2019 to explore nuclear energy as an option.<sup>60</sup> Additionally, Thailand and Indonesia are both actively working on their nuclear energy plans.<sup>61</sup>

### 3.2 Sub-Saharan Africa

Sub-Saharan Africa’s technical generation capacity potential is estimated to be 11,000 Gigawatts, largely from renewables.<sup>62</sup> Despite the resource potential and rising

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<sup>57</sup> See Asia’s Nuclear Energy Growth, *World Nuclear Association 2019*, <https://www.world-nuclear.org/information-library/country-profiles/others/asias-nuclear-energy-growth.aspx> (accessed on November 15, 2020).

<sup>58</sup> See Alex Nitzsche, *IAEA and ASEAN Strengthen Cooperation in Nuclear Science, Technology and Applications, and Nuclear Safety, Security and Safeguards*, <https://www.iaea.org/newscenter/news/iaea-and-asean-strengthen-cooperation-in-nuclear-science-technology-and-applications-and-nuclear-safety-security-and-safeguards> (accessed on September 16, 2019).

<sup>59</sup> As 2020 comes a-knocking, whither Malaysia’s nuclear power plan? See <https://www.malaymail.com/news/malaysia/2020/01/03/as-2020-comes-a-knocking-whither-malaysias-nuclear-power-plan/1824208> (accessed on November 15, 2020).

<sup>60</sup> See Press Service of Rosatom Overseas JSC, *Russia and the Philippines agreed to collaborate in the area of small modular reactors*, <https://www.rosatom.ru/en/press-centre/news/russia-and-the-philippines-agreed-to-collaborate-in-the-area-of-small-modular-reactors/> (Accessed on November 15, 2020).

<sup>61</sup> See Sanjayan Velautham et al., *Pre-Feasibility Study on the Establishment of Nuclear Power Plant in ASEAN*, p.38 (2018), <https://aseanenergy.sharepoint.com/PublicationLibrary/Forms/AllItems.aspx?id=%2FPublicationLibrary%2F2018%2FACE%20Publications%2FNRPAS%20%2D%20Pre%2DFeasibility%20Study%20on%20the%20Establishment%20of%20Nuclear%20Power%20Plant%20in%20ASEAN%2DFinal%20%28May%202018%29%2Epdf&parent=%2FPublicationLibrary%2F2018%2FACE%20Publications&p=true&originalPath=aHR0cHM6Ly9hc2VhbmVuZXJneS5zaGFyZXBvaW50LmNvbS86YjovZy9FYVg3MUdYUkwweExpeXVaeK9MSWs0VUJjbEhIY3I1M1l6a0RlcmhvY0xab1RBP3J0aW1lPVlYSmlJYU5HMIvN> (accessed on June 15, 2021).

<sup>62</sup> See Nkiruka Avila & Juan Pablo Carvallo et al., *The energy challenge in Sub-Saharan Africa: A*

demand, the current total electricity installed capacity in Africa is only around 170 Gigawatts.<sup>63</sup> Beyond an abundance of solar and wind energy resources, three of the ten-largest uranium resource-holders in the world (Namibia, Niger and South Africa) are in Sub-Saharan Africa.<sup>64</sup> However, a limiting factor in the region's electricity development is lacking an effective, technical, financing, and policy mechanism that enables the region to fully utilize these resources.<sup>65</sup>

The lack of energy access in Sub-Saharan Africa is also unique given that it has countries whose level of electrification is below what their income level would predict.<sup>66</sup> The electricity supply mix is dominated by coal at about 35 per cent, with South Africa being the biggest contributor by producing 90% of its energy requirement from coal. Access to electricity in Kenya stands at 75%, in Ghana and South Africa at 84.3% and 94.9% respectively, while Democratic Republic of Congo still stands at only 8.7%. Except for the Democratic Republic of Congo, these statistics don't particularly alarm. However, it appears far more concerning when talking in terms of the number of people without access to electricity, which stands at about 600 million given that Sub-Saharan Africa constitutes about 16% of the global population.

Beyond this, the access to clean cooking shows much worse statistics. In Ghana for example, only about 24% of the population has access to clean cooking, 15% in Kenya and only 3% in Congo.<sup>67</sup> Thus, these economies remain heavily reliant on polluting sources of energy. Also, despite the steady growth in clean energy investment, the share of renewables in their energy mixes remains quite low. For instance, the share of renewables in the energy consumption in Kenya stands at 3.5%, in Ghana at 13.7% (excluding hydro power), in Congo at 17.2%, South Africa at 3.3%.<sup>68</sup> The two major constraints to renewable energy production are the lack of infrastructural capacity and the issue of reliably meeting baseload energy demand.<sup>69</sup>

The above figures do not include hydropower because of the socio-economic and environmental effects of hydropower. While Africa offers immense scope for hydropower expansion, only about 11 percent<sup>70</sup> of hydropower capacity available there has so far been utilized.<sup>71</sup> Hydropower combined with nuclear energy constituting the largest carbon-free sources of electricity generation<sup>72</sup> and application of both hydro and nuclear in Africa is expected to accelerate in response to growing energy demand.<sup>73</sup> Yet, there are factors that inhibit development of hydropower including risk of floods,

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*guide for advocates and policy makers*, Oxfam Research Backgrounder, p.20 (2017), <https://s3.amazonaws.com/oxfam-us/www/static/media/files/oxfam-RAEL-energySSA-pt1.pdf> (accessed on June 15, 2021).

<sup>63</sup> See International Energy Agency, *Africa Energy Outlook 2019*, <https://www.iea.org/reports/africa-energy-outlook-2019> (accessed on June 15, 2021).

<sup>64</sup> Ibid.

<sup>65</sup> See supra note 28.

<sup>66</sup> See supra note 28.

<sup>67</sup> See supra note 36.

<sup>68</sup> See supra note 53.

<sup>69</sup> See supra note 38.

<sup>70</sup> See International Hydropower Association, *Hydropower Status Report*, p.57 (2019).

<sup>71</sup> See supra note 23.

<sup>72</sup> See supra note 48.

<sup>73</sup> See supra note 70.



damage to marine life, and displacement of local population which are especially amplified in certain regions already prone to flooding and landslides.<sup>74</sup> Beyond environmental concerns, hydropower projects are susceptible to cost overruns and construction delays.<sup>75</sup> These concerns are partly similar to concerns surrounding large-scale nuclear power as well.

The daunting level of commitment required to embark upon a nuclear power program and the lack of funding as mentioned above have significantly discouraged Sub-Saharan African economies from considering nuclear energy despite the fact that 57% of their population altogether is rendered without access to electricity. Interestingly, in 2018, IAEA-INIR mission to Nigeria found that while Nigeria was infrastructurally ready to expand its nuclear power program, many Sub-Saharan African grids were not yet ready for it. For example, in Kenya which depended heavily on diesel generators, the grid capacity currently stood at 2400 Megawatts while a country needed to have 10,000 Megawatts already in place to use 1000 Megawatts from a nuclear reactor.

Now however, there is renewed interest in seriously committing to a nuclear power project in Kenya, Ghana and South Africa with assistance from the China National Nuclear Corporation.<sup>76</sup> Additionally, there are also serious interests from Russia to invest in nuclear energy in Sub-Saharan Africa. However, it has own legal issues, for example recently an agreement between Russia and South Africa for adding 9600 Megawatts capacity with 10 nuclear reactors was ruled unlawful for lack of transparency and unfair tax incentives to Russia.<sup>77</sup>

## **4. Barriers to Nuclear Energy for Electricity Generation**

While there is considerable interest among Asian and African economies to utilize nuclear energy as a clean baseload source of electricity, and despite the fact that it has been utilized for electricity generation since the 1950s, commercial application of nuclear energy especially in developing economies presents some peculiar challenges. Major barriers include the high cost of building nuclear power plants, the time required to develop robust legal and regulatory frameworks, the long-term commitment required towards establishing a sustainable safety and non-proliferation culture, small grid sizes and lack of interconnections, and human resources capacity.<sup>78</sup>

### **4.1 Financial and Infrastructural Barriers**

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<sup>74</sup> See Ottmar Edenhofer & Ramón Pichs-Madruga et al., *Renewable Energy Sources and Climate Change* (2011), <https://www.ipcc.ch/report/renewable-energy-sources-and-climate-change-mitigation/> (accessed on June 15, 2021).

<sup>75</sup> See Laura Gil, *Is Africa ready for nuclear energy?* <https://www.un.org/africarenewal/magazine/august-november-2018/africa-ready-nuclear-energy> (accessed on June 15, 2021).

<sup>76</sup> Kenya is on course to develop nuclear energy, official says.

<sup>77</sup> See W. Roelf, *South African Court Declares Nuclear Plan With Russia Unlawful*, <https://www.reuters.com/article/us-safrica-nuclear-court/south-african-court-declares-nuclear-plan-with-russia-unlawful-idUSKBN17S25R> (accessed on March 22, 2021).

<sup>78</sup> See Lenka Kollar, *Newcomer countries face common challenges in nuclear infrastructure development* (2016), <https://www.iaea.org/newscenter/news/newcomer-countries-face-common-challenges-nuclear-infrastructure-development> (accessed on June 15, 2021).

Developing states face unique challenges and often lack the finances, institutional capacity, and physical infrastructure to support a large-scale, multibillion-dollar nuclear power plant project, even if the costs are spread out over several years. There is no precise way to measure whether a country can afford a nuclear power plant, especially since decisions may be driven by factors such as politics, national pride, energy security, industrialization strategy and proliferation risks. Although stretching a national budget to buy a nuclear power plant may in theory be possible, this always implies opportunity costs, since even development banks do not lend for nuclear energy projects, and private investors are likely to be wary. Despite this, the construction of nuclear power plants is set to continue at a steady rate in many countries in Asia, where India and China are considering adding over 30 more nuclear power plants to meet rising demand for energy. That said, large traditional nuclear facilities are generally extremely capital-intensive and expensive to build and maintain.<sup>79</sup> With advancements in nuclear reactor technology however, there may be lower-cost options for these economies.

Small Modular Reactors (hereinafter referred to as SMRs) are one such way to counter a lot of the issues associated with construction and maintenance of large-scale nuclear facilities.<sup>80</sup> Cost estimations for SMRs tend to be much different in comparison with large nuclear power plants.<sup>81</sup> The estimated cost of construction of SMRs is around USD 3 billion in contrast with the average of USD 9-12 billion for large nuclear facilities.<sup>82</sup>

SMRs are reactors that are much smaller in size producing less than 300 Megawatts.<sup>83</sup> Given their smaller size and reduced cost, SMRs can be a plausible option for several countries who are currently unable to afford embarking on a nuclear power program. In fact, the key driving forces of SMR development are providing flexible power generation and economic affordability.<sup>84</sup> SMRs are different in design from large nuclear facilities and have far fewer components resulting in reduction of cost. Further, the modularity of SMRs makes their production process more competitive by replacing the need for on-site deployment with much more economical centralized fabrication of

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<sup>79</sup> See International Atomic Energy Agency, *Financing Nuclear Power in Evolving Electricity Markets*, p.6 (2018), <https://www.iaea.org/sites/default/files/18/07/financing-np-0418.pdf> (accessed on June 15, 2021).

<sup>80</sup> See Organization for Economic Cooperation and Development-NEA, *Small Modular Reactors: Nuclear Energy Market Potential for Near-term Deployment*, pp.19-27 (2019), [https://www.oecd-nea.org/jcms/pl\\_14924/small-modular-reactors-nuclear-energy-market-potential-for-near-term-deployment](https://www.oecd-nea.org/jcms/pl_14924/small-modular-reactors-nuclear-energy-market-potential-for-near-term-deployment) (accessed on June 15, 2021).

<sup>81</sup> See International Atomic Energy Agency Vienna, *International Status and Prospects for Nuclear Power 2012*, [https://www.iaea.org/sites/default/files/gc56inf-6\\_en.pdf](https://www.iaea.org/sites/default/files/gc56inf-6_en.pdf) (accessed on March 22, 2021).

<sup>82</sup> See S. Kirshenberg et al., *Purchasing Power Produced by Small Modular Reactors: Federal Agency Options*, Department of Energy, p.66; Matthew Wald, *The Next Nuclear Reactor May Arrive Hauled by a Truck*, <https://www.nytimes.com/2013/04/25/business/energy-environment/the-next-nuclear-reactor-may-arrive-hauled-by-a-truck.html> (accessed on March 23, 2021).

<sup>83</sup> See International Atomic Energy Agency, *Deployment Indicators for Small Modular Reactors*, International Atomic Energy Agency TECDOC (2018), <https://www-pub.iaea.org/MTCD/Publications/PDF/TE-1854web.pdf> (accessed on June 15, 2021).

<sup>84</sup> See International Atomic Energy Agency, *Advances in Small Modular Reactor Technology Developments*, IAEA Advanced Reactors Information System (2020), [https://aris.iaea.org/Publications/SMR\\_Book\\_2020.pdf](https://aris.iaea.org/Publications/SMR_Book_2020.pdf) (accessed on June 15, 2021).

components, standardized design and mass production. Thus, SMRs can also provide power to smaller grids in contrast with the traditional large 1000 Megawatts reactors which require minimum grid capacity of 10,000 Megawatts that several emerging economies especially in Sub-Saharan Africa do not yet have.<sup>85</sup>

## **4.2 Legal Barriers**

Notwithstanding the above, safety, liability, and proliferation concerns have made the idea of deploying nuclear technologies in certain locations a highly sensitive topic. A plethora of reasons, notably the political instability in certain regions which make them susceptible to the threat of increased nuclear weapon proliferation, and the lack of local expertise necessary to run the technological intricacies associated with nuclear plants. For the purpose of this paper, we will look into how the issue of civil liability affects the application of advanced nuclear technology in developing countries. This is because nuclear power plants tend to be multi-billion dollar projects that involve various technological risks as has been seen in Chernobyl and Fukushima. So, an equitable international civil nuclear liability framework to manage the potential risks of transboundary nuclear damages is of great significance to making a decision to embark on them.

## **5. Civil Nuclear Liability Management -- Mitigating Risks through International Cooperation**

Currently, there is no uniform nuclear liability regime in Southeast Asia and Sub-Saharan Africa. Thus, there are no treaty relations between most nations pursuing their nuclear power programs in these two regions. The discussion below explores why this is problematic and also emphasizes the importance of having a clear domestic law, supported by a wider international instrument which binds nations to expedite claims settlement in the aftermath of a nuclear incident. This can be achieved by more cooperation in managing civil nuclear liability.

