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COVID-19 and Universality

Comparative Law

COVID-19: Universal Challenge or Challenge of Universality?

COVID-19 poses a common threat to human beings. People have to mobilize to respond to the challenge. Yet there are many forms and sites for mobilization, such as the State, and International. States invoke status of exception to react to COVID-19. It is hoped that this common understanding of the need for an exception can bring States together, and lay the groundwork for international cooperation, and therefore the application, interpretation, and making of international law. We call this the materialist universalist hypothesis. Yet COVID-19 may also magnify the tension within international law, that the institution and practice are not inherently universal, and should not be so, that the international legal claims made through the COVID-19 crisis exposed the bias of a group of people over the others.[1]

This section presents a transcription of the analysis made by the scholars from three continents who delicately discussed questions including: Why do people mobilize around States rather than international law during a global pandemic? Why are biases seemingly reinforced, rather than reduced when people face a common challenge? Can international law build its legitimacy for its universality during COVID-19?

Following the section of transcribed text of the Symposium, four articles are introduced.

Yang Liu:

Before we launch the discussion, let me spend a few minutes introducing the event. This event was originally from the joint research program, actually a seed fund program held by universities. It's cool for Professor Işıl Aral and me to have a research program. And eventually, it's developed from a critical perspective of the international legal history to the examination of the current situation. Yet we still hope to project our critical perspective on the reflection of the current situation from a theoretical perspective. I am Yang Liu, Assistant Professor at Renmin University of China Law School, and Director of the Center for Global Law and Strategy, as the co-host of this event. Let's welcome Professor Işıl Aral to have a few words from our co-host.

Işıl Aral:

Thank you very much, Professor Yang Liu. And welcome to you all. I also want to thank all the panelists and all the participants for joining us today. I look forward to everyone's contribution after the presentation.

[1] On May 19, 2021, Renmin University of China Law School held the Global Law and Strategy Roundtable VIII — "COVID-19: Universal Challenge or Challenge to Universality?" Assistant Professor Yang Liu, the Director of the Center for Global law and Strategy, Renmin University of China organized the roundtable. Speakers are (1) Işıl Aral, Assistant Professor of Public International Law at Koç University, Istanbul; (2) Kangle Zhang, Ph.D., Postdoctoral Researcher of Peking University Law School; (3) Maria Adele Carrai, Assistant Professor of Global China Studies at New York University Shanghai; and (4) Fozia Nazir Lone, Ph.D., Associate Professor of School of Law at City University of Hong Kong. Commentators are Congyan Cai, Professor of Law, Fudan University, Shanghai; and Tony Carty, Professor of Law, Beijing Institute of Technology, Beijing. All of them confirmed the records of their own speeches.

Yang Liu:

Thank you very much. Now, we have another co-sponsor, which is the Institute for International Disputes, Prevention and Settlement. Professor Wenliang Zhang is the Acting Director of the Institute. Now, we have Professor Wenliang Zhang.

Wenliang Zhang:

Hi, good evening, Chinese friends and colleagues and good morning, friends and colleagues from the other parts of the world. Thanks to Professor Yang Liu for organizing such a meaningful event. Our institute was established in 2019. It was able to promote the teaching and research in the field of international dispute, prevention and settlement. Today, we have a very good number of very influential Chinese and foreign scholars. Thanks again to Professor Yang Liu for organizing such an event and with every success of this event, and I also look forward to welcoming each of you to come to Renmin University of China in the future for conferences. Thank you.

Yang Liu:

Thank you very much. I think tonight the panel at the round table also reflects those concerns in terms of geographic representation, gender balance, and also probably the variance of political, social, and cultural backgrounds. We have scholars from five countries teaching on several continents, some from the common law system, some from the civil law system.

We are going to the presentation. I will spend a few minutes briefly introducing Işıl Aral, Assistant Professor of International Law. As some of our audience may know, Professor Işıl Aral is editing a book about the universality of international law, which is to be published soon. She's also a prolific writer on ideology and international law, democratic governance, etc., all tied to today's discussion. We also have Professor Maria Adele Carrai. Some of our audience may notice that she just published a book on the issue of sovereignty in China. She was critically and historically examining the issue of sovereignty related to a number of issues in our current debate. So, she will speak about COVID-19, international law and the relevance of authoritarian legalism. Professor Tony Carty is a well-known international theorist, who is now teaching at Beijing Institute of Technology. He will speak about COVID-19 in the United Kingdom. I will speak about the legal responses across a number of countries, including the states we discussed, China, Turkey, the United Kingdom, and the United States. The title will be "Asia as a method". Our last speaker is Associate Professor Fozia Nazir Lone from City University of Hong Kong. She will speak about a very important topic. Her topic will be on leadership and its relations with the World Health Organization during the COVID-19 pandemic.

Besides our five speakers, there will be two distinguished commentators. The first one will be Professor Congyan Cai from Fudan University Law School, who is a frequent contributor to a number of Oxford handbooks on international law and also published widely on leading international law journals. Professor Congyan Cai just published two articles on universality of international law. And we are looking forward to your presentation. Then the second commentator is Doctor Kangle Zhang, who is a postdoctoral researcher from Peking University Law School. Doctor Kangle Zhang holds his Ph.D. from University of Helsinki. For those of you who don't already know, it is one of the major bases of critical international legal studies. Professor Kangle Zhang is an expert in critical

international legal theory, as well as international law of finance. Each of the speakers and the commentators will speak for 12 minutes. We will enforce the time rule very strictly. Then we'll have roughly 25 minutes for an open Q & A. Now, Professor Işıl Aral, the floor is yours.

Işıl Aral:

Thank you very much for your very kind introduction. Since I am the first panelist, I want to start with a few introductory remarks about what we mean by the concept of universality of international law. This is a concept that we frequently use in international law. And its frequency is undeniable. And often when we refer to the universality of international law, we refer to its geographical outreach, that it's a legal system that applies to all international actors equally. In this sense, it has some important, explanatory virtue. It explains how international law actually maintains a global legal order. But apart from this special dimension, I think the concept of universality is also a moral and substantive dimension by providing an image of integrity, inclusive virtue, and harmony, and also an agreement, both in its special and non-special dimensions.

The concept of universality plays a decisive role in creating the history of discipline. It's under this idea of universality that we can read the history of international law, as history progresses. We can read it as a linear development throughout history. We used to have coexisting legal systems with the development of international law. Now we have a universal system which applies to all international actors globally. So, this concept can also help to project an image of international law. And it can help us to see internationalization as a necessity. But surprisingly, all these dimensions have been very heavily criticized in international law. They have been challenged and contested since international law has been in existence in Europe and imposed on the rest of the world. I think the history of international law can hardly be read as a history of progress. Rather, many scholars actually highlighted the limits that are drawn by this concept that we can draw from this universality of international law and the cultural domination that it also creates, for example, feminists and critical scholars. They have long actually challenged this idea of universality of international law. So, charges against this concept actually abound. But here I want to take a step back and question how we create this concept of universality. Because I think this concept is an efficiently void concept. It doesn't have a meaning on its own, and it's only within a context that we can understand what it really means. It can only be defined as to what it's being opposed to. When discussing the idea of universality, someone says universality is not a standalone concept. It's an empty frame. It's an entire frame that has to draw from a certain particularity in order to define itself.

Whenever we talk about universality, there will always be a particularity from which this concept of universality will have to derive from. Here again, the broader touches upon a similar point. And there's always this tension between what is universal and what is particular, because universality is not an authentic concept. It has to actually draw from a particular in order to define itself. There will always be attention between the two because universalities will always try to detach themselves from what is particularly important in order to become a standalone concept. But it's a paradoxical attention, because universality will always necessarily have to draw from a particularity. If universality will always have to impose itself to a certain particular, does it mean that we should abandon this concept in international law? There's no way to abandon the concept of universality. But we just need

to be mindful about the concept in which it's being used and to what universality is being opposed, what type of particularity it has. So, it also underlines this fact that universality cannot be understood on its own, just as a standalone concept.

So, I think in that sense, it's possible to identify some particulars that have already been actually discussed in international law. They have highlighted how, rather than a universal international law. Actually, we can oppose hegemony against this concept and how international law is actually hiding the power imbalances that we have in international affairs. Again, feminist scholars have drawn attention to gender inequality. So, they presented as a binary opposition gender inequality and universality. And they have highlighted how it is actually, rather than as a system of objective and neutral rules. Here, we have a system which is designed by men and which misses the experiences and voices of women. I think another binary that we can find is also the fragmentation and universality. Fragmentation can also be presented as an opposing concept to the universality of international law. Because if you understand international law as a unitary system, the fact that we have some separate normative systems with different norms which apply to different actors, then this fragmentation can actually be read as a threat to the universality of international law.

Again, I think another binary might be regionalism against universality. So, all the regional international organizations and the normative systems that they create can, in the same way with fragmentation, actually be opposed to the universality of international law. Cultural relativism can be seen as another opposition. Here, I want to turn to the topic and relate all these discussions about universality. And we can define this concept in international law to the issue of COVID-19, and especially I want to present the case of Turkey and what happens in terms of the measures that have been adopted in Turkey during the COVID-19 pandemic. I think the binary, in my opinion, is quite relevant in today's presentations about the COVID-19 pandemic.

In recent years, we've seen many states that started to oppose the universality of human rights, that started to oppose and have become more skeptical about universal human rights protection mechanisms. For example, we see this trend in the United Kingdom, Russia, Poland, Switzerland, and Turkey, where states argue that these international courts should not impose their decisions on national states, and that the national state is better suited to, in a way, govern its fundamental right. I think a reflection is the restrictions that have been imposed in Turkey. We also witness this rise regarding human internationalism. In recent years, Turkey has been very skeptical about international human protection mechanisms as has been witnessed by the withdrawal of Turkey from certain conventions. And Turkey has also advocated in recent years that the judgments of the European Court of Human Rights are not legally binding.

Turkey is trying to find a way to avoid implementing the judgments of these international courts. I think, in the COVID-19 pandemic, with the measures, and with the restrictions imposed on fundamental rights, Turkey has gone even a step further. Most of the measures have been adopted due to the COVID-19 pandemic, including the curfews, the lockdowns, travel bans or restrictions on the right to work or freedom of religion. They have been adopted most of the time, if not all, in violation of the Constitution. Unlike many other states, Turkey has not declared a state of emergency. And at the moment, all the limitations that have been brought to these fundamental rights have been adopted in the absence of a legislative act. This is in violation of the Turkish Constitution. And I think

this shows an important setback in the protection of institutional fundamental rights, but also a trick is compliance with the European Convention on Human Rights, because constitutional regulations have not been respected. There have been severe, excessive and disproportionate restrictions that have been imposed. Also, the fact that all these restrictions have been adopted in an unconstitutional manner weakens the rule of law. In that sense, I think when we look at the recent trend regarding the rise in human rights, and the fact that Turkey is becoming so skeptical about universal human rights protection mechanisms. These recent measures have been adopted during the COVID-19 pandemic. The evidence is a very important retreat from the universal protection of human rights. I thank you for your attention, and look forward to your comments.

Yang Liu:

Thank you very much. I think that's a very good start. It lays out a very rich conceptual framework. Help us to think about what we mean by universality when we talk about the term. It also nicely laid out the basic situation in Turkey. I think that will serve as a very good basis for later discussion. The second speaker is Professor Maria Adele Carrai, who is an Assistant Professor at New York University Shanghai. She will speak about COVID-19.

Maria Adele Carrai:

Okay, so hi, everybody. Thank you so much for having me today. I am particularly grateful to Professor Yang Liu for having assembled this great event. It is great to see some old faces as well. My presentation today is trying to answer things that are here. And so much in the media and in new European Union foreign policy papers, we hear over and over that there is a rule-based international order led by Western powers. China continues to challenge its authoritarian legalism. This rule-based order is an expression of the liberal international order that became dominant during the Cold War, according to the narrative, and had no revolt during the 1990s. In particular, when the Cold War ended, this rule-based order corresponds to a set of global rule-based orders on political liberalism, economic liberalism, and liberal internationalism.

It takes a form of international law, a system of multilateral policy making, and the rule setting institution usually referred to as the Bretton Woods Accord. An international law in this context will provide the framework. States adapt precise sets of rules through teamwork, within which the strategic competition and disputes between states take place peacefully, while avoiding interference and coercion. And China, since its integration with the Western led and forcefully created international society during the 19th Century, has been considered uncivilized without law and at the periphery of the system.

However, since the financial crisis of 2008, China has taken its central stage in the international system. But there is still some orientalism in Western media or scholarship where scholars and people talk about China as the exception. It has become not only the country that does not abide by the rules of the international system, but with its promotion, authoritarian international law has also become a serious threat to the rule-based order. This narrative can be seen and expressed in some new scholarship emerging about authoritarian legalism or authoritarian international law. And allegedly, China and Russia will be at the forefront promoting this kind of authoritarianism together. According to the scholar Tom Ginsburg, authoritarian regimes are revising the substance of international

law. They are developing their own international organization that tends to be thinner than their democratic counterparts and sovereignty for reinforcing rather than sovereign eroding. Authoritarian countries like China, therefore, would emphasize, according to Tom Ginsburg, a rule of international law that shields them from criticism, rather than a rule-based order that might affect their sovereignty and make them more accountable. And in return, international law will be reflected also by these regimes, abandoning speed resolution and instead embracing the softer commitments.

The COVID-19 pandemic has further accentuated this debate. It has become a contest between democracy and authoritarian systems from which none of them seem to come out really successful. If we look around the different kinds of media all over the world, like in Africa, in Europe, etc., China deserves a sum of praise for its effective way to control the COVID-19 pandemic. And instead, it is quite surprising the failures of European countries, the United States under the Trump administration, and some others that have condemned the very destructive measure that was implemented by the Chinese government. And overall, the COVID-19 pandemic has accelerated many trends that are already in place. But what has happened to international law under or after COVID-19? I don't know. Are we witnessing an acceleration of authoritarian legalism that reflects a new geopolitical transformation with China as a major competitor? And so, many seem to suggest that first, we have to acknowledge the weakness of international law in dealing with the COVID-19 pandemic. The World Health Organization has not been adequately equipped with the necessary authority to fulfill its mission and the high-level coordination that was promoted. It is clearly not sufficient to achieve global health or address global health challenges. There is a need for political cooperation and intrusive power by a governing authority that cannot be left to an organization that doesn't have much actual power. Basically, this is a kind of power that the World Health Organization, as well as many other international organizations, do not enjoy.

This brings me indirectly to the first point I want to make, that there is a problem with the characterization of international law. International law is often described as value-neutral, and if someone attempts to corrupt this neutrality, it is considered a big threat to this idealized rule-based order. However, I think this vision is problematic. It denies the history and the politics of international law. The history of international law is far from being value neutral. It is characterized by a Western projection of value and universalism that has continued to evolve over time and has become more, sadly, invasive of state sovereignty. And the politics of international law, even the politics of the history of international law, have been already exposed in various ways, including by members of our panel today, who have contributed to these debates, exposing the politics of the history of international law. I think international law should be seen more through the lenses of politics and of clashing visions of values that claim to universality when they are quite partial. In reality, it is not China or any of the regimes that have legalized international politics to international law. This rule-based order is revisionist or malevolent.

Another point I want to make is that some of the scholarships are not very clear that international law can be seen as a continuation of orientalism. China is oriented and continues to be seen as the other and as an exception. It is often perceived as a country ready to cheat and not abiding by the rules of international law. Whenever it tries to be legitimately more assertive in international fora or creative, the institution is seen with great suspicion. For instance, the Asian infrastructure investment continues to be considered as

an alternative that contravenes completely from the Bretton Woods Accord. In reality, if one looks at its Constitution, it is pretty much a copy and paste of previous multilateral investment institutions. And also, during other pandemics, this regional, comprehensive economic partnership was signed, but again, it was seen with suspicion. It was accused of not promoting deep integration and making progress on environmental or digital standards. It was seen as a regression from the mega regulator, high standard of the Trans-Pacific Partnership Agreement. While this is partly true, most of this characterization is unwarranted. Moreover, their steps were seen as a way for China to get a general in the region. When it was, in reality, the multilateral way to balance China's rise, even the fear of the Silk Road Economic Belt and the 21st-Century Maritime Silk Road does not seem to be promoted intentionally in authoritarian international law. And I have done some studies on that. Especially in Africa, I did some fieldwork.

And so even the modernization of the Silk Road Economic Belt and the 21st-Century Maritime Silk Road distribution mechanism misplaced them. One point I want to make is that when we talk about international law and rule-based order in the singular, we dismiss the plurality of orders that make up the system. In his seminal work, Young Johnson, Professor of Harvard University in Political Science, identifies the series of orders that constitute the broader international system and measures how countries abide or not. These orders from his findings, show China has been a strong supporter, for instance, of the United Nations and of moving global governance issues, and that, it is true, has become largely integrated with the World Trade Organization with some exceptions. At the same time, China has opposed what he regards as the political development order that is embodied in a series of treaties that promote more liberal standards. But his empirical findings also suggest that the United States has not followed this rule-based order. It claims to be leading this rule-based order. The the United States, for instance, has only ratified 5 of the 18 major human rights treaties and protocols. It has not ratified the United Nations Convention on the Law of the Sea and has discounted on several important occasions the rule-based order, ignoring the United Nations Security Council from a conceptual and empirical point of view, that otherwise there is a single liberal order that the United States supports and China challenges is problematic. If this was the case and there was one single order, we would expect China to oppose all the norms and institutions the United States supports and vice versa, that the United States opposes all those that China supports. But this is clearly not the case.

To conclude, if we ask whether, during the COVID-19 pandemic, there was an acceleration of the expansion of an authoritarian international law that reflects China's rise, I don't think this is the case. And the challenges to the international group-based order are narrative because I don't think it ever really existed as a rule-based international order. It is more aspiration than real. I think that more comes from within rather than from external rivals like China. The crisis of liberal internationalism is due to a failure of the underlying political bargains and institutions that support that. The liberal internationalism has lost its order of conditionality. And states could come in more opportunistically, get what they want, but honestly, actively support the overall framework and foundation. Ultimately, I believe this reflects the different orders that continue to coexist, overlap, and clash, and international politics from which international law continues to arise from. Thank you very much.

Yang Liu:

Thank you, Professor Maria Adele Carrai. I think most of the audience will have reflections and questions of the very interesting and rich presentation brought by you. Let's have another Professor, Tony Carter, to introduce and discuss the situation in the United Kingdom. He will bring us the other half of the story and the capitalist system.

Tony Carty:

Thank you very much, Professor Yang Liu. I also congratulate you for organizing this symposium. I am fascinated by the participation of this workshop. I am in London at the moment suffering from COVID-19. The situation is changing every day here. I cannot go back to China. I am not in the lucky position that Professor Maria Adele Carrai seems to be in Shanghai. I agree with everything that Professor Maria Adele Carrai and Professor Işıl Aral have said. But my perspective will be a bit more concrete.

This topic is very much one that I share with my colleague and friend, Professor Fozia Nazir Lone, who will speak after me. We began to study this question in the context of the allegations of the argument that China was legally responsible as the country which caused the coronavirus and allowed it to spread to other countries. Professor Fozia Nazir Lone is a specialist in the law of the Torah and electoral obligation in civil law. It is the best subject and we have been working on that intermittently. And I am in the United Kingdom. However, there is an advantage and a disadvantage about being in Britain. There is an incredible freedom of information, there is constant criticism and debate and there is a constant publication of reports and information. It inevitably means that I am totally overwhelmed by the amount of material available. I will merely be able in the time available to show you who said something about my theoretical framework, and something about indicating the types of information available at which you can all find on the internet. Certainly, if you are in China, unfortunately, you will need a VPN to access this material, but otherwise, it should be possible. My approach is a box standard, a very traditional Marxist approach that the British state is a capitalist state. That is to say, it is run by a political class, the Conservative Party, which runs a capitalist nationalist ideology. It has left the European Union and this in China is determined to go global, which is a particular form of universalism which it was connected with. But Professor Işıl Aral is talking about Britain believing the European Union is Euro-centric, bureaucratic, and exclusive, and it is for the rest of the world. I understand it now from the very substantial access I have to British official policy. Britain is indifferent too. It does not intend to develop serious trade relations with China.

Basically, universalism and going global definitely means going against China, not in favor, not including China. I've been teaching it in class for two hours before this meeting, actually cutting it short, because it would continue for another hour on the Comprehensive Investment Agreement. And that represents a massive attempt on the part of the Europeans and the Chinese to reach some kinds of common agreements on how to do business with one another, which is very relevant to Professor Işıl Aral's discussion of the notion of how universal concepts are developed because of the major contents contesting points there. So, I agree with Professor Maria Adele Carrai. Ginsburg's article is hopeless. I really don't understand why the American Journal of International Law gave 40 pages to this, the really shallow interpretation of democracy that this man provides. He is a nice person. But Americans are not able to think about these questions, except in terms of competition with China and anxiety about China. They are not academically as serious as I wish. But to come

back to my Marxist analysis of Britain, basically it is a pretty radical analysis, it is supported by an enormous amount of empirical evidence coming from every direction that the Conservative Party is put into power, through the power of the media who are owned by capitalist enterprises, by proof of rights, and by companies that fund the party and sponsor the party that comes into power.

Now to put this in a theoretical framework, we are really moving here, and I hope Professor Yang Liu can find some way to keep this group together and to tell you the research further. Because I am simply being bombarded by information this morning, the National Audit Office, which is an accounting office attached to the Parliament, has published a long report, which I want to be able to read the summary about which explains the austerity policies of the government. Since it came to power in 2010, it has rendered the British incapable administratively of preparing for and coping with the academic, because the Conservative Government has simply wished to reduce public expenditure and to reduce taxation and thereby to reduce the power of the national health services. The pandemic preparation committees were removed when the epidemic started in the spring. There was no equipment. There was not the technology for a test and trace system, such as you have in China. To make matters more ridiculous, even the conservative press, the Daily Mail, has led further to demonstrate how these politically appointed ministers have simply been channeling the contract for this technology to their friends. And we are reliably informed that we still do not have one. Britain does not have a test and trace system, because the friends of the party that committed to do this are not competent.

There is a lot of legal material we can get to work. It is not just propaganda coming from left-wing student magazines. There is a good lawyers' group of law firms who have been able to take the government to court. There was a major court case in February where at the end of January the court decided that the government had failed to publish all of these contracts that had been awarded to his friends without going through proper procurement procedures. There is another case going on for five days and this week about the corruption, whereby service has to do with the test and trace management of the response to the current virus and whether it has been put in the hands of completely incompetent people. Professor Maria Adele Carrai has said about the so-called rules based international order. Britain is the most delinquent country in the world. Now, when it comes to observing international law, it has defied the International Court of Justice cases. It has defied the United Nations over the Chicago silent cases and its arguments with China about the Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the question of Hong Kong are completely without foundation. So, the idea that the United States is a law-abiding country is ludicrous, and the idea that the United Kingdom is a law-abiding country is also ludicrous. All of this is simply propaganda, political rhetoric. But if we go into these court cases, we do get the freedom of the press in Britain, which is wonderful. We have a legal system which is open where the judges criticize the regime. We have a press which will criticize the regime. The most popular, ultra conservative newspaper, the Daily Mail, is actually campaigning for the Prime Minister. Boris Johnson is harassed by his girlfriend and his girlfriend has demanded the most expensive refurbishment of the apartment of the Prime Minister to the tune of about £112,000. The Daily Mail is after him because this refurbishment was being paid for out of Conservative Party funds, which are not funds that are coming from Conservative Party donors. Now that in itself is not corruption, but the

problem is that donors expect something for their money. And if they're going to pay £50,000 to have his apartment refurbished, they're going to expect him to provide favors in return, which he's doing all the time, which is what the newspapers are discovering.

I am running out of time now, but to show the extent of what we are up against here, remember the original context of this is that the British state has the highest rate of deaths in the world in the COVID-19 pandemic. According to official statistics, about 130,000 people died compared to 4,000 people in China. But basically, the state has dismantled the capacity to deal with hospitals, to deal with care problems, and about 50 % of the people who died in Britain was because there has not been proper provision for protection.

The government has wasted it assessed by the National Audit Office, which is an official, independent accounting office of the Parliament, that the government has wasted at least £13 to 14 billion in equipment, which is useless. Now, finally, another thing that has come up today, we have a report in the Guardian about the level of racism that is coming up at the present time, confronting hate against East Asians.

But finally, it is the most important because this is a tragic comedy rather than just a tragedy. Do British people know everything I am saying? Do the British people care about any of this? Does the democratic process care? The answer is definitely no. They do not give a damn. On Thursday, March 6, the concerns were massive in the local elections throughout the whole of England, Scotland, and Wales. And in England, the Conservative Party won massively against the Labor Party, and the Labor Party had been going on and on about how terrible the corruption is, and how terribly efficient the administration of coronavirus is. But Britain is a democracy, and the people are very happy with the fact that the vaccines are working, and that the death rate has been reduced to virtually zero. It is less than ten people a day. The number of infections is down to about 1% or lower than 1%, and about 2,000 people are becoming infected today. They are all young people who have not had the vaccine. So basically, the government has succeeded. The capitalist system succeeded in funding, because all of the vaccines of aristocratic vaccines, all of that has been funded by the government. They funded the research, they funded the organization, they have effectively funded the vaccine rollout. The people, those who are still alive, do feel that they are protected. Those who died obviously are not in a position to protest. The relatives of those who died are not numerous enough to make any political difference. So, the government is actually riding high at a very high level of popularity. The issue of the administration of the coronavirus was simply not an issue. The election and the government's nationalist policy of Britain going alone in the world, and writing the most efficient producer of vaccines and the most sufficient distributor of vaccines form the public impression of the government. People do not give a hoot about whether Boris Johnson's girlfriend bullied him into wasting a lot of money. The Conservative Party's money and refurbishment are all regarded as trivial. So, this is a capitalist system and how it works. It has radical casualty implications for the population. But it is a very rough process. There are many other issues that were great. Britain is intending to renounce the European Convention of Human Rights. And one of its main reasons for leaving the European Union is the enforcement of economic and social rights by the European Court of Justice is unacceptable.