The law on civil nuclear liability is extremely complicated. The overall legal regime for nuclear liability consists of international conventions and domestic laws. Before doing a deep dive into the laws, it is important to first understand why specific laws need to be enacted to deal with nuclear liability and why there needs to be synchronization between laws of different countries.

The discussion here will deal with the peculiarity of the nuclear industry and liability management, as well as nuclear liability in cases of transboundary damage. Chernobyl clearly showed how far-reaching the effects of a nuclear accident can be and the level of specialized knowledge required to investigate claims of radiation damage. There was widespread damage suffered even in neighboring countries. In the aftermath of Chernobyl, victims from neighboring countries were left distraught as they found

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<sup>85</sup> See Laura Gil, *Is Africa Ready for Nuclear Energy? – Economic growth puts pressure on countries to go nuclear, but hurdles remain*, <https://www.iaea.org/newscenter/news/is-africa-ready-for-nuclear-energy> (accessed on September 3, 2018).

themselves faced with the challenge of seeking remedy through the Union of Soviet Socialist Republics' courts, because there was no reciprocity established between their countries and the Union of Soviet Socialist Republics to create binding obligation to compensate such victims in case of transboundary nuclear damage.<sup>86</sup> The principle of reciprocity<sup>87</sup> in international law implies that any benefits, favors or penalties granted by one state to the citizens of another should be returned by that state. It was finally agreed that it was not rational to make one state responsible for compensating victims from another state which would have no obligation for the same under similar circumstances.<sup>88</sup>

Despite the experience from Chernobyl today, and even after the Fukushima Daiichi nuclear incident, the law relating to international nuclear liability is extremely complex owing to the existence of different regimes. Subscribed to in different parts of the world and the lack of participation from several major nuclear power states.<sup>89</sup> This is highly problematic given that a nuclear accident has been seen to result in transboundary damage and lack of uniformity in liability rules may complicate claims settlement process for victims. Further, this lack of uniformity is a serious impediment to trade as it creates a lot of uncertainty for suppliers by making it difficult for them to accurately gauge the risk portfolio associated with pursuing new build in a particular country in the form of uncertainty about the nature and extent of liability. These issues will be discussed in greater detail later in this section.

Before analyzing the different treaties, it is imperative to understand the law of treaties to see the functionality of different international conventions and their role in shaping domestic law.

The foundation of the law of treaties lies in the principle of *pacta sunt servanda*.<sup>90</sup> This principle is enshrined in Article 26 of the Vienna Convention on the Law of Treaties which states that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'<sup>91</sup> However, while to be performed in good faith, it is ultimately upon sovereign states to determine the means they choose to fulfil their international obligations.<sup>92</sup> Thus, international law leaves it to the domestic legal order of a sovereign to determine how it gives effect to its treaty obligations in the domestic legal arena. However, whichever means a contracting state to a treaty adopts, it cannot invoke its internal law as justification for a failure to perform as per Article 27 of the Vienna Convention on the Law of Treaties.<sup>93</sup>

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<sup>86</sup> See Stephen G. Burns, *Reformed and reforming: Adapting the licensing process to meet new challenges*, 99(1) Nuclear Law Bulletin 7, 30 (2017).

<sup>87</sup> See Francesco Paris & Nita Ghei, *The Role of Reciprocity in International Law*, 36(1) Cornell International Law Journal 93, 100 (2003).

<sup>88</sup> Ibid.

<sup>89</sup> See N. Pelzer, *Facing the challenge of nuclear mass tort processing*, 17(1) Nuclear Law Bulletin 45, 45-60 (2018).

<sup>90</sup> See Hans Wehberg & Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39(2) The American Journal of International Law 180, 180-197 (1959).

<sup>91</sup> See Article 26 of Vienna Convention on the Law of Treaties (1980).

<sup>92</sup> See Mario Mendez, *The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts*, Oxford University Press, p.2 (2013).

<sup>93</sup> See Article 27 of the Vienna Convention on the Law of Treaties (1969).

There are two main approaches to align domestic law with an international instrument: the transformation approach and the incorporation approach. The transformation approach consists of adopting specific rules, through national legislation or regulations/ordinances to implement the provisions of an international instrument. Through this process, the rules stipulated in an international instrument are transformed into domestic law which can be enforced through the national administrative and judicial infrastructure of a state. The transformative approach is based on the ideas that a state while drafting national legislation, intends to ensure that all its obligations under treaties it is a party to, are implemented. Next, under the incorporation approach, there are two ways through which international treaties are brought into effect domestically.<sup>94</sup> The first way is through a constitutional or legislative provision which automatically makes treaties adopt a part of the national legislative framework. Another way is when ad hoc legislation<sup>95</sup> is required for each international instrument into force within the country by not mirroring the treaty but by just providing for it to be applicable.<sup>96</sup>

Now coming back to the discussion on liability conventions, the reason why these are so important is related to the discussion above about the disastrous impact of Chernobyl. As also mentioned above, the claims settlement process after Chernobyl was just as disastrous as the accident itself for victims. There was no specific law to specify the forum for claims, liable entity, and rights of victims in neighboring countries. To unpack, this problem was two-fold. First, the lack of specification in domestic law to deal with liability and claims in the aftermath of a nuclear accident, and second, the lack of treaty relations between neighboring countries (installation state as well as others states that suffer damage) to recognize and protect the rights of victims outside the territory of the state where accident occurred.

To remedy this, it has been recognized that having a comprehensive domestic law that defines liability for operating a nuclear installation, assigning the competent authority or forum for claims settlement, and other principles governing the nuclear industry are considered vital. International conventions on nuclear liability also play a role in this. They lay down certain basic principles of nuclear liability that then contracting states adopt in their domestic law. A comprehensive domestic legislation ensures two important things. Firstly, that all states especially neighboring states treat nuclear liability similarly in terms of amount liable parties etc., and that there is consensus in the claim settlement process. Secondly, that treaty relations are established between neighboring countries that may be affected by transboundary nuclear damage. There are several different ways to achieve these two objectives through international law and they will be discussed in greater detail below.

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<sup>94</sup> Also, certain international instruments contain provisions that identify a need for a State to enact national legislation. Examples of such instruments in nuclear law include the Vienna Convention on Civil Liability for Nuclear Damage, the Convention on the Physical Protection of Nuclear Material and the International Convention for the Suppression of Acts of Nuclear Terrorism.

<sup>95</sup> Ad hoc legislation is a law that is enacted especially for the purpose of making the provisions of an adopted treaty binding under domestic law.

<sup>96</sup> See Carlton Stoiber & Abdelmadjid Cherf et al., *Handbook on Nuclear Law*, p.20 (2010), [https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1456\\_web.pdf](https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1456_web.pdf) (accessed on June 15, 2021).

The Vienna Convention on Civil Liability for Nuclear Damage, (passed on May 19, 1963, entered into force in 1977), the Organization for Economic Cooperation and Development (hereinafter referred to as OECD) 's Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 (entered into force in 1968, hereinafter referred to as the Paris Convention), the Brussels Supplementary Convention, 1963 and the Convention on Supplementary Compensation (hereinafter referred to as CSC), 1997 are the main treaties governing nuclear liability. The Vienna Convention on Civil Liability for Nuclear Damage and CSC were adopted under the auspices of the IAEA and are of a more global character unlike the Paris Convention which is under the auspices of Organization for Economic Co-operation and Development-Nuclear Energy Agency (hereinafter referred to as OECD-NEA) and is a regional organization. Beyond these conventions, the Joint Protocol Relating to the Application of the Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention was adopted in 1988 to create a link between the Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention (to be discussed later). Each of these treaties embodies the basic principles of civil nuclear liability. Precisely, these principles prescribe compensation without discrimination, strict and exclusive liability of the operator so that the victim is relieved from proving fault and that in the case of an accident, and all claims are to be brought against the nuclear operator. Each of these principles will be discussed in detail in the next section. Both the Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention provide that there should be limitation on liability for the operator of a nuclear power plant and beyond that stipulate that the installation state is responsible. CSC does the same, but with an additional step. In addition to limiting the operator's liability, it also limits the liability of the installation state and provides for a fund to be established between all contracting states. This fund is to be utilized for paying claims that fall beyond even the installation state's liability. This fund is created through contributions from all contracting states based on a calculation method that is provided within CSC.

As emphasized several times in the discussion above, it is likely that a nuclear accident will affect neighboring countries and therefore it is important to establish reciprocity with regard to recognition of victim's rights between these countries. Beyond this, if neighboring countries stick to uniform rules, the purpose of reciprocity can be served better at the residents of each of those states can be equally covered. This is just one part of the problem though. The other facet of the problem is that several states with significant nuclear power programs like China are still not covered by any nuclear liability convention which means that there are no internationally recognized principles that define the rights of victims from neighboring countries. The discussion below aims to unpack the various aspects of these two problems.

Precisely, the question to explore here is what is the best way both domestically and internationally to manage civil nuclear liability? Is it through creating reciprocity between neighboring countries or ensuring that all countries are covered under the same treaty? This is a dilemma that is seen in the evolution of the global nuclear liability regime as discussed below.

The law on nuclear liability has evolved over the last 60 years and it has been greatly influenced by the Chernobyl accident. For the sake of convenient understanding, analysis on the law on nuclear liability can be classified into two sections—pre and post Chernobyl. Pre-Chernobyl era was characterized by parallel regimes of first-generation conventions and post Chernobyl one, separated from the former by the gravest nuclear disaster of its time, has been dedicated to synchronization of these regimes.

## 5.1 Pre-Chernobyl First-Generation Conventions

In the early days of the development of the nuclear industry, governments realized the need to protect the public from risks posed by the hazards of nuclear industry, the economic benefits of a nuclear power, and the need to protect investors and suppliers from ruinous claims for damages. It quickly became obvious that the answer lay in removing the legal and financial impediments to industrial development while at the same time ensuring adequate compensation for any damage that might be suffered by innocent third parties.<sup>97</sup>

The Brookhaven Report of 1957<sup>98</sup> is the prime document that deals with the assessment of risks involved in operating civilian nuclear power and makes an impact analysis of the ensuing corollaries of a nuclear incident. From the findings of Brookhaven Report, it is ascertained that the possibility of a nuclear incident, however remote, can not be disputed. On these grounds, the foundation of special nuclear liability regimes is laid and work begins at OECD towards drafting the Paris Convention.<sup>99</sup> The Paris Convention was supplemented by Brussels Supplementary Convention of 1963 (Brussels Convention),<sup>100</sup> which was further revised by an Additional Protocol of 1964 and a Protocol of 1982 under the auspices of OECD. Beyond OECD efforts, the Vienna Convention on Civil Liability for Nuclear Damage<sup>101</sup> came into effect in IAEA.<sup>102</sup>

Before getting to a detailed discussion about provisions of each of these conventions, below are some of the basic principles of civil nuclear liability that these conventions together established.<sup>103</sup> Most domestic and international laws relating to nuclear liability are based on these principles:

- Strict liability of the nuclear operator;

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<sup>97</sup> See Wolff, *The Vienna International Conference on Civil Liability for Nuclear Damage*, Pergamon Press, p.7 (1966).

<sup>98</sup> See Associated Universities Inc., *Brookhaven National Laboratory Annual Report*, p.125 (1957), <https://digital.library.unt.edu/ark:/67531/metadc67224/m1/1/> (accessed on June 15, 2021).

<sup>99</sup> See Nuclear Energy Agency, *The Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960*, [https://www.oecd-neo.org/jcms/pl\\_20196/paris-convention-on-third-party-liability-in-the-field-of-nuclear-energy-paris-convention-or-pc](https://www.oecd-neo.org/jcms/pl_20196/paris-convention-on-third-party-liability-in-the-field-of-nuclear-energy-paris-convention-or-pc) (accessed on June 15, 2021).

<sup>100</sup> Brussels Supplementary Convention supplements the compensation amount in the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960.

<sup>101</sup> International Atomic Energy Agency, *the Vienna Convention on Civil Liability for Nuclear Damage*, <https://www.iaea.org/sites/default/files/infocirc500.pdf> (accessed on June 15, 2021).

<sup>102</sup> See Stephen G. Burns, *A Global Nuclear Liability Regime: A Journey Or A Destination?*, <https://aidn-inla.be/content/uploads/2014/12/ba-congress-inla-2014.pdf> (accessed on April 25, 2021).

<sup>103</sup> See Carlton Stoiber & Alec Baer et al., *Handbook on Nuclear Law*, p.99 (2003), <https://docplayer.net/23201-Handbook-on-nuclear-law.html> (accessed on June 15, 2021).

- Exclusive liability of the operator of a nuclear installation which means that no other party except the operator of a nuclear power plant assumes monetary liability for damage occurring to third parties in the event of a nuclear accident;
- Compensation without discrimination based on nationality, domicile or residence;
- Mandatory financial coverage of the operator's liability;
- Exclusive jurisdiction (only courts of the State in which the nuclear accident occurs have jurisdiction);
- Limitation of liability in amount and in time.<sup>104</sup>

### **5.1.1 The Paris Convention on Nuclear Third-Party Liability, 1960**

(As supplemented by Brussels Convention, 1963)

The Paris Convention limits the liability of an operator to 15 million Special Drawing Rights (hereinafter referred to as SDRs).<sup>105</sup> However, discretion has been granted to member states to increase the quantum of the operator's liability through their domestic legislation.<sup>106</sup> Recognizing the existence of a possibility that the financial security might be exhausted by the claims of victims of the installation state an additional layer of indemnification was deemed useful. The Brussels Supplementary Convention was along these lines, providing additional funding beyond the amount available under the Paris Convention up to a total of 300 million SDRs, consisting of contributions by the Installation State and contracting parties. With respect to time, the right of compensation extinguishes beyond ten years of a nuclear accident, if no action is brought. In addition, States may limit the operator's liability to not less than two years from the time when the damage and the operator liable become known to the victim or ought reasonably to have become known.

### **5.1.2 The Vienna Convention on Civil Liability for Nuclear Damage, 1963**

The Vienna Convention on Civil Liability for Nuclear Damage was focused on bringing uniformity between national legislations relating to third party liability for nuclear damage by prescribing a set of general rules to be applied by all contracting parties. Undoubtedly, the enforceability of the Vienna Convention on Civil Liability for Nuclear Damage is restricted to its contracting parties and a non-contracting state is not bound to adhere to the principles established therein. But the Vienna Convention on Civil Liability for Nuclear Damage's contracting parties are not obliged to recognize

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<sup>104</sup> See M. J. L. Hardy, *Nuclear Liability: The General Principles of Law and Further Proposals*, 36(2) British Year Book International Law 223, 249 (1960).