So, I am very excited to participate and Professor Yang Liu, you are the next.

Yang Liu:

Thank you very much, Professor Tony Carty. I hope we will have the opportunity to carry on this project. I noticed that it is a little bit overdue. So, it will be quick. I am prepared for PowerPoint. So let me share with you.

My talk is a general reflection on how to observe, think about, and compare the responses of various countries, including the states we discussed, China, Turkey, the United Kingdom, and the United States. First, let us go through the data. This is the data ranked by the infected cases and accumulative death. Apparently, you can see that the United States is leading in the number of infected cases and the accumulative death number. That is, East Asia and a number of countries so far are the most successful measured in terms of cases and the cumulative death. And apparently, there are a number of independent reviews. Professional groups are producing reports for the World Health Assembly, which is going to take place next week. Basically, they have a conclusion that those countries who were ranked do not perform well.

We will have a look at the number of vaccines. You can see the data of people who received the COVID-19 vaccine. The the United States has the highest share and now is over 40%. And people in Asia are beyond the world average, and there are two major producers of the vaccine countries, China and India. A number of opinions of the COVID-19 are that countries in Asia generally perform well, without the help of vaccines. They do that generally through the non-pharmaceutical method that is social tracing, etc., as we discussed. But when it comes to contribution or reputation, these countries in Asia, now are not well received by the public opinion in the West, in terms of so-called authoritarianism that invades into the liberal values.

Let us talk about what is happening now. We have a common threat. The threat is apparently a security threat because lots of people are dying. And lots of the central governments see it as a threat to national security. In terms of the health, perhaps more important, the clothing has a serious impact on their economic performance, as well as military and political influences. And perhaps that is the reason why some people in the United States are so anxious about COVID-19 because it may accelerate the competition and shorten the distance between the United States and China. When we have a security challenge, let us go back to the book. In the condition of a war, there is a war. Because the reason for a political entity to have sovereignty is because there was an enemy to the country. Based on that, some people and some Western countries have the reason that the state has developed the contract theory into the liberal theory of state. But COVID-19 changed the basis. When there is an enemy who poses a security threat to the country and to everyone, the country has a primary duty to deal with the security threat. But this was not fully understood and not fully implemented from those criticisms. They were criticized that now some of the tracing measures invaded personal privacy, but that worked.

People will ask, are you going to argue "Asia as method" from a materialist perspective? Are you going to argue that because Asian countries perform well, you can have a valuable plan? Not really, the claim of my view will develop basically simply like this: it is a form of international legal orient. We just discussed it. Orientalism is primarily slowed from compatibility, which has the default that every country is different from the others. Orientalism does not mean a kind of cultural colonialism or imperialism. There was a clear distinction between the United States and the other. International legal orientalism is a different thing. It does not claim one over the other, but it has a strong claim as one. There was a big bias in the name of systematic discourse, etc. It is less in the form of

colonialism, but more in the context of power competition. That is what you read in American journals, that is authoritarian international law. What they worry about is that the whole system is going to tilt towards the other end, not in the end. There is one orientation, and that is the debate, the struggle, the claim for the whole system, the struggle of the making of wellness in the name of this international law gets intensified. Back to the coexistence model, in the COVID-19, we witnessed this, right? China has a responsibility to compensate because of some kind of theory of the origin of the virus. And China did not respond with the integrity of respect for human integrity or human rights. China has a vaccine diplomacy, because when China disputes the vaccine through bilateral means, it is a way to increase its political influence.

But if other countries do that through either unilateral, bilateral, or multilateral institutions, it is the benign effort at the mercy over the world. We have heard all this. The real question is not the content of the claim, but the problem is who has authority to speak? That is what I mean, that is international orientalism. Again, some people are making the claim in the name of a system against another group of people, in their mind, it is a power competition. Asia is a concept, though some people would say Asia is not a concept, it is not a coherent concept. Asia is a concept itself, and is a construction of orientation, because there is a great variance, like English in terms of political, religious, economics, legal background, right? There it makes no sense to say Asia is not a matter, what is the matter? I agree with that, but my point is based on this, what do I mean? Asia is a concept, there is book titled "Asia is a Method". Basically, what he means is that the method is to take the modernization of certain countries in Asia as internally generated. This sounds extremely like a comparative law. We need no locality. But what I mean is a little bit different. What I mean is that we do not only need the comparative insight, but also based on the local situation and root of modernization, legal standard, human rights standard, and value standard.

It is more than that, what I mean by "Asia is a method" is that it is an international perspective which is not isolated. Asia is the opposite mirror of Europe or America. Asia has a better representation of the world, because Asia has a great variance, and Asia can react to COVID-19 in the common thread. How they deal with the internal dispute, struggles, and conflicts could provide perhaps a better solution, for example, as overall, systematic for international law and for the conservation.

So, what my claim is not, is materialist, a purely materialist "Asia as a method" is not something substantial. It is not Japan, China, or India as the center. But the country has a sense of centrality. That is a way we discuss things here. Locally, there is a slight sense of rejection of interference that apparently from what you read from what my presentation. I would like to continue the discussion with the scholars and friends.

Thank you. Our last speaker is Professor Fozia Nazir Lone from City University of Hong Kong. She will discuss the situation in India, and she has a very interesting perspective. The floor is yours, Professor Fozia Nazir Lone.

Fozia Nazir Lone:

Thank you very much. Hello everyone. Depending on where you are listening from, good morning, afternoon, or good evening. To all distinguished speakers, colleagues, ladies, and gentlemen. It is my pleasure to speak at this conference today, the roundtable on universalism and the response to COVID-19. Thanks to Professor Yang Liu for his kind

invitation and opportunity. I think that the speakers so far have clarified to a large extent the fragmentation of international rules. So, clearly in my understanding, COVID-19 is not a challenge to the universality of international law since the international legal order is already very fragmented. With this, I would like to talk about how this fragmentation, to a large extent, or to some extent, could be healed by good leadership. I have done a lot of work with Professor Tony Carty on this. We have been discussing and thinking about it for a long time in terms of leadership in the United Kingdom, as well as in India. But more of my thoughts that I present today are quite related to my grant that I recently received. It is on Indian relations with the World Health Organization during COVID-19. I would like to suggest that it is a proper time to reflect on the leadership failures during the COVID-19 pandemic.

As of today, on May 19,2021, India's COVID-19 tally surpassed 25.5 million confirmed cases, with over 279,000 deaths in the country, which is likely an underestimation due to the limited testing, according to the World Health Organization and the United States scholars. So, based on this background situation, my presentation will focus on the leadership failures in its response to the COVID-19 pandemic and its commitment to Eastphalian processes of international health. Finally, I will reflect on the importance of improving effective governance at each level, which can increase local, regional, and global health security.

The universalist approach of international law in my understanding, means applying common standards to protect every human being, and that requires good governance at local, regional, and global levels. At present, there is a virtual consensus, globally and domestically. I think at a global level and a domestic level, despite having sufficient evidence to take early precautionary measures, there were immediate failures by the Indian central government in its handling of the COVID-19 pandemic. From the beginning of the COVID-19 crisis, community spreading was predicted in India due to its high population density and the deficient health care and sanitary systems. However, in the first months of the outbreak, the Indian Ministry of Health and Family Welfare claimed that COVID-19 was not a health emergency in India. At the same time, the Indian government also chose to focus on and advance its nationalist policies, using the cover of the COVID-19 pandemic to make unilateral political changes in the governance of the disputed territory. For example, in Kashmir, which is recognized as a disputed territory, India in August of 2019 took a series of questionable legal actions under the communication blackout, passed Presidential Orders that bifurcated the territory, and brought it under the direct control of New Delhi. In fact, since then, India put Kashmir under a complete communication blackout with little internet capacity, despite the worsening conditions of the COVID-19 pandemic there. India did not end there. On May 18, 2020, it changed the domicile rules for the union territory of Kashmir, allowing people from any part of India to obtain domiciles in Jammu and Kashmir, which was not possible before, because obviously, it is a disputed territory. India's action drew condemnation from the international community, including a joint statement from Pakistan and China. These unilateral changes that India completed during the COVID-19 pandemic in Kashmir also led to the face-to-face clash in mid-June 2020 in Ladakh on the China and India border, which became the deadliest conflict between the two nations in half a century. This conflict was resolved through Chinese diplomatic efforts. But in India, people with East Asian or Chinese appearance in Sikkim were continually harassed for spreading COVID-19.

Now, as affirmed by the recent reports, India, also along with many right-wing populist governments such as the United States under the Trump administration and the United Kingdom under the Johnson government, delayed the medical responses to the COVID-19 pandemic until mid-March 2020. The COVID-19 upsurge of nationalism in India is not only a socially directed understanding, but is political and has drawn condemnation from international scholars. For example, the Muslims in India under the BJP government faced a spree of targeted violence after the Indian Ministry of Health and Family Welfare repeatedly blamed Islamic sects for spreading the coronavirus.

Instead of managing the spread of COVID-19, India, as well as the United States populist ruling parties, also decided to start a blame game and a disinformation campaign against China. Since then, the World Health Organization and other health reports have discredited this kind of theory. That said, on the world stage, India has moved to use its domestic medical capacity to increase its global standing, temporarily emerging as a major donor of vaccines.

Now, with this background that I presented to you, it is important to understand Indian leadership failures in its response to the COVID-19 pandemic, which have become a matter of universal consensus. India, which has one of the lowest per capita spending level on healthcare in the world, is not equipped to cope with the COVID-19 pandemic. The National Disaster Response Force headed by the Director General of the Armed Forces had warned of a large-scale biological pandemic for over a decade and has proposed a plan to deal with it. But, due to the negligent behavior of the bureaucrats, which obviously has increased during the BJP government led by Narendra Modi. In fact, the Modi government's response has been described as "knee jerk", and that contradicts the Indian Council of Medical Research official data as well.

With India's grim COVID-19 situation, vaccinations are necessary for improving the situation. In line with recent reports, it is increasingly clear that global vaccine coordination needs to be a part of actual effective governance for disease prevention and treatment. The Indian situation shows the need for giving effect to the right to healthcare, combat corruption and mismanagement, and address irregular privatization and social inequalities. This position on governance is now well supported by the Independent Panel for Pandemic Preparedness and Response report, as well as the United Kingdom National Audit Office governance report, both released in May 2021.

Taking a step back, we can see that the current pandemic would have been largely mitigated, as affirmed by the Independent Panel for Pandemic Preparedness and Response reports. In fact, in the new millennia, the world was on the path towards better pandemic preparedness, , and it can be demonstrated by the efforts to curb H1N1 in 2009, as well as the efforts of the United States in 2014 during the Ebola outbreak, for example, where they allocated sufficient funding to resolve the matter. In fact, in 2014, the Security Council passed Resolution 2177, which was in the tradition of UNSC 1308 and UNSC 1983 on the HIV/AIDS epidemic, and it called for international collaboration. For the first time, it declared the disease outbreak a "threat to international peace and security", and referred to the duty of the Member States, particularly in terms of using the global framework to fight the virus.

However, in recent years, right-wing populism removed the focus on local and global governance in countries, including India and the United States, and led to the collapse of this growing standard of global governance during the COVID-19 pandemic. The most

obvious example is the United States' decision to pull its funding from the World Health Organization during the coronavirus pandemic. The contrast between places such as China, including here in Hong Kong, and New Zealand for example, with focus on COVID-19 prevention and taking care at all levels, and places such as the United Kingdom, the United States, and India, that made various messaging-based calculations, is key to understanding the future direction of the global community towards pandemic management.

The case study of India may help to bring clarity about two emerging schools of thought to my understanding. On the one hand, there is an idea of "vaccine diplomacy" being a rivalry. On the other hand, there is a growing discourse on governance. India was supposed to be part of the World Health Organization and United Nations International Children's Emergency Fund efforts to distribute vaccines, known as COVAX. However, the universally recognized failure of pandemic management in the country has led to it being unable to adequately supply the vaccine shipment during March 2021, despite being responsible for around half of the billions of vaccines due.

Therefore, it is clearly important to reflect on how it could happen. On the one hand, India supposedly sought to help other countries, which appears to reflect a commendable commitment to the collective wellbeing of the world. On the other hand, there is a comprehensive failure of pandemic management leading to human catastrophe that could have been avoided in India. The title of an iconic article written by Arundhati Roy is that "We need a government", which was an appeal to Prime Minister Narendra Modi to step aside. I should clearly summarize what India, or any other country, where there are these governmental or leadership failures needs.

Indeed, the only real difference is about countries that managed the COVID-19 spread successfully. These countries diligently put pandemic protocols into effect, while unsuccessful ones focused on the blame game and unnecessary politics. Considering the cause of widespread COVID-19 in India, vaccination may be used as a part of good governance and prioritizing the protection of the people, rather than pursuing this contentious zero-sum rhetoric. In fact, it is only good governance, genuine multiculturalism, naturalism, and mutual support that can prevent further catastrophes.

That brings me to the Wilson model of five elements that are required for handling the crisis, namely the need for a calm approach and clear communication, a collaborative approach, effective coordination, and adequate support. Clearly, these leadership qualities were demonstrated by countries like China, New Zealand, Iceland, Vietnam, etc., that handled the crisis the best. These qualities reflect good governance and demonstrate the fact that human rights principles are essentially a part of good governance principles.

At the global level, it is also important to shed some light on the more universalist Eastphalian approach towards global health security, as was demonstrated by the May 18, 2020 speech by President Xi Jinping to the World Health Assembly, where he urged strong global governance and cooperation to deal with the pandemic, as well as supporting the World Health Organization. These principles were later affirmed in the White Paper of June 7, titled "Fighting COVID-19: China in Action", which demonstrates his commitment to information sharing and providing a model for how other countries can respond to pandemics. Clearly, I would like to argue that Indian's intention to support the COVAX vaccines and other World Health Organization issues, also supported this principle. Traditionally, the difference between the concepts of Eastphalian and Westphalian approaches are that the former was more committed to non-intervention and sovereignty.

Post-Second World War universalism has, in fact, been characterized as neither Westphalian nor Eastphalian. However, the approach is largely taken by China and to some extent by India, which suggests a new brand of the Eastphalian approach to global health security and coordination.

There is growing consensus, now on the need to improve the effectiveness of good governance at each level in the implementation of influenza protocols on testing, medically supervised isolation, and contact tracing with monitoring of quarantine, as well as research, vaccination cooperation, and the basic functioning of the government and health authorities in implementing the healthcare protocols towards increasing local, regional, and global health security. In my understanding, I would like to argue that the primary obligation for protecting the right to life as a human right falls on the state under Article 2 of the International Covenant on Civil and Political Rights. And it shows that human rights principles are good governance principles. I would like to argue that the states must adopt human rights principles towards the protection of global health, which not only protect their own citizens, but also the global population, from the effects of contagious disease.

I urged that the lessons from pandemic unpreparedness, as I demonstrated in relation to India, should not be forgotten. In a sense, the fact that the emerging universalism towards human rights protection of the post-Second World War order could not wipe away the horrors of the Holocaust and the genocide of European Jews and human suffering during the Second World War. In a similar manner, the post COVID-19 approach to global governance should not forget the gross negligence of leadership in India and other populist countries like the United Kingdom and the United States and its collaborators that systematically resulted in the manslaughter of millions of humans, whereby they experimented with herd immunity by natural infection.

In fact, the lesson to learn from such negligent leadership is that we need to have a universalist common approach towards pandemic management. I recognize that the adequate pandemic protocols, when properly implemented through good governance, which are based on anti-corruption, human rights protection, and transparency, can achieve a greater advancement of the respect for human life, human rights, and human dignity, as envisioned by the Universal Declaration of Human Rights, as well as by the United Nations Charter after the Second World War. Hence, clearly the vaccination success, which some argue can a have a “more lasting memory”, should not be used to cover up the leadership errors of the populist governments, such as India. With this, I would end my presentation. Thank you.

Yang Liu:

Thank you very much, Professor Fozia Nazir Lone. Perhaps Professor Congyan Cai has a lot to say on this topic as well. I have full confidence in Professor Congyan Cai and Doctor Kangle Zhang as well. Now, the floor is yours.

Congyan Cai:

Okay. All the presentations are fantastic. I would like to use three words to capture the themes of the four presentations. The first is universality, the second is governance, and the third is individual. First, I agree with the Professors that universality is a concept that can be understood in terms of our scope, standards, and belief or imagination and

rationality. It is really misused or abused. We need the justifications for universalities and a limit of the universalities.

For me, the problem today is not whether the universality of international law is needed, or really exists. The problem is which universality of international law we need, whether it can be recalculated. In today's debate on international law, I think ideology is talked about too much. We can see many reports and comments of some Western government officials that the Chinese Communist Party should be accountable to COVID-19. But for me, the fighting of COVID-19 really is evolving the issue of governance.

Do you use authoritarianism as the ideology? Also, as the word of governance? This is my question to Professor Maria Adele Carrai. Professors Fozia Nazir Lone introduced the situation in India's government and its failure to combat COVID-19. For me, maybe there is another perspective to examine, and the laws are different. If we look at the different performance of fighting COVID-19 between China and India, we can clearly see the difference is that the public in China is cooperating with the Chinese government. It is what we could not find in India. My question is, supposing the government has good leadership, do you think the Indians can find cooperation as good as China. Maybe it is also applied to Professor Yang Liu's presentations. According to Professor Yang Liu, there is a possibility of the Asia method as the best. Look at the differing performances of China and India. I just want to say, Asia is too diverse to generalize. My question to Professor Yang Liu is, do you think that Asia could be a method? Those are my comments and question to our speakers.

Thank you very much.

Yang Liu:

Thank you very much. Professor Congyan Cai. On rare occasions, we can see commentators, and commentators can provide power points.

Now we have Doctor Kangle Zhang. And the floor is yours.

Kangle Zhang:

Thanks, Professor Yang Liu. I really enjoyed all the presentations from each of the presenters. I will be very brief and share some stuff I have heard to all of you guys. For me, there is the fair recognition of the internal biases in the concept of universality. This is quite evident in issues of the presentations, in turns by looking at the changes to the concept of universality. For example, the current balance, the gender, the central and peripheral sort of attention, and the fragmentation were quite apparent. This is shared by Professor Maria Adele Carrai, for example, when she talked about the tension between the international and the liberal international rule of law, the absolute conception of rules. International Law Professor Tony Carty, talked about the same tension, also making references to issues and conceptual frameworks in understanding universality and international law. Both Professor Young Liu's talk and Professor Fozia Nazir Lone's talk mentioned that. So, this is the first thing that I share on all the presentations. The second thing that I share on all the presentations is this frustration with countries that are addressing COVID-19, and there is success in some cases and failure in other cases.

For me, there is a question as to why we are talking about this from the perspective of universality. I am not saying that we should not, but I am trying to put it out there and ask. We have been talking about universality and bias. What is new about progress? So given

that sort of question, it may be urgent for the United States to talk about universality. So why universality? Is it the useful channel through which we wish to be approaching this? For example, Professor Fozia Nazir Lone was talking about governance instead of universality, and somehow related universality. Then in the second comment, we tend to be thinking about having legal procedures dealing with corruption. We think we are trying to, for example, have a kind of conception of a plural legal system. That is what my real talk is about. We tend to be thinking about Asia as a method, in terms of putting the Asian scholars or Asian countries in a position of talking about international law.

Now, Professor Yang Liu presented and was talking about governance. We tend to be doing all those things, first of all, because we are lawyers, right? We are using the norms that we are familiar with. At the same time, for example, Professor Tony Carty talked about the same legal techniques that are enabling someone to have trust and then with all kinds of legal maneuvers be able to do that are more complicated than what I am saying here. But at the same time, we are trying to solve the problem with some legal ideas, something related to the law. Then why are we doing that through the law? Is there another platform? So that is related to my first comments on universality. Is there anything else we should try? I am saying all this just out of frustration with COVID-19 and with just being friends in all parts of the world being in lockdown and really suffering. It is a terrible period of time. For me, it does make sense that I have a desire for something determinate, something that can fix things, a kind of achievement that we can press. It does not make sense to focus on things that are less legal, less technical to be focusing on other experiences, to be focusing on our passion, on things that we experience. We suffer in a sort of anthropological way, telling that story, just as long as we are telling it from the perspective of the individual who is experiencing all that, really makes sense.

And that is my comment. Thanks again to everyone.

Yang Liu:

Thank you, Doctor Kangle Zhang. Those are really hard questions. Before we open the floor, I think I will let each speaker respond. Will the comments be 3 minutes long? I do not know whether Professor Işıl Aral wants to take the floor to respond to the comments.

Işıl Aral:

Thank you, Professor Yang Liu. I also want to take the comments. These are very useful comments. I think you raised some very important issues. I want to start. Since I have only 2 minutes, I will start with the question about why we look at this issue. Why does it matter that we are discussing the universality of international law? Because I think, as international lawyers, probably when we had this pandemic at the beginning of last year, we had this thought that international law will provide the answer and the solution, and that we were at the stage where international law was capable of providing all the answers to these problems, that maybe the World Health Organization would manage to keep it under control. I think it comes from this idea, this urge to think that international law was going to save us. It stems from this positive image that we have about international law, that it is universal. It provides a comprehensive, legal global system, which helps us to maintain international legal order. I think we have seen this inclination to think that international law could actually be helpful. On the contrary, we have seen how the World Health Organization was actually incapable of providing substantive guidance to states to keep the

COVID-19 pandemic under control...Also, probably, we have this private belief because it is not a political matter. It is a disease. It is an epidemic. It is an illness.

Maybe there was this idea that it was something that could unite all the states to just agree on some methods about how they can keep this under control. They can respond to these very urgent problems. Although it is something that we can actually keep under control with the scientific method, I think that the legal side of the story is much more complicated than that. In that sense, I think because the COVID-19 pandemic showed us that we have not actually made that much progress in international law, because we always want to believe that the story of international law is a story of progress, but I think that the current situation showed us that we are very far from reaching a point where this global system can provide all the answers.

Yang Liu:
Right. We will go on according to the initial order.

Maria Adele Carrai:
Right. So, I guess it is me, the next one, right? Thank you so much for the comments. I will address whether this authoritarianism is more related to governance or to ideology. I think a bit of both. Because they are intertwined. I think that governance, in a way, reflects a form of ideology of governing without politics, in a way. Also, I think when I talk about authoritarian legalism or authoritarian international law, I am not really happy with this definition. I think it is kind of misleading, as well as this dichotomy between democracies versus authoritarian systems.

Now that you study comparative politics to the management of the COVID-19 pandemic, I think it is not the most useful one and it should be rethought. What is new about COVID-19? Like in recent times, universality is not really the question for me, but I think what is new now with COVID-19 is that the world received a big shock. I think there is the need for international law, but what kind of international law, what kind of international law for the future, what kind of values will govern this? This new system is something that we are here to see. I think we were very much kind of anxious about what is the order to come and what kind of international order we will help govern.

Thank you.

Yang Liu:
And now Professor Tony Carty.

Tony Carty:
I am fascinated by the orientalism debate. The kind of racial prejudice where “race” is a strong word, and cultural prejudice against Asia is very strong in this direction. I come across it all the time with individual people. However, I think these are stereotypes which are illusions. I just make two points, so as to leave space for other people to speak. Firstly, the British people have an attitude to government which is not any different from other people in Asia or China or Japan. Whenever the government says people should do something, they just simply do it. They are very law-abiding. They are very willing to follow regulations. What they have been told to do by the government has been automatically followed, and there has been little need for police enforcement of rules and

regulations. So, this willingness to follow the government, if you trust it, applies very much in Britain and it has been. Admittedly, though, in some demonstrations, it has not been like the resistance that you have had in France or Germany.

Secondly, I think that when we are talking about this issue from a legal point of view, a legal administration point of view, what one is talking about is the balance between individual freedom and economic activity, on the one hand, and health considerations, health, welfare, the right that a lot of languages called a human right to life, on the other. That is what is at stake here. People in Britain by and large recognize that health is more important than personal freedom. However, European lawyers have been very concerned about the fact that in practice in Britain, and especially in France and Germany, my constitutional law friends consider that this crisis had led to declarations of a state of emergency.

In fact, human rights and individual liberties have been restrained in a manner which is not compatible with the French Constitution or with the German Constitution. One thing I want to say to Professor Yang Liu is about a figure of European vaccination rates of 55% or something like that. The vaccination rate in the British population is about 75%. It is very large, and that's one of the reasons the Conservative government, despite everything it is up to, is very popular with the people. It may be bumbling, inefficient, and incompetent, it may be confused, but that is the British way of governance, like unprofessional, amateurish, but ultimately effective. We British have a very romantic view of the government, and we think that it has done rather well. In spite of everything, I am quite happy as well with two vaccines and feeling quite safe and comfortable.

So, thank you.

Yang Liu:

I think that is a very nice response. It is my turn now. Professor Maria Adele Carrai points out whether it is ideological or whether international law is neutral. Why are we discussing the question of universality? Because there is a discussion of politicizing the legal response, and response with a heavy aspect of technology and health science has been politicized. I think I cannot agree that international law is now politicized. The exception can be a very long process. The temporary methods and responses utilized by countries like China, Singapore, North Korea and South Korea bring a fear that there can be a new standard, because there is another way to deal with the threat that we are now faced with.

There is also another aspect of anxiety, that is exactly to the government's capacity. Because certain countries can use this legal structure to strengthen their legal capacity, to strengthen their competitiveness, there is a fear that in future, power competition is not purely that, but it is a competition of models. So that is the process of politicization. Why are we discussing it? Why do I want to discuss the issue of universality? It is not only about international law, but also about how we perceive the order where in the future, countries can and do get along with each other.

The presenter asked me whether it is the method or China's method. It is not a pleasant experience to most Chinese international lawyers in my mind. For myself, I can speak for myself. I do not feel comfortable when this operation is applied to me. We are trying to avoid the imposition of centrality. That's my response.

Now, we move to Professor Fozia Nazir Lone.

Fozia Nazir Lone:

Thank you very much. I think that you have raised a very important question, and I think that, in clearly understanding the question, we are really talking about why we need a universal approach to management. Also, the other question that was raised in relation to India was whether India could have dealt with COVID-19 if it had good governance. To my understanding, what is the international law for cooperation? It is there for coordination and solidarity. That is the main aim of international law that I teach to my students, right? So, we already know that international law is fragmented. On the one hand, COVID-19 has just demonstrated very clearly how fragmented it is. On the other hand, how much there is a need to have universal and common standards for dealing with health emergencies like COVID-19.

Obviously, we already know that universality actually emerged to provide common standards to protect human beings after the Second World War. It is also consistent with the language of diplomacy. Also, that is in line with global health security. Obviously, just because we have states like the United States or the United Kingdom or other countries that really haven't done well; they are actually not upholding these standards. This does not mean that we need to abandon this principle, because it is really important.

You cannot simply self-lockdown. So, it is very important for us to see how well our neighbor does. It is not really just about how well we do. That is why I think that, in my understanding, universality principles are very necessary, even more so in relation to the COVID-19 pandemic. Clearly, the COVID-19 pandemic and preparedness, like I mentioned in my presentation, should not really be forgotten and just swept under the rug, just because we have vaccinations now. It does not mean that we have conquered it. What is very important to see is that we must highlight this mismanagement and try to address it for the future, because you see, we have a shared common future only when we are together. Right?

So, when we have a health emergency, the COVID-19 pandemic has clearly demonstrated that, no matter how fragmented we are at an international level or in international law, universality is important. As mentioned about different approaches that we take to the understanding of international law, we have a total approach, we have a feminist approach, we have critical legal studies, or any other positives approach, but for now, it is very important that we must uphold universal principles, because obviously, as I mentioned, it is to protect human rights. Obviously, this understanding of universality ties in very well with a common standard of protecting human rights. That is linked to diplomacy, and that is linked to protection of global health security. I think that is the reason precisely, in my understanding, why we should have a debate. By no means can we predict that this is the last pandemic. There could be more. We need to have a common standard, and how we approach why China did well. They use that knowledge to protect themselves, whereas in other countries, we had different discussions going on where there was individual right protection or whether we should wear masks. So, in these countries, the debates were different, and that is the reason why they did not do very well.

Now, I would also like to answer the question of whether India has good leadership, whether it could have done better. Now, we know that India has the lowest per capita spending on health care. So, I would not be that optimistic that they would have done as well as China. But at least I can say with confidence that certain things that do not require spending, such as educating your population to wear a mask, would have definitely

mitigated the spread of COVID-19. The situation in India would not have been as bad as it is.

Now, I think nationalist, non-cooperative governments that basically sabotage the efforts of those who are more cooperative to promote universalism and joint efforts should actually be more helpful. I think this is not an individual situation where we have to protect ourselves, but we have to be mindful to see how well our neighbor is doing, because that, in fact, will have an effect on you as well. That is basically my response to it.

Yang Liu:

Thank you very much. Now we have a few minutes. We now open the floor. You can touch your questions in the App. We can pick up. While we are waiting, does Doctor Kangle Zhang have anything to say?

Kangle Zhang:

I had something I wanted to ask. It is really interesting here in the feedback from each of the presenters. And I really appreciate that. Sort of the idea for me, especially as a response to Professor Fozia Nazir Lone that certainly we do need certain kinds of standards. We do have the standards, such as they are. For example, you are talking about the right to life. We do need standards, we do need this principle. There is also space for different ideas, different views from different places, different cultures.

Those are the questions that I have, and I really appreciate all the feedback.

Yang Liu:

Thank you very much, Doctor Kangle Zhang. I think we are close to the end of this event. But before that, it seems that I want to make sure whether it is a perfect party you have. Yeah.

Tony Carty:

Thank you for giving me that opportunity because I have talked very much on the problems within Britain and I agree very much that we have to prepare for the next pandemic, which will certainly come. I think we have to focus very much on how we can have international cooperation. I am studying a review article about the extent to which racism has entered into the picture at the moment to determine whether it should be published. So, I would use a stronger word than orientalism, because orientalism is quite sympathetic to Asian culture. It is just simply emblematic of that. These are funny and curious and it is very interesting to study them, but xenophobia and racism are something quite different. This is the kind of contempt that you feel towards traditions, which I think is merely a racial compensation for anxiety, about Asia, about China. I do strongly support presenters' calls to strengthen the World Health Organization and international cooperation, and I do think that is a very long-term process because the cultures are very different.

But I think that the mechanisms for international cooperation are going to be very slow. I just spent this morning before this class studying the comprehensive investment agreement. Both Europeans and Chinese try to better it and work out common standards for doing business in each other's countries. Both sides realized this is a really uphill undertaking, that the two cultures of Europe and China are very different.

However, as much sympathy as there may be, the process of reaching a common standard can only come through working together and building up a common customary practice of working together. That is the only way that we can establish common standards, not through declarations at international conferences. I am quite optimistic that the Europeans and China can achieve that. The big fly in the ointment is America, which is polarizing everything in terms of its anxieties about its own position in the world. I think everything comes back. So, thank you for giving me the opportunity to get away from just talking about it. Britain has a negative side in that it is really not much interested in international cooperation.

Yang Liu:

You have a class in front of this event, which is related to Britain. How do you interpret it? Whether the approach taken by the Britain administration is effective or not?

Tony Carty:

That is for me, I wonder, and I think that it is an attitude of basic tolerance. The British people are tolerant, and they recognize that human beings are not infallible, and they make mistakes and they get things wrong. If things work out in the end, then just let bygones be bygones and move on. That is very much a British attitude. I think that I have mixed feelings about it because Fozia is right. We get things wrong. Everybody gets things wrong, but that is no reason for not moving on and making the best of it. And that is very much a British attitude.

Yang Liu:

Thank you very much, Professor Tony Carty. You actually give us the topic of the next discussion, that is health governance and how to strengthen the World Health Organization as we know it. It claims that there is a plan to strengthen the World Health Organization, but how to do it is actually controversial, especially given the history of the liberal plan.

I think today we have had a very insightful discussion on politics, and around the response to the COVID-19 pandemic. I think basically, some speakers emphasize that there was an element to find to construct the universality or commonality on the level of technique, governance, capacity, etc. Some scholars emphasize that there was another perspective at the source of universality, which is not only from states, but also from the World Health Organization. Some other scholars, like Professor Maria Adele Carrai and me, are trying to argue that the way to find universality is not through politicization., but through the political situation, through another way. There was a discussion of legal orientation, ideology in international law.

How to do it is a big question. But all in all, I am happy to see that the discussion tonight has been great. The situation on the ground demands that we will not talk about empty things. We care for the people, their lives, the struggle, the feelings, and we worry about what will be the most effective measures to help people around the world to get over it and get out of this pandemic as quickly as we can. But the anxiety, this struggle over the future of international law, perhaps will not go away because of this. We look forward to continuing this meaningful exchange in the future. Thank you very much. Thank you all. Please also join me to thank the audience from Turkey, Hong Kong, the Chinese Mainland,

and as far as I can see, some in Europe, the Hague, and other places in the world. Thank you very much.

The COVID-19 Pandemic: Another Blow to the Universality of International Law

Işıl Aral[1]

The COVID-19 pandemic has raised international law issues on several grounds: protection of public health at a global scale that involved the intervention of the World Health Organization (hereinafter referred to as WHO), restriction of fundamental rights that involved several questions about how human rights should be protected in a state of emergency, protection of national security, management of global economy, etc.[2] For some the COVID-19 pandemic even constituted a potential threat to international peace and security.[3] Several political leaders did not shy away from comparing the COVID-19 pandemic to a war and declared that their reaction would accordingly be in line with what this war would require.[4] Faced with a global health threat of such magnitude, at first international organisations were seen as the key players to halt the damage that would be caused by the COVID-19 pandemic. Soon after it was realised that the COVID-19 pandemic would have severe consequences in term of protection of public health, international travel and global economy, several international organisations, including the United Nations and regional organisations, started issuing roadmaps. There are now a number of international organisations that have distributed general guidance on how to fight against the COVID-19 pandemic. These include the Office of the United Nations High Commissioner on Human Rights,[5] United Nations Human Rights Committee,[6] WHO,[7] Council of Europe.[8] While it would be expected that states prioritise policies, guidelines and regulations set by international organisations, which would allow a coherent response to a global threat, on the contrary, states mostly acted based on policies they

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[2] See Ntina Tzouvala, *COVID-19, International Law and the Battle for Framing the Crisi*s, https://ilareporter.org.au/2020/03/covid-19-international-law-and-the-battle-for-framing-the-crisis-ntina-tzouvala/ (accessed on January 28, 2022).

[3] See Marko Svicevic, *COVID-19 as a Threat to International Peace and Security: What place for the UN Security Council*', https://www.ejiltalk.org/covid-19-as-a-threat-to-international-peace-and-security-what-place-for-the-un-security-council/ (accessed on January 28, 2022).

[4] On the war rhetoric used during the COVID-19 pandemic, see Eliana Cusato, *Beyond War Talk: Laying Bare the Structural Violence of the Pandemic*, https://www.ejiltalk.org/beyond-war-talk-laying-bare-the-structural-violence-of-the-pandemic/ (accessed on January 28, 2022); Christine Schwobel-Patel, *We Don't Need a 'War' against Coronavirus. We Need Solidarity*, https://www.aljazeera.com/opinions/2020/4/6/we-dont-need-a-war-against-coronavirus-we-need-solidarity (accessed on January 28, 2022).

[5] See the Office of the United Nations High Commissioner on Human Rights, *The COVID-19 Guidance*, https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf (accessed on January 28, 2022).

[6] See Human Rights Committee, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, UN Doc. CCPR/C/128/2 (April 30, 2020).

[7] See World Health Organization, *Addressing Human Rights as Key to the COVID-19 Respons*e, https://www.who.int/publications/i/item/addressing-human-rights-as-key-to-the-covid-19-response (accessed on January 28, 2022).

[8] See Council of Europe, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States*, SG/Inf (2020)11 (April 7, 2020).

strategized at the national level. Rather than a universal approach, it is possible to witness those states preferred to adopt a more particularist approach in their fight against the virus.

This paper focuses on how the COVID-19 pandemic challenged the universality of international law at a time when international cooperation and solidarity would be key to fight against a global health threat. It can be observed that states mostly relied on their national policies and adopted measures that did not always align with the demands of international organisations such as the WHO. This paper argues that the reluctance of states to abide by universal international rules can be explained in two steps. First, the failure of the WHO to provide an effective guidance on how to fight against the COVID-19 pandemic provided a sound premise for states to follow their own policies. Due to the lack of a clear plan that would require states to all meet on the same ground by adopting similar policies, states were left to their own devices to organise their own strategies. Second, the magnitude of the COVID-19 pandemic has been a useful tool for states to avoid their international obligations by relying on the existence of an unprecedented health crisis. The "crisis mode" legitimised those states react to the COVID-19 pandemic based primarily on their national agenda. The paper focuses on the measures adopted by Turkey. It inquires how Turkey's response to the COVID-19 pandemic is a clear example of a particularist approach to the COVID-19 pandemic. Then it investigates how the failure of the WHO and the "crisis mode" allowed a particularist position to states.

1. Turkey's Response to the COVID-19 Pandemic from a Domestic and International Law Perspective

Unlike many other states, Turkey has not declared a state of emergency during the COVID-19 pandemic. The curfews, compulsory quarantine for travellers, closure of workplaces, obligation to wear a mask, closure of public places including cinemas, theatres, bars and restaurants, prohibition regarding places of worship, or the prohibition of the selling of certain items such as alcohol, are all measures that infringe with fundamental rights protected by the Constitution and international human rights treaties to which Turkey is a party. The procedures followed by the Turkish public authorities to impose these restrictions raise important issues regarding the protection of fundamental rights.

At the domestic level, the restrictions adopted to protect public health raises serious questions about the constitutionality of these measures. According to Article 119 of the Turkish Constitution, the President can declare a state of emergency due to the outbreak of a dangerous epidemic disease and restrict fundamental rights in accordance with Article 15 of the Turkish Constitution. Article 15 details how fundamental rights can be restricted in a state of emergency. It provides that in a state of emergency, fundamental rights and freedoms can be suspended "to the extent required by the exigencies of the situation, as long as obligations under international law are not violated". While the Constitution explicitly regulates the power of the President to declare a state of emergency in case of an epidemic disease, this was not the case in Turkey. In the absence of a state of emergency, limitation of fundamental rights and freedoms should follow the procedure set out in Article 13 of the Turkish Constitution. According to this Article, fundamental rights and freedoms can only be restricted if this restriction is prescribed by law, in line with the reasons mentioned in the relevant articles of the Constitution, does not interfere with the essence of the right, is not contrary to the letter and spirit of the Turkish Constitution and to the secular democratic order of the republic, and is proportionate. Article 13 provides a

detailed list of requirements to be followed in case a right is restricted. Since there was no declaration of a state of emergency, a limitation of a fundamental right and freedom has to abide by all these requirements. Regarding the constitutionality of the restrictions, there are two main issues: On one hand, some limitations, such as curfews, do not seem to be prescribed by law,[9] and on the other hand, freedom of residence and movement or freedom of work and contract cannot be limited to protect public health when there is no state of emergency.[10]

At the international level, the absence of a state of emergency requires that Turkey abide by all its international human rights obligations. The unconstitutionality of measures adopted during the COVID-19 pandemic has severe consequences for Turkey's international obligations. Turkey is a state party to the European Convention on Human Rights (hereinafter referred to as ECHR) and the International Covenant on Civil and Political Rights. As mentioned above, Turkey did not declare a state of emergency and in accordance with that, it did not notify the Council of Europe that it would derogate from its obligations deriving from the European Convention on Human Rights based on Article 15 of the ECHR. In that sense, Turkey is bound to respect all its obligations under the Convention since the beginning of the COVID-19 pandemic. However, it is clear from the measures adopted by the public authorities that there have been severe limitations with regard to the right to travel, right to work, right to education, right to liberty, right to privacy, right to assembly, all protected by the ECHR. While Article 119 of the Turkish Constitution allows restricting fundamental rights and freedoms in a state of emergency, Turkey opted not to do so. In that sense, the restrictions brought to the above-mentioned rights raise serious questions about the compliance of these measures with Turkey's obligations under the ECHR.

2. Universality of International Law Yielding Its Place to Particularity

International law is supposed to be universal.[11] It is projected as a field that transcends all particularities, such as different cultural, legal, historical characteristics of states, in order to bring about a set of rules that are globally applicable. Its universality firstly refers to a geographical dimension and it is assumed that international law applies to all states equally.[12] The idea of universality provides in that sense a form of unity to the field. While all states might act based on different interests, international law provides a common legal framework that allows states to maintain a global order.[13] This unifying power of

[9] See Volkan Arslan, *COVID-19 Salgını Sebebiyle Uygulanan Sokağa Çıkma Kısıtlamalarının 1982 Anayasası'na Uygunluğu (Constitutionality of COVID-19 Related Curfews in Turkey)*, 78(2) Istanbul Law Journal 809, 814 (2020).

[10] See Kemal Gözler, *Korona Virüs Salgınıyla Mücadele için Alınan Tedbirler Hukuka Uygun mu? (Do Measures Adopted to Fight Against the Coronavirus Abide by Law?)*, https://www.anayasa.gen.tr/korona.htm (accessed on January 28, 2022).

[11] See Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16(1) European Journal of International Law 113, 113 (2005).

[12] See André Nollkaemper, *Universality' in Max Planck Encyclopaedia of Public International Law*, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1497 (accessed on January 28, 2022).

[13] See Anne Orford, *Constituting Order*, in James Crawford & Martti Koskenniemi (eds), International Law, Cambridge University Press, p.287 (2012).

universality is also what gives this legal field a sense of harmony and agreement among states. In a world full of disagreements and diverse interests, the idea of universality provides a sense of comfort, making us believe that the actors of international law will eventually meet at a common point of agreement. This, however, has been severely criticised by those who emphasised the Euro-centric, [14] gendered, [15] and imperialist dimensions of the field.[16]

The COVID-19 pandemic has challenged the universality of international law is several ways. It is argued here that the COVID-19 pandemic has been a useful subterfuge for states to rely on the particularity of their national health crisis in order to resist a universal application of rules. The COVID-19 pandemic has been used as a tool to rely on a particularist position in the international arena on two grounds. First, the failure of the WHO to provide an effective response to the COVID-19 pandemic has allowed states to follow their own agenda without necessarily following the demands of international organisations. Second, the magnitude of the COVID-19 pandemic provided states with the opportunity to use this crisis to adopt measures that at times disregarded their international obligations. These two sets of grounds have provided ample space to states to rely on a particularist agenda and move away from a universalist perspective.

First, it has been widely discussed how well The WHO coped with the COVID-19 pandemic.[17] The WHO adopted International Health Regulations (hereinafter referred to as IHL) in 2005 in order to "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade". The IHL gives the Director-General the right to declare a Public Health Emergency of International Concern in which case the Director-General can issue temporary recommendations to states. Several scholars discussed whether the way the WHO handled the crisis and put in practice the IHL served the purposes set up by this

[14] See Onuma Yasuaki, *When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2(1) Journal of the History of International Law 1, 1 (2000); Brett Bowden, *The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization*, 7(1) Journal of the History of International Law 1, 1 (2005); Karen J. Alter, *Visions of International Law: An Interdisciplinary Retrospective*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666895 (accessed on January 28, 2022).

[15] See Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*,Manchester University Press (2000); Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches*, Oxford University Press (2005); Anne Orford, *Feminism, Imperialism and the Mission of International Law*, 71(2) Nordic Journal of International Law 275, 275 (2002); Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, 10(1) Melbourne Journal of International Law 11,11(2009); Gina Heatcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures*, Oxford University Press (2019); Susan Harris Rimmer & Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law*, Edward Elgar (2019).

[16] See Makau Mutua, *What is TWAIL*?, 94(1) American Society of International Law Proceedings 31, 31 (2000); Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*,42(4) Harvard International Law Journal 201, 201 (2001); Anthony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27(5) Third World Quarterly 739, 740 (2006); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8(1) International Community Law Review 3, 18 (2006); Sundhya Pahuja, *The Postcoloniality of International Law*, 46(2) *Harvard International Law Journal* 459, 459 (2005).

[17] See generally, Lawrence Gostin, *Global Health Law*, Harvard University Press (2014).

framework.[18] While many would expect the WHO to be the beacon for a universal response to the COVID-19 pandemic, what happened on the ground reversed all these expectations. It is not hard to envisage that the WHO is the primary international organisation that would provide an efficient framework to inform states about measures they should adopt to fight against COVID-19. Surprisingly, that was not the case and the WHO failed to act as the control room of the crisis. States mostly decided on their policies without international cooperation. The ineffectiveness of the WHO as an international organisation around which states could gather to adopt similar policies and act in solidarity, allowed states to respond to the COVID-19 pandemic in the way that accommodated their national policies. Rather than a universal reaction, what we witnessed during the COVID-19 pandemic was each and every state's peculiar response.

Second, the use of crisis narrative is common in international law.[19] What is unanticipated, unusual, catastrophic, disastrous, urgent or pressing creates exceptional circumstances which allow states to move away from what would ordinarily be expected from them. Undoubtedly the COVID-19 pandemic constitutes a crisis by the unprecedented public health concerns it raised in recent history. When it comes to the protection of fundamental rights, the conventional approach would be to expect from the state to limit these rights in accordance with its domestic regulations and international human rights obligations. However, the crisis mode generated by the unprecedented developments of the COVID-19 pandemic brought about an atmosphere where anything could be done to protect public health. Several states used this crisis mode as an opportunity to strengthen their authoritarian rule by issuing emergency measures.[20] In Turkey, this crisis mode allowed the state to disregard not only its domestic law requirements for the protection of fundamental rights and freedoms but also its international obligations arising from human rights treaties. While in Turkey, it is a widely shared opinion that the restrictions are not constitutional, due to the urgency of the situation and the necessity of these restrictive measures, there is a sense of tolerance regarding their unconstitutional nature. In order to meet the exigencies of this crisis, exceptions are allowed or tolerated. International law almost always intervenes when there is a crisis, when there is something that is outside the

[18] See Gian Luca Burci, *The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations Fit for Purpose?*, https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/ (accessed on July 7, 2022); Philippe Sands in Conversation with Gian Luca Bruci, *COVID-19 and International Law: What went wrong and what can we learn from it?*, https://www.biicl.org/documents/10303_covid19_and_international_law_16_april_2020_event_report.pdf (accessed on January 28, 2022); Armin von Bogdandy & Pedro Villarreal, '*International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No.2020-07, https://ssrn.com/abstract=3561650 (accessed on January 28, 2022); Armin von Bogdandy & Pedro Villarreal, *Critical Features of International Authority in Pandemic Response: The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No.2020-18, https://ssrn.com/abstract=3600058 (accessed on January 28, 2022).

[19] See Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65(3) Modern Law Review 377, 377 (2002); Dianne Otto, *Decoding Crisis in International Law: A Queer Feminist Perspective*, in Barbara Stark (ed), International Law and Its Discontents: Confronting Crises, Cambridge University Press, p.115 (2015). For different accounts on how the crisis narrative is used in international law, see Makane Moïse Mbengue & Jean d'Aspremont (eds), *Crisis Narratives in International Law*, Brill (2021).

[20] See Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114(3) American Journal of International Law 687, 691-692 (2020).

ordinary or normal. Disregarding violations only because there is an unprecedented threat to the protection of public health does not seem like a sensible option because we constantly live in a certain crisis, be it the climate crisis, financial crisis or terrorism crisis. These examples can be multiplied without much difficulty in a way that would help the state to justify its detours from international law almost in every case that goes beyond what is accepted as the normal state of affairs.

3. Concluding Remarks

Recent years have been marked by the rise of a more particularist position by states in their international affairs. Withdrawal from international organisations,[21] international courts[22] or a certain nihilism about international law[23] have raised serious questions about the universality of international law. The COVID-19 pandemic has been no different. It has added a new example on how states prioritise a more particularist policy rather than abiding by a universalist agenda that international cooperation would require. This paper has looked at the institutional deficiency and the crisis mode as the two elements that allowed this particularist stance. What would be expected in a crisis mode is a return to the old normal or a new normal. In the case of Turkey, the backsliding regarding the rule of law has been the new normal for a long while.[24] It is hard to argue that the crisis mode is an exceptional period which will leave its place to an era where human rights will receive the respect they require. The crisis mode of the COVID-19 pandemic coupled with the current decline in the rule of law generates a gloomy picture for the future of human rights protection in Turkey.

[21] See Catherine Brölmann & Richard Collins et al., *Exiting International Organizations*, 15(2) International Organizations Law Review 243, 243 (2018); Jed Odermatt, *Brexit and International Law: Disentangling Legal Orders*, 31(1) Emory International Law Review 1051, 1051 (2017).

[22] See Juan-Pablo Perez-Leon-Acevedo, *Why Retain Membership of the International Criminal Court? Victim-Oriented Considerations*, https://www.duo.uio.no/bitstream/handle/10852/72569/International+Orgs+Rev+Perez-Leon-Acevedo.pdf?isAllowed=y&sequence=1 (accessed on January 28, 2022).

[23] See Stefan Talmon, *The the United States under President Trump: Gravedigger of International Law*,18(3) Chinese Journal of International Law 645, 645 (2019).

[24] On democratic backsliding in Turkey, see Esra Demir-Gürsel, *The Former Secretary General of the Council of Europe Confronting Russia's Annexation of the Crimea and Turkey's State of Emergency*, 2(2) European Convention on Human Rights Law Review 303, 303 (2021); Emre Turkut, *The Venice Commission and Rule of Law Backsliding in Turkey, Poland and Hungary*, 2(2) European Convention on Human Rights Law Review 209, 209 (2021).