<sup>105</sup> Special Drawing Right or SDR is a unit of account defined by the International Monetary Fund based upon a basket of key international currencies. The currency value of the SDR is calculated daily and the valuation basket is reviewed and adjusted every five years. As of July 25, 2020, one SDR is currently equivalent to USD 1.4, [www.imf.org/external/np/fin/data/rms\\_sdrv.aspx](http://www.imf.org/external/np/fin/data/rms_sdrv.aspx) (accessed on April 25, 2021).

<sup>106</sup> The Organization for Economic Cooperation and Development Steering Committee for Nuclear Energy, the governing body of the Nuclear Energy Agency, recommended that Contracting Parties to the Paris Convention should aim at setting the maximum liability at not less than 150 million Special Drawing Rights.



and enforce judgements entered by the courts of such a state. In so far as its provisions are self-executing, each contracting party can choose between the incorporation of the convention in the domestic legal system, thus allowing for its direct application, and the adoption of national legislation directly implementing the Vienna Convention on Civil Liability for Nuclear Damage. This is also the case with the Paris Convention. But in its entirety, the Paris Convention does not bring about specific legal guidance; rather, as is stated in its Preamble, it establishes “some minimum standards to provide financial protection against damage resulting from certain peaceful uses of nuclear energy” while leaving it upon the contracting states to incorporate the same in their domestic law, hence leaving scope for deliberation. The most important function to take note of for the Vienna Convention on Civil Liability for Nuclear Damage is that fact that it creates reciprocity between neighboring states to honor claims of each other’s citizens in the even of a nuclear accident.

## 5.2 Chernobyl Accident -- Hard Realization

The above-mentioned complexity created by this discord between the Paris Convention and the Vienna Convention on Civil Liability for Nuclear Damage continued unrealized until exposed by the Chernobyl incident. It is a confusing scenario where, the Paris Convention and the Vienna Convention on Civil Liability for Nuclear Damage are like two nearly identical conventions, and a bridge is needed to be built between them to synchronize their operation, thus avoiding a conflict. The cumbersome claims settlement in the aftermath of Chernobyl is a clear example of why having legal clarity and why treaty relations between neighboring countries are so vital. When Chernobyl occurred in 1986, there was no specialized Union of Soviet Socialist Republics’ law that defined nuclear liability. Union of Soviet Socialist Republics was also not party to any international convention on nuclear liability that provided compensation after its collapse to victims in the successor countries of Ukraine, Belarus and Russia which were heavily affected. As a result, the victims were left to rely on political will of their respective governments to seek any relief.<sup>107</sup>

Quarter of a century later, while preparations were underway at the IAEA headquarters in Vienna to celebrate 25 years of accident-free nuclear power generation worldwide, a tsunami hit the Fukushima Daiichi Nuclear Power Plant in Japan. While the resulting effects of Fukushima were not as extreme as Chernobyl, the lack of established reciprocity between Japan (which was not party to any liability conventions until 2015 when it joined CSC) and other nations caused complications in the claim settlement process and the need for global efforts to align national viewpoints was realized.<sup>108</sup>

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<sup>107</sup> See Adriana Petryna, *Nuclear Payouts: Knowledge and Compensation in the Chernobyl Aftermath*, *Anthropology Now*, pp.30-9 (2009), <https://anthronow.com/online-articles/nuclear-payouts-knowledge-and-compensation-in-the-chernobyl-aftermath> (accessed on June 15, 2021).

<sup>108</sup> See Julia A. Schwartz, *International Nuclear Third Party Liability Law: The Response to Chernobyl*, *International Nuclear Law in the Post-Chernobyl Period* OECD-NEA (2006), <https://www.oecd-nea.org/law/chernobyl/SCHWARTZ.pdf> (accessed on June 15, 2021).

The occurrence of Chernobyl accident necessitated urgent actions to be taken in the area of nuclear liability regimes, and work began towards harmonizing the nuclear liability regime. Further lessons learnt from Fukushima expanded the scope of work on establishment of a global nuclear liability regime.

### **5.3 Post Chernobyl Era of Synchronization -- Second Generation Conventions**

The 1986 Chernobyl accident was a landmark event in the history of civil nuclear industry. The incident exposed the flaw in the first-generation liability regimes which were not subscribed to by some major nuclear economies like the Union of Soviet Socialist Republics. It gave a clearer picture of how destructive and fatal a major nuclear accident could be. The effects of this were evident in the accelerated time within which Joint Protocol was created to link the two liability regimes. The IAEA began work on all aspects of nuclear liability with a view to improving the basic conventions and establishing a comprehensive liability regime. In 1988, as a result of joint efforts by the IAEA and OECD-NEA, the Joint Protocol relating to the Application of the Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention was adopted, establishing a link between the two conventions combining them into one expanded liability regime. Parties to the Joint Protocol are treated as though they were parties to both conventions and a choice of law rule is provided to determine which of the two conventions should apply to the exclusion of the other in respect of the same incident. Till, 1997 the international liability regime was thus embodied primarily in two instruments<sup>109</sup> linked by the Joint Protocol adopted in 1988.

Another issue was that the Paris as well as the Vienna Convention on Civil Liability for Nuclear Damage restricted themselves to the territories of their respective member states. As stipulated under Article 29 of the Vienna Convention on Civil Liability for Nuclear Damage and Article 2 of the Paris Convention, in order for a victim of a nuclear incident to be entitled to legal redress, the injury would have to be suffered in the territory of a party to the convention. This left out nuclear accidents that occur on the high seas, or ones that cause transboundary damage.

Beyond the lack of uniformity, some states felt that the compensation regime provided for by the convention should benefit only persons in states which were party to the convention. In other words, indemnification in case of a nuclear incident should be an incentive for states to join a nuclear liability regime. It was argued that, only those persons should be entitled to compensation through the machinery of the convention,

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<sup>109</sup> See the Vienna Convention on Civil Liability for Nuclear Damage of 1963 and the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 which was later built up by the 1963 Brussels Supplementary Convention.

who belong to states which accept not only the benefits, but also the obligations, of the convention.<sup>110</sup> This came to be known as the “territoriality” principle.<sup>111</sup>

However, the representatives of other states regarded this approach as inadequate. It was contended that only states which operate a nuclear-power industry operate an inherently risky venture and should be made responsible to compensate victims regardless of where they are citizens of states party. Further, it was said that states that do not benefit from nuclear energy and do not, therefore, contribute to the risk of a nuclear accident, should not be deprived of compensation just because they have not acceded to the convention. The right to compensation should derive from the fact of suffering damage from an activity beyond the control of the state where the damage is suffered, especially in the case of an ultra-hazardous activity.<sup>112</sup> This ideology evolved into the universality principle.<sup>113</sup>

It is essential to note that, the Vienna Convention on Civil Liability for Nuclear Damage had no provisions regarding damage suffered beyond the territorial waters. This issue was resolved by upholding the principle of reciprocity.<sup>114</sup>

### 5.3.1 Convention on Supplementary Compensation for Nuclear Damage, 1997

The Preamble to the 1997 CSC makes it clear that the purpose of the new convention is the establishment of a worldwide liability regime “to supplement and enhance” measures provided not only in the Vienna Convention on Civil Liability for

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<sup>110</sup> See Organization for Economic Co-operation and Development-Nuclear Energy Agency, *Liability and Compensation for Nuclear Damage-An International Overview*, p.59 (1996), <https://www.oecd-neo.org/law/pubs/1994/liability-compensation-nuclear-damage.pdf> (accessed on June 15, 2021).

<sup>111</sup> See Gerhard Kegel & Ignaz Seidl-Hohenveldern, *On the Territoriality Principle in Public International Law*, 5(2) *Hastings International and Comparative Law Review* 245, 245 (1982).

<sup>112</sup> There are numerous precedents, both in conventions and in international case-law, for the proposition that one state causing damage to another gives rise to an obligation to compensate victims of damage. These include the following: 1) Article 11 of the Convention on International Liability for Damage caused by Space Objects which provides that: “A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight”; 2) Article 235 of the United Nations Convention on the Law of the Sea states: “States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.” 3) Principles 21 and 22 of the Stockholm Declaration state: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.”; 4) Cases in which states have been declared entitled to compensation for transboundary damage include the Trail Smelter Arbitration, 33 A31L (1939) 182; 35 A31L (1941), 684, and the Gut Dam Arbitration, 8 ILM (1968), 118.

<sup>113</sup> See James Hamilton, “Access by Victims to the Compensation Regime of the Vienna Convention on Civil Liability for Nuclear Damage - Question of Geographical Scope” at the Budapest Symposium, 1999.

<sup>114</sup> Ibid.

Nuclear Damage and in the Paris Convention, but also in national legislation “consistent with the principles of these Conventions”.<sup>115</sup> CSC contains specific provisions on civil liability for nuclear damage in an Annex, and Article II.3 states that the Annex constitutes an integral part of the convention.

#### Pre-Conditions to Membership

There are only two basic requirements that need to be satisfied for a state to be eligible for acquiring membership to CSC:<sup>116</sup>

(a) Implementation of the Paris Convention or the Vienna Convention;<sup>117</sup> or

(b) Compliance with provisions of the Annex (explained later).<sup>118</sup>

This makes CSC an instrument that can cover all States regardless of whether they are parties to any existing nuclear liability convention or have nuclear installations within their territories.

#### Incentives to Joining CSC

##### *Creates Legal Certainty*

CSC achieves legal certainty by requiring each member country to have national law on nuclear liability that is based on the Paris Convention, the Vienna Convention on Civil Liability for Nuclear Damage or the Annex to CSC and that incorporates the provisions in CSC on jurisdiction, compensation and the definition of nuclear damage. This requirement ensures that the national law of each member country will reflect the basic principles of nuclear liability law as also discussed earlier in the section describing the basic principles of civil nuclear liability.<sup>119</sup>

##### *Exclusive jurisdiction*

CSC conforms to the principle of exclusive jurisdiction of courts of the installation state. Further, CSC also requires other member countries to recognize the exclusive jurisdiction<sup>120</sup> of the courts of the member country where a nuclear incident occurs and to refrain from asserting jurisdiction over the incident. CSC also requires member countries to recognize and enforce judgments rendered by the courts of the member country with jurisdiction.

##### *Facilitates Additional Indemnification*

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<sup>115</sup> See Convention on Supplementary Compensation for Nuclear Damage 1997, at Article II.1.

<sup>116</sup> See International Atomic Energy Agency Explanatory Texts on the 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage by the INLEX.

<sup>117</sup> See supra note 116, at Article XVIII.

<sup>118</sup> Id., at Article XIX.

<sup>119</sup> Channeling all legal liability for nuclear damage exclusively to the operator; Imposing liability on the operator without the need to demonstrate fault, negligence or intent; Granting exclusive jurisdiction to the courts of the country where a nuclear incident occurs; Permitting liability to be limited in amount 10 and in time; and Compensating damage without any discrimination based upon nationality, domicile or residence.

<sup>120</sup> See supra note 116, at Article XIII.

CSC not only creates an effective mechanism for claims settlement but also provides an additional layer of indemnification to compensate the damages caused by a nuclear incident. It assures the availability of a meaningful amount of compensation for nuclear damage in member countries by providing for two tiers of compensation. CSC fixes the amount of the first tier to be provided by the installation state, which constitutes the “minimum national compensation amount” at 300 million SDRs. This makes up the first tier of compensation.<sup>121</sup> Beyond this, CSC requires the Installation State to make public funds available to cover the difference. For this, an international supplementary fund has been provided for in CSC<sup>122</sup> to which all of its Contracting Parties are obligated to make contributions, hence forming the second tier of compensation. These contributions are to be 300 SDRs per “unit of installed capacity”<sup>123</sup> and an additional amount equal to 10% of the former amount<sup>124</sup> calculated as per a distinct formula<sup>125</sup> provided there under, allocates one half of the international fund for the compensation of damage in all Contracting Parties without differentiation,<sup>126</sup> but priority has been given to the compensation of “transboundary damage”. If claims for transboundary damage do not exhaust this part of the fund, the balance becomes available for compensation of other claims i.e., damage within the Installation State.<sup>127</sup>

#### *Wider Scope of Coverage of Nuclear Damage*

CSC requires member countries to adopt a broad definition of nuclear damage. It specifically provides that nuclear damage must include not only personal injury and property damage, but also certain categories of damage relating to impairment of the environment, preventive measures, and economic losses. CSC also provides that the definition of nuclear incident includes situations where preventive measures are taken in response to a grave and imminent threat of a release of radiation, even though no actual release has occurred.<sup>128</sup>

#### *Encompassing Grandfather Clause*

Reflections of the fundamental principles of nuclear liability can be found in the Annex to CSC. It provides for exclusive liability of the operator of the nuclear installation.<sup>129</sup> In order to allow for the participation of the United States without changing its legislation, which is based on the concept of “economic”, as opposed to “legal”, channeling of nuclear liability, a so-called “grandfather clause” was inserted in the Annex which though takes within its purview each State whose national law

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<sup>121</sup> Id., at Article III Paragraph 1(a).

<sup>122</sup> Id., at Paragraph 1 (b).

<sup>123</sup> Id., at Paragraph 1(a)(i).

<sup>124</sup> Id., at Paragraph 1(a)(ii).

<sup>125</sup> Id., at Article IV.

<sup>126</sup> Id., at Article IX sub-paragraph 1(a).

<sup>127</sup> Id., at sub-paragraph 1(b).

<sup>128</sup> See Ben McRae, *The Compensation Convention: Path to a Global Regime for Dealing with Legal Liability and Compensation for Nuclear Damage*, 30(48) Nuclear Law Bulletin 25, 25-38 (1998).

<sup>129</sup> See the Annex to the Convention on Supplementary Compensation, at Article 3.9 and Article 10.

contained certain provisions on January 1, 1995, and the United States appears to be the only State whose legislation contained those provisions on that date.<sup>130</sup>

Under Article 2.1, the national law of a contracting party is deemed to be in conformity with the provisions of Articles 3, 4, 5 and 7 of the Annex if, on January 1, 1995, it contained provisions that: (a) provide for strict liability for substantial off-site nuclear damage; (b) require the indemnification of any person other than the operator liable in so far as that person is liable to pay compensation; (c) ensure the availability for such indemnification of at least 1000 million SDRs in respect of a civil nuclear power plant and at least 300 million SDRs in respect of other civil nuclear installations.

### *Potential Global Nuclear Liability Regime*

Preamble to CSC recognizes the existing international instruments and national legislations which form the legal context within which it was designed to operate. Its prime objective is to create a worldwide liability regime and increasing the amount of compensation for nuclear damage. Article II makes clear that the Annex is an integral part of the convention. Paragraph 1 of the Article states that the convention's purpose is to supplement (explained at the beginning of this section) the system of compensation provided pursuant to national law that implements the Vienna Convention on Civil Liability for Nuclear Damage or the Paris Convention or that complies with the CSC's Annex.