Never Let a Crisis Go to Waste: The Legal Profession in the Pandemic

Kangle Zhang[1]

Since the COVID-19 pandemic hit the globe, some international lawyers' default reacting mode has been to either seek first-aid or to decorate the profession with flowery words on their concern for the effects of the COVID-19 pandemic. By first aid, I am referring to the quick legal actions pursuing the idea that some particular countries, organizations, or even individuals, could be held responsible. This was the idea, for example, in Peter Tzeng's piece published in European Journal of International Law Talk. This short essay is driven by a strong dissatisfaction over these that serve the interest of political chaos and drama.

1. The Craziness in the COVID-19 Pandemic

In China, due to concerns like available medical resources and the population size, the pandemic is managed in ways that the virus is eradicated "on sight". These measures have achieved great success. Yet despite the success, measures coping with the COVID-19 pandemic are actively debated in China. These debates target measures ranging from face-scanning, which is required to enter premises like universities, to local quarantine-requirements for individuals traveling from regions that have active COVID-19 cases.

Instead of discussing what is fiercely debated, I am bringing up these to compare them with the tendency of precepting the "Chinese" as a homogenous group. At least in some parts of the world, the identify of a "Chinese" seems to represent specific characteristics and tendencies, to the extent that individual preferences and differences are largely overlooked. This is particularly worthy of attention, for during this pandemic much abuse and violence centers on race (and nationality).

The contrast between the singular perception of the "Chinese" and the internal difference within China raises the question of, what might be the reasons for a tendency to label the individuals, especially the foreigners, we encounter? Some straightforward answers could include, for example, the animalistic need to quickly understand these encounters by putting them into specific categories that we have pre-determined, and the very fact that foreign languages are usually taught with country-names and nationalities at the very beginning. I wish to suggest that, perhaps it also has something to do with international law: the very mindset of international law which centers on states contributes to the tendency of reducing individuals to nationalities and labeling them with it. Accordingly, it is possible to draw a link between what was described above and the specific mindset of international law.

Orthodox international law views states as individual actors in international law, and from there legal concepts like state responsibility are contemplated. The formulation of international legal affairs as affairs between individual states seems to contribute to the tendency of labelling actors with nationalities. And more importantly, such an individualistic thinking — of states as individuals — emphasizes difference over similarity, and it seemingly promises legal remedies as the way moving forward. That is, as long as

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some states are held responsible for the "wrongs", progress is made. "Othering" becomes a legal technique.

The naivete of such a mindset lies in the fact that, after centuries if not even longer, the mobilization of domestic forces and emotions for political uses deploy the same rhetoric. This is as well dangerous. Brexit, the crisis of the Euro, and the rise of populism (and fake news) in the United States all had this playbook in hand. And in the context of the COVID-19 pandemic, the China-US rivalry that is so popularly employed domestically risks erasing any progress that is made at the age of globalization.

2. The Human Actions Making the Pandemic Possible and Worsening the Sufferings

If the useless attempt of finding the state(s) to blame for the COVID-19 pandemic will be over, a rethink of the conditions making this pandemic as well as the sufferings around it possible, is much needed.

To start with, environmental changes and the internationalization of contemporary life have exposed the human race to unforeseeable risks. And (international) law underpins much of these activities. Aside from these, human actions have hugely exaggerated the pain and suffering that relate to the COVID-19 pandemic. Some disastrous human actions are more obvious than others. For example, the waves of non-sensical speeches spreading distrust in vaccines, politically driven accusations (often wearing the skin of lawsuits) against particular countries in pursuit of international responsibility, and most notoriously the mismanagement of the COVID-19 pandemic since the start. The less obvious ones are perhaps just as frustrating, if not more. A good example is the vast disparity in medical resources available to different groups of people both within societies and internationally. This very disparity, and other differences in the experiences of distinct ethnic groups and nationalities during the COVID-19 pandemic, are results of years of human actions.

Human actions and their effects in worsening situations in the world have been investigated from multiple angles. Among which, the diagnosis of capitalism and its hailing of individual subjects, insightfully points to the underlying forces making and remaking a world of struggle. Each individual is inevitably trapped in some specific institutional logics, and the all-encompassing ideology shapes the body and mind of each individual, making her the defender of the very ideology suppressing herself. This diagnosis explains some of the human actions we have witnessed since the start of the COVID-19 pandemic. Since individualism and self-interest are the primary concerns in a capitalist system, not only are collective actions like wearing masks for the protection of the weak and elderly in societies not popular, but it also weakens instructive messages on for example vaccines. Adding to which, as international lawyers Robert Knox and Ntina Tzouvala have brilliantly articulated, the legal mechanism of state responsibility is a materialization of the international legal ideology which represents a specific relationship between states, capital and global disaster, and this relationship constitutes the very social and economic conditions that make an international pandemic possible.[2] Furthermore, since the broader domain of societal governance is measured in economic benefits (and losses), and the logic of private capital accumulation prevails in all societal domains, a capitalist system is

[2] See Robert Knox & Ntina Tzouvala, *International Law of State Responsibility and COVID-19: An Ideology Critique*, ANU College of Law Legal Studies Research Paper Series No 21.25.

inevitably ill-prepared in coping with the distinct effects the COVID-19 pandemic has on different groups.

3. The Profession in the COVID-19 Pandemic

The diagnosis of capitalism and the interpellation (and making) of individual subjects explains the human actions in failing to address the COVID-19 pandemic in "better" ways. Yet the critique against capitalism, ideology and international law is most certainly not new. In legal academia, the examination and critique of the capitalist system have inspired new understandings of law and its complicity in this deeply unequal world. As some critical minds have usefully pointed out, the world and its subjects are legal constructions, and the law is itself the materialization of power and coercion. And more specifically, the complex virtue of and dynamic within international law itself is rigorously debated. It consolidates and reinforces the unequal relationships of the past, and it offers the venue, the language and the promise for emancipation.

Numerous works targeting the capitalist system seem not to shake its operations. Indeed, the critical investigations in the past at least three decades might have shaped the minds of many international lawyers and inspired reimaginations of the world itself, but as we have witnessed since the start of the COVID-19 pandemic, it is largely powerless against the orthodox international lawyers picking fights for politicians. In the particular context of the COVID-19 pandemic, it might seem that, at a time when quick reactionary responses are needed in the legal profession, the critical endeavors are not at all useful.

This is not to say, that the critical endeavors ought to have brought about the emancipation it promises by itself. It is certainly not the task, not even the motivation, of any profession and its more specified division or genre to singlehandedly resolve the puzzles of the world. "I am just an international lawyer." That said, the ways the critical efforts engage with the orthodox forces in the legal profession might deserve some more attention. In other words, the critical-minded international lawyers might be missing an avenue of engagement in their usual ways of interrogating the predeterminations, assumptions and methodological choices of the orthodox approaches.

This avenue that the crits are missing, I argue, is the institutional logic of the profession itself. International lawyers in academia, after all, are within the same industry. They are judged by similar metrics, praised (and dismissed) by their colleagues, and ruled by the logic of the institution. This institutional logic internalizes the liberal values. Research topics ought to be timely, for it promises a broader audience in both legal practice, research and the political circle. And a broader audience generally equals a larger revenue. Each researcher is judged by the research output, for these outputs together contribute to the ranking of the research institutions and universities. These rankings in turn are commercialized through various training programs and projects, issuing "licenses" to any individual that is willing to pay for the title of the ranking and to have it on their resumes. The liberalization of universities is a part of our lives, and we live by the institutional logic that is a product of liberalization.

What does it mean for the critical minded international lawyers to recognize the institutional logic of the profession? I suggest that it at least signals the necessity of reflecting on the daily operations of the profession. In the specific context of the COVID-19 pandemic, Sarah Nouwen, Joseph Weiler and ICON Editorial Team asked the question of, what can journals (and others) do facing the unequal impact of the COVID-19 pandemic

on scholars with care responsibilities.[3] This certainly is a good start. But perhaps some more questions could be asked. Essentially, what are the powers and forces at an operational level within the profession?

4. Concluding Remarks

The global reach of the COVID-19 pandemic and its close connection to international health law makes the COVID-19 pandemic a topic within the compass of international legal enquiries, yet few of these enquiries actually touch on international law's making of the world which enabled the spread of the virus at the first place. This short essay is an attempt in this direction. This perhaps raises more questions than it answers, but by specifically targeting the institutional logic of the profession, as well as the human actions in the industry, this essay hopes to attract attention to the international lawyers themselves. The attention to the operations within the profession is one way of expanding the target of critique. Facing the numerous "first-aid" legal endeavors since the start of the COVID-19 pandemic, such an expansion of the target of critique is perhaps useful.

[3] See Sarah Nouwen, Joseph Weiler and ICON Editorial Team, *The Unequal Impact of the Pandemic on Scholars with Care Responsibilities: What Can Journals (and Others) Do?*, https://www.ejiltalk.org/the-unequal-impact-of-the-pandemic-on-scholars-with-care-responsibilities-what-can-journals-and-others-do (accessed on December 28, 2021).

COVID-19, China and the Alleged Emergence of an Authoritarian International Law

Maria Adele Carrai[1]

1. Introduction

The competition between autocracy and democracy has given rise to a new Cold War Era that affects all fields, including international law. On one hand, liberal democracies, led by the United States and Europe, promote liberal values such as human rights, the rule of law, democracy, and economic liberalization. Conversely, authoritarian countries, led by the emerging China-Russia coalition, plan to create a new type of international law that is oppressive and disregards rule-based order. In western media, as well as the United States and EU foreign policy papers, we often hear that there is a rule-based international order led by western powers that is challenged by China's authoritarian legalism. This rule-based order expresses the liberal international order that became dominant during the Cold War and was unrivaled during the 1990s when Francis Fukuyama declared the end of history. It corresponds with global, rule-based structured relationships based on political liberalism, economic liberalism, and liberal internationalism, and takes the form of international law, a system of multilateral policymaking, and rule-setting institutions, which are referred to as the Bretton Woods. International law provides a neutral setting where states can compete and resolve disputes peacefully; they abide by a distinct set of rules and avoid interference and coercion. Tom Ginsburg's recent book, "Democracies and International Law", articulates the existing tension between democratic international law and authoritarian international law. According to Ginsburg, newly assertive authoritarian regimes are revising the substance of international law. They are developing their own international organizations, which reinforces sovereignty rather than eroding it. Authoritarian countries like China favor an "international rule of law" that shields them from criticism, rather than a rule-based order that affects their sovereignty and makes them more accountable. Furthermore, under authoritarian international law, these regimes would abandon dispute resolution and embrace softer commitments.

COVID-19 exacerbated the liberal and autocratic ideological divisions in the world.[2] Liberal countries limited state intervention so freedom of press and information could allow for private entrepreneurs to successfully innovate and develop the mRNA vaccine. Autocratic countries, represented by China, were condemned for lack of transparency and draconian measures that hindered personal freedoms and liberties. However, inadequate handling of the pandemic by western liberal democracies prompted people living in democratic countries to question the effectiveness of the democratic system in providing an effective solution to the crisis. Moreover, the initial success of countries like China in controlling the spread of the virus and sustaining a zero-COVID policy has augmented their differences with liberal democracies. Liberal democracies struggled in balancing individual freedoms with mask and vaccine mandates in places where millions of people

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[2] See David Stasavage, *Demoracy, Autocracy, and Emergency Threats: Lessons for COVID-19 From the Last Thousand Years*, International Organizations (2020); Rachel Kleinfeld, *Do Authoritarian or Democratic Countries Handle Pandemic Better?*, Carnegie Commentary (2020).

had died from poor policies and lack of state leadership. Many citizens from Western democracies favored authoritarian governments for their perceived efficiency and decisiveness. This pessimistic attitude of western democracy is rooted in its inadequate response to the 2008 Financial Crisis in addition to the failure of liberal democracies to address the COVID-19 pandemic. Before World War II, more than 70% of people valued living in a democracy. For those born after the 1980s, however, that number shrinks to less than one third.

The pandemic, and more recently Russia's invasion of Ukraine, exacerbated existing tensions between autocracies and democracies and has prompted new debates about the rise and decline of democracy, liberalism, the west, and human rights.[3] According to the Freedom House Project, the world has seen an acceleration in the decline of democracy, which corresponded with a rise of authoritarianism. This confirms a trend that has been underway around the globe for the past thirty years. The global liberal order is being challenged by populists, economic nationalists, and autocrats. The pandemic has accelerated this trend and has created an international contest between democracies and authoritarian systems to define international law and the new world order. This document discusses the limitations of the dichotomy between authoritarian and democratic regimes that characterize current debates on authoritarian international law and challenges the vision of international law as a universal rule-based order.

2. The Dichotomy of Authoritarianism vs. Democracy and Its Limitations

The dichotomy between democracy and authoritarianism characterizes many debates and much of the scholarship on regime types. There is a limitation in applying this distinction globally and extracting an "authoritarian" international law. There is no liberal international law, nor is there an authoritarian one. While international law aspires to be neutral, it remains profoundly contested.[4] Furthermore, there are many differences among authoritarian regimes and their attitudes toward international law. Democracy has authoritarian features, and autocracies have liberal features. For instance, the U.S. is considered the world's leading democracy, but the Trump administration ignored democratic principles such as the separation between public and private interests, respect for peaceful protest, and bureaucratic autonomy. In China, Deng Xiaoping tempered Maoism with democratic characteristics like accountability, competition, and limitation of powers. The Chinese system remains an autocracy with democratic elements although partly changed with Xi Jinping's autocratic grip.

It is difficult to accuse China of being the stronghold of authoritarian international law when it has successfully integrated into international law and liberal institutions. During the early years of the People's Republic of China, China rejected international law and institutions in the name of proletarian internationalism, and ideological division among democratic and communist countries during the Cold War. But more recently, Deng

[3] See for example: David Runciman, *How Democracy Ends* (2018); Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (2018); Michael J. Abramowitz, *Freedom in the World 2018: Democracy in Crisis, Freedom House* (2018). This followed the 2017 Freedom House report which was subtitled Democracy Beleaguered. See Stephen Hopgood, *The Endtimes of Human Rights* (2013); Eric Posner, *The Twilight of Human Rights Law* (2014); Costas Douzinas, *The End of Human Rights* (2000).

[4] See Anthea Roberts, *Is International Law International?* (OUP, 2017).

Xiaoping began the gradual integration of China into the international system while still emphasizing the importance of sovereignty. Since China became a member of the United Nations (replacing the Republic of Chinese Taiwan in 1971), it has joined multilateral institutions and signed many international treaties and conventions. This global integration has been accelerated by China's Going Global policy, launched in 1999, followed by China's entry into the World Trade Organization (WTO) in 2001. Since Xi Jinping came into power in 2013, China's global rise and integration into international organizations have been accompanied by Xi's strong rhetoric of China's new place in the world as a responsible global power, and also by new initiatives, key among them the Belt and Road Initiative (BRI).

The rule-based order led by the United States and EU has become characterized by the rule of law, human rights, democracy, and economic liberalism. However, this rule-based order is mostly idealized and remains contested. Countries like the United States, who are supposed to be leading it, often do not join conventions and treaties and disrespect the rules of the rule-based order. China has often felt like an outsider to the current international order and complained of the persistence of the west dominance in international institutions and their double standards and selective application of international norms. Still, China has signed hundreds of multilateral treaties and thousands of bilateral treaties ranging from climate change to arms control and human rights. Chinese officials speak regularly about the importance of international law and that China claims to be a staunch defender of international rule of law that has substantially increased its participation in international organizations and bodies.

3. China's Integration into New Economic Order

China has had success integrating itself into the new economic order that is based on Bretton Woods institutions. In 2001, it joined the WTO, undertaking greater commitments than other WTO members and incorporating various international commercial legal regimes into its domestic legal system. It has worked within the current trading system to perpetuate trade liberalization and has complied with international trading rules and the appellate body's resolution. It has significantly reduced tariffs and remains active in the WTO. An exception to the general practice of the WTO is to prevent new rules that discriminate against SOEs. Since 2014, China has opened its trade services and reduced intellectual property theft dramatically without imposing restrictions on foreign direct investment (FDI). It has also signed a series of bilateral and regional free trade agreements (FTA) with the Association of Southeast Asian Nations (ASEAN) that promoted the ASEAN Regional Comprehensive Economic Partnership (RCEP) and the Free Trade Area of Asia Pacific (FTAAP).

Additionally, China signed the Convention on Settlement of Investment Disputes between States and Nationals of other Nations in 1993 and has become a prominent signatory of Bilateral Investment Treaties (BITs). These agreements are similar to treaties signed by developed countries as they promote trade liberalization, nondiscrimination, and transparency. China has been accused of disrespecting standards of good governance when developing finance. While there is no overarching law governing overseas commercial activity, hundreds of directives regulating outward FDI so that it complies with Chinese development and industrial policies have been issued since 2013. Among these regulations are directives relating to the BRI and others that encourage China's State-Owned

Enterprises (SOEs) and private companies to respect local customs, honor social responsibilities, and uphold environmental and labor protections. The *Guidelines for Enterprise Compliance Management of Overseas Operations* (2018), for example, encourages Chinese investors abroad to comply with domestic rules and self-disciplinary regulations included in China's laws, the host country laws, and international treaties. The China State Council's *Opinions on Further Guiding and Regulating Outbound Investment* (2017) delineates how outbound investments should align with the BRI and respect the host country's regulations. Both of these documents are consistent with the OECD's *Policy Framework for Investment (PFI)* of 2015 and *OECD Guidelines for Multinational Enterprises* of 2011.

While China has had considerable success integrating into international economic institutions over the past four decades, it is still true that many of the economic reforms needed for joining the WTO have stalled and the United States and the EU have complained about the gap in implementation of WTO rules on market access, technology transfer, intellectual protection, regulatory transparency, subsidies. China's economy remains state-led, its main economic actors abroad and within are State-Owned Enterprises (SOEs) that receive state subsidies that distort the free market. Strict rules continue to limit foreign investment in China and Beijing does not seem to be particularly committed to advance more structural reforms of its economic model. Still, this does not make China a spreader of an authoritarian international law.

4. China's Integration into the International Political and Normative Order

China's membership in global institutions has helped Beijing become more active in asserting its views and values. While China has been accused of opposing democratization, studies that were able to prove that the Beijing is spreading an authoritarian model in international law and institutions are often based on anecdotes rather than a broader analysis of facts. China has become active at the United Nations General Assembly and Human Rights Council by making proposals and advancing amendments that promote civil and political rights. China believes that "[t]here is more than one path for developing human rights. As an important element in the economic and social development of each country, the cause of human rights must be promoted based on the national conditions and the needs of the people of that country." China has provided further elaboration on this position through its 2018 Human Rights White Paper, which provided that China can provide Chinese solutions to global human rights problems by advocating for the right to subsistence and development to be recognized as fundamental human rights, promoting people-centered human rights, and focusing on the historical and national conditions of individual countries. China has taken on a more active role in the Human Rights Council and has rejected criticisms from other countries about its own human rights record. It has thereby advanced a sovereigntist approach to protecting human rights that uses the rule of law to bring civil society under state control and promotes a collective vision of human rights aimed at furthering social stability and prioritizing developmental and subsistence rights. The white paper confirms China's intent to take a more assertive stance on human rights and gradually change the global uniformity of human rights discourse.

Sovereignty has long been the cornerstone of Chinese foreign policy. China refrains from interfering with the domestic policy of other countries and does not impose conditions

on foreign investment. However, China does impose political conditions on investment, such as the condition that its one-China policy be recognized, and/or the condition that its internal affairs not be interfered with. This aspect of China's foreign policy is also reflected in China's opposition to the Responsibility to Protect (R2P) commitment of the United Nations member states which is viewed by China as a violation of sovereignty. China would prefer multilateral interventions with the United Nations support. It believes that the United Nations' primary security obligation is to protect member states' sovereignty, not the political and civil rights of citizens. China's approach to collaboration within the international community demonstrates how it has become an influential member of international organizations. Sometimes it supports the foundational tenets. However, sometimes it erodes them from within, such as with the United Nations Human Rights regime. Iain Johnston noticed in his in-depth analysis of China and the international order that perhaps the major exception to Chinese integration with the "rule-based order" is its coercive diplomacy, such as with the South China Sea Dispute in 2012-13 when China rejected third-party mediation, arbitration, and adjudication in sovereign-related matters.

5. The Persistence of Orientalism

Despite its integration into international order, China is still looked at in an orientalist way. The roots of this approach dates back a few centuries, but at least in part, the recent assertiveness of China and the new global initiatives launched by Xi Jinping contribute to foster this deep-rooted fear and trigger the process of othering in the West. In the orientalist othering, China has become recognized as a country that does not abide by the rules of the international system and promotes an authoritarian international law that threatens the rule-based order. It is often perceived as the country ready to cheat and disregard the rules of international law. Whenever it tries to be more assertive in the international community or create its own institutions it is looked at with suspicion. An example is the AIIB, which is led by China and considered to be an alternative to Bretton Woods institutions. However, the AIIB is actually very similar to Bretton Woods institutions. Similarly, the Regional Comprehensive Economic Partnership (RCEP) was viewed with suspicion during the pandemic. It was accused of preventing innovation and progress on environmental and digital standards and was seen as a regression from the high standards of the Trans-Pacific Partnership (hereinafter referred to as TPP). Legally, it was incorrectly considered an "old generation agreement", which, unlike "new generation agreements", only covers the trade of goods but does not cover critical new areas such as intellectual property, data, and services. It was also viewed as a regression from TPP, which was aborted by the Trump administration in 2017 and transformed into the Comprehensive and Progressive Agreement for TPP in 2018. Mega-regulators like TPP are characterized by "high standards" and comprehensive coverage of goods, services, capital, and data flows. They also advance a neoliberal vision of the state that deliberately contrasts with China's economic order as it relies on state-owned enterprises (SOEs).[5] The RCEP has few standards beyond trade and investment.[6] Contrary to the TPP, the RCEP does not have chapters on "Environment", "Labour", and "State-Owned Enterprises". Although the RCEP supposedly "aspires" to

[5] See Benedict Kingsbury & David M. Malone et al., *Global Economic Ordering After TPP*, Oxford University Press (2019).

[6] See Min Ye, *China and Competing Cooperation in Asia-Pacific: TPP, RCEP, and the New Silk Road*, 11(3) Asian Security 206, 206-224 (2015).

"create new employment opportunities, raise living standards, and improve the general welfare of the people", it departs from the TPP's more specific aims to "protect and enforce" labor rights and "improve working conditions". Furthermore, the TPP's preamble stresses the need to promote "high levels of environmental protection, including through effective enforcement of environmental laws". The RCEP "recognizes" that "economic partnership can play an important role in promoting sustainable development", but it does not explain how this is accomplished. However, it is not an "old generation agreement," as it contains chapters dedicated to "Intellectual Property", "Electronic Commerce", and "Competition". This characterization of the RCEP was misplaced. This is also true of the BRI — there is no evidence that it promotes a debt trap, poor standards of government, or Chinese model authoritarianism. These misperceptions give China the image of an authoritarian threat to the west that is fundamentally and almost irreconcilably separated from the liberal rule-based order.[7] However, this continuous orientalism and othering of China does not allow to see clearly and separate fiction from facts, leading to ill-informed policies.

6. The Political and Historical Nature of International Law

International law is often incorrectly characterized as value-neutral, and any attempt to corrupt this neutrality is considered a threat. However, the current definition of international law as a "rule-based order" reflects a particular set of values. When we hear the term "rule-based international order", it is as if it has always been around, but the term first started being used recently by Hilary Clinton after being coined by Kevin Rudd in 2009. When we talk about international law in the singular form, we dismiss the plurality of orders that make up the system. Iain Johnston, in one of the most systematic analyses of the China and the international system, has identified a series of orders that reflect how countries abide by these directives in the international system.

Johnston's findings show that China has integrated into the WTO (with certain exceptions) and is a strong supporter of dealing with global governance issues through the United Nations. Conversely, China opposes the political order that is embodied in certain treaties that promote liberal standards. Johnston also found that the United States does not always follow the rule-based order it claims to lead. The the United States has only ratified five of 18 major human rights treaties and protocols. It has not ratified the Convention on the Law of the Sea and has ignored the United Nations Security Council on several important occasions. The idea that there is one liberal order that is supported by the United States and opposed by China is incorrect. If this was true, China and the U.S. would always disagree on the implementation of international standards and institutions which is not the case.

This idea that there is one liberal international order is founded on the principle that international law is neutral. However, this disregards the history of international law. Historically, international law has never been value neutral, it is characterized by the dominance of western values which do not correspond with the values of all societies. International law reflects international politics. Therefore, states that support the rule-based order should not be viewed as status quo, and states that challenge the rule-based order should not be viewed as revisionist or malevolent. International law is constantly evolving, and open to different interpretations. Research shows that international agreements and

[7] See Ivan Franceschini & Nicholar Loubere, *Global China as a Method* (2022).

patterns of behavior do not correspond with regime type and countries of different regime types often agree on the values and institutions that form the foundation of the international community.

7. Conclusion

There has not been an expansion of authoritarian international law led by China during the pandemic, and China has not been the main cause for the trend of democratic backsliding that characterized the past three decades of international society. The latter has to do not only with the rise of autocrats, but probably even more with the rise of populists and economic nationalists within democracies. The dichotomy between authoritarian and liberal states in their approach to international law limits our understanding of the world and political systems. The convergence of the pandemic with power politics between democracies and authoritarian states has obstructed international cooperation and the functioning of international institutions. This is demonstrated by stalemates within the World Health Organization (WHO) that have hindered international cooperation in addressing the global pandemic.