### *Annex conforming to Fundamentals of Nuclear Liability*

CSC has a wide scope of coverage in all terms and is a potential global nuclear liability regime which many states may find beneficial to subscribe as it acknowledges the existing regimes and extends beyond their operational frontiers. The Annex provides, in particular, for: "absolute" and exclusive liability of the operator of a nuclear installation (Article 3); limitation of liability in amount and/or of liability cover by insurance or other financial security (Articles 4 and 5); limitation of liability in time (Article 9).<sup>131</sup> Article 3 states that the liability of the operator for nuclear damage shall be absolute. Paragraph 9 of this Article states that the right to compensation for nuclear damage may only be exercised against the operator liable, or if national law permits, against any supplier of funds made available under national law to ensure compensation. Article 5 deals with financial security to be provided by operators. Under sub-paragraph I(a), operators in installation states that are contracting parties subject to the Annex must be required to obtain financial security e.g., insurance to cover their liability for nuclear damage in such amount, of such type, and under such terms as the Installation State may require. Claims that exceed the yield of financial security maintained by the operator must be met through the provision of public funds, up to the applicable limit if any, established under Article 4. When an Installation State has not limited the liability of an operator, the amount of financial security that operator is required to obtain may not be

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<sup>130</sup> Id., at Article 2.

<sup>131</sup> See International Atomic Energy Agency Explanatory Texts on the 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage.

less than 300 million SDRs. Again, if the yield of financial security is insufficient to meet claims up to the amount of security required, the difference must be made up through public funds.

The presence of the “grandfather clause” gives CSC a distinct international character and opens the door for several states including the United States, which could not find themselves covered by an international nuclear liability regime.

## 6. Need for a Global Nuclear Liability Regime

Review of various Nuclear Liability Regimes in force in different parts of the world and the ones which are yet to come into force and national approaches in different states reveal that a consensus on an ultimate nuclear liability regime is yet to go through a long process of metamorphosis. The Chernobyl accident<sup>132</sup> was an eye-opener to the need for a viable and more effective international nuclear liability and compensation regime. Efforts have been made nationally, regionally and internationally as evident in the amendments and creation of newer nuclear liability regimes.<sup>133</sup> Notwithstanding these efforts, there are still big lacunae in the nuclear liability regime. The Paris Convention and the Vienna Convention on Civil Liability for Nuclear Damage have although been bridged by the 1997 Joint Protocol, these Conventions have mostly been ratified by European Union countries. This leaves several advanced as well as embarking states uncovered by any uniform globally recognized instrument on managing nuclear liability. In Asia alone, China, South Korea, Iran, and Pakistan are all not party to any nuclear liability convention. This is quite problematic if one of the factors in the possibility of transboundary damages, such as absence of reciprocity or cooperation regarding claims settlement, etc. Between these, states especially endanger the victims and industry stakeholders. CSC, as discussed above, provides a plausible way to create a global nuclear liability regime. A global regime simplifies international nuclear trade by ensuring that all the stakeholders are covered by identical liability rules, especially because of the existence of the principle of legal channeling of liability to the operator which not only helps the victims make their claims but also encourages the industry and the suppliers in particular. Moreover, the elimination of conflict of jurisdiction further creates greater certainty.<sup>134</sup>

## 7. Conclusion

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<sup>132</sup> See World Nuclear Association, *Chernobyl Accident 1986 (Ukraine)*, <http://www.world-nuclear.org/info/chernobyl/inf07.htm> (accessed on June 25, 2020).

<sup>133</sup> See The Joint Protocol 1988, the Vienna Convention on Civil Liability for Nuclear Damage of 1997, the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 2004 and the Convention on Supplementary Compensation of 1997.

<sup>134</sup> See the International Expert Group on Nuclear Liability, *Civil Liability for Nuclear Damage: Advantages and Disadvantages of Joining the International Nuclear Liability Regime*, [http://ola.iaea.org/ola/treaties/documents/liability\\_regime.pdf](http://ola.iaea.org/ola/treaties/documents/liability_regime.pdf) (accessed on April 25, 2021).

As human-beings have already begun to feel the brunt of a warming planet, decarbonization of the electricity sector holds one of the keys to mitigating and minimizing the impact of climate change. As discussed above, electricity generation has been seen to significantly contribute to the rise in emissions driven by increasing energy demand. This demand for energy is only projected to grow especially in emerging economies which have become more dependent on fossil fuels as they go through rapid industrialization and population growth. Reducing emissions from electricity generation becomes vital in this context to prevent irreversible damage to the planet which will occur if earth's temperature continues to rise.

Nuclear energy has an especially important role to play in emerging economies in Southeast Asia and Sub-Saharan Africa where a fast-growing population and even faster growing energy demand need a zero-carbon baseload source of energy. In this background, nuclear energy investment in these regions remains a very pertinent issue given the need for improving energy access there while ensuring compliance with internationally recognized safety principles for nuclear power project implementation. However, effective implementation of a national nuclear program requires the cooperation of many stakeholders, from industry players, technical and scientific and design institutions to different governmental bodies at local, regional and national levels. Developing states face unique challenges and often lack finances, institutional capacity and physical infrastructure to support a large-scale, multibillion-dollar nuclear power plant project, even if the costs are spread out over several years. Vendors of nuclear technology from mature nuclear industries can bring valuable technical know-how as well as decades of expertise in various aspects of nuclear power generation. This presents a range of great opportunities that can be availed with international collaboration between various stakeholders to take objective stock of both their concerns and interests. One of those concerns is how the risk of a potential nuclear accident leading to transboundary damage will be managed.

Nuclear power projects in the past used to be more of a domestic affair with limited involvement of international entities. However, they are much more complex today as also mentioned earlier. This necessitates an evolution of the legal framework especially when it comes to civil nuclear liability. In the past, balancing the protection of the liable operator (economic interests) and the protection of victims (public interests) was a herculean task that the drafters of liability conventions had to maneuver through. Initially, it started in favor of the nuclear industry, i.e. preferring economic interests to public interests. Later on, it started shifting towards and in favor of public interests over economic interests.

In the event of a nuclear accident regardless of whether there is transboundary damage or not, having a system in place to facilitate claims settlement between the affected nations is of utmost importance. Having a uniform nuclear liability regime enables the necessary treaty relations between the affected states to clarify the applicable law, define jurisdiction and enforcement of awards, and ensure availability of funds to compensate victims.<sup>135</sup>

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<sup>135</sup> Ibid.



Beyond safeguarding the interests of victims, a global nuclear liability regime is also beneficial to nuclear trade, and so is greater legal clarity and certainty in a highly globalized market to understand the risks associated with participation in a nuclear power project. A global nuclear liability regime may be achieved if all states are with nuclear installations and as many states as possible that may be affected by a nuclear accident establish treaty relations.<sup>136</sup> Absence of treaty relations and lack of uniformity in governing laws have been seen to impede trade. The most recent example of this was seen in India where all trade in nuclear energy remained stalled between 2012 and 2015 because of the introduction of suppliers' liability in their law as discussed above.

A global regime simplifies international nuclear trade by ensuring that all the stakeholders are covered by identical liability rules, especially because of the existence of the principle of legal channeling of liability to the operator which not only helps the victims make their claims but also encourages the industry, the suppliers in particular. Moreover, the elimination of conflict of jurisdiction further creates greater certainty.<sup>137</sup> Currently, there is no such uniform nuclear liability regime in Southeast Asia and Sub-Saharan Africa and consequently there are no treaty relations between most nations pursuing their nuclear power programs in these two regions. That will have to change in the future to safeguard the interests of firstly the victims in the case of a nuclear accident and also to ensure the risk of significant liability from a nuclear accident is handled cohesively at least among neighboring countries.

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<sup>136</sup> See Organization for Economic Co-operation and Development-Nuclear Energy Agency, *Nuclear Law Bulletin No.93*, at p.18 (2014), [https://inis.iaea.org/collection/NCLCollectionStore/\\_Public/46/109/46109547.pdf](https://inis.iaea.org/collection/NCLCollectionStore/_Public/46/109/46109547.pdf) (accessed on June 15, 2021).

<sup>137</sup> See supra note 134.

# Prospects for the Operation of China-South Korea International Police Cooperation Mechanism against Crime

Zhaobin Pei & Yuntong Wu<sup>1</sup>

**Abstract:** At present, the research on international police cooperation is mostly confined to the field of international relations. Before 2015, the research on international police cooperation on cross border crimes is few in Chinese Mainland. The range of activities undertaken is not simply police investigations and information sharing, but also the influence of national comprehensive and national power on police cooperation. This paper discusses the police cooperation mechanism between China and South Korea to combat cross-border crimes as the research object, and focuses on the current situation, obstacles, and reasons for obstacles, future development and counter-measures of the police co-operation mechanism. It is time that China should actively enact relevant legislation, establish domestic legal system on international police cooperation, take flexible ways to solve the problem of extradition, and establish bilateral mutual trust and cooperation mechanism.

**Keywords:** Transnational Crime; Bilateral Police Cooperation; China; South Korea

## 1. Introduction

With the development of time, cross regional crime and transnational crime have become a norm, which has brought great challenges to national development. This not only considers a country's comprehensive criminal investigation ability, but also measures a country's comprehensive national strength. In order to further crack down on cross-border crimes between China and South Korea and maintain the world order, the two countries should unite to achieve the best effect. Therefore, it is necessary to speed up the establishment and improvement of the international police cooperation mechanism to crack down on cross-border crimes. China has passed through massive transformation since the Third Plenary Session of the 11th Central Committee of the Communist Party of China, from a planned to a market economy, and from an economy that was almost totally closed to one that is much more open than most countries that are at the same level of income.<sup>2</sup> At the same time, there are more cross-border crimes between China and South Korea. Owing to the influence of some factors such as the form of consciousness and national interests, as well as the transnational nature of cases,

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<sup>2</sup> See Jianfu Chen, *The Transformation of Chinese Law: From Normal to Substantial*, 37(1) Hong Kong Law Journal 689, 670 (2007).

evidence and witnesses, it is difficult to effectively govern the cross-border crimes in China. In order to effectively crack down on cross-border crimes, China should establish an international police cooperation mechanism and make joint efforts with many countries. Both China and South Korea are countries deeply affected by cross-border crimes, and both countries have realized the importance of maintaining security and reached relevant consensus. Though two countries have achieved certain results in police cooperation, both countries still have many problems in combating cross-border crimes.

Before 2015, the research on international police cooperation is mostly confined to the field of international relations. The research on international police cooperation on cross border crimes is few in Chinese Mainland. And there is less research on the mechanism of international police cooperation to combat cross-border crimes between China and South Korea. The range of activities undertaken is not simply police investigations and information sharing, but also the influence of national comprehensive and national power on police cooperation. Therefore, in the process of strengthening international police cooperation, China should consider not only its own rights and obligations, but also the relations between cooperating countries and its own country. Based on the study of the mechanism of combating cross-border police cooperation between China and South Korea, this paper evaluates the existing mechanism, analyzes its shortcomings and causes, and puts forward suggestions for improving the mechanism of police cooperation.

The research on cross-border crimes and international police cooperation has become a hot academic issue in Chinese Mainland. For example, when it comes to “Fox Hunt 2014”, Yao Zhang pointed out in the fight against cross-border crimes, Chinese judiciary often faces various problems. Therefore, people should base on their reality to further strengthen cooperation with other countries and organizations through International Criminal Police Organization, to carry out arrest, repatriation and other activities.<sup>3</sup> Other academics such as Yong Pi,<sup>4</sup> have focused on comparative studies of transnational crimes. By studying the differences and similarities of transnational crimes legislation in different countries, Yong Pi pointed out the problems in China’s legislation and expounded the conditions and causes of crimes from the perspective of criminology. Focusing on the countries represented by the civil law system and the common law system, and learning from the relevant experience by studying the laws of these countries, so as to draw lessons and avoid detours in the process of development, it is also helpful to deal with some cases of cross-border crimes in China.

The study of police cooperation in China began in the 1990s, and scholars such as Dang Xiang have systematically expounded the concept of international police cooperation to the part in their books. One of them clearly states it is a law enforcement act of mutual assistance in the punishment of transnational criminal activities in

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<sup>3</sup> See Yao Zhang, *The Plight and Measures of China’s Pursuit of Fugitives abroad from the Fox Hunt 2014*, 28 (2) Journal of Hubei University of Police 11, 13 (2015).

<sup>4</sup> See Yong Pi, *Review on German Cybercrime Legislation under the Background of European Criminal Law Integration*, 24(5) Peking University Law Journal 1038, 1040-50 (2011).

different countries in accordance with international conventions and national laws, and points out six characteristics of international police cooperation.<sup>5</sup> At the same time, Dang Xiang also believes that international police cooperation can be understood in a narrow and broad sense. In Dang Xiang's view, international police cooperation in a narrow sense refers to the activities of mutual liaison and cooperation within the framework of International Criminal Police Organization and within the limits permitted by national laws.<sup>6</sup> The broad sense of police cooperation also includes the relevant content of criminal judicial assistance, such as controlled delivery, extradition of detainees, confiscation of the proceeds of offenders and so on.

In addition, Jian Li and Yu Zhao elaborate on the development of international police cooperation since the founding from Chinese Mainland, and point out that strengthening cooperation with International Criminal Police Organization will enable China to play a role in international affairs, since improving international prestige and international status is also an objective need of the country's external development. Jian Li and Yu Zhao also believe that there are many constraints in the process of participating in international police cooperation, and therefore it is necessary to make clear the overall development goals of the country—to promote the reform of the police system, to strengthen publicity, and to train more police personnel for further development of police cooperation.<sup>7</sup>

In addition, Yichao Li points out in his paper that the current police cooperation strategy in Chinese Mainland includes perfecting laws and regulations, improving the construction of intelligence and information mechanism, following the principle of mutual respect and coordination, and improving the ability of joint fighting crimes.<sup>8</sup> In his paper, Zhouwei Zhang points out that the main body of international police cooperation is the police organ, and the cooperation has a wide range and many ways, which are mainly embodied in international law and domestic law. As far as China is concerned, the relevant procedures for the public security bureau to participate in international police cooperation have been stipulated in the legislation. Although China's police cooperation with South Korea and other countries in the world has achieved good results, there is still room for more development and improvement.<sup>9</sup>

## **2. The Characteristics of Crimes between China and South Korea and the Current Situation of Police Cooperation**

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<sup>5</sup> See Dang Xiang, *An Overview of International Police Cooperation*, People's Public Security University of China Press, p.33 (2005).