Additionally, the rule-based international order is challenged from within more often than it is challenged by external rivals like China. The disintegration of liberal internationalism has been due to the failure of its foundational political agreements and institutions. According to international relations scholar John Ikenberry, liberal internationalism has lost its "order of conditionality" and states now come in opportunistically to get what they want, but do not support they system's overall framework and foundations. Different orders continue to co-exist and overlap within international politics. The current international order evolves in accordance with changing geopolitical conditions, and China continues to hold a critical position within this dynamic international community where nothing is yet set in stone and where the liberal internationalism must regain its order of conditionality from within if it wants to continue to define the international system.

Indian Leadership during COVID-19: Forward to Eastphalia or back to Westphalia?

Fozia Nazir Lone[1]

Abstract: Universal application of international norms requires good leadership. It is a proper time to reflect on the leadership failures to the COVID-19 pandemic. As of today, on May 19, 2021, India's COVID-19 tally surpassed 25.5 million confirmed cases with over 279,000 deaths in the country, which is likely an underestimation due to limited testing according to the World Health Organization and the United States scholars.[2] Based on this background situation, my introductory 12 minutes talk, will focus on Indian leadership failures in its response to the COVID-19 pandemic and its commitment to Eastphalian processes of international health. Finally, I will reflect on the importance of improving effective good governance at each level which can increase local, regional and global health security.

1. Introduction

The universalist approach of international law means applying common standards to protect every human being, and that requires good governance at local, regional and global levels. At present, there is a virtual consensus, globally and domestically, that despite having sufficient evidence to take early precautionary measures, there were immediate failings by the Indian central government in their handling of the COVID-19 pandemic. From the beginning of the COVID-19 crisis, community spread was predicted in India due to its high population density and deficient healthcare and sanitation systems. However, in the first months of the outbreak, Indian Ministry of Health and Family Welfare claimed that COVID-19 was not a health emergency in India. At the same time, the Indian government also chose to focus on and advance its nationalist policies, using the cover of the COVID-19 pandemic to make unilateral political changes to the governance of the disputed territory of Kashmir (disputed between India, Pakistan and China) where India in August 2019, through a series of questionable legal actions under communication blackout, passed Presidential Orders and the Jammu Kashmir Reorganization Act of 2019, removed special status of Kashmir under its control, bifurcated the territory into two union territories Kashmir and Ladakh, and re-classified Ladakh as a Union Territory to be governed directly from New Delhi. Since then, Indian Administered Kashmir has been put under a complete communication blackout with only little internet services despite the worsening conditions of the COVID-19 pandemic there. India did not stop there but on May 18, 2020 changed the domicile rules for the union territory of Jammu and Kashmir, allowing people from any part of India to obtain domicile in Jammu and Kashmir, which was not possible before. Clearly, these Indian actions have drawn condemnation from the international community,

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[2] See CNA, *India's COVID-19 cases lower but WHO expert says positive tests ominously high*, https://www.channelnewsasia.com/news/asia/covid-19-india-cases-lower-but-who-expert-says-positivetests14826508?cid=FBcna&fbclid=IwAR1Dn6txXr2jB0PGSMzg5CRw6Q88nNlW0D9T8BDWhD5VS8DeVbmzPHxf7Es (accessed on May 17, 2021).

including a joint statement from China and Pakistan. These unilateral changes that India completed during the COVID-19 pandemic in Kashmir also led to a face-to-face clash in mid-June 2020 in Ladakh on the China and India border, becoming the deadliest conflict between the two nations for half a century. This conflict was resolved due to Chinese diplomatic efforts, but in India, people with East Asian/Chinese appearance in Sikkim are continually harassed for spreading COVID-19.

Further as affirmed by recent reports, India, along with many right-wing populist governments such as the United States (under the Trump administration) and the United Kingdom, delayed meaningful responses to the COVID-19 pandemic until at least mid-March 2020. The COVID-19 era upsurge of nationalism in India is not only socially directed but is politically tied and has drawn condemnation from international scholars.[3] Muslims in India under the BJP government faced a spree of targeted violence after Indian Ministry of Health and Family Welfare repeatedly blamed an Islamic seminary for spreading the coronavirus.[4]

Instead of managing the spread of COVID-19, India as well as the United States populist ruling parties, also decided to start a blame game and disinformation against China and World Health Organization. Since then, World Health Organization and other reports have discredited this theory.

That said, on the world stage, India moved to use its domestic medical capacity to increase its global standing, temporarily emerging as a major donor of vaccines.

2. Analysis

With this background, it is important to discuss the Indian leadership failures in its response to the COVID-19 pandemic, which now has become a matter of universal consensus. It is clear that India, which has one of the lowest per capita spending on healthcare in the world, was not equipped to cope with the COVID-19 pandemic.[5] The National Disaster Response Force (headed by the Director General of the Armed Forces) had warned of a large-scale biological pandemic for over a decade and had proposed a plan to deal with it, but it was neglected and undermined by bureaucratic resistance, which increased under the BJP government led by PM Modi.[6] The Modi government's response

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[3] See Kapil Satish Komireddi, *Malevolent Republic: A Short History of the New India*, Hurst (2020); The Wire Staff, *90 UK Scholars Condemn "Crackdown on Dissent" During India's COVID-19 Lockdown*, https://thewire.in/rights/covid-19-lockdown-dissent-crackdown-uk-scholars (accessed on August 3, 2021).

[4] See Jeffrey Gettleman & Kai Schultz et al., *In India, Coronavirus Fans Religious Hatred*, https://www.nytimes.com/2020/04/12/world/asia/india-coronavirus-muslims-bigotry.html (accessed on August 3, 2021). Two key measures that have led to calls for independent inquiries in the United Statesthe United States and the United Kingdom relate to experiments with deliberately allowing the virus to spread: emails show Trump officials pressuring the CDC with messages like "We want them infected" referring to "infants", young people and others they assumed would likely survive, and justifications about vulnerable groups that may not survive, and in the UK this was given the label of herd immunity by natural infection.

[5] See Swagata Yadavar, *India's per capita expenditure on healthcare among lowest in the world; govt spends as little as Rs 3 per day on each citizen*, https://www.firstpost.com/india/indias-per-capita-expenditure-onhealthcare-among-lowest-in-the-world-govt-spends-as-little-as-rs-3-per-day-on-each-citizen-4559761.html (accessed on August 3, 2021).

[6] See Praveen Swami, *Twelve Years Ago, India Drew up Plans to Deal with Massive Pandemic. Then, Bureaucrats Sabotaged Them*, https://www-news18-com.cdn.ampproject.org/c/s/www.news18.com/amp/news/india/twelve-years-ago-india-drew-up-plans-to-deal-withmassive-pandemic-then-bureaucrats-sabotaged-them-2569059.html (accessed on August 3, 2021).

has been described as "knee-jerk",[7] and that contradicted the Indian Council of Medical Research official data.[8]

With India's grim COVID-19 situation, vaccinations are necessary for improving the situation. In line with recent reports, it is increasingly clear that global vaccine coordination needs to be a part of actual effective governance for disease prevention and treatment. The Indian situation shows the need for giving effect to the right to healthcare, combat corruption and mismanagement and address irregular privatization and social inequities. This position on governance is now well supported by the Independent Panel for Pandemic Preparedness and Response (hereinafter referred to as IPPPR) report and the United Kingdom National Audit Office governance report,[9] both released in May 2021.

Taking a step back, we can see that the current pandemic could have been largely mitigated, as affirmed by the IPPPR report. In fact, in the new millennium, the world was on a path towards better pandemic preparedness. This can be demonstrated by the efforts to curb H1N1 in 2009 and the efforts of the United States in 2014 during the Ebola outbreak, when the interventions of the United States government through the provision of over 1 billion US$ funding and their efforts in the United Nations Security Council mitigated the crisis. Also in 2014, the Security Council passed Resolution 2177,[10] which was in the tradition of UNSC 1308[11] and 1983[12] on the HIV/AIDs epidemic, and called for international collaboration, and for the first time declared a disease outbreak a "threat to international peace and security", and referred to the duty of Member States, particularly in terms of using the global framework to fight the virus.

However, in recent years right-wing populism replaced the focus on local and global governance in countries including India and the United States and led to a collapse in growing standards of global governance during the COVID-19 pandemic. The most obvious example is the United States decision to pull World Health Organization funding during the coronavirus pandemic. The contrast between places (such as China, including here in Hong Kong, New Zealand etc.) that focused on COVID-19 prevention and taking care of all infected persons and the places (such as the United Kingdom, the United States and India, etc.) that made various messaging-based calculations is key to understanding the future direction of the global community towards pandemic management.

The case study of India may help to bring clarity about two emerging schools of thought: on the one hand, there is the idea of "vaccine diplomacy" being some kind of

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[7] See Bishwajit Bhattacharyya, *For the Third Time in Four Years, Modi's Knee-Jerk Decision-Making Has Cost India Dear*, https://thewire.in/government/for-thr-third-time-in-four-years-modis-knee-jerk-decisionmaking-has-cost-india-dear (accessed on August 3, 2021).

[8] See Scroll Staff, *Covid-19: ICMR rejects reports that said over 15% people in hotspots infected, says study not final*, https://scroll.in/latest/964183/covid-19-icmr-rejects-reports-that-said-over-15-people-inhotspots-infected-says-study-not-final (accessed on August 3, 2021).

[9] See Peter Walker & Jessica Elgot, *Covid Laid Bare Existing Weaknesses in UK Government, Say NAO*, https://www.theguardian.com/world/2021/may/19/covid-laid-bare-existing-weaknesses-in-uk-government-says-nao (accessed on May 19, 2021).

[10] See United Nations, *Peace and Security in Africa, S/RES/2177(2014)*, http://unscr.com/en/resolutions/doc/2177 (accessed on December 27, 2021).

[11] See United Nations, *The Responsibility of the Security Council in the Maintenance of International Peace and Security: HIV/AIDS and International Peacekeeping Operations, S/RES/1308(2000)*, http://unscr.com/en/resolutions/1308 (accessed on December 27, 2021).

[12] See United Nations, *Resolution 1983, S/RES/1983(2011)*, https://www.unaids.org/sites/default/files/sub_landing/files/20110607_UNSC-Resolution1983.pdf (accessed on December 27, 2021).

rivalry. On the other, there is growing discourse on governance. India was supposed to be part of World Health Organization and United Nations International Children's Emergency Fund effort to distribute vaccines known as COVAX. However, the universally recognized failure at pandemic management in the country has led to it being unable to supply vaccine shipments since March 2021 despite being responsible for around half of the billions of vaccines due.[13]

Therefore, it is clearly important to reflect on how this could happen: on the one hand, India supposedly sought to help other countries appear to reflect a commendable commitment to the collective wellbeing of the world; on the other hand, a comprehensive failure in pandemic management led to a human catastrophe that could have been avoided in India. The title of an iconic article written by Arundhati Roy "We need a government",[14] which was an appeal to Prime Minister Narendra Modi to step aside, clearly summarizes what India needs — a responsible government.

Indeed, the only real difference is about countries that managed the COVID-19 spread successfully. These countries diligently put pandemic protocols into effect while unsuccessful ones were focusing on blame games and unnecessary politics. Considering the cause of widespread COVID-19 in India, it is clear that vaccines must be used as a part of good governance, meaning prioritizing protection of people rather than pursuing contentious zero-sum rhetoric. In fact, it is only good governance, genuine multilateralism, and mutual support that can prevent further catastrophe.

That brings me to the Wilson model of five-fold elements required for handling the crisis, namely the need for a calm approach; clear communication; a collaborative approach; effective coordination; and adequate support.[15] Clearly these leadership qualities were demonstrated by countries like China (including Chinese Taiwan, Hong Kong), New Zealand, Iceland, Vietnam, etc., that handled the crisis the best. These qualities reflect good governance and demonstrate the fact that human rights principles are essentially a part of good governance principles.

At a global level, it is also important to shed some light on the more universalist Eastphalian approach towards global health security, as was demonstrated by May 18, 2020 Speech of President Xi Jinping to the World Health Assembly where he urged for strong global governance/cooperation to deal with pandemic as well as supporting World Health Organization. These principles were later confirmed by Chinese State Council Information Office, on the June 7, 2020 in the White Paper titled "Fighting COVID-19: China in Action" which demonstrates its commitment to information sharing and providing a model for how other countries can respond to pandemics. Clearly, it could be argued that the Indian intention to support COVAX vaccine and other World Health Organization initiatives also supports this principle. Traditionally, the difference between concepts of Eastphalian and Westphalian approaches was that the former was even more committed to non-interference and sovereignty.[16] Post-Second World War universalism has in fact been characterized as

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[13] See Tulip Mazumdar, *India's Covid Crisis Hits Covax Vaccine-Sharing Scheme*, https://www.bbc.com/news/world-57135368 (accessed on May 17, 2021).

[14] See Arundhati Roy, *We Need a Government*, https://scroll.in/article/994022/arundhati-roy-we-need-a-government (accessed on May 4, 2021).

[15] See Suze Wilson, *Pandemic Leadership: Lessons from New Zealand's Approach to COVID-19*, 16(3) Leadership 279, 285 (2020).

[16] See Andrew COLEMAN & Jackson Nyamuya MAOGOTO, *"Westphalian" Meets "Eastphalian" Sovereignty: China in a Globalized World*, 3(2) Asian Journal of International Law 237, 237-269 (2013).

neither Westphalian nor Eastphalian.[17] However, approaches largely taken by China and to some extent by India suggest a brand-new Eastphalian approach towards global health security and coordination.

There is growing consensus on the need for improving effective good governance at each level in implementation of influenza protocols on testing, medically supervised isolation and contact tracing with monitoring of quarantine, as well as research, vaccine cooperation, and the basic functioning of government and health authorities to implement healthcare protocols, towards increasing local, regional and global health security. It is argued that the primary obligation for protecting the right to life as a human right falls on the state (Article 2 of the International Covenant on Civil and Political rights) and shows that human rights principles are good governance principles. I therefore argue that states must adopt human rights principles towards the protection of global health, which not only protects their own citizens but also the global population from the effects of contagious disease.

I urge that the lessons from pandemic unpreparedness should not be forgotten. In essence, the fact that the emerged universalism towards human rights protection of the post-Second World War order could not wipe off the horrors of the Holocaust and the genocide of European Jews and human suffering during the Second World War. In the similar manner the post-COVID-19 approach to global governance should not forget the gross negligence of leadership in India and other populist countries such as the United Kingdom and the United States and its collaborators that systematically resulted in manslaughter of millions by human experimentation of herd immunity by natural infection. In fact, the lesson to learn by such negligent leadership calamities is that we need a universalist common approach towards pandemic management that recognizes the adequate pandemic protocols when properly implemented through good governance which are based on anti-corruption, human rights protection and transparency can achieve a greater advancement of respect for human life, human rights and human dignity as envisioned by the Universal Declaration of Human Rights as well as the United Nations Charter after the Second World War. Hence, clearly the vaccination success which some argue can have a "more lasting memory" should not be used to cover up the leadership errors of the populist governments such as in India.[18]

Thank you.

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[17] See Tom Ginsburg, *Eastphalia as a Return to Westphalia*, University of Chicago Public Law and Legal Theory Working Paper, No.292 (2010).

[18] See Tom McTague, *The Pandemic Disaster That Might Not Matter: Britain's COVID-19 death toll has risen above 100,000. But, if it is successful, the country's vaccine drive may leave a more lasting memory*, https://www.theatlantic.com/international/archive/2021/01/uk-pandemic-deaths-100k/617811/ (accessed on December 27, 2021).

Chinese and French Families, National Minorities: A Comparative Study

Norbert Rouland[1]

1. Introduction

It seemed interesting to me to compare the situation of families and their evolution in China and in France. Being myself a legal historian, but also a legal anthropologist, I am particularly interested by historical and anthropological data.

For a French author, it is difficult to study the evolution of Chinese families, because there are several types of families in China as in France, without knowing how to speak or read the Chinese language.

I will start first with developments on the relatively recent modifications of the Chinese family. After that, I will focus on the anthropology of China as we know it in France, and its relationship to the status of national minorities in China. Finally, I will study the specificities of family organization among the *Moso* (other named *Naxi*), a small national minority in southern China, by showing how it differs from the family among the *Han*. On this third point, we are fortunate to have in French language the work not translated into Chinese of Professor Hua Cai,[2] who now teaches in Beijing, but who did his doctoral thesis in France, which aroused the interest of Claude Levi Strauss. In the course of these developments, we will see that in China as in France, the relationship between law and social reality is complex.

2. A Comparative Study of Chinese and French Families

I will start by recalling the evolution in China concerning marriage, which has led China from arranged marriages and sometimes cruel traditions, to modern marriage, based on freedom of consent. Then, I will talk about recent developments concerning the family in China, before proceeding to comparative aspects between China and France.

2.1 Marriage and Tradition in China

In China, the movement for the emancipation of women appeared in the 20th century in the open ports of the south. It mainly concerns civil servants and merchants. We can cite the example of Jin Qiu (1875-1907). Daughter of a civil servant with progressive ideas, she escaped foot binding, and practiced sport and horse riding. Married relatively late, at 21, she separated from her husband, went to Japan in 1905, where she became friend with the exiles. Upon her return to China, she taught in several schools, and participated in the clandestine activities of revolutionary groups. She was arrested and executed. However, this is an exception. In the second half of the 19th century, tea planters in Hunan province called on female labor. Popular opinion, supported by local scholars, had a bad sentiment of these young girls who do not have their feet bound that they endangered the social order. The Japanese colonial authority imposed on Chinese Taiwan the abolition of this custom.

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[2] See Hua Cai, *Une société sans pére ni mari-Les Na de Chine*, Presses Universitaires de France, pp.1-505 (2014).

Foot binding became very common from the 16th century. It mainly operated in the north of the country. On the other hand, in the south, it was less frequent for practical reasons. Women had to work standing up in the flooded rice paddies and binding their feet would prevent them.

Associations against bound feet (*chan zu* 缠足, *bao jiao* 包脚, *guo xiao jiao* 裹小脚, *chan jiao* 缠脚) only really took off starting in 1900. In 1902, the binding of little girls' feet was prohibited. However, it is different in practice. I myself in 1997 could still observe an old woman walking with difficulty because of her feet which had been bandaged. During the Cultural Revolution (1966-1976), some women with bound feet were able to pass for reactionaries.

At the beginning of the 20th century, the proportion of women who had received an education did not exceed 4% or 5%. At that time, the Chinese particularity was due to the fact that the situation was changing suddenly, with Western law suddenly superimposing itself on Chinese law. Any woman born in China before 1912 passed from patriarchal subjection to a certain form of freedom.

On May 4, 1919, a major youth demonstration took place in Beijing, directed against the capitulation of the delegates of the Republican government to Japanese demands during the discussions preceding the Treaty of Versailles. These youth also rebelled against the patriarchal authority in the family and the doctrine of Confucius. Young people wanted to be independent and had the freedom to love. In 1931, Pa Kin, back from France, published his novel: *Family*. It described the confrontation between a young man and his family and became a bestseller.

Even at the beginning of the 20th century, traditional conceptions were still very strong. In rural populations, 97% of women were illiterate. Marriage took place between the ages of 14 and 18. In the poor regions of southern China, the so-called custom of child brides (*tong yang xi* 童养媳) persisted for a long time. A 10-year-old girl had to take care of her future husband, a younger child. Several years often passed between the celebration of the marriage and the birth of the first child, which took place at around 19 years of age on average. Marriage was concluded by resorting to an intermediary. It was generally a female matchmaker who negotiates marriages. She arranged the meetings between the families as well as the exchange of the first gifts. Engagement had a coercive effect, practically equivalent to that of marriage. It would be infamous for one of the two families to break them. Most of the time, at this stage, the future spouses had never met.

In the early 1930s, legislators in Nanjing intended to reform family law; they relied on sociological surveys. In the countryside, they tried to dissuade peasants from indulging in lavish spending on the occasion of marriage: this is the New Life Movement (1934-1949). In practice, little changed. The nationalist government controlled only part of the territory and it did not have the means to institute civil registration or to carry out a census.

According to the analysis made by Zedong Mao and Chinese Marxist theorists, women and poor peasants are the victims of an unjust social order.

The Communist Party began to have an influence in the 1920s in the southern provinces — Hunan, Jiangxi and Fujian. Yet in these provinces, the clan structure was strong. The Communist Party implemented policies favoring nuclear families. However, it was careful not to offend popular opinion too much. It took measures to abolish the binding nature of engagements and imposed the registration of marriages in order to establish the freedom of choice of spouses. It also established divorce by mutual consent and

conciliation was recommended in the course of the divorce. In general, it fought against arranged marriages, which would, however, remain numerous in rural areas, including at the end of the 20th century. Polygamy continues in Islamized populations, as well as the temporary "*hiring*" of wives. The Communist Party took power over all of China in 1949. Legislative production was weak, but the Marriage Law of 1950 was important. It enacts the principle of union by mutual consent, the obligation of monogamy, equality between man and woman, and the right to divorce at the initiative of either spouse. An official registration was instituted. The intervention of intermediaries was prohibited; the payment of engagement gifts was no longer mandatory. The minimum age for marriage was 18 for girls and 20 for boys. The man must prove by testimonies that he is indeed single. This law on marriage was parallel to the agrarian reform.

Investigators sent to the field register women's complaints. Lots of divorces were happening, even though divorce has been frowned upon in China for a long time. However, it was not easy. How, for example, can you leave a spouse when you do not know where to go, and when you have not obtained permission from your work unit to take a job elsewhere? In practice, peasants continued to see engagement gifts as a binding commitment. Many girls continued to celebrate their marriage before the age of 17.

In a speech delivered on March 22, 1958, Zedong Mao predicted:

"*In socialism, private property remains, as do small groups and the family. The family appeared in the final period of primitive communism and it must be destroyed: it had a beginning, it will have an end (...) In the future, the family will become something unfavorable to the development of the productive forces.*"

On June 14, 1958, Shaoqi Liu said in an interview with the Party branch of the National Women's Federation:

"*Chairman Mao spoke of the three nors: neither government, nor state, nor family, and this will be applied everywhere in the future. He said twice that the family would be suppressed (...) in China, it was Youwei Kang who first mentioned this idea. He proposed that marriage be limited to one year: in this way, in sixty years, he there would be no more family. He wanted to destroy the private property he believed to be owned by the family; by eliminating the second, we eliminated the first.*"

From 1958, the government established people's communes. The way of life there was communal and consisted of a breakdown of the family unit. In practice, the peasants resisted, and these community experiments were abandoned in 1961. The traditional family survived. In 1966, the period of the Cultural Revolution began. Old customs and old thoughts were outlawed. However, the customs persisted: engagement of girls aged 13 or 14, payment of important engagement gifts. It was not until 1957 that illiteracy rate of girls fell below 40%.

Like any society, Chinese society is crossed by various movements. The opposition to certain measures shows the persistence of traditional mentalities. Other phenomena show, on the contrary, the rejection of these mentalities. These are therefore dialectical processes. Moreover, Chinese society does not form a single block. In 2018, it still comprises 40% of peasants, even if these peasants migrate to the cities, and undergo processes of acculturation. In addition, China has 55 national minorities, whose customs are sometimes very different from those of the *Han*.

Until the establishment in 1949 of the People's Republic of China, the patriarchal *Han* Chinese family had remained very traditional. For their part, the national minorities

continued to follow their own customs. As we shall see, there were soon important legislative measures reforming the family. However, their application has been uneven. In remote provinces, ancient traditions have persisted, including to the present day. As we can see by reading the beautiful novels of Lianke Yan. For example: *La Fuite du temps*, *Ri guang Liu nian* (日光流年), 2009.

You should also read about peasant customs: *In the land of the White Deer* by Zhongshi Chen. You can also read the novels of Lisa See, an American writer of Chinese origin. In *Girls of Shanghai*, published in France in 2010, whose action took place in 1937, she describes the lives of two young Chinese women whose father, who has been ruined, decides to sell them to Chinese from California who have come to seek wives in China. In *Flower of Snow*, which was published in France in 2006, she describes in parallel the life of *Flower of Lis*, daughter of peasants, and the life of *Flower of snow*, of aristocratic origin.

The one-child policy, which lasted nearly half a century, has caused fundamental transformations in Chinese families, even if it has been applied differently in urban areas, rural areas, and among national minorities. She revealed the persistence of the traditional Chinese mentality of preferring boys over girls. You can read the novel *Mrs Yang* by Yihe Zhang. The author is a recognized intellectual in China, daughter of the politician Bojun Zhang, who was one of the victims of the Zedong Mao's anti-rightist campaign from 1957.

At present, Chinese youth show behaviors different from those of their parents. Not only have young, urban, Chinese women become independent, but Chinese women have seen their legal status evolve favorably.

As for young Chinese people, it seems that some of them no longer obey the same imperatives as their parents. They no longer want a life dominated by work and economic imperatives. This is reminiscent of the so-called Hippie Movement that occurred among Western youth in the 1960s. The study of the Chinese family is therefore complex and requires distinctions.

2.2 Three Evolutions of the Chinese Family

2.2.1 The one-child policy (1971-2015) and its negative consequences

From the founding of the People's Republic of China in 1949 to the 1970s, under the leadership of Zedong Mao, the "policy of population growth" of prohibiting birth restrictions and encouraging fertility has always been the rule, for have more manpower to increase production.