<sup>6</sup> Ibid.

<sup>7</sup> See Jian Li & Yu Zhao, *An Analysis of China's Status and Role in the International Policing Cooperation Organization*, 28(2) Journal of Guangxi Police College 24, 28 (2015).

<sup>8</sup> See Yichao Li, *Analysis on Barriers to International Police Cooperation in China and its Countermeasure*, 23(3) Journal of Hunan Police Academy 18, 20 (2011).

<sup>9</sup> See Zhouyi Zhang, *Discussion on Basic Issues of International Police Cooperation*, 24(1) Journal of Zhejiang Police College 36, 40 (2011).

Both China and South Korea are both affected by transnational crimes. Through multiple rounds of conversation, the two countries have reached a consensus on joint fight against crimes, and achieved phased results, laying a foundation for the establishment of an international police cooperation mechanism between the two countries. The international police cooperation between China and South Korea in combating crimes not only has a wide range of practical needs, but also shows the variety of ways, complexity of process and international characteristics of region.

## **2.1 Characteristics of Criminal Offences Transiting between China and South Korea**

Since the establishment of diplomatic relations between China and South Korea in 1992, the relationship between the two countries has developed rapidly. Economic and cultural exchanges have surged forwards and personnel exchanges have also entered a peak period.<sup>10</sup> At the same time, the crimes involving the two countries also exhibit the characteristics of diversity of methods of the crimes, complexity of the process, and regional internationality. The characteristics of criminal offences include the following:

### **2.1.1 The diversity of transnational crime patterns**

According to authors calculate, transnational crimes between China and South Korea include but are not limited to transnational smuggling, drug trafficking, smuggling, money laundering, financial fraud and other organized crimes. And the number of requests for mutual legal assistance in criminal matters from 2013 to 2015, the number of requests made by South Korea to China was 69, and the number of requests made by China to South Korea was only 5. But there are far more Chinese prisoners in South Korea than South Koreans in China. As of 2014, the number of South Koreans imprisoned in China was 340, of which about 35% were for drug crimes. The number of Chinese imprisoned in South Korea was 492 convicted and 340 unconvicted, accounting for about 65.5% of all foreign criminals.

Moreover, the number of Chinese criminals has been increasing yearly, and the proportion of all foreign criminals has been increasing as well. The crimes committed by these criminals are mainly those committed in the course of entering South Korea through illegal or alternative means such as forged documents, bogus marriages, especially South Koreans in China, as well as transnational organized crime and the drug trade associated with South Koreans.<sup>11</sup> South Korean criminals in China are mostly located in the three north-eastern provinces and Shandong Province near the South Korean peninsula. The criminals are mainly involved in drug trafficking,

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<sup>10</sup> See Feihu Zhang, *Review on the Police Cooperation Mechanism under the Background of Cross-border Crimes*, 34(4) *Journal of Xinjiang Police College* 35, 36 (2014).

<sup>11</sup> See Jinbao Ma, *International Crime and International Criminal Judicial Assistance*, Law Press, p.45 (1999).

smuggling crimes, telephone financial fraud and other crimes. There is complex process of transferring criminal proceeds presents a complex trend.

### **2.1.2 The complexity of the process of transferring the proceeds of crime**

After a crime occurs, the crime suspect often needs to transfer the proceeds of crime quickly, change the original form of the criminal proceeds, and eliminate the traces that may become evidence, and disguise the proceeds of crime and its profits, and even eventually merge them with legitimate profits. This has forced cross-border transfers to adopt complex techniques, through various intermediate forms, and take a variety of operational means to transfer the proceeds of crimes.

For example, some proceeds of crime are first transferred to one country through underground banks and then transferred to another country through direct investment. After multiple transfers, the illegal properties of these crimes are becoming less likely to be discovered and even it takes up to years to be discovered.<sup>12</sup>

### **2.1.3 International nature of the crime suspect's absconding the region**

Crime suspects absconding is becoming more international. The absconding place is no longer confined to the domestic region, but from one country to another. This makes cross-border tracing extremely difficult. In the process of investigation and evidence collection, another country will also be involved. While the legal system and interest demands of another country are different, so also, the degree of cooperation and initiative varies greatly.<sup>13</sup>

The extradition case of Mou Zheng, head of the Christian Evangelical Mission (also known as JMS), is a typical case. The defendant, surnamed Zheng, fled to Chinese Hong Kong, where he could enter and leave without a visa, and then to Chinese Taiwan, during the investigation into the alleged rape of five evangelical Christians between 2001 and 2006. After media in Chinese Taiwan reported Mou Zheng was suspected of sex crimes, he fled back to Chinese Hong Kong. He was detained by Chinese Hong Kong immigration authorities, released on bail and smuggled into the Chinese Mainland. South Korea's District Public Prosecutors Office and other investigative agencies issued an arrest warrant for Chung, a total of nine wanted content. In order to extradite Chung, the Ministry of Justice of South Korea submitted an extradition request to China in December 2006. In May 2007, Chinese police arrested Mou Zheng in Beijing and detained him in Liaoning Provincial Detention Center. The Supreme People's Court of the People's Republic of China has appointed the Liaoning High People's Court to carry out the extradition of the accused. In September 2007, Liaoning High People's Court conducted a public trial on the extradition of criminals. In September 2007, the Liaoning

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<sup>12</sup> See Li Wang & Yuzhu Zhao, *A Literature Review of International Police Cooperation Theory*, People's Public Security University of China Press, pp.17-8 (2014).

<sup>13</sup> See Jun Zhou, *A study on China's International Police Cooperation from the Perspective of Cross-regional Governance*, 33(5) Social Scientist 137, 142 (2018).

High People's Court ruled that the request for the extradition of the offender submitted by South Korean to Chinese government met the conditions for granting extradition stipulated in the extradition treaty between China and South Korea and the Extradition Law of the People's Republic of China. In December 2007, the Supreme People's Court of the People's Republic of China reviewed and approved the decision of the Liaoning High People's Court. In January 2008, the State Council of the People's Republic of China made a decision to grant extradition to the criminals. In February 2008, the Ministry of State Security of the People's Republic of China handed the defendant over to South Korean side at Dalian International Airport in Liaoning Province. After arriving in South Korea, the defendant, surnamed Zheng, was sentenced to 10 years in prison for rape and wounding, and he is currently serving time at Daejeon Prison.

This case is a classic example of mutual legal assistance in criminal matters between China and South Korea. Mou Zheng hid in the Chinese Mainland through Chinese Taiwan and Chinese Hong Kong before being extradited to South Korea a few years later. This shows that under Chinese inter-regional judicial system, the process of criminal judicial assistance between China and South Korea faces many difficulties. In particular, Chinese Hong Kong, Chinese Macao and Chinese Taiwan enjoy independent criminal jurisdiction in China. Therefore, if there is a need for mutual legal assistance in criminal matters with South Korea, South Korea may contact the relevant jurisdiction of China directly to resolve the situation; information about the case is not available elsewhere. That is, Chinese Mainland, Chinese Hong Kong and Chinese Taiwan were initially unaware of the fact that the perpetrators had committed crimes in each other's jurisdiction, thus making it difficult for China to conduct inter-regional criminal judicial assistance procedures and international criminal judicial assistance between each region and South Korea.<sup>14</sup>

## **2.2 Current Status of China-South Korea International Police Cooperation in Combating Crimes**

The purpose of China-South Korea international police cooperation in combating crime is to solve the current situation of cross-border criminal crimes. There is an increasing number of transnational organized crimes involving China and South Korea that transcend national boundaries, especially transnational financial fraud, cyber-hacking and drug crimes, and the phenomenon of these criminal suspects fleeing to a foreign country after their criminal acts have been uncovered is also becoming increasingly serious.<sup>15</sup> In recent years, with the active coordination and efforts of the Ministry of State Security of the People's Republic of China, the Ministry of Justice of the People's Republic of China and the Ministry of Foreign Affairs of the People's Republic of China, the exchanges and cooperation between the judicial departments of

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<sup>14</sup> Ibid.

<sup>15</sup> See Lee Young Ran, *State of International Crime and Countermeasures in Korea*, 12(2) Criminal Policy 262, 263 (2000).

China and South Korea have become increasingly close.<sup>16</sup> Chinese government have established close cooperation mechanisms with South Korea. With the joint efforts of the law enforcement agencies of China and South Korea, some of the major suspects who fled to South Korea were repatriated. These are greatly deterring criminals who want to flee to South Korea.<sup>17</sup>

Relevant data shows that, the bilateral trade volume between China and South Korea exceeded \$245.6 billion in 2011, with more than 6 million people visiting and more than 70 thousand Chinese studying in South Korea. At the same time, some Chinese crime suspects also took advantage of the convenience of close communication between Chinese and South Korean, hoping to seek illegal ways to settle down or even naturalize in South Korea, in order to avoid legal sanctions. As of June 2012, the extradition request of South Korean police to the Ministry of State Security of the People's Republic of China for fugitives accounted for 23% of the total extradition request of South Korea. Although the general trend of judicial and police cooperation between the two countries is good, judicial proceedings are interrupted or delayed occasionally in individual cases due to insufficient consultation between the two countries.<sup>18</sup>

Up to 2014, the joint pursuit of fugitives has achieved remarkable results. The two countries have captured 30 criminal suspects from China and South Korea at large. Among them, China has captured and transferred to the Republic of South Korea the fugitive crime suspects such as Longzan Peng, who was suspected of homicide. And South Korea has captured and transferred to China Chuanbo Lv, a key member of the Qingdao Nie Lei criminal gang involved in the criminal case, and other fugitive criminal suspects, which fully demonstrates that China and the South Korean police are determined to fight crime and safeguard the safety of people's lives and property.<sup>19</sup> In recent years, the Ministry of State Security of the People's Republic of China has established a regular working meeting mechanism and a 24-hour hotline with multiple law enforcement agencies including the Ministry of Justice of South Korea, the General Prosecutor's Office, the Headquarters for Foreigners' Entry and Exit Policy, and the National Police Agency. A comprehensive, multi-level, and wide-ranging law enforcement cooperation system and mutual trust, mutual benefit, and close friendly cooperative relations have been established. China-South Korea law enforcement cooperation is an important part of the strategic partnership. Under the new situation, the Chinese and South Korean law enforcement agencies will further enhance understanding and mutual trust, intensify business contacts, and carry out pragmatic cooperation to effectively combat transnational crimes such as telecommunications

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<sup>16</sup> See Zaishang Chen, *Construction of Police Cooperation Mechanism for Combating Cross-border Crimes*, 14(2) Journal of Hebei Vocational College of Public Security Police 54, 55 (2014).

<sup>17</sup> Ibid.

<sup>18</sup> In September 2011, bilateral trade between China and South Korea reached US \$18.95 billion, See General Administration of Customs of the People's Republic of China, <http://kr.mofcom.gov.cn/article/jmxw/201110/20111007792180.html> (accessed on December 2, 2020).

<sup>19</sup> See Zengyu Zhao, *The Trend and Defense Countermeasures of the Transnational Crime*, 24(2) Journal of Liaoning Police College 48, 49 (2010).



fraud, online gambling and drug crimes, and maintain national and regional security and stability.<sup>20</sup>

### **3. Basic Framework of China-South Korea International Police Cooperation in Combating Crimes**

The legal basis of international criminal judicial assistance is domestic law, bilateral treaties and multilateral conventions. These international treaties provide great help for other countries to promote the development of criminal judicial assistance and conclude bilateral treaties. From the perspective of development time, criminal extradition and narrow sense criminal judicial assistance are widely introduced and applied in the world in the form of classical criminal judicial assistance. Extradition is the most classical and effective means in international criminal judicial assistance. Comparatively, although the transfer of criminal procedure, the recognition and enforcement of foreign criminal judgments have not been widely applied, they are developing rapidly.

#### **3.1 Legal Basis for Police Cooperation**

Since international police cooperation involves the transfer of partial sovereignty by the participating countries, therefore, the international police cooperation should be based on the corresponding legal system. The legal system mainly includes international conventions and domestic laws of cooperating countries, which is also the theoretical basis of establishing cooperation mechanism. An international convention is a publicly announced agreement reached by states in accordance with international law concerning the rights and obligations that states should enjoy, which includes not only agreements, declarations, protocols, but also treaties and conventions. According to the specific content, international police treaties can be divided into extradition treaties, international crime treaties and criminal judicial assistance treaties. According to the specific scope, they can be divided into bilateral treaties, multilateral treaties and global conventions.<sup>21</sup>

##### **3.1.1 The treaty between China and South Korea on mutual legal assistance in criminal matters**

The treaty on mutual legal assistance in criminal matters between China and the South Korea was signed in Beijing, China on November 12, 1998 and entered into force on March 24, 2000. The treaty consists of three chapters and 27 articles, including the scope of application, content, manner, grounds for refusal or delay, execution of

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<sup>20</sup> See Minli Ji, *Legal Problems in the Extradition of Chinese Criminals*, 33(6) Journal of Lanzhou University (Social Science) 91, 92-5 (2005).

<sup>21</sup> See Dekai Huang & Yun Pei, *The progress, problems and countermeasures of international police cooperation under the "Belt and Road" under the new crown epidemic*, 36(6) Gong'an Jiaoyu 70, 76 (2021).

requests for assistance, etc. The subject of the request is the designated central judiciary or diplomatic agency.

Article I of the treaty states: “The Parties shall afford one another the widest measure of assistance in criminal investigations, prosecutions or proceedings in accordance with the provisions of this treaty.” The convention applies only in a narrow sense, but makes clear the general principle “that all forms of criminal mutual legal assistance developed from the extradition of offenders are applicable”. There is no uniform definition of political crime. International judicial assistance in criminal matters does not apply on the basis of the principle of respect for the sovereignty of states and non-interference in their internal affairs. Therefore, the assistance may be refused for political and military offences.

In addition, “the principle of punishable by both parties” shall apply. Receipt of requests and provision of assistance shall be limited to statutory offences punishable under the domestic law of both the requesting and requested states. The principle of respecting human rights, which is derived from the principle of non-extradition of capital crimes, has become the practice of international criminal judicial assistance, and most countries cite it in the form of international criminal judicial assistance. China and South Korea are both retentionist countries and therefore, although the treaty does not provide for the death penalty, the treaty does provide that criminal judicial assistance may be refused.