From which situation did we start when the Communist Party took power in China? In 1949, the People's Republic of China was already the most populous country in the world, with 518 million inhabitants. The average fertility rate was then 6 children per woman, while the birth rate was 35 births per 1000 inhabitants. This sustained demographic growth was brutally curbed in 1958 by the economic policy of the *Great Leap Forward* (1958-1960). However, population growth resumed with force and resulted in a further rise in fertility from 1960 to 1970, from 5.48 to 6.15 children per woman, despite the disorders of the Cultural Revolution. Faced with this strong increase in the birth rate and fertility, the government decided in 1971 to put in place a first birth control policy.

Enlai Zhou advocated the rule of "late, spaced out, little" (*wan* 晚, *xi* 稀, *shao* 少), which aimed to delay the age of marriage, spaced births and imposed a reduction in the number of children per woman.

In 1978, this planned birth was clearly stated in Article 53 of the Constitution of the People's Republic of China. In 1979, the "one-child policy" began to be implemented in Shanghai and other cities. In 2002, the "Population and Planned Births Law" was enacted: "Citizens have the right to give birth and are obliged to give birth according to a plan by law, and couples have a joint responsibility to carry out the planned birth." (Article 17) National minorities, concentrated in the western provinces of the country, were not affected by these coercive measures.

In rural areas, if the first child is a girl, the birth of a second child is permitted. The one-child law did not prevent some mothers from getting pregnant a second time. Thus, for women who became pregnant after their first child, a pecuniary penalty was imposed on them, namely a fine between 500€ and 800€. For poor families, this fine was unaffordable. This forced them either to abort, abandon their children at birth, or to raise them in hiding.

These clandestinely raised children are called "*ghost children*" because they have no civil and legal existence. Indeed, these children have neither birth certificates nor identity cards and are not recognized by the Chinese civil status.

Conversely to the policy of repression, there were policies of rewards for one-child families, which has reinforced inequalities and social injustice. Indeed, only children benefit from preferential treatment in terms of housing, medical care and education, and also benefit from food bonuses, monthly health allowances as well as specific bonuses for voluntary sterilizations.

2.2.1.1 But all these revealed problems of an anthropological nature

The traditional idea of family in China is the importance of boys, as we can see from the proverbs "*duo zi duo fu* (多子多福)" (the more children, the more happiness), and the "*yang er fang lao* (养儿防老)" (Parents give birth to a boy, and raise him to guarantee their retirement).

The government therefore quickly came up against very strong opposition within peasant families in rural and poor provinces, for whom children are a guarantee of material and financial support for old age in the absence of a system of support. A measure was thus introduced in 1984 in 19 provinces, the child and a half rule in order to authorize poor families to have a second child if the first is a girl.

At the Fifth Plenary Session of the 18th Communist Party of China Central Committee in 2015, the one-child policy was dropped and a new policy named two-child-policy was put in place. Indeed, we had noticed some negative consequences of the one-child policy.

2.2.1.2 The negative consequences of the one-child policy

Due to the limited number of children a woman can have, various phenomenas have been observed. For instance, the abandonment of girls in order to have them adopted by others, their abandonment in front of hospitals or orphanages. In addition, abortion has become widespread due to the introduction and diffusion of technologies such as ultrasound. According to official figures, the 35 years of one-child policy have prevented 400 million births in China. Beyond demographic and economic considerations, the one-child policy has had negative social consequences.

In the 1980s and 1990s, female infanticide exploded, especially in rural areas. We can read on this subject the tragic novel by Jian Ma, *La Route sombre* (*The Dark Road*, 2013). As a result, in the 2000s, the sex ratio difference became significant. The average fertility

rate in China (1.6 children per woman in 2017) is now well below the universal threshold for generational renewal, estimated at 2.1 children per woman.

In addition, from 178 million in 2010, the population of people aged over 60 should increase to 440 million in 2050. The increase in the number of seniors is a phenomenon that also concerns France. The share of seniors in the total Chinese population should therefore be multiplied by 2.5, to represent a third of the Chinese population by 2050.

This reversal causes a reversal of the burden pyramid, since the 60 million only children will each have to support the financial and material burden related to the care provided to their parents and grandparents. The aging of the Chinese population is expected to continue, despite the implementation since 2015 of the two-child policy.

However, the most important challenge is that of the sex ratio. The sex ratio, which measures the proportion of boys in relation to the number of girls in a given population, is established on average, at birth, worldwide, at 105 boys for 100 girls. However, the prevalence of the number of boys compared to girls is significantly higher in China than in the rest of the world, although India also faces a similar phenomenon. The People's Republic of China has, on average across all the provinces, a sex ratio of 120 boys for 100 girls. This percentage is partly the result of the one-child policy, which pushed families to make a choice in favor of boys.

The boy is the guarantor of the transmission of the family name and the care of the parents within the patriarchal and patrilineal *Han* societies. Families are therefore reluctant to welcome a girl into their home, given that they are forced to leave after their marriage to live with their husband's family and therefore cannot guarantee their care in their old age. Thus, *Han* parents faced with the imperative of giving birth to only one child opted massively for selective abortions from the 1980s, a period when ultrasounds were perfected and generalized to all provinces. The preference for the boy is attested in many societies. In India, a proverb says: "He who has a daughter plows the neighbor's field."

Currently, 40 million men find it difficult to get married; they are ironically nicknamed "*dead branches*" to emphasize their inability to found a home. This masculinization of the sex ratio is not without consequences for Chinese society and demography. Traditional family structures being remodeled under the combined effect of the rural exodus and the drop in fertility which is reducing the size of families.

The one-child policy ended in 2015, following a relaxation in 2013 that provided that if one parent is an only child, then the couple is allowed to have two children. The two-child policy will probably not boost fertility in China because of the difficulties for Chinese women to reconcile family life and professional life.

Since the early 2000s, a relatively wealthy middle class has emerged, including women, who are increasingly entering the professional market. Today, some Chinese women are reluctant to have children, considered an obstacle to their professional life. Indeed, the proportion of women in senior management positions in the main sectors of society is higher in China than in the rest of Asia and then in some Western societies. In addition, as in the West, legal reforms favorable to women have been taken.

2.2.2 Positive legal reforms in favor of women

The promotion of women was from the beginning a concern of the Chinese communists, opposed to the patriarchal system of the old society. When he was young, Zedong Mao read the magazine *New Youth* (*Xin Qing nian* 新青年), which advocated the

emancipation of women. In 1934, the government of the Chinese Soviet Republic issued a marriage law. This became a union between free and equal individuals, arranged marriages were prohibited, concubinage and polygamy were also prohibited, and divorce by mutual consent was introduced.

After The Communist Party seized power in 1949, these principles were found in the Marriage Act of 1950. Divorces experienced a spectacular increase even if, until the end of the previous century, divorce was considered a shameful act. The main stages of family life (marriage, separation) were also decided within the framework of the work unit.

During the Great Leap Forward and the Cultural Revolution, official discourses emphasized gender equality — anything a man does, a woman can do.

Today, Chinese judges are increasingly considering women's domestic work in divorce cases. We can cite a recent divorce case in Beijing.[3] On February 22, 2021, the Fangshan District People's Court in Beijing sentenced a man to compensate his ex-wife for the domestic work she had done in the household during their life together, which sparked much debate.

In 2015, Mr. Chen and Ms. Wang got married and gave birth to a son. 3 years later, the couple separated. The child has been living with Ms. Wang since November 2018. In 2020, the divorce was pronounced, in favor of Ms. Wang. The court sentenced Mr. Chen to pay her alimony of 2,000 yuan per month (254 euros), as well as the sum of 50,000 yuan (6,340 euros) in compensation for the household chores she carried out during their life together.

This is the first judgment rendered in this type of case since the adoption, on January 1, 2021, of a law requiring the ex-spouse to compensate for the years of domestic work carried out by their partner. The average salary in Beijing is 8,768 yuan (1,150 euros), or 43% less than in France. Renting a studio in the center of the Chinese capital costs 947 euros. It is necessary to quote some comparative data.

According to a United Nations study, women still do, on average worldwide, two and a half times more household chores than men. In Europe, the inequality in the distribution of household tasks is strong. According to a survey carried out in 2019 by the "*Gender, sexuality and sexual health*" center of the French Institute of Public Opinion, 73% of French women believed that they do more than their partners. The men refused in particular to wash the linen, to clean the water closet or to wash the floor.

Also in China, women do more domestic work than men. The 1982 Constitution of the People's Republic of China reaffirms equality between men and women. In 2004, a first law prohibiting domestic violence completed in 2015.

China pays particular attention to its divorce rate, which has increased significantly since 2003, when divorces by mutual consent were legalized. In 2019, 4.15 million divorces were recorded, compared to 1.3 million in 2003, while the number of couples getting married each year fell over the same period by 8.5 percent, standing at around 9.3 million. However, this divorce rate remains much lower than that of France. That is, one out of two marriages in France ends in separation. When there are young children, most of the time, it is the mother who has custody of them.

In addition, in 2020, in China as in France, confinements have exacerbated tensions within couples. In France, a woman dies every 3 days from domestic violence by her

[3] See Norbert Rouland, *Etre Chinoise Aujourd'Hui*, The Conversation (2021).

companion or her husband. To avoid too many divorces, considered unfavorable to the increase in the birth rate, the Chinese authorities have reacted. According to the first Chinese Civil Code, which entered into force on January 1, 2021, Chinese men and women wishing to initiate divorce proceedings must wait 30 days before their petition can be registered. Cases of claims for domestic violence are exempt from this period.

The Chinese government is therefore seeking to curb this evolution of mores. Especially since in China, 200 million people, i.e., 14% of the population, live alone (in France, in the big cities, one person in two lives alone, either by choice or because they have not found a place to live. In general, in France, divorced people, if they get back into a couple, prefer to continue to have a separate home). This is one of the consequences of the policy of the only child, child-king who has trouble finding a soul mate. This complex reality is well highlighted in several recent Chinese novels which describe daily life in Shanghai. Anyi Wang (*The Song of Eternal Regrets* 长恨歌) is very popular in China, and also known in France. She writes as a Chinese painter: everything is suggested.

In addition, singles markets are a good example of the evolution of Chinese mentalities.

2.2.2.1 Singles markets

Posters stuck to open umbrellas on the sidewalks depict young people. Most of the people holding these umbrellas are elderly women who want more than anything to have grandchildren. It is their son or daughter that they present on their umbrella.

The physique of the person matters. The skin color, weight, and height are indicated. It is specified if the person has an apartment, a car, if she works, how much she earns, the studies she has done, etc. These markets (which can be found in People's Square or Luxun Park in Shanghai) are often the site of contradictions indicating the social upheavals at work in China.

Indeed, most of the young people whose portraits and descriptions are posted do not wish to marry. They prioritize their studies, their professional life, or seek to have a free sentimental life. Eager to control their privacy, they often oppose the existence of these markets (which have existed since the 1980s) where they are presented as products. Chinese youth in large cities is therefore evolving towards more individualistic behavior. Some young Chinese are also questioning the domination of life by work.

2.3 Chinese Youth: "Let's Stay in Bed (躺平)"[4]

Young people from the middle classes, but also sometimes rural people and second-generation migrants, no longer want to "play the game". They feel an "involution" (*nei juan* 内卷) of the system. The feeling that the competition for money, power, social status no longer makes sense, leads nowhere. The ideology of 996 (work from 9 a.m. to 9 p.m., six days a week) is losing its appeal.

It was the Tang ping Movement which brought the phenomenon to light.

[4] The author: The term *tang ping* (躺平) can be literally translated in French as "lying flat", but its real meaning is close to the expression "let's stay in Bed."

The urban population has benefited from the development of higher education and the considerable increase in skilled employment, particularly in the tertiary sector. By leaving their countryside, rural migrants have also changed their lives and increased their incomes.

However, this model shows signs of weakness, because all this leads many Chinese to a logic of over-indebtedness, which pushes them to always work more and more intensely, for ever less satisfaction. They have the feeling of being imprisoned in a logic that escapes them. The challenge does not lead to opposition to the Communist Party. These young Chinese do not question the political system but certain excesses of the social and economic system.

Indeed, the meteoric growth of the economy recorded since the 1990s has completely transformed society. As soon as the movement exploded on the Internet in May 2021, the authorities reacted by denouncing its negative impact. How could China become prosperous and powerful if the Chinese give up working?

Many Chinese researchers have a different discourse. First, the researchers consider that the critique of success at all costs and limitless consumerism is beneficial to the new economic orientations that favor green growth, a reduction in inequalities, and more collaboration between employees and between companies. Second, more reasonable social and financial ambitions would improve the social climate by alleviating the anxiety and anxiety of "downgrading" among the middle classes. Finally, the Tang ping Movement could contribute to an ebb of tension in the education, real estate, and health sectors. Less ambition for his children, less demand for housing, and probably fewer health problems because of less stress. All this could improve the socio-economic climate.

Although, Chinese researchers are not advocating for a radical version of *tang ping*. They consider that many young people alternate between periods of high activity and times when they "stay in bed" or reduce their participation. Few are those who withdraw from the social game. It is therefore a question of rebalancing, of promoting a moderate model that can contribute to an evolution towards a healthier economy and a more collaborative society. To a certain extent, one can think of the Hippie Movement in the West in the 1960s — *peace and love*.

In China as in France, the care of the elderly will therefore become an increasingly heavy burden for young people. It is therefore interesting to compare the attitudes of the Chinese and the French people with regard to the elderly. In China, they are protected by the Constitution. In 2020, China had 245 million people over the age of 60; in 2030, this number will increase to 350 million. In China, the third age begins at 60 years old. In France, on January 1, 2019, 20.5% of the population was aged 65 or over. Also, university professors are forced to retire at 68 and can no longer direct a thesis, which is regrettable. In daily life in China, it is normal for young people to give way to older people on public transport. This is less and less often the case in France.

On the legal level, Article 49 of the 1982 Constitution of the People's Republic of China that adult children must take care of their parents, and that it is forbidden to mistreat them, as well as women and children. As in most Western countries, older people want to continue living at home. This is why, in China, it is quite normal to see parents living with their children. In Shanghai, 70% of elderly people want their children to take care of them at home. Only 11% would like to live in retirement homes.

Yet, the number of retirement homes for old persons in China has almost tripled in recent years. In 2017, there were 144,600 in China. The 12th Five-Year Plan, which ended in 2015, planned to increase the number of beds in retirement homes from 3 to 9 million.

However, the problem lies in certain facts — life expectancy is increasing, like the price of real estate. In cities, it is becoming difficult to keep the elderly at home. 600,000 people live today in France in one of the 7,500 establishments for dependent elderly people, 43% of which are public.

Proportionally, the number of residents in retirement homes in France is therefore much higher than in China. In Paris, the monthly price of a retirement home in a nice neighborhood is around 6,500 €. In the provinces, it is around 3000 €. Recently, there was a scandal in France with ORPEA retirement homes, which want to settle in China. Prices range from 7,000 € up to 15,000 € per month, but the elderly are mistreated there. Typically, residents die at age 89 after an average stay of three and a half years. In France, when one of the spouses dies, which is generally the case for men, the surviving spouse receives 40% of the salary or pension of the deceased spouse. This is called the survivor's pension.

In the Middle Ages, there were obviously no retirement homes. Children who had reached adulthood took their parents to their home. However, the agreement was not always perfect. Thus, agreements were made that included insupportable clauses. This meant that in the event of a persistent bad agreement, the parents had to move elsewhere. In extreme cases, it even happened that we physically got rid of parents who had become troublesome. In France, there is no constitutional protection for the elderly.

However, Article 205 of the Civil Code prescribes: "Children owe support to their father and mother or to other ascendants who are in need." By other ascendants, we must understand the parents-in-law, who therefore have a right to maintenance equal to that of the parents. This obligation for children exists even if as a result of certain facts, they did not know their parents. The existence of a direct emotional tie is not a condition of this obligation. However, if the parent has seriously breached his obligations towards his children, the judge may discharge the children in whole or in part from this obligation to provide assistance.

Filiation means the bond that unites the child to his father and mother. This link, whether it originates in biology or fiction, generates reciprocal obligations. Since the Law of June 23, 2006 on the reform of inheritances and gifts, those who renounce an inheritance are required, in proportion to their means, to pay the funeral expenses of the ascendant or descendant whose inheritance they renounce (Article 806, Civil Code French). Children owe food to their father and mother, but reciprocally, ascendants are required to provide food to their offspring in the same circumstances (Article 207, French Civil Code). The child, having become an adult, must therefore be animated by a consciousness of solidarity with his father and mother in need.

2.3 Comparative Aspects

We will successively examine the mutations of the French family and the protest movements of Western youth in the year 1968, which correspond to the period of the Cultural revolution in China.

2.3.1 Changes in the French family

In terms of family legislation, the autonomy of the married person was gradually acquired during the 20th century. In particular, the affirmation by law of the financial

autonomy of the spouses and the recognition of the exclusive management by the spouses of their own property.

The Law of July 13, 1965, reforming matrimonial regimes enshrines the right for each of the spouses to have opened, without the consent of the other, any deposit account and any securities account in their own name (paragraph 1, Article 221, French Civil Code). The Law of December 23, 1985, relating to the equality of spouses in matrimonial regimes and of parents in the management of the property of minor children consolidates the right of each spouse to freely exercise a profession, to receive their earnings and wages and to dispose of them after be acquitted of marriage charges (Article 223, French Civil Code).

Dean Carbonnier, a great French jurist, was able to write: "Thus the history of our marriage law, for fifty years, is the history of a continuous liberation, and the outcome is not far: to bind as to unbind, the man will no longer have no other key than his responsibility towards himself." Dean Carbonnier was a sociologist of law, and had written a good paper on my *Legal Anthropology* when it had been published in France in 1988. The liberation of the individual takes place above all in morals, before receiving a consecration in positive law. In any case, this generalized decline of the compulsory in positive marriage law attests to a certain triumph of individualism, a Western value.

Two recent developments in French case law on the notion of good morals in marriage are particularly eloquent. In 2011, the Court of Cassation ruled that the contract proposed by a professional, relating to the offer of meetings with a view to the realization of a marriage or a stable union is not null, as having a contrary cause to public order and good morals, because it is entered into by a married person. An already married man or woman can therefore legally seek another partner, in a new form of arranged marriage. This also applies to internet dating sites.

Previously, in 2004, the Plenary Assembly of the Court of Cassation had also held that gifts made by a spouse with the aim of continuing an adulterous relationship were not contrary to morality. This liberal attitude of jurisprudence in conjugal matters reflects a real policy of assimilation by the judge of morals of a society which henceforth intends to elevate individualism, but also autonomy and freedom to the rank of new values.

Modern marriage now resides in mutual affection. It is for this reason that it is necessary to allow any individual, whatever their sexual orientation, to have access to the only contract which has political legitimacy in the eyes of modern French society, as well as that of the feelings experienced: the "*marriage for all*", i.e., open to homosexuals.

Paradoxically, French law does not make love between spouses an obligation of marriage. Spouses owe each other assistance, help, respect, and fidelity, but they do not owe love to each other. This was confirmed nearly 50 years ago by a judgment of the Court of Cassation.

In France, what affects the family often has a political coloring. The passage of the law permitting same-sex marriage was generally opposed by right-wing political parties. It was supported by a left-wing parliamentary majority. This law calls into question a fundamental anthropological category — the division between the sexes.

In China, marriage remains heterosexual, but public opinion has gradually admitted the existence of homosexual couples. In 1999, the first lesbian newspaper, Le Ciel (*Tian kong* 天空), was published. Xinxin Zhang, born in 1953, popularized female homosexuality. Some women advocate "*same-sex love*" (*tong xing lian* 同性恋), as a marker of freedom. It is therefore a point of convergence between China and Western societies.

In North America, gender studies are very common in universities. They are less so in France. Since the mid-1980s they have existed in China.

2.3.2 A comparison between "Let's stay in bed" and the protest movements in the West in the 1960s

It is good to begin by recalling the analyzes of a French anthropologist, Roger Bastide, well known in Brazil.[5] Roger Bastide was one of the outstanding figures of French anthropology in Brazil. Born in 1898, he held the chair of sociology in Sao Paulo in 1938 until 1957. He carried out a rather positive analysis of hippie communities by showing that in the West, the young people of the 1968s wanted to dissociate progress and happiness. More broadly, he observed that each time progress had taken a new form, it had given rise to counter-modernity in reaction. Modernity being defined by him as the generalization of the means of communication between individuals and groups, as well as a critique of traditional authorities. This phenomenon is observable several times in the history of the West.

For example, at the beginning of the 19th century, there was a transition from the first capitalism to a more modern industrial capitalism. It was also the era of romanticism and various revolutions in Europe — the "*springtime of the people*". In May 1968, industrial capitalism was challenged by financial capitalism.

Hippie communities have not stood the test of time, whether in the United States or in Europe. On many points, Roger Bastide was a precursor. We obviously think of globalization and the generalization of computing via the Internet. We simultaneously notice the end of a dream. In the 1990s, the hope that new global growth in emerging countries would be the locomotive seemed close to being realized. In fact, what followed was a dramatic increase in inequality.

The dissociation between technological progress and happiness operated by the movements of May 1968 also seems to be confirmed. A study entitled "*Internet and satisfaction with life*" shows that the time spent on the Internet is correlated with an increase in loneliness. We can also note that recently the Chinese authorities have taken measures to limit the time spent by young people in video games.

Similarly, the standard of living in Western countries has increased several times since the 1950s. The indicators of well-being in the West have fallen by almost 30%, compared to the level reached in those years. In France, in 30 years, the consumption of antidepressants has been multiplied by three, the suicide attempts of 15/25 years old, by two.

The conclusion is clear. While material progress increases, happiness regresses or stagnates. The happiness index is particularly high in Scandinavian countries, such as Denmark. I asked a Danish lawyer colleague about this in Copenhagen. She replied that in Denmark there were very few social inequalities and that social protection was largely provided by the state. It is therefore a harmonious society.

We can also think that the current forms of terrorism are partly generated by the need for a concrete rapprochement between individuals. The terrorist will find a new family in his accomplices. In addition, if he is a Muslim, he will enter paradise as a martyr, a reward that the hippie communities could not give him.

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[5] See Norbert Rouland, *Retour Du BrEsil, Impressions D'Un Juriste Anthropologue Français*, L'Harmattan, pp.35-37 (2018).

Let us now look more specifically at the youth protest movements in the United States and France.

Postwar conformist, neo-Puritan American society is plagued by anti-Communist paranoia. From the start of the Cold War, radical pacifists campaigned against atomic weapons while defenders of civil liberties opposed McCarthyism. Within artistic bohemianism, the small group of beatniks led a non-conformist and wandering life, exalted by Jack Kerouac in *On the Road*, published in 1957. He fascinated part of the youth when he praised of leaving, of the road, to escape his environment and live more intensely. In addition, authors such as Herbert Marcuse, Charles Wright Mills, and Paul Goodman carry out a critical analysis of Western civilization in which they denounce the alienation and conditioning suffered by the individual within societies dominated by technology and consumption. The supposed "consensus" eroded in the second half of the 1950s with the decline of McCarthyism and the intensification of the struggle for civil rights when a new generation of activists resorted to the techniques of non-violence to denounce the segregation in the southern states. Young black activists founded the *Student Nonviolent Coordinating Committee* (SNCC) in 1960. The claim to be the "land of freedom" and equal opportunities in the face of totalitarian states seems false when segregation laws persist. Young activists, denouncing this fundamental contradiction and the absence of real democracy, created the student organization Students for a Democratic Society (SDS) in 1960.

In the first part of the 1960s, the "campus awakening" saw unrest gradually spread to a good number of universities to the great dismay of the authorities. Activists promote humanist values. Thus, the Free Speech Movement was created in 1964 on the Berkeley campus to defend freedom of expression within the university.

Finally, the massive involvement of the United States in the Vietnam War from 1964 aroused in part of the youth a real revulsion for a deadly system and institutions, contrary to the values of peace and love that it advocates. Overall, young Americans yearn for a more just and brotherly, egalitarian and peaceful world.

From the mid-1960s, youth revolt accelerated by the Vietnam War and gained momentum. Activists denounce the intervention in Vietnam and the United States policy towards the Third World (especially Cuba), conscription, links between universities, and the military-industrial complex.

Moreover, this revolt of a "political" nature is coupled with a "cultural" revolt led by young people qualified as hippies. These benefit from a more permissive and longer education (the number of students explodes) as well as the emergence of this "land of plenty" of which the United States is so proud. Many young people develop a common culture based on their sense of belonging (values, ways of expressing themselves, music). The "counter-culture" takes the opposite view of the norms and habits of the "dominant model". Instead of the "hedonism of having", which gauges success by the ability to accumulate valuables and signs of distinction in a competitive and hierarchical society. The hippies prefer a "hedonism of being", turned towards the personal fulfillment, and through immediate pleasure and free interhuman relations.

In 1966-1967, the Cultural Revolution, practically simultaneous with that which took place in China, won over the activists of the "New Left". Relatively specific demands (withdrawing troops from Vietnam, granting the same rights to blacks as to whites) are gradually being replaced by a vaguer utopian project, aimed at profoundly changing human

relations, and building a new, egalitarian, and fraternal society where exploitation, domination, and hierarchy would no longer have their place. This was also the goal of the Cultural Revolution, which wanted to permanently abolish all class distinctions. At the end of the 1960s, the mobilization against Vietnam had never been so intense, and the Woodstock festival brought together hundreds of thousands of young people in August 1969. The latter is remembered as the height of the American Cultural Revolution.