One of the main objectives of the conclusion of treaties on mutual legal assistance in criminal matters is to provide the maximum scope of assistance more efficiently and effectively. Accordingly, the scope of assistance in a treaty on mutual legal assistance in criminal matters includes not only the assistance matters enumerated in the treaty, but also other forms of assistance that are not prohibited by the law of the requested state and provide for so-called omnibus assistance matters. In the light of the fact that South Korean law on international mutual legal assistance in criminal matters does not provide for general assistance matters, in contrast to the further provisions of the treaties on mutual legal assistance in criminal matters, it can be said that the above-mentioned omnibus provisions in the treaty on mutual legal assistance in criminal matters provide a basis for China and South Korea to carry out extensive mutual legal assistance.<sup>22</sup>

### **3.1.2 The extradition treaty between China and South Korea**

Since the establishment of China-South Korea diplomatic relation in 1992, trade and other economic activities between the two countries are going up since ever. the number of company personnel and foreign students have increased, personnel exchanges have become increasingly frequent. On the other hand, with the development of transportation and communication, the expansion of personnel exchanges and the exchange of commodities have also brought negative effects. The economic crimes in the two countries have gradually increased especially after the commission of major

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<sup>22</sup> Ibid.

crimes such as drug-related crimes. There has been increase in the number of criminals fleeing to the other country because of geographical proximity. In view of the above-mentioned criminal tendency and the trend of criminals escaping, the extradition of criminals between China and South Korea is of great significance for the effective prevention of crime and punishment of offenders.

China and South Korea concluded an extradition treaty on October 18, 2000 and the treaty entered into force on April 12, 2002 (Extradition Treaty between the People's Republic of China and the Republic of Korea). Guided by the principles of mutual respect for sovereignty, equality and mutual benefit, China and South Korea have concluded an extradition treaty for the purpose of more effective cooperation between the two countries in the prevention and containment of crimes. China and South Korea shall be obliged, in accordance with the provisions of this treaty, to extradite each other, at the request of the other party, persons found in its territory that are wanted by the other party for the purpose of prosecuting, adjudicating or enforcing the sentence for the offence for which extradition is sought.<sup>23</sup>

The extradition treaty between China and South Korea is the legal basis for extradition cooperation between the two countries. There are 21 articles in the treaty, which make clear provisions on such issues as the obligation of extradition, the scope of the crime of extradition, the circumstances of refusal of extradition and the concrete implementation of extradition. It should be noted that the agreement between the government of Chinese Hong Kong and the government of South Korea on mutual legal assistance in criminal matters was signed on November 17, 1998. Although falling within the scope of the mutual legal assistance in criminal matters systems of the two countries, however, as the Constitution of the People's Republic of China and other laws provide that the Chinese Hong Kong have the power to sign judicial agreements with foreign governments, the agreement shall not apply between China (except Chinese Hong Kong) and South Korea.<sup>24</sup>

### **3.1.3 The United Nations Convention against Corruption**

In addition to bilateral treaties, the multilateral conventions to which China and South Korea have joined can also provide international legal sources for their international criminal judicial assistance. On October 31, 2003, the United Nations Convention against Corruption was adopted in New York. It was signed by China on December 10, 2003 and came into force on December 14, 2005. It was signed by South Korea on December 20, 2003 and came into force on April 26, 2008.

The United Nations Convention against Corruption has a great influence on the development of all forms of international criminal judicial assistance. First of all, for the extradition of offenders, the United Nations Convention against Corruption

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<sup>23</sup> See Jiangping Yuan & Fuyong Ou, *On the Basis of International Law for the Legal Mechanism of International Cooperation in the pursuit of Fugitives and Recovery of Stolen Assets Outside China*, 27(4) Journal of Shanghai University of International Business Economics 77, 80-2 (2020).

<sup>24</sup> Ibid.

stipulates “when the object of extradition is within the territory of the requested party, the crime specified in this Convention shall apply, provided that the crime of the object of extradition shall be punished according to the domestic laws of both the requesting party and the requested party, and adopts the principle of punishability of both parties, and the principle of non-extradition, extradition or prosecution of its own nationals. The principles of human rights and respect for human rights are also stipulated”.<sup>25</sup>

In addition, the content of political crime is of great significance to international criminal judicial assistance. As the definition of political crime has not yet been established, some countries’ domestic laws stipulate that corruption crime can be regarded as political crime. Therefore, for the corruption crime of public officials, the extradition of criminals is refused. The United Nations Convention against Corruption clearly stipulates no matter what the domestic law stipulates, the parties to the Convention are required to include the “crime of corruption” as an extraditable crime rather than as a political crime. Apart from the extradition of criminals, corruption crimes are not regarded as political crimes in other forms of international criminal judicial assistance.<sup>26</sup>

The United Nations Convention against Corruption is the first legal document in the global international community with the theme of guiding the international fight against corruption. So far, the United Nations Convention against Corruption is also the most complete, comprehensive, global and innovative international legal document on the governance of corruption in the international community. The international legal mechanism of anti-corruption reflects the firm attitude and determination of the international community in the fight against corruption crimes, which is of great significance to promote international cooperation in anti-corruption and strengthen the international community’s fight against corruption crimes. In view of the fact that corruption has been regarded as an international common problem that seriously hinders political integrity, the construction of the rule of law and social justice, the United Nations Convention against Corruption, through the provisions on extradition, asset recovery and other issues, enriches the cooperation content limited by international cooperation in anti-corruption in the past, which is of great significance to mutual trust in politics and mutual assistance in practice.<sup>27</sup>

### **3.1.4 The United Nations Convention against Transnational Organized Crime**

The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. The Convention was signed by China on December 12, 2000, entered into force on September 29, 2003,

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<sup>25</sup> See Guiping Xie, *Non-Traditional Security Issues in China’s Cross-board Regions: Challenges and Countermeasures*, 38(1) Journal of International Security Studies 131, 132-40 (2020).

<sup>26</sup> See Ifelou J. Koni, *Mechanisms for Recovery and Repatriation of Stolen Assets under the United Nations Convention against Corruption*, 20(1) The Nigerian Law Journal 243, 243-60 (2017).

<sup>27</sup> Ibid.

signed by South Korea on 13 December, 2000, effective December 5, 2015. The United Nations Convention against Transnational Organized Crime covers a wide range of areas. The three Protocols to the Convention provide for international crimes that can accept universal jurisdiction. The three protocols were adopted and entered into force by South Korea on December 5, 2001.<sup>28</sup>

Transnational organized crime poses a serious threat to the social stability, economic development and people's life of all countries. The transnational nature of this crime determines that only by strengthening international cooperation can it be effectively attacked and controlled. Based on this understanding, the international community, in the spirit of sincere co-operation and seeking truth from facts, and with mutual respect for sovereignty, equality and mutual benefit, contributed to the birth of the Convention, thus making a landmark step in international cooperation against transnational organized crime.<sup>29</sup> According to the requirements of the Convention, each state party shall improve its relevant domestic legislation, establish effective cooperation and assistance between judicial and law enforcement organs, and strengthen the exchange and sharing of experience and information in combating and preventing transnational organized crime.<sup>30</sup>

### **3.1.5 The provisions of other conventions relating to the fight against transnational organized crime**

In recent years, China has joined a series of multilateral conventions on the punishment of international crimes. Such as the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1969), the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), and the International Convention against the Taking of Hostages (1979).<sup>31</sup> The provisions on combating transnational organized crime in these international treaties, which the South Korean government has acceded to them, shall also be one of the bases for China and South Korea to carry out criminal judicial assistance in combating transnational organized crime. In addition, in the course of mutual legal assistance, the requested assisting party often needs to handle requests for assistance in accordance with the provisions of its domestic laws, such as the determination of dual criminality and the examination of mutual legal assistance requests. Therefore, the relevant domestic laws of China and South Korea is also an indispensable basis for mutual legal assistance in criminal matters related to transnational organized crime in both countries.<sup>32</sup>

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<sup>28</sup> See Xiaowei Zhang, *Review on the United Nations Convention against Transnational Organized Crime and its Protocols*, 23(5) Chinese Criminology Review 74, 74-80 (2003).

<sup>29</sup> See Misty Robinson, *Global Approach to Anti-Bribery and Corruption, An Overview: Much Done, but a Lot More to Do*, 37(1) Thurgood Marshall Law Review 303, 303-7 (2012).

<sup>30</sup> Ibid.

<sup>31</sup> See Guixia Zhang, *On Establishment of International Cooperation Mechanism for Counter-terrorism in China*, 32(4) Journal of Guangxi Police College 91, 94 (2019).

<sup>32</sup> Ibid.

To define money-laundering as an offence, and in order to guide states parties in enacting legislation for the confiscation of property acquired through drug-related transactions, to actively support the tracing of the diversion routes of drug-related proceeds, as well as the investigation and prosecution of the falsification of sources of income, the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted at Vienna on December 20, 1988. China signed the Convention on December 20, 1988, and the Standing Committee of the National People's Congress of the People's Republic of China ratified it on September 4, 1989, and it entered into force on November 1, 1990. On December 6, 1995, South Korea enacted and implemented the special case law on the prevention of illicit drug-related trade, thereby improving its domestic law. On December 1, 1998, the preparatory process for ratification by the National People's Congress of the People's Republic of China required for accession to the convention was completed, and on December 28 of the same year, deposited its instrument of accession with the United Nations Secretariat, becoming the 152<sup>nd</sup> party to the Convention. There is also the first convention to establish international norms relating to offences committed on board aircraft Convention on offences and certain other acts committed on board aircraft.

To sum up, international police cooperation is an important part of national foreign-related criminal jurisdiction, which has a wide range of legal basis due to its foreign-related nature. From the point of view of the characteristics of the legal basis, it has a very distinct duality, that is, in the international police cooperation, Chinese should not only strictly abide by the legal provisions of their country, but also seriously implement the relevant provisions of international law. At the same time, they should also consider the legal provisions of relevant countries. Taking Chinese law and international law as the basis of handling foreign-related cases is a remarkable feature of China's international police cooperation.

## **3.2 Modes of Cooperation**

International criminal judicial assistance is a kind of state behavior in which the judicial organs of many countries make some concessions on the issue of national criminal jurisdiction in order to achieve the purpose of criminal proceedings and sanction criminal acts, provide mutual assistance and carry out cooperation. At present, China and South Korea have initially formed some smooth modes of judicial assistance, which provide a powerful channel for the two countries to jointly combat transnational crimes.<sup>33</sup>

### **3.2.1 Mechanism for the exchange of criminal data and intelligence**

“Criminal intelligence information” is a comprehensive record of crime, from which the causes and characteristics of various crimes, the laws and trends of criminal

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<sup>33</sup> See supra note 13.

activities can be analyzed. Information on criminal activities, such as cross-border planning, preparation, implementation process, use of criminal means, tools and skills, basic information on organized crime and relevant information on the target of crime, can be obtained. The timely sharing by police agencies of the above-mentioned information collected in coordination with each other will help police agencies to develop practical and context-specific preventive measures and take joint action to combat criminal activities.<sup>34</sup> Criminal intelligence information is the premise of combating crime. Without data and intelligence, it is impossible to determine the escape routes of suspects, the transfer way and path of the criminal income, and thus impossible to seal up, freeze, detain and confiscate the criminal income, so as to effectively recover the criminal income.

At present, China and South Korea achieve data and intelligence exchange mainly through the following ways:

Firstly, the police agencies of China and South Korea transmit their criminal data and intelligence to International Criminal Police Organization, whose intelligence liaison office is responsible for the analysis and collation of such intelligence, to the central bureaus of both countries.

The second approach is to exchange data and information through the world's most advanced communication and information-seeking system built by International Criminal Police Organization. The system transmits criminal data and information through various means of information transmission, and member states can access the relevant information by logging into the system and using the automated search function. The system is informative and operates 24 hours a day. In addition to the exchange of data and intelligence through International Criminal Police Organization, police agencies between the two countries sometimes provide relevant data and intelligence directly to each other.<sup>35</sup>

### **3.2.2 International cooperative mechanism for evidence collection**

According to the difference of collecting subjects, the international police cooperation in evidence collection between China and South Korea can be divided into two ways. One is to assist in investigation and evidence collection, and the other is to assist in international investigation and evidence collection. For a considerable period of time, owing to the existence of the principle of sovereignty, no sovereign state has allowed the police of another state to exercise criminal jurisdiction within its territory, nor do treaties on mutual legal assistance between sovereign states, generally providing for the police services of other states to investigate, gather evidence and conduct investigative activities in their own countries. Therefore, in the traditional sense, the police cooperation mechanism is mainly a kind of entrustment relationship, in which the

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<sup>34</sup> See Zhihua Gao, *Mode and Path of Police Cooperation in Regional Criminal Judicial Assistance*, 25(1) Journal of People's Public Security University of China (Social Sciences Edition) 35, 40 (2009).

<sup>35</sup> Ibid.

requesting state entrusts the requested state to carry out the relevant investigation and judicial activities on its behalf.<sup>36</sup>

However, with the deepening and development of the trend of economic globalization, the mobility, transnational nature, global nature and high-tech of crime are also increasing. It is difficult for a single sovereign state to complete the investigation of criminal acts and the location, as well as determine the transfer of criminal proceeds within its territory. In this context, in order to adapt to the new characteristics of crime, the international community and sovereign states are constantly exploring and implementing new mechanisms for international police co-operation. That is, on the basis of respecting state sovereignty, equality and mutual benefit, on a case-by-case basis, the police authorities of other countries are given the right to conduct limited investigative operations in their own territory in order to combat crime. The afore mentioned mode of police cooperation, namely, international investigative cooperation, is on the basis of equality and mutual benefit. “The two sides give each other’s investigators the power to enter the country to investigate and handle cases, or the police agencies of various countries to jointly investigate and solve cases, and jointly combat transnational crimes”.<sup>37</sup>

International investigation cooperation enables the police agencies of China and South Korea to carry out direct dialogue and communication, breaking the pattern of the police agencies of the two countries fighting on their own, and expanding the jurisdiction within the region to the jurisdiction outside the region. From entrusted investigation to cross-border direct exercise of jurisdiction, it has accelerated the process of investigation and ensured the timeliness and accuracy of the investigation.<sup>38</sup> At present, international investigation has become the most typical and direct way of international police cooperation between China and South Korea. The extraterritorial investigation and evidence collection is one of the main contents of the international investigation assistance between the two countries.

### 3.2.3 Seizure and transfer of stolen money and goods

Although the “illicit money” and “booty” are directly related to the evidence of crime, there is still a big controversy among countries as to whether they belong to the category of evidence. Therefore, they are generally listed as a separate matter of judicial assistance in the existing treaties on judicial assistance, rather than categorizing it as mutual legal assistance on evidence. For the fight against crime, the seizure and transfer of stolen money and goods is essential to fundamentally prevent crime.<sup>39</sup> Although the

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<sup>36</sup> See Zhiqiang Jia & Chunlei Min, *The Predicament and Solution of Investigation and Evidence Collection under Judicial Assistance in Chinese, Japanese and Korean Criminal Law System*, 35(3) Dongjiang Journal 42, 43-8 (2018).