However, political violence is unleashed. In 1968, Martin Luther King and Robert Kennedy were assassinated. This climate frightened moderate activists, so other political organizations had been radicalizing their discourse since the middle of the decade. Converted to Marxism, they now call for a revolution in the United States, the model of which they seek in the Liberation Movements of the Third World. This radicalization also affects the Black Movement from 1966.

The affirmation of Black Power marks the evolution towards "black nationalism", in which the founding of the Black Panther Party, a radical organization that advocates self-defense and the organization of the African-American community take part. The "counter-culture" is based on the rejection of the model inherited from parents, from the past, from tradition, while the ethnic minorities enter into a process of identity affirmation which is based on the search for roots and a newfound pride. This concerns not only African Americans, but also Native Americans (founding of the American Indian Movement in 1968) and Hispanics. We are also witnessing a radicalization of feminist struggles (creation of the National Organization for Women in 1966), while the fight for the rights of homosexuals intensifies (first Gay Pride in 1969).

The end of the movements in the early 1970s, a decade marked by the economic crisis, can be interpreted as a failure in terms of the aspirations of an entire generation. Nevertheless, American society emerged transformed from this turbulent time, and not all activists fell into line or renounced their ideals. Gender-related battles continue (women, homosexuals) as well as identity claims by ethnic minorities.

The struggles took new forms, more modest but just as pugnacious. Many activists founded or took part in "rural communities" whose number exploded at the end of the 1960s (they would be several thousand throughout the United States in 1970). The observation is simple. Since we cannot manage to change society from within, we must leave, in order to experience utopia in a concrete, immediate way, within small communities (more or less autarkic) which demonstrate that another way of existing is possible between human beings and with nature.

There remains in particular this fundamental question that these "angry young people" posed with acuity, while many so-called "revolutionaries" elude it. Can we find a new world without first changing ourselves and his relationship to others?

In France, during the same period, young people refuse to lead what they call "*a stupid life*". They refuse a life where there is no face-to-face relationship, at a time when the Internet did not exist. Some want to return to a life in the countryside. Others are more realistic and do not reject modernity but ask for its re-examination. That is, we can keep what is good in it, but we must remove its excesses.

On certain points, all this anticipates the current movement "Let's stay in bed" in China. The contestation of a productivist logic, the opposition to the generations of parents and grandparents, the fact of preferring to succeed in one's life than to succeed in one's life, in the sense of the unbridled search for material consumption. However, young

Chinese do not seem to aim to found communities, let alone settle in the countryside. As Karl Marx said: "history does not repeat itself, it stutters."

Another difference between today's Chinese youth and French youth is that young Chinese like European classical music. In France, classical music only appeals to the elderly while oriental music is almost unknown and absent from musical programs. At the Shanghai Oriental Center, the average age of the public is 30 years old. The great Chinese pianist Xiaomei Zhu, a specialist in Johann Sebastian Bach, is well known in France. Persecuted during the Cultural Revolution, she drew crowds when she returned to China in 2014.

3. Chinese Anthropology and National Minorities

We must now tackle problems of an anthropological nature. I will begin by briefly describing the anthropology of China as we know it in France. I will then talk about the influence of French authors in China. Finally, I will address the question of intangible cultural heritage and its consequences for the study of national minorities in China.

3.1 Anthropology of China[6]

Finally, since 2021, France has had a work by one of the greatest Chinese anthropologists, Xiaotong Fei (1910-2005), whose title in French is: *To the roots of Chinese society*. It is prefaced by a great French sinologist, Catherine Capdeville, professor of Anthropology at the School of Oriental Languages in Paris, with whom I am in contact.[7] The original Chinese publisher is Commercial Press, Shanghai. The Chinese title is: *Xiang tu Zhong guo* 乡土中国. Catherine Capdeville points out that this title reflects a fundamental idea: *Tu* 土, the land; *xiang* 乡, the native country. The book allows the French reader to better understand the mentalities of rural people, much less known than those of large cities. Obviously, the data is old. Xiaotong Fei wrote in the 1940s, and his first manuscript would be published in 1948. However, as I have already said, traditional customs have long persisted in the countryside, including in our century. It is necessary to briefly summarize the life of this great Chinese author.

He was born in 1910 into a literate family in southern Jiangsu province, not far from Shanghai. He then studied in Beijing. He completed a Master's degree in anthropology at Tsinghua University, under the direction of the Russian anthropologist S.M. Shirokogoroff, who made him aware of the study of ethnic minorities. Then he left for Great Britain to study at the London School of Economics and Political Science, under the direction of the great anthropologist Bronislaw Malinowski, who gave him guidelines for his future field investigations. Later, anthropologist Simon Roberts would occupy Malinowski's office. Simon Roberts is now deceased, but I knew him well and he prefaced the English edition of my *Legal Anthropology*.

Xiaotong Fei defended his doctoral thesis in English in 1938, devoted to a village in his native province. In 1938, he wrote *Peasant Life in China*, which was published the following year. He returned to China and joined Yunnan University where he became a professor. He directed several field investigations in the countryside of Yunnan. Then he

[6] See Stanford Libraries, *Cargo： Revue internationale d'anthropologie sociale culturelle & sociale*, https://searchworks.stanford.edu/view/11860265 (accessed on August 10, 2022).

[7] See Xiaotong Fei, *Aux Racines De La SociEtE Chinoise*, Presses de l'INALCO (2021).

returned to Beijing where he taught at Tsinghua University. In 1951, he was one of the three vice-presidents of the Central Institute for Minorities. Then he visited Guizhou, Inner Mongolia, and Yunnan. After the campaign of the Hundred Flowers, he must do his self-criticism. During the Cultural Revolution, he was sent to the countryside in Hubei province for two years. In 1979 he was appointed President of the *Chinese Sociology Association*. He was one of the judges in the *Gang of Four* trial in 1980. At Peking University, he trained a generation of young Chinese anthropologists. Some specialize in the study of the *Han*, others in that of national minorities. These biographical details are important because they allow us to understand that Xiaotong Fei's knowledge is not only theoretical, but he really lived in the field. As we will see later, he sought to express fundamental differences between Chinese societies and Western societies.

This comparative concern brought him closer to the French author Louis Dumont, a specialist in Indian society. This is structured by the hierarchy of castes, and the Chinese rests above all on the circles, and also hierarchical of personal relations.

Xiaotong Fei was best known in Great Britain and the United States, but he was not completely ignored in France. It is notably quoted by Claude Lévi-Strauss in the *Elementary structures of kinship.* He adopts an authentically anthropological approach, different from that of jurists. Jurists want to reform society from above by enacting laws. The anthropologist starts from concrete observations on the ground before thinking about reforms.

Yet, this is not the French mentality. In France, theory comes first. This is noticeable in the French language. French is a language particularly favorable to abstract concepts, while English describes concrete facts more faithfully. English speakers prefer to first examine the facts and then develop theories. In American law teaching methods, we always start from concrete facts.

In my writings, I argue that the same should be done with respect to human rights. More than the official declarations of states or international organizations, it is necessary to know what these rights mean in a given culture, at a given time.

How to summarize Xiaotong Fei's theories?

For him, especially in his time, Chinese society was essentially rural. For example, the most frequently represented god is *Tu di ye* 土地爷, the God of the Soil. Chinese peasants lived in small villages, which ignored each other. In these face-to-face societies, writing was not necessary. We lived according to customs and rites. Rites were standards of behavior approved by all. Their basis was tradition, unlike the law which was based on the coercive force of the State. At the same time, recourse to the judges and lawyers was almost ignored. The trial was synonymous with discord; it only applied to city dwellers.

Ignorance of the law (*The Emperor is in Heaven and Heaven is far away*) was not a sign of inferiority. Custom is not a rudimentary form of law. Legal anthropology has confirmed this. A modern, urban society is of a completely different nature. It is made up of people who do not know each other, including in the same building. Urban people do not rely on words alone, they need writings. It is the rule of law. And the Chinese, rightly, define France as "*the land of laws*".

In my opinion, nothing proves that this rule of law is inferior to that of custom; one could even argue the contrary. For example, Xiaotong Fei points out that in the countryside, everyone knows the rites and customs. These norms of behavior have been internalized through education. In town, it is impossible to know all the laws. Therefore, it is necessary

to use lawyers. In modern cities, changes are rapid: we can no longer rely on traditions. Case law adapts the laws to all these changes.

It may be doubted that the passage from a rural life to an urban life is a progress. Rapid changes can lead to stress and disorder. In France, more and more people would like to live not very far from the cities, but in the countryside.

Jean Viard, whom I know well, is a renowned sociologist in France. He has written extensively on the relationship between the countryside and the city. He himself lives in a small village not far from Aix-en-Provence. He runs a publishing house there with his wife, Marion Hennebert. This publishing house is called *Éditions de l'Aube*. In particular, in 2018, it published a fascinating book by Claude Martin, former French ambassador to Beijing: Diplomacy is not a gala dinner. Jean Viard, born in 1949, published in 1978 *The Invented Countryside*, in 1990: *Nature Between City and Countryside*, in 1996: *To the Happiness of the Countryside*, in 2010 *Letter to Farmers*, in 2012 *Thinking Nature*, in 2016 *What is the campaign?*

We can predict that in 2100 three-quarters of the world's population will live in cities, often in very difficult conditions. Jean Viard thinks that the era of big cities is not over: we cannot go back in time. Who today would live without Internet and the social networks? Many French people living in big cities would like to move to medium-sized cities, such as Aix-en-Provence. They would like to live near these medium-sized towns, but to own a house with a garden. The development of telework during the confinements of the crisis due to COVID-19 have accentuated this trend.

The thesis of primitivist anthropologists in North America today is interesting. It is possible that in the history of humanity the inventions of States and Empires, sedentary life and the transition to agriculture were catastrophes.[8] With sedentarization and urbanization, men have lived in increasingly confined communities. This has favored the transmission of diseases, and even pandemics like COVID-19.

Science also seems to confirm that we are not made to live in big cities. Our genetic heritage does not evolve as quickly. We are programmed for more physical expenditure and for a life more in contact with nature. We have nostalgia for it. During their holidays, city dwellers often go to rural areas.

The history of political ideas needs to be reconstructed in France, in particular taking into account non-Western political ideas.

Along the same lines, Xiaotong Fei, who obviously did not know these current theories, wrote that the absence of writing was not synonymous with inferiority.

What is its comparative approach? Westerners have a precise idea of the family. This is usually the nuclear family. The family expands temporarily only during family celebrations, or, possibly, during the summer holidays. We then take what we call "*family photos*". The Chinese family is much less defined (we find this characteristic in Chinese art: it suggests, much more than it describes). The term *family* can mean the only spouse as well as any other person who is not part of the biological family, but whom one wants to associate with it. However, given the patriarchal society of the *Han*, the expansion of the Chinese family is unilinear and can only integrate patrilateral kinship. Gender and the married girl are outside the family. A family can bring together five generations under the same roof, on the principle of patrilateral kinship. If the problems to be solved are small,

[8] See James C. Scott, *Against the Grain. A deep History of the earliest States*, Yale University Press (2017).

the nuclear family is sufficient. Otherwise, it will be necessary to associate the brothers and uncles.

Moreover, unlike modern Chinese and western families, the relationships between men and women are strictly hierarchical. The social life of an individual is spent most of the time between groups of the same sex and of the same age. This explains the restraint shown by Chinese couples. Married life should be discreet. It must be stable, which imposes restraint in the expression of emotions. The conjugal union cannot have primarily a sentimental aspect. The division of labor between the sexes is strict. Marriage can only be heterosexual.

These differences are actually the product of even larger differences. In Western societies, the membership of individuals in groups is precise. In Chinese society, each person organizes their relationships according to their social influence. A Chinese proverb says: "You can have a cousin 3000 li from here." The neighborhood of a powerful family could extend to the whole village, and that of a very poor family will be reduced to two or three close neighbours. These networks of private individuals are not egalitarian. Within each network, there is a hierarchy of statuses, in accordance with the doctrine of Confucius. This emphasizes filial piety, as it is a means of maintaining social stability. This model of a society organized according to statutes explains that it is impossible to provide rules that are universal.

It would obviously be necessary to bring nuances to these distinctions. In the West too, belonging to groups can be fluid. You can change your political affiliation and even gender. In France, marriage does not only unite heterosexuals. And still in France, the network of personal relationships counts enormously. Equality exists in law, but not in fact. Finally, in France, the hierarchy of status also exists: this is the case for diplomas obtained at the end of the educational cycle. A doctoral degree will allow more things to its holder than a simple bachelor's degree.

3.1.1 Finally, how can we summarize the evolution of the place of Chinese ethnology in the 20th century?

After 1949, following the closure of Yenching University like all other private universities, the disciplines of Sociology and Anthropology were officially abolished in 1953 as "burgess pseudo-sciences" and the Yenching school ceased to exist. However, thanks to the remarkable contributions of this school during the first period of Chinese anthropology and thanks to Xiaotong Fei, we still continue to talk about the Yenching school today and the research devoted to it is numerous.

Chinese ethnology found new impetus in the classification of national minorities in 1950. The ethnic classification of the 1950s was decided by the Chinese Communist Party committee. During the Long March (1934-1936) and the Yan Nan period, The Communist Party had contact with non-*Han* populations. The party then developed a doctrine of a unitary, multi-ethnic state. Many investigations on the ground were launched from the seizure of power. In 1979, the number of national minorities was set at 55. In 1952, anthropologists had to rename themselves ethnologists, historians or linguists. In 1981, Sun Yat-sen University in Guangzhou received approval from the Ministry of National Education to develop an anthropology program.

From the 1990s, the number of field surveys increased. It consists of monographs on rural communities. At that time, Chinese anthropology was dominated by evolutionary ideas. By 1930, English-speaking evolutionary anthropologists of the 19th century

(Morgan, Tylor, Frazer) had moreover been translated into China. At that time, there was no field investigation. On this subject, a significant anecdote. Hungering for his life, Frazer was interviewed by a reporter. This one asked him: "Have you been among the populations of which you speak so well?" He replied: "Thank God, never!"

In 1994, the American anthropologist Grégory Guildin, who had worked at Sun Yat-sen University, published the first Western book on anthropology in China: *Anthropology in China: from Malinowski to Moscow to Mao.* However, anthropology remains marginal in most universities.

In 1997, anthropology became part of sociology. Ethnology became the discipline that studies national minorities. It should emphasize the benefits they receive from the Chinese state. In 1984, the law on national minorities was the basis of the autonomy of national minorities. A particularly important discipline became Tibetology. A research center on Tibetology was created. Other studies concern the *Mongols, Hani, Yi, Bai, Manchu, Tujia, Miao*. In 1983, Ruxian Yan and Zhaolin Song studied itinerant marriage among the Mosos.

The work of Professor Mingming Wang is particularly remarkable. He is a professor of anthropology at Peking University. He is also the director of the *National Center for Anthropological and Ethnological Studies* at the Minzu University of China in Beijing. He obtained a doctorate degree in London, and did fieldwork in France.

In 2000, he published a study on the mountainous village of Puy Saint-André, near Briançon, in the south of France. This study reveals a similarity of mentalities between the inhabitants of this small French village and the *Han*. He is the author of a theory of *the three circles* which he exposed in several works from 2005. The first circle is that of the *Han* communities, the second circle that of the national minorities, and the third circle that of the Chinese communities expatriates outside of China. The new anthropology he advocates can be summed up under the term *civilization*. We must move away from the compilation of monographic studies to arrive at a global anthropology of Chinese civilization.

From an ethnological point of view, China remains very imperfectly known in France. This observation is of course valid for its "*national minorities*", but it is just as valid for the whole country with its local cultures which are of astonishing diversity. A quantity of written information, provided since Antiquity by successive dynastic administrations, on mores and customs, religion and kinship structures, and food and modes of production which gives a false impression of transparency. In fact, these abundant official writings (local monographs, genealogies, collections of folk tales and songs, domestic and community rituals, legends, folklore treatises, etc.) for the most part correspond to precise standards as dictated by the political authority. In his desire to impose a so-called "Confucian" orthodoxy on an ethnologically very diverse nation.

The ethnology of China appears to the French sinologist Brigitte Baptandier to be close in certain respects to that of Europe. They have in common to come up against corpora already constituted and almost unaffordable; they are so intimidating.

3.1.2 How can we sum up several centuries of Chinese ethnology?

For more than 2,000 years, in China, there has been a tradition of investigation, of collecting materials. Even before the unification of the empire by the Qin (221 BCE), each kingdom, each state of China's Warring States (4th-3rd centuries BC), had its own customs which differed greatly from country to country, and region to another. Yet, they were not

a priori suspect. Each country had its ancestors, its heroes, its legends, its music, and its rites which were the expression of its own genius.

The *fang shi* (方士), local scholars in the service of the Emperor, each in his own territory, had to collect recipes, ritual or medical procedures, beliefs, myths, legends, and miracles specific to the place. Thus, regional specialties were incorporated into the food of the Son of Heaven — who thus "*ate the land*" — as he married women from different places, ethnicities, and clans.

It is interesting to underline the role of music in Chinese ethnology and its legal consequences. There is no equivalent in the West. One of the essential stages in the history of French law was the drafting of the Civil Code in 1804. It was put into versified form in the illusory hope of promoting its memorization. Some writers even recommended setting it to music, but this was never accomplished.

Since Antiquity, the songs of the countries of the Chinese confederation had been brought together by the poets of the court. Adapted and rewritten, these poems from the "*Book of Songs* (诗经)" were performed during festivals for the God of the Ground of the Center, the royal holy place. We do not know the methods used by the poets of the royal courts of feudal China to collect the songs of the people. This practice continued with the founding of the Empire. When the "*Mandate of Heaven*" was taken over by the *Han* dynasty, it was necessary to proceed with the creation of a new court ceremonial in harmony with the "virtue" of the new dynasty. The *Han* therefore created within the imperial administration the Bureau of Music, *Yue fu* (乐府), responsible for collecting the songs and dances of the different regions in order to incorporate them into the ceremonies, sacrifices, festivals, and entertainments of the court.

These songs were considered as so many oracles, giving indications on the state of mind of the population, and, consequently, on the "virtue" of the emperor and the effectiveness of his local officials. Disharmonious music, disorderly parties were signs of declining dynastic virtue.

From the Song dynasty (960-1279), local officials had the duty to write local monographs (*di fang zhi* 地方志). Of course, they had to record all the political, economic, geographical, and ideological documents of their region, but also described the festivals and the rites, the myths and all the particularities of the place. The offices of culture and religion were gradually starting to collect local materials, including in the *Han* environment — cults, myths, rituals, songs, medicine, etc., as did the *fang shi* then the imperial officials. We are currently republishing the old local monographs, kept secret for a long time, reviewed, and corrected. It is remarkable that, reconnecting with the political ethnological tradition of the Empire, the monographs very often begin with a local song, chosen to express the *tai ping* (太平) and show the overall agreement of the peoples with the governmental ideology.

Taiwanese ethnologists themselves began, according to tradition, by working among the "others", the aboriginal populations of the central mountains of their country. Currently, many of them are dedicated to cultural and social anthropology among Chinese populations. Some now also travel to the continent to conduct field research in collaboration with their colleagues, historians, or sociologists most often. Comparisons of material from the mainland and the island are also (for different reasons) favorably received on both sides, as evidenced by the international colloquia on Chinese popular beliefs.

When the nature of power changed and when the Empire gave way to foreign Marxist ideology, we logically concealed even the traces of what had fueled the previous power. All these collections, these texts, extracted in short from the people, were no longer tolerable because they endangered the new power because of their content. They had to be concealed and the people themselves transformed.

We understand from these examples that ethnology had an ambiguous status. It was placed at the service of power. This was also the case in the West. The colonial administration wanted to know the customs in order to better exercise its power and proceeded in this direction with ethnological surveys and the codification of customs. However, true ethnology obviously has a different function. It must reveal the reality of the functioning of society, which more or less corresponds to state policies.

What was the French influence on Chinese ethnology?

3.2 The French Influence

A special place must be given to the French sociological tradition and to the sinologist, Marcel Granet. Claude Lévi-Strauss followed him when he wrote the chapter of *Elementary Structures of Kinship* devoted to China. First of all, Mr. Granet was able to take a sociological look at the materials of ancient China. Paradoxically, he who did not know the field research strictly speaking, even if he lived in Beijing, nevertheless knew how to give life to these fragmentary texts and made it possible to think that an ethnology of China was possible. We also know that Mauss wrote an investigation manual in the field, although he never went there. As for Claude Lévi-Strauss, a Brazilian anthropologist called him a "*philosopher among the Indians*". According to the testimonies, he lacked the minimum patience essential in all field investigations.

There is no "*French school of anthropology*" in China. French sources and, in particular, the classical traditions of sociology, history, sinology, and anthropology, have had a particular structuring effect on Chinese ethnology, which prompted the latter to combine research on ancient and contemporary Chinese society.

We understand from these examples that ethnology had an ambiguous status. It was placed at the service of power. This was also the case in the West. The colonial administration wanted to know the customs in order to better exercise its power and proceeded in this direction with ethnological surveys and the codification of customs. However, true ethnology obviously has a different function. It must reveal the reality of the functioning of society, which more or less corresponds to state policies.

3.2.1 What was the French influence on Chinese ethnology?

The interest of French researchers for China has a long history, but it was not until the beginning of the 20th century that they launched field research with a scientific scope. It was not until the 1920s, and the return to the country of a group of students trained in France, that they introduced French sociology and anthropology to China. For example, Deheng Xu (1890-1990), who studied at the University of Lyon between 1920 and 1924, translated and published *The Rules of Sociological Method* of Émile Durkheim in 1929. Upon their return to China, these trained students mainly grouped in two cities, Beijing and Nanjing, forming two distinct styles of research. In Beijing, Kun Yang, Huang Li, Xusheng Xu and others emphasized the research method initiated by the sinologist Marcel Granet (1884-1940), combining sinology, history and ethnology.

Among them, Kun Yang, who in 1930 obtained the doctor's degree from the University of Paris, was very active in introducing the point of scientific French theories. In 1932, in *An introduction to Lucien Lévy-Bruhl's theories of sociology,* he presented Lucien Lévy-Bruhl's research on primitive mentality. His two articles: *The past and present of French ethnology* (1936) and *The latest developments in French ethnology* (1937) constitute the first documents in Chinese presenting French ethnology in a relatively complete manner. In 1938, he published an article entitled *The sociological theory and methodology of Professor Mauss*, where he retraced Mauss's scientific background, Durkheim's influence on his work and listed his scientific and methodological contributions.

In 1935, the *Academia Sinica* published *Ethnographic Survey Questionnaire* prepared by Chunsheng Ling: this questionnaire is divided into 23 parts and 842 questions that encompass multiple points related to the survey of the cultures of ethnic minorities, and it lays the foundations for systematically developing ethnological surveys in China. From the 1980s, we note the return of French theories in contemporary China. With the implementation of the Reform and Opening-up Policy in 1978, anthropology and sociology gradually regained political and scientific legitimacy in China. From the early 1980s, a few universities reestablished the discipline of anthropology and research centers were dedicated to it.

During the 1990s, the reference works of French anthropology and sociology were systematically introduced into the country. Practically all of Durkheim's important works are gradually translated into Chinese.

Today, the list of French authors translated into Chinese continues to grow, to which are added Maurice Godelier, Philippe Descola, Marc Augé, Marc Abélès, Florence Weber, etc. The translation of French authors into other disciplines in the humanities and social sciences has also greatly contributed to this attraction for French theories. Above all, we must mention the philosophical works of Michel Foucault, Gilles Deleuze, Jean Baudrillard, and, recently, Bruno Latour, as well as the sociological works of Raymond Aron, Michel Crozier, and, above all, Pierre Bourdieu. These are all authors who have had a considerable influence on the work of contemporary Chinese anthropologists.

At the same time, after the 1990s, the number of Chinese students going to study sociology and anthropology in Europe and North America gradually increased. And even if those who go to France remain very few, some students discover French scientific sources from Anglo-Saxon countries. In this context, the new efforts to develop locally a specifically Chinese anthropology have benefited to a certain extent from French scientific resources, favoring the birth of two currents: "*sinological anthropology* (汉学人类学)" and "*history* (历史人类学)". "*Sinological anthropology*" has been around for a long time, but the epistemological re-examination of research paradigms must be attributed to Mingming Wang, one of the most important anthropologists in modern China. As for "*historical anthropology*", it gives a historical dimension to anthropology. The term "*historical anthropology*" comes from the third generation of the School of Annales, represented by Jacques Le Goff (1924-2014), and is used to designate the fusion in a new discipline of the three fields close to the human sciences that are history, anthropology, and sociology. The productions of historical anthropology have been particularly rich in recent years in China. Among them, we must cite the research of a group of brilliant researchers

who work on local societies, a group which is referred to as the "*South China School* (华南学派)".

Chinese ethnology has been particularly devoted to the study of national minorities. Yuanpei Cai (1868-1940), introduced the term now officially adopted to designate ethnology (*min zu xue* 民族学): study of peoples, ethnic groups or nationalities, in an article that has remained famous, "*On ethnology* (说民族学)" in 1926. He defined discipline as follows: "*Ethnology is a branch of science that inquiries into culture of nations, and is concerned with written records and makes comparisons.*" He was the first president of the *Central Academy of Sciences* (1928) and organized the first field research, but only among the so-called "*national minorities*". He had organized four sections within the Institute of Social Sciences attached to the Academia Sinica.

As director of the ethnological branch, he proposed 6 research themes that were very significant in the spirit of the time — surveys among the *Yao*; among the aborigines of Chinese Taiwan; among the *Hezhen*; studies of the primitive writing systems of the nations of the world; translation of the names of foreign nations; collection of materials for the study of non-*Han* ethnic groups in southern China.

He showed there an exceptional acuity of gaze which attracted to him a certain number of Chinese researchers, in particular Kun Yang (1901-?), the pupil of Mauss, who was at the origin of the Chinese Ethnological Society (1934) and Chengzhi Yang (1902-1991) who presented the first field report in China in 1930, based on his study among the *Yi* of Daliangshan, Sichuan.

It is also necessary to mention the importance taken by the American Historical School and the works of F. Boas and RH Lowie, which were translated between 1930 and 1940. They had in particular for disciples Benwen Sun, Wenshan Huang, founder of "Science of culture or civilization (文化学)". Most Chinese ethnologists, faithful to the 1000-year-old tradition, carried out their research among national minorities. From this point of view, the situation in China is quite similar to the situation in the United States and Canada. In North America, indigenous peoples are located within the national territory.

Things are different in Europe and in France. For a long time, French legal anthropology concerned French territories in Africa, and few in Vietnam and Cambodia. Then, with decolonization, research flowed back to the national territory. French ethnologists were interested in life in small rural communities. The result has been a certain disappearance of the boundaries between ethnology and sociology.

I tried to explain this in an article on French legal anthropology, which was published in Chinese by Professor Weichen Wang in Shanghai.[9] It took until the 1980s for the Academy of Social Sciences to see the light of day again. Ethnology most often concerns minority nationalities — *Miao*, *Yao*, *Uighurs*, and *Tibetans.*

At this time, scholars had not really passed the evolutionary stage yet. Evolution would lead minority peoples — formerly called "*raw*" — towards the ultimate state of access to socialism and modernity. It is the heritage of the 19th century and its evolutionary theories that I myself traced in my book *Legal Anthropology*.[10] It has been translated by Professor Yunfei Liu of Guyang University. This should soon be published in Shanghai by the publisher Commercial Press.

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[9] See Norbert Rouland, *Legal Anthropology Review*, Bloomsbury Publishing plc, pp.307-325 (2000).

[10] See Norbert Rouland, *Legal Anthropology*, Stanford University Press, California, 28 sq (1994).

A roughly equivalent policy had been followed since Stalin in the Soviet Union about the indigenous peoples. In particular, an attempt was made to annihilate their religious beliefs. We, therefore, study their societies to "help" them take this decisive step.

Taiwanese ethnologists themselves began, according to tradition, by working among the "*others*", the aboriginal populations of the central mountains of their country. Currently, many of them are dedicated to cultural and social anthropology among Chinese populations. Some now also travel to the continent to conduct field research in collaboration with their colleagues, historians, or sociologists most often. Comparisons of materials from the mainland and the island are, moreover (for different reasons) favorably received on both sides, as evidenced by the international colloquia on Chinese popular beliefs (or those, held every two years, and still very cautious on the social sciences).

As far as legal anthropology is concerned, I was able to observe that the North American authors were known in China, but unfortunately not the European authors. I would like to be able to read Professor Weichen Wang's thesis on Bohannan, but unfortunately, it has not been translated into French or English. On the other hand, I was able to read the thesis of Professor Hua Cai, who teaches in Beijing, but who did all his studies in France. I was able to read his work on *Naxi*, published in French and I believe in English, but never in Chinese. It is a good example of ethnology with many legal aspects.

There are probably not many legal anthropologists in China right now, even though it is a country of great ethnic diversity. In France, which is a non-polyethnic unitary State, there are not many. They mainly devoted themselves to research in Africa, in the former French colonies. I am an exception, since for my part, I have studied the Inuit, especially in Greenland and Canada. Fortunately, my *Legal Anthropology* textbook was translated by Professor Yunfei Liu, from Guyang University. I hope that Chinese readers will be able to have it.

3.3 Intangible Cultural Heritage and National Minorities

The notion of intangible cultural heritage has become very important. It is related to the study of folklore. As in France, the studies of "folklore" in China — in Chinese, *min su xue* (民俗学) — and their organizations are an old tradition. Since the beginning of the 1920s, when the first movement of the study of folklore was launched mainly by Yuanpei Cai(1868-1940), the former president of Peking University, this discipline has undergone several evolutions. In November 1927, Sun Yat-sen University in Canton established the first official organization, *Canton Folklore Society* (民俗学会). In 1950, another association, *Chinese Folk Literature and Art Association* (中国民间文艺家协会), was founded. Another very important example, *the Association China Folklore Society* (中国民俗学会), was created in 1983. The latter has its headquarters in the Daoist temple of Dongyue, *Dong yue miao* (东岳庙), which later became the Folklore Museum of Beijing.

Later, in 2007, one could read in the media critical reactions like this: "Students are not sensitive to traditional Chinese culture, so they are influenced too much by Western cultures, so we have to reinforce knowledge of our own culture." We are witnessing an explosion of creations of training in PCI in well-known universities. China ratified the 2003 Convention in August 2004 and immediately a national Intangible Cultural Heritage inventory plan was launched over four years (2004-2008).

Then, the Intangible Cultural Heritage appears as a new way of managing and dealing with the issue of minorities. Yet, in two cases — that of the Tibetans and that of the Muslim

Uighurs — there have been very strong political tensions. In general, these minorities live in villages and have remained largely isolated from current economic development. The PCI offers two opportunities in this respect. First, it presents all the minority contributions in an egalitarian way and it values the most "*traditional*" minorities, those who have preserved ancient ways of life and practices, and who have often remained very poor with regard to the current standard of living. At the same time, the Intangible Cultural Heritage can appear as an economic resource within the framework of a "*sustainable development*" of minorities.

4. The Moso[11]

What I would like to talk about here is the opposition between two family systems. The first is patriarchal, it is that of the *Han*, who are about 90% of the Chinese population. The second is that of the *Moso*, a national minority of 30,000 people, who live in Yunnan province, not far from Tibet Province. We will then see the importance of the linguistic factor.

4.1 The Conflict between Two Family Systems

I will successively study the *Han* patriarchy and the *Moso* family system, in particular the itinerant marriage.

4.1.1 The Han patriarchy

For a very long time, the *Han* have been organized into patrilineal lineages. The family name was transmitted in a direct exclusively male line. Only boys inherit from their parents, girls receive a dowry. In northern and central China, the rate of patrilocality exceeds 99%. On the southeast coast, between Guangzhou and Shanghai, the status of women had been higher: sometimes the matrilocal marriage rate reached up to 10%. This has long been the case in France. It took the French Revolution for girls and boys to be treated equally at the level of inheritance.

Since coming to power, the Communist Party has sought to diminish the authority of patrilineal lineages. However, some recent works encourage more reserve on the existence of a real patriarchy, in the sense of an exclusive power of men. What are the feelings characterizing the different types of union?

Chinese anthropologist, Xiaotong Fei, in his 1947 survey of his native Jiangsu province, wrote that rural Chinese society was not oriented by love, but rather by a certain distance, reserve, and between married people. They were thus protected from passionate excesses, which could be a threat to the social order. However, other sources (notably romantic and poetic) show that China knew individual forms of love, while placing them below family relationships. Romantic love was practiced with courtesans, who, in the upper classes, could become concubines. The family was thus protected against divorce.

At the beginning of the 20th century, the young urban Chinese intellectuals declared themselves in favor of the consensualism of the spouses. Thus, preceding the communists,

[11] See Norbert Rouland, *Chinese Matristic Societies: A Case of Legal Pluralism* (in French), Rev. Fac. Direito UFMG, 329-371 (2021); Les Moso, cette minorité chinoise qui fait la part belle aux femmes, *The Conversation*, https://www.causette.fr/societe/a-l-etranger/les-moso-cette-minorite-chinoise-qui-fait-la-part-belle (accessed on May 28, 2022).

who, in 1950, promulgated a law prohibiting arranged marriage and concubinage. In practice, the old customs will persist for a long time.

After the chaos of the Cultural Revolution, which saw the multiplication of divorces for political causes (as under the French Revolution), individualistic aspirations resurfaced. They are accentuated with the economic modernization of the 1980s. Field surveys show the decline in the choice of spouse by parents. Marriage is no longer simply an instrument of procreation; it must be the framework for personal feelings and the search for individual happiness.

Let us recall that in the history of Western law, there was a centuries-old struggle between consensualism, advocated by the Catholic Church and customs, encouraged by royal law which made the consent of families. That is to say fathers of families, the condition of marriage. Most marriages in France were therefore arranged marriages.

In all of the foregoing, we, therefore, see that what is called Chinese patriarchy, even if the *Han* system is unquestionably patrilineal, must be assessed with nuance. Individual love, sexual attraction, and romantic love are common to *Han* and *Moso*. Although, heir family structure differs widely. Additionally, and perhaps most importantly, due to evolutionary theories, *Naxi* customs were seen as the remnants of a backward state that therefore needed to be reformed in the direction of progress. This presupposition explains that the Chinese central power, since the coming to power of the Communist Party, will attempt several reforms of *Naxi* customs. Overall, it doesn't succeed. The opposite of patriarchy would be matriarchy. So, what is matriarchy? Does it exist?

4.1.2 Matriarchy: An Erroneous Theory

In order to avoid confusion, two preliminary observations. First of all, matriarchy is not the inverse symmetrical of patriarchy. Empirical observation shows that what we call matriarchal societies are in fact societies where women and men are on an equal level. If matriarchy were to be the domination of women over men, it would indeed not exist. The term matriarchy is therefore confusing, and another would have to be found. On the other hand, matrilineality is not synonymous with matriarchy. It only means that when it comes to the exercise of parental authority and the transmission of property, it is the maternal lineages that are privileged. Thus, within a family the educational role of the mother's husband, or the child's biological father, is exercised by the maternal uncle.

However, matrilineality can very well go hand in hand with patriarchy. Within maternal lines, it is men who exercise power. The fact remains that most of the time matriarchal systems are also matrilineal systems.

Instead of being linked primarily to his paternal and maternal ancestors, the child is linked equally to his father and mother. Even if in practice, the most socially valued lineage is privileged in family memory.[12] Because there is a subjective interpretation of kinship ties. As C. Lévi-Strauss writes: "A kinship system does not therefore consist of objective links of filiation and consanguinity (...) it only exists in the consciousness of men, it is an arbitrary system of representations."[13]

Within our genealogies, we therefore classify our parents according to their status. We no longer remember those who played a part in history, however, local, or who

[12] See Norbert Rouland, Palimpsestes Familiaux, A Paraître Dans *La Revue De La Recherche Juridique*, Aix en Provence (2021).

[13] See Claude Levi-Strauss, *Anthropologie Structurale*, Plon (1958).

occupied a high social position. This lineage equivalence and their concentration in the nuclear family are the phases prior to their dissolution. At the end of this acculturation, the division between the old groups disappeared.

What do we mean today by a matriarchal society? Lithuanian archaeologist Marija Gimbutas (1921-1994), to avoid confusion, prefers to use the term *matristic* societies. In the beginning of the Neolithic period, the socio-economic organization of the first agricultural societies seemed to develop with women. As farmers, they are said to be at the origin of the domestication of plants and the invention of agricultural tools. Around 6000 BC, sedentarization increases, as does food production. Men gradually become holders of crops and herds and establish patrilineal filiation in order to ensure its transmission to their children. Women find themselves more and more confined to the domestic space. But the heavy work is not spared them. Their state of health was analyzed using currently updated female skeletons. There is an increase in pathologies linked to carrying heavy loads, repeated pregnancies, deficiencies due to a diet deficient in proteins, mainly based on starchy foods and plants, as well as trauma resulting from violence. Patriarcate is born. However, the phenomenon is not uniform. In several tombs, the deceased wear rich ornaments and show few pathologies and trauma.

In a recent work, H. Goettner-Abendroth[14] defines matriarcal societies as follows:

"*The necessary conditions concerning the definition of matriarchy are as follows:*

mothers are at the center of society, as evidenced by matrilineality and, in economics, the power of distribution of goods held by mothers (or women) who are both in a context of gender equality. (...) Matrilineality is an essential element, not only because it structures the social relations of the whole society, but also because it guarantees these relations via the right of female inheritance online and the processes of taking policy decisions (...) gender equality is also an essential element, because it guarantees that, notwithstanding the central position of women, matriarchal societies do not adopt a gender hierarchy: they place equal value on both sexes. Matriarchal societies are therefore not an inverted image of patriarchy. However, matrilineality and equality between the sexes are not yet sufficient to characterize matriarchy: in addition, the power of economic distribution must be held by women. This element is essential, because it is the foundation of the matriarchal economy of sharing. This type of economy could not arise if the economy rested in the hands of men and leaders who accumulate property, even if the society was otherwise matrilineal. Such societies do exist, but they are only matrilineal, not matriarchal."

Since the works of Bachofen and Morgan at the end of the 19th century, ethnologists have identified around ten thousand human societies around the world, past or present. In neither do women have political power, or even power comparable to that of men. With the development of more and more sedentary societies, patriarchal ideologies have multiplied. The turning point seems to be from the 5th millennium. Female representations fade into the background, and those of armed warriors, male power, become the preferred theme of public images.

4.1.3 Itinerant marriage

[14] See Heide Goettner-Abendroth, *Matriarcal Societies-Studies on Indigenous Cultures Across the Globe*, Peter Lang Publishing Inc. (2012); See Pascale Marie MILAN, *Les Na de Lijazui*, Somogy Editions d'Art (2016).

There are four modalities of sexual relations, well described by Professor Hua Cai. The furtive visit (*nana sésé*), the ostensible visit (*gepié sésé*), the cohabitation of a couple without a ritual banquet (*tidzi-ji mao the*); the cohabitation after the feast (*tidzi ji the*), which is equivalent to marriage. Marriage is scarce. The most popular method is the furtive visit. *Nana sessé* means furtively. We will study only it because we have no more place. It is impossible to begin other relations without starting by *nana sésé*.

This is the most common practice. The expression indicates a secret romantic encounter or a stealth visit that takes place without the knowledge of the consanguineous, especially the adult males of the visited. A woman and a man who establish this relationship discreetly call each other *açia*. The two *açias* are considered to be strangers to each other; their relationship is strictly private. It is a uniquely sentimental, romantic, and sexual relationship. The *açia* relationship begins at age 15 for girls, 17 for boys. Among the *Naxi*, sexual activity is between 13 and 55 years old for a woman, 13 and 61 years old for a man. Continuing to have sex after these age limits is frowned upon, but not prohibited. Virginity doesn't matter.

Such a relationship can last from one night to a few years. Usually, the man's visit is in the woman's room around midnight; the visitor leaves the woman at dawn to return to her house. Women and men are on an equal footing. A woman as well as a man can take the initiative in advances. The appointment can be made after a period of reflection, or else immediately, provided that this is done in the absence of any consanguineous of the opposite sex of the two concerned. Appointments are set during the day, at the time that seems most favorable. Today, the cinema is a place which is perfectly suited to this kind of flirtation, perfectly accepted by the girls as the film has little importance. If the partners agree, at the exit of the cinema, they will spend the night together. During the meeting, they should speak in a low voice, so that nothing reaches the ears of the woman's blood relatives. All meetings are prohibited during the day. Women are prohibited from visiting men. The *Naxi* points out that they are not like the *Han*, among whom the ancestors always seek to arrange meetings; they are completely free.

What are the selection criteria? Women favor physical beauty; second, humor and the ability to work; finally, tenderness and generosity. For men, the essential criterion of choice is beauty. The more beautiful a woman is, the more the number of her suitors increases. Women who are ugly or disabled are very unlikely to be visited. From the age of thirty, women are much less in demand. After a while, if the visits from the same man increase, the girl can talk to her mother. The mother does not have the power to decide whether to maintain or terminate the relationship. The affair is purely sentimental and sexual, but sometimes men leave some money behind when they visit. In general, there are few material gifts between partners.

An individual can maintain simultaneous relations with several *açia*. A woman can receive two or three visitors per night; a man can visit two or three women during the same night. Even if some relationships last a long time, each of them is conceived only in the present. The notion of commitment to the future does not exist. It is very easy to break the relationship. A woman who wants to end it tells her partner not to come back; a boy doesn't even have to explain the reason for his decision to end the relationship. Moreover, the case of an individual who has established only one *açia* relationship throughout his life does not exist. A handsome and / or rich man who has only known a few *açias* risks being considered unfit and clumsy.

Very strange to foreign observers for centuries, jealousy does not exist. This is because for the *Naxi*, the oath of loyalty is shameful, because it is conceived as a business, an exchange that is not in accordance with customs. No sexual relationship can lead lovers to promise each other a monopoly on sexuality. Sexuality is not a bargain, but a purely romantic and sentimental affair which does not involve any mutual coercion. This is an essential difference from our societies, in which the commitment of loyalty is held as proof of the authenticity of the relationship. The *Naxi* says that if they come to a woman who is already taken, they are not jealous. There is no shortage of women, you just have to look elsewhere. A *Naxi* proverb says: "Behind every mountain slope, there is a village, where are there no women?" A woman owes a man nothing, so there is no reason to be jealous.

Of course, as a result of these relationships, some women can become pregnant. As far as filiation is concerned, it is by the physical resemblance of the child to one of the *açia* of the woman that the *Naxi* judge who this child is from. If no physical resemblance is found, they consider the progenitor to be the one who was seeing the mother at the time she became pregnant if, at that time, he was the only visitor. The question is relatively unimportant: it does not matter who is the father of whom. Usually, a woman does not tell her child who is her father, a man does not tell a child that he is her father. Even if he knows it, a child, boy or girl, never says who his father is, all because of the ban on sexual evocation. The term bastard has no pejorative connotations. Whether the parent is known or ignored has no effect on the status of the child. All children are treated the same within the lineage as well as in society. In the survey conducted by Professor Hua Cai, 14.05% of the sample of children were from unknown parents.

Professor Hua Cai stresses that visiting is extremely different from marriage and that this example of a society established on an institution other than marriage is unique in anthropological literature. In non-matriarchal societies, especially those with a patrilineal rule of transmission, the institution of marriage is essential. Without it, it would be difficult for a man to have rights over the children of whom he is the parent. On the other hand, when the rule is matrilineal, a society can dispense with marriage. However, most matrilineal societies have instituted marriage. As we have seen, the essential difference between marriage and visit is that in marriage the partners belong to each other and must collaborate economically, whereas in the visit there is no privilege sexuality or economic cooperation. Moreover, in marriage, as a rule, the partners live under the same roof, which is not the case in the visitation.

Additionally, Professor Hua Cai thinks that in human nature, there is both a desire for possession of the partner, but also a desire for the multiplication of partners. For him, these are two invariants. The desire for possession, for exclusivity, is found in the institution of marriage. On the other hand, we observe that the passionate feeling wears out over time and that every human being can be attracted to several other individuals, even simultaneously, and not just to one. Everyone knows, in China as in France, that you can fall in love several times. From the desire for diversity therefore arises the desire for more partners.

Theoretically, the only formula capable of responding simultaneously to these two trends would be an institution in which an equal number of men and women possessed each other simultaneously. But we do not find any such example in anthropological literature. This modality is in itself contradictory. It does not lead to possession, but to sharing. Only two possibilities remain: possession without enjoyment of diversity, or else

enjoyment of diversity without possession. We find these two formulas on the one hand in marriage, on the other hand, in the visit. But the desire for diversity is also manifested in marriage by the existence of adultery, very common, even if it is legally condemned. This leads to the multiplication of divorces in marriage societies, which we know well in our contemporary societies. The advantage of the method of the visit is that it reconciles freedom, but that it can also be lasting, since the visit can last several years.

Professor Hua Cai also insists on the idea that contrary to popular belief in anthropology, the establishment of the institution of marriage is not the only one to guarantee human reproduction: the visit also fulfills this function. He also points out that the visit leads to a questioning of Lévi-Strauss's theory. He wrote that the central point of kinship is the institutionalized exchange of women through the covenant of marriage. He also believes that because of its universality, the prohibition of incest requires marriage, that the division of labor between the sexes also makes marriage essential, and that without marriage no society could survive. Marriage would therefore be consubstantial with humanity. Conversely, the *Naxi* society, in which marriage is rarely practiced, is an example of a society in which, in the institution of the visit, there is also the prohibition of incest, and the sexual division of the taboo of incest, in any society, directly prohibits only sexual intercourse, not marriage. The *Naxi* example therefore shows that without marriage, a society can perfectly maintain itself and function as well as another.

Besides, isn't this what the current development of Western societies is telling us, in which marriages are declining, without jeopardizing their existence? A legal solution could be fixed-term marriage, familiar to Shia Muslims, which allows both the institution of marriage, but also its brevity without divorce, which corresponds to the imperative of diversification of partners. Of course, these *Moso* customs are very different from the *Han* family. What was the reaction of Chinese government?

4.1.4 Chinese government measures

The first measure dates from 1956, the year of land reform. In order to undermine the matrilineal system, a regulation is adopted according to which the distribution of land will be made according to the habitation of men. If a man wants to start a household on his own, the land will be distributed to him, instead of being distributed to his maternal family. This measure was completely ineffective, as no *Naxi* wanted to benefit from it, much to the astonishment of the local government.

In 1958, during the *Great Leap Forward*, the local government declared itself in favor of the superiority of *socialist monogamy* over stealth visits. It was trying to formalize long-term stealth visits. It would turn them into a de facto monogamous marriage. Young people were encouraged to marry between or with executives from other ethnic groups. This didn't work. The *Han* failed to understand that a spouse, husband or wife, could be considered a stranger in relation to their partner. Government policy was supported by ethnologists who published the investigative reports in 1960 and 1963. This backward system must be reformed.

In 1966 and 1971, it would try again to impose monogamy. In 1966, at the start of the Cultural Revolution (1966-1976), Zedong Mao urged the Chinese people to sweep away the "*Four Oldies*" — ancient customs, ancient habits, ancient morality, and ancient culture. Some couples formed, but they dissolved quickly. In 1974, leftism was at its peak. Another attempt at matrimonial reform was about to take place. The provincial governor of Yunnan made a personal field inspection and stated: "*We must resolutely reform the backward*

matrimonial system of the Naxi. Reforming this old matrimonial system falls within the framework of class struggle in the ideological field and therefore constitutes a revolution in the field of superstructure."

The old arguments were put forward. The stealth visit affected production activities; it was harmful to the solidarity between husband and wife by promoting adultery; it was detrimental to the education of children; it prejudiced the formation of morality and communist qualities in the mass. Educational measures were not enough; it was necessary to pass to the constraint. Anyone under the age of 50 and living in a long-term stealth visit situation must get married. Any natural child would only be able to obtain his annual cereal ration when his mother has determined with certainty who is his father, and the father would have to provide his child with his means of subsistence until he is 18 years old. After marriage, joint residence was compulsory. As the authorities had observed that in previous reform attempts, these were blocked by older women, they would be particularly aware of the new reform.

As a result, the villagers were afraid to make sneaky visits, fearing that they would eventually be forced to marry. Professor Hua Cai quoted testimonies: "*A wife and a husband (monogamy) is the quality and characteristic of the Han; we Naxi do not live that way. Visiting women without getting together as a couple is our characteristic. If all together we must practice monogamy, we will become Han and Naxi will disappear*."

We cannot say it better….

Other testimony:

"*At the moment, we have come together, but it is only to carry out government policy. We hope to be able to return each to our birthplace, later, when politics allow. Provided that the policy lets us live in note of visit…*"

Concretely, disorder reigns in all the villages. Some couples dissolve. Others are relatively stable: either those who started a nuclear family, or those with a small host line.

From June to August 1976, 4 researchers from the *Yunnan History Institute* visited the field. They see resistance. They conclude that more reform efforts are needed. They fail to understand how this backward matrilineal system has been able to maintain itself as China today finds itself in the socialist stage.

In total, more than half of more or less forced marriages will end in separation. At the end of the previous century, even if having children out of wedlock was still considered immoral and illegal, the policy eased from 1981. In 1982, the lines obtained that each had its own land. Fines penalized the birth of natural children. The villagers depend on the local government for little. They were increasingly trying to hijack administrative rules. For example, a villager declared that he is the progenitor of the children of several women of different lineages whenever a lineage is at risk of being fined. Indeed, when someone acknowledges being the parent of the child, the fine is waived. This was a service that some individuals render to women.

Which is the situation now? Today, there are other factors more effective than coercive measures. The young *Moso* people are increasingly tempted to leave their villages to live in tourist towns where they can earn money. Every year, 500,000 Chinese tourists come to the *Moso* region. Inevitably, all this leads to a weakening of customs.

The teachers are *Han*, appointed in this distant region, without necessarily having chosen it. They give their lessons in Mandarin. Since all textbooks are written in Chinese

by *Han* people (*Moso* is a language without writing), the texts are imbued with *Han* values. For example, they teach that all children should know their biological father.

As we can see, in this huge country that is China, with its 56 nationality, family customs are very diverse. Just like everywhere else in the world, modernity is transforming them, both in big cities and in the countryside. In this context, the question of minority languages and their teaching is therefore fundamental.

4.2 The Issue of Minority Languages