<sup>37</sup> Ibid.

<sup>38</sup> See Yunqi Tang & Zhanqing Jiang et al., *Analysis on the Construction of Synthetic Combat System in the New Mechanism of Fighting Crimes*, 35(2) Journal of People’s Public Security University of China (Social Sciences Edition) 47, 50 (2019).

<sup>39</sup> Ibid.



seizure and transfer of stolen money and goods is an important regime for international mutual legal assistance in recovering the proceeds of crime, the conditions are also relatively strict.

In addition to meeting the first two requirements (illicit money and booty) for the transfer of evidence material, the requirements also include the following four aspects: First, the ownership of the booty belongs to the party specified in the request of the requesting state. Second, it is obtained in the case of a crime committed in the requesting state. Third, it is found in the requested country. Fourth, the transfer of stolen money and booty shall not violate the requested country's import and export laws and regulations on goods and finance and foreign exchange control laws and regulations. Subject to the foregoing conditions, the requested state shall promptly hand over the property to the requesting state, which shall return it to its rightful owner.<sup>40</sup>

In recent years, with the deepening of the relations between China and South Korea, the exchanges between labor service personnel of both sides have become more and more frequent. But some individuals, taking advantage of the desire of ordinary Chinese people to go to South Korea to work hard and get rich, have taken various measures to swindle money and caused bad influence in society. Since China and South Korea signed the Treaty on Mutual Legal Assistance, the judicial departments of the two countries have successfully solved the cases for the first time. Among them, "Hailin to South Korea Labor export fraud case" is a typical case. From 2006 to 2008, a South Korean, Yu Lung Chow, together with his agent, Jiang Qing, defrauded more than 1,280 victims in the three north eastern provinces of China of more than 23 million yuan, in the name of recruiting workers to South Korea. After the incident, Zhoulong Yu fled back to South Korea. Yunhe Li was captured by Chinese police in July 2008. After arresting Yu, South Korean police quickly seized his bank account and kept detailed records of his assets. After the Chinese police went to the South Korea, South Korea transferred the money to China as soon as possible. According to South Korea's statistics, in addition to the 450 million won, or 2.1 million yuan, in cash that has been handed over to China, the culprit also owns a property. South Korea will auction the property at a later date and return the money to the Chinese victims.<sup>41</sup>

### **3.2.4 Direct recovery of proceeds of crime**

In recent years, the recovery of proceeds of crime is a new trend and field of international police cooperation, which is a very effective measure to prevent and combat crime. This system was originally established by the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances to combat transnational money laundering. It is a special means to detect and recover illegal income transferred internationally. According to this international investigative

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<sup>40</sup> See Shoufen Liu & Xiaofang Sun, *Crime on Internet*, 38(3) Journal of Peking University (Philosophy and Social Sciences) 114, 122 (2001).

<sup>41</sup> See *supra* note 31.

technique, investigators can investigate the drug trafficking or other criminal activities of the offender and presume that all property in his possession is the illicit proceeds of drug trafficking or other crimes; therefore, they take the form of confiscation to nationalize them.<sup>42</sup>

With the increase in the cross-border transfer and concealment of the proceeds of crime, this means of investigation or coercive measures has gradually been applied to the recovery of the proceeds of crime in international mutual legal assistance. In the theoretical world of criminal law, it is generally believed that recovering the proceeds of crime plays a fundamental role in cracking down on crime. However, the recovery of proceeds of crime often involves multiple states.<sup>43</sup> In order to effectively identify, trace, freeze, detain and confiscate the proceeds of crime, several countries often need to take joint action. Many countries have also set up specialized agencies for the recovery of proceeds of crime, which are composed of police, customs and other relevant departments. They are responsible for identifying the source and flow of proceeds of crime, taking measures to trace and seize proceeds of crime in accordance with the law, and providing strong evidence of the proceeds of crime to foreign judiciary for the purpose of seizure and final collection.<sup>44</sup>

To sum up, it is not only necessary but also feasible to carry out transit police cooperation between China and South Korea to recover the proceeds of crime. In the course of cooperation, China and South Korea should abide by the principle of state sovereignty. On this premise, Chinese people should pay attention to appropriate flexibility in the exercise of sovereignty. Moreover, in the course of cooperation, China and South Korea should consider bilateral cooperation in the form of a treaty.<sup>45</sup>

### **3.3 Problems in International Police Cooperation between China and South Korea**

Under China's existing legal system and framework, China and South Korea have actively carried out international police cooperation and made certain achievements. However, there are also problems such as unblocked mechanisms for data and intelligence exchange, more restrictions on the collection of overseas evidence, and inconsistent legal provisions between the two countries.<sup>46</sup>

#### **3.3.1 Restriction between sovereign states and international organizations**

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<sup>42</sup> See Huizhang Shen, *Discussion on Expanding New Fields of International Police Cooperation*, 24(3) Journal of Xinjiang Police College 17, 19 (2004).

<sup>43</sup> See supra note 5.

<sup>44</sup> See supra note 31.

<sup>45</sup> See Honghua Men & Xiaoyang Liu, *China-South Korea Strategic Cooperative Partnership: Its Process, Evaluation and Outlook*, 53(6) Jilin University Journal Social Science Edition 62, 62-74 (2013).

<sup>46</sup> See supra note 38.

When discussing the cooperation in combating transnational crimes, people often face a sharp restriction factor, that is, national sovereignty. The so-called sovereignty is the highest power of a country to deal with internal and external affairs independently. Sovereignty is the most important feature and the most fundamental attribute of a democratic country. In theory, the emergence and development of inter-governmental international organizations (conventions) are the acts of exercising sovereignty for the sake of safeguarding their own interests. International organizations (conventions) are essentially not superior to states, nor can they infringe on and interfere with member states. Without the recognition of sovereign states, the statutes, conventions, agreements and treaties adopted by international organizations cannot become the international rules generally followed by the international community. Without the participation of sovereign states, neither the United Nations nor International Criminal Police Organization can carry out transnational cooperation in combating crimes.<sup>47</sup>

With the strengthening of the functions of international organizations, it can be expected that the development of international organizations will always be accompanied by the contradiction between expanding their functions and safeguarding national sovereignty. In order to further deepen the international police cooperation, the sensitive issue of mutual growth and decline between national sovereignty and international organization functions should be solved.<sup>48</sup>

### **3.3.2 Conflict between human rights and sovereignty**

Western developed countries have put forward such viewpoints as ‘human rights are higher than sovereignty’ and ‘human rights have no national boundaries’. They emphasize that the principle of human rights has been included in the Charter of the United Nations and has become a principle of international law. In the relationship between human rights and sovereignty, the principle of state sovereignty and non-interference in internal affairs is not applicable to the field of human rights, and human rights should be higher than sovereignty. However, most developing countries believe that the human rights issue has its international aspect, but its essence belongs to a country’s internal jurisdiction. The implementation of human rights can only be effectively guaranteed on the basis of the principle of national sovereignty.

Therefore, it is only meaningful to talk about human rights on the basis of respecting national sovereignty, and human rights are subordinate to national sovereignty. There are differences in values, cultural traditions, social systems, and economic development among different countries. So, the different opinions on whether human rights or sovereignty is more important may become an obstacle to international cooperation in combating transnational crimes.<sup>49</sup>

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<sup>47</sup> Ibid.

<sup>48</sup> See supra note 38.

<sup>49</sup> See supra note 31.

### 3.3.3 Complex willingness and attitude of government support

In the international police cooperation system, the willingness of governments to co-operate plays a decisive role. The transnational cooperation of policing is not only from the perspective of policing, but also involves political, economic, cultural and other factors. If the two countries are hostile to each other militarily or politically, the police cooperation between the two countries will be difficult to carry out. Police cooperation between countries can be regarded as a kind of foreign affairs of the police circle. The police department is a government organ. Without authorization, it is impossible to engage in international activities on behalf of the country at will. The different attitudes of governments of different countries often lead to blocked channels of police cooperation.

Moreover, whether the administrative procedures of the government to combat transnational crimes are simple or not will also affect the effectiveness of international police cooperation. Since the police department is a government department, the amount of operational budget will affect the effectiveness of international cooperation. If the government agrees that the effective fight against transnational crimes through international police cooperation can bring positive help to national security, then sufficient financial support will increase the frequency of international cooperation; on the contrary, police cooperation can only choose what to choose, resulting in omissions and regrets in international cooperation.<sup>50</sup> Due to the different economic development in the quality of police officers, factors such as the advanced detection tools, the developed level of investigation technology, the implementation of monitoring procedures, the communication of language ability and the speed of work may appear at any time, which will affect the smooth development of China's international police cooperation.<sup>51</sup>

### 3.3.4 More limited international cooperation in the collection of evidence

The economic and cultural development of China and South Korea is bound to affect the input of the two countries in evidence collection. This type of input includes the costs of training for the overall quality of the domestic police force, the training of professionals in the field of evidence collection and analysis, and the updating and maintenance of various investigative tools, particularly those for the integrated analysis of evidence. These investments in personnel and equipment will inevitably affect a country's ability to collect evidence and solve cases, and in turn, the differences in evidence collection that exist with other countries when participating in transnational evidence-gathering international policing activities, which is not conducive to the

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<sup>50</sup> See Shulan Xue, *Research on Judicial Review of Extradition*, People's Public Security University of China Press, p.41 (2008).

<sup>51</sup> See supra note 25.

development of international police cooperation activities between China and other countries.

The collection, analysis and processing of data and intelligence require special talents to ensure their effective use in the process of solving cases, whereas the development level of science and technology in China and South Korea is different, the various levels of the structure of the various talents also add to the difficulties in the exchange of data and intelligence in the course of international police cooperation. China and South Korea have very different understanding of data and intelligence exchange mechanism, which will be an obstacle to international police cooperation between the two countries.

### **3.3.5 The extradition process and complicated procedural requirements**

The difference of laws between China and South Korea is bound to affect the cooperation of extradition. There are no clear provisions on the specific procedures and implementation details of extradition in domestic law, which will also lead to many problems in the process of extradition cooperation between China and South Korea in practice. If a country fails to improve its domestic laws in accordance with the provisions of international treaties, it will inevitably affect the intended purpose of international extradition cooperation. There are differences in ideas and legal provisions as to whether an event constitutes a crime, what crime it constitutes, and what punishment should be imposed for the crime. In practice, different judgments made on the same case, will certainly affect the result or failure of extradition cooperation. One of the biggest problems of international criminal judicial assistance between China and South Korea is that the procedure is complicated and takes a long time. International criminal judicial assistance between the two countries requires a series of cumbersome documentation procedures due to sovereignty issues and therefore takes some time. In addition, communication and cooperation in criminal cases between different regions of China also require other procedures, thus resulting in time delays.

## **4. Prospects for the Operation of China-South Korea International Police Cooperation Mechanism on Combating Crimes**

On the premise of respecting the laws of their own countries, the two countries have provided mutual support and cooperation to the utmost extent. China and South Korea have carried out fruitful cooperation in the fields of combating transnational crimes, assisting in investigations and handling of cases, arresting and deporting crime suspects, and have successfully carried out many major transnational cases. Crime suspects were

arrested and brought to justice, effectively combating transnational crimes and maintaining the security and stability of the two countries and the region.<sup>52</sup>

## **4.1 Significance of International Police Cooperation**

In order to combat transnational and cross-border crimes, the international community, under the coordination of the United Nations, has strengthened ties and cooperation among countries. In particular, the United Nations Convention against Transnational Organized Crime, formed in 2000, advocates mutual legal assistance and law enforcement cooperation among countries, which has been responded by many countries. More countries have joined International Criminal Police Organization, and a unified police organization has been set up in Europe. The police of various countries have strengthened mutual assistance and cooperation in the investigation and evidence collection of crimes and extradition, thus giving the transnational and cross-border criminals a proper attack. The international police cooperation between China and South Korea is no exception. It has made some progress in recent years.

### **4.1.1 Effective crack down on transnational crimes between China and South Korea**

The fight against transnational crimes involves the definition of criminal jurisdiction, the standard of conviction and sentencing, and the evaluation of penalty effect. And it involves many aspects, such as the sense of sovereignty, diplomatic relations, values, economic interests and political factors of a country. It is not only connected with but also restricted with the handling of simple domestic crimes. Therefore, it is necessary to ‘apply the law and implement the international law of the country’ legal obligation has become the core issue in dealing with such crimes. With the international community paying more attention to transnational crimes, the bilateral or multilateral criminal justice cooperation and police cooperation mechanism have developed rapidly. International police cooperation has gradually become one of the main contents of international cooperation. It is a necessary bridge in the field of criminal justice in many countries and an important means to effectively combat transnational crimes.

### **4.1.2 Improve the effects of criminal jurisdiction abroad and optimize the law enforcement capacity of China and South Korea**

International police cooperation can not only save a lot of manpower and material resources, but also effectively avoid the legal and judicial obstacles in trans-national and cross-border jurisdiction, strengthen the effects of overseas criminal jurisdiction, and

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<sup>52</sup> See supra note 25.

improve the ability of overseas investigation and case solving.<sup>53</sup> Through international judicial cooperation, especially the cooperation between the police departments, they facilitate each other in fighting crime and arresting suspect. They not only enhance the effects of domestic extra-territorial jurisdiction, but also support foreign extra-territorial jurisdiction, which is important guarantee for effective exercise of their extra-territorial jurisdiction.

International police cooperation has gradually enhanced the law enforcement capacity of police and other judicial organs in various countries. The wide range of international police cooperation, various channels and simple procedures provide a practical guarantee mechanism for all countries to combat transnational crime and arrest suspects in time.<sup>54</sup> Regular direct cooperation provides opportunities for the police of various countries to learn from each other's strengths and to improve their ability to punish crimes. International police cooperation, especially cooperation forms such as joint investigation and joint case handling, can also make up for a country's police's lack of understanding of its own social system, economic system and cultural background, and overcome the obstacles of case handling.<sup>55</sup>

#### **4.1.3 Protect the legitimate rights and interests of the state and citizens**

International police cooperation in cracking down on various crimes is not only the need to protect the legitimate rights and interests of domestic citizens, but also the need to maintain national dignity, and to purify the international public security environment. Through effective international police cooperation, the restoration of the legal net in the international community will undoubtedly cause great psychological shock to criminals and effectively control the high incidence of international crimes.

Transnational criminals usually take the advantage of the weak links of social management and judicial control to commit crimes.<sup>56</sup> Some countries often have to degrade or even give up case handling because of the limited scope of judicial sovereignty and the high cost of handling cases. However, through international police cooperation, China should seize the favorable opportunities and take appropriate measures. If the country really cooperates in the international field, it is entirely possible to recover or minimize the losses.

### **4.2 The Trend of Police Cooperation between China and South Korea**

At present, countries have strengthened cooperation to achieve the purpose of joint control of crimes, which is not only conducive to safeguarding their own interests, but

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<sup>53</sup> See Canping Chen, *International Criminal Judicial Assistance*, People's Public Security University of China Press, p.65 (2007).

<sup>54</sup> See Yongchen Zhao, *International Criminal Law and Judicial Assistance*, Law Press, p.120 (1994).

<sup>55</sup> Ibid.

<sup>56</sup> See Zheng Wang, *Foreign-related Criminal Procedures and Criminal Judicial Assistance——Guidelines for Handling Cases*, Qunzhong Press, p.42 (1999).

also promoting diplomatic relations among countries. The success of international police cooperation between China and South Korea is closely related to the diplomatic relations of the countries concerned. The process of international police cooperation itself is a process of deep understanding, resolving differences, fully seizing the opportunity to promote a virtuous circle between the two countries, which is bound to benefit the future.<sup>57</sup>

#### **4.2.1 Multilateral cooperation within the framework of National Central Bureau of International Criminal Police Organization**

The relative ease of movement of nationals between neighboring countries makes it easier for criminals to flee to neighboring countries and evade their nation's laws. This requires that criminals and the countries from which the proceeds of crime flow can cooperate and act together with neighboring countries to ensure the member states can take the initiative in combating transnational crime, so as to combat cross-border crime to the maximum extent as possible. The establishment of multilateral police cooperation is a platform to directly increase the contacts and exchange among the police authorities of the member states. The police authorities of the member states learn from each other in their operations, communicate in their concepts and methods, cooperate and carry out their work; all these will promote good relations between the police authorities of the region and the various countries.

China and South Korea are both neighbors as well as members of International Criminal Police Organization. The international police cooperation on joint crime fighting between the two countries within the framework of International Criminal Police Organization is a kind of police activity that makes better use of the advantageous resources of both countries. The international police cooperation forms mutual cooperation and cooperation based on the principle of mutual benefit and reciprocity. It makes positive contributions to the fight against transnational crime in the region, safeguarding the judicial respect of all countries, and increasing exchanges and cooperation among countries, which is a common mission that needs the active efforts of both countries.

#### **4.2.2 Expanding the scope of cooperation and diversifying the mode of cooperation**

With the development of history, the scope of international police cooperation has gradually expanded. From the initial limited cooperation involving extradition, investigation and evidence collection, it has gradually developed into a variety of police business cooperation, including assisting in the investigation of criminal cases and joint handling of cases; statistics and arrest of fugitives and even cross-border pursuit by both countries; confiscation of criminal proceeds, including tracing, freezing or detaining; joint special strike activities.

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<sup>57</sup> Ibid.



Since the 1950s, International Criminal Police Organization and diplomatic channels have been the main channels for police cooperation among countries. However, the above-mentioned conventional cooperation channels can no longer meet the needs of combating new transnational crimes. More flexible cooperation networks are gradually emerging. Bilateral cooperation is developing to multilateral cooperation, from regional cooperation to global cooperation. Regional cooperation institutions, communication channels between countries and some cross regional specialized international cooperation agencies are emerging.

#### **4.2.3 Internationalization of police training and integration of police law enforcement**

In recent years, China has signed police cooperation agreements with dozens of neighboring countries and established bilateral cooperation mechanisms. By signing bilateral agreements with neighboring countries, joint police operations and mutual assistance in handling cases can be better carried out, thus increasing the efficiency of the work of national police organs. The police organs of the two countries may, on the basis of bilateral agreements and within the scope of their respective functions and powers, organize activities to detect and capture criminals and seize proceeds of crimes.<sup>58</sup>

The police authorities of the two countries may also cooperate with each other in carrying out joint investigation activities, that is to say, for a given case, the police authorities of the two countries may carry out investigations within their respective jurisdictions and transmit to each other the results of the investigation and the progress of the case, the two countries agreeing to take action and divide responsibilities. Bilateral police cooperation can also provide for the exchange of personnel into each other's territory, with each other's police departments to cooperate in the arrest of criminals and recovery of stolen money and goods. While conducting police cooperation, the two countries can also exchange experience and enhance their respective investigative capabilities.<sup>59</sup>

The development trend of economic globalization has objectively promoted the integration process of police law enforcement system in relevant regions. More bilateral or multilateral agreements on police law enforcement cooperation have been signed by countries with similar geographical location, common cultural origin and similar social system. In January 2004, the Association of Southeast Asian Nations, China, Japan and South Korea Ministerial Conference on combating transnational crime was held in Bangkok, Thailand. The meeting established the principles of equal consultation,

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<sup>58</sup> See Xin Jin, *The China-ASEAN Cross-border Security Governance: Institutional Dilemmas and Strategies for Optimization*, 21(4) International Forum 74, 75-80(2019).

<sup>59</sup> Ibid.

mutual respect for sovereignty, gradual and flexible cooperation, which effectively promote law enforcement cooperation in the above regions.<sup>60</sup>

### **4.3 Prospects for the Operation of the Cooperation Mechanism**

In recent years, the Ministry of Public Security of the People's Republic of China has established a comprehensive, multi-level and wide range law enforcement cooperation relationship with law enforcement agencies such as South Korea's police agency, the prosecutor's office, and the courts. Comprehensive and practical cooperation has been carried out in the fields of information exchange, case cooperation, investigation and evidence collection, arrest and deportation of criminal suspects. The public security bureau will further strengthen practical cooperation with South Korea law enforcement agencies to combat transnational criminal activities involving the two countries and vigorously maintain normal personnel, economic and trade exchanges between the two countries.<sup>61</sup>

#### **4.3.1 Establish a domestic legal system**

The domestic legal sources of China's international police cooperation include the constitution, criminal law, administrative law and extradition law. In view of the problems revealed in the current international police cooperation between China and South Korea, and in order to adapt to the forms and requirements of the public security bureau and the South Korea police in conducting police law enforcement cooperation, the domestic laws were implemented. In terms of relevant domestic legal systems, China's legislative organs should step up the pace of legislation and actively construct other laws on international police cooperation.<sup>62</sup>

The origin of China's domestic law on international police cooperation, especially after the implementation of Extradition Law of the People's Republic of China, has made the legislative direction of international police cooperation develop to the direction of specialized separate law. On the existing basis, the legislature should proceed with the formulation of specific laws and regulations in this regard. In the process of formulating specific laws and regulations, the United Nations model treaties should be fully taken into account, and China's international law on judicial assistance in criminal matters should be formulated in accordance with its classification criteria.<sup>63</sup> Moreover, after the legislature has established a legal system that is compatible with international police cooperation, the departments concerned need to do a good job in the coordination and integration of laws and regulations. First of all, the relevant laws of international criminal judicial assistance should be integrated into Criminal Law of the

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<sup>60</sup> See Hongxi Liu, *Research on China's International Police Cooperation in Combating Transnational Crimes*, Liaoning University Publishing House, p.24 (2013).

<sup>61</sup> See supra note 34.

<sup>62</sup> See supra note 12.

<sup>63</sup> See supra note 25.

People's Republic of China so that the two can be unified. The harmonization of China's legal system on mutual legal assistance in criminal matters with international treaties on mutual legal assistance in criminal matters should also be noted. For example, if the content of Extradition Law of the People's Republic of China is not consistent with the extradition treaty signed by South Korea, it should be amended in consultation with South Korea to achieve a unified legal effect.<sup>64</sup>

#### **4.3.2 Adopt a flexible approach to the problem of extradition**

As a universally accepted international police cooperation project, extradition system has been carried out in the world for a long time, and widely accepted by all countries both in theory and in practice. The extradition system has made it possible for China and South Korea to crack down on transnational crimes, effectively filling the legal vacuum in a country's domestic law in terms of being unable to exercise criminal sanctions against criminals fleeing abroad. Extradition has contributed to safeguarding the sovereignty of a country, the peace and stability of the general environment of the international community.<sup>65</sup>

With the rapid development of globalization, international police cooperation is faced with many new problems, which can only be solved by China and South Korea on the basis of mutual consultation. With the development of international police cooperation activities, the principle of non-extradition in the extradition system should also adapt to the trend of the times and adjust its scope of application in order to deal with the international crimes under the new situation. The principle of non-extradition should be able to adapt to the modern international environment, enhance the exchange of countries to combat transnational crime, promote the development and progress of extradition system.<sup>66</sup>

#### **4.3.3 Establish bilateral mechanisms of mutual trust and cooperation**

With the continuous development of economic globalization, the exchanges between China and South Korea are becoming more frequent, and countries across the geographical boundaries are practicing global cooperation in more areas. International police cooperation between China and South Korea has come into being in such an era.<sup>67</sup> The cooperation can not only combat criminals across borders, recover the proceeds of crime, protect the interests of the countries and citizens of the victimized countries, recover the losses of the countries and citizens of the victimized countries, to a certain extent, it can also optimize the law enforcement capacity of the police organs of the two

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<sup>64</sup> See supra note 31.

<sup>65</sup> See supra note 25.

<sup>66</sup> See supra note 34.

<sup>67</sup> See Chaofeng Yin, *On the Bilateral Mechanism of China's Anti-corruption International Cooperation*, 19(5) Journal of Tianjin Administration Institutes 81, 81-7 (2017).

countries, enhance the cooperation between the police organs and other organs, and enhance mutual learning assistance between the countries.<sup>68</sup>

To strengthen China-South Korea international police cooperation, it is necessary to strengthen cooperation from the aspects of information exchange, working mechanism and organization, so as to enhance the efficiency and achievements of China-South Korea international police cooperation and enhance the overall strength of combating transnational crimes. Mutual trust refers to China and South Korea's efforts to put aside differences in social ideology and institution among countries and abandon the way of thinking that only their own interests prevail in the course of their exchanges. Mutual trust also entails consulting each other on an equal footing, instead of using methods such as cold war and armed conflicts to solve problems. Also, not to maliciously mistrust each other's purposes, not to be hostile to each other's country, and to live in friendship among each other's country are the mentalities of mutual aid and cooperation in international exchanges.<sup>69</sup>

#### **4.3.4 Develop foreign police training and foreign aid**

Actively carry out foreign police training and assistance to South Korea, and gradually build China's security strategic barrier. In order to enhance cooperation and exchange with the police departments of South Korea and its neighboring countries, South Korea should cultivate a group of friendly forces with China, and gradually build a strategic barrier for China's surrounding security, China should actively carry out foreign police training and increase foreign aid in accordance with the principle of focusing on neighboring countries and taking into account other developing countries. It is necessary to promote foreign aid work in a planned, step-by-step and focused way, and establish a set of standardized foreign aid working mechanism to maximize the benefits of foreign aid.

After the training has been held for many times, China should rely on the overall plan of the Ministry of Human Resources Development and Social Security, closely combine with the work needed, make full use of the existing training resources of the public security organs, and gradually form a comprehensive foreign police training network. The training shall have different focuses in colleges and universities affiliated to the ministry of public security and provincial public security colleges with mature conditions, so as to plan, implement and manage the foreign police training as soon as possible. It is necessary to establish a set of training mode with Chinese characteristics. On this basis, sharing resource courses with South Korean counterparts, colleges and universities, in-depth cooperation, co-training, establishing a close and unified training system to ensure the cooperation and exchange of talents should be enforced.

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<sup>68</sup> See supra note 25.

<sup>69</sup> See Feng Huang & Linna Zhao, *Overseas pursuit of escape and stolen property and international judicial cooperation*, China University of Political Science and Law Press, p.34 (2008).

#### 4.3.5 Use direct receipt and dispatch of requests for assistance

In principle, requests for assistance should be made between the parties to a treaty through diplomatic channels. However, the designation by the parties to the treaty of their respective central authorities enables requests for assistance to be sent directly between the central authorities without the need for diplomatic channels, thus facilitating the more expeditious performance of assistance. According to the treaty on Mutual Legal Assistance in Criminal Matters, the central organ of China is the Ministry of Justice, and the central organ of South Korea is also the Ministry of Justice.

However, in practice, South Korea, the United States, Canada, Japan, Australia, Switzerland and Chinese Hong Kong with a large number of assistance adopt the direct receiving and sending mode. The authors believe that if the Ministry of Justice of the People's Republic of China and the court from South Korea adopted the method of sending and receiving requests for assistance by express mail instead of diplomatic channels through consultation, assistance could have been performed more quickly. Moreover, in order to improve the efficiency of assistance, South Korea has implemented the pre-examination system of letters of assistance with some countries such as Japan. The system is designed to avoid situations in which additional assistance is required in the course of the performance of the assistance, which may have to be deferred.

It is because of the series of international judicial cooperation between China and other countries that no criminal element who has fled abroad can think of any country as a safe haven for him to escape punishment and hide the criminal assets. China and South Korea have repeatedly worked together to crack transnational fraud cases. No doubt in this regard they have a good demonstration. The successful detection of the case will certainly play an active role in China's foreign pursuit, case investigation, evidence collection, etc.<sup>70</sup>

## 5. Conclusion

With the variety of crimes and the complexity of the means of implementation across the two countries, international police cooperation between China and South Korea should continuously deepen cooperation, carry out technical exchanges and international police training, as well as improve and perfect the professional, technical level and comprehensive quality of the police system. China should actively enact relevant legislation, establish domestic legal system on international police cooperation, take flexible ways to solve the problem of extradition, and establish bilateral mutual trust and cooperation mechanism.<sup>71</sup>

International police cooperation between China and South Korea is an activity that can only be carried out on the basis of a domestic legal system. Adopting a flexible

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<sup>70</sup> Ibid.

<sup>71</sup> See supra note 3.

approach to the problem of extradition and putting in place bilateral mechanisms of mutual trust and cooperation between China and South Korea should be put on the agenda. Besides, developing foreign police training and foreign aid among countries in all aspects and levels matter as well. Using direct receipt and dispatch of requests for assistance on the basis of mutual trust and cooperation calls for cooperation. All in all, the establishment of a bilateral mechanism of mutual trust and cooperation between China and South Korea will not only safeguard the interests of the countries and citizens of the two countries, but also be of great positive significance to the peaceful development of the whole world.<sup>72</sup>

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<sup>72</sup> See *supra* note 25.

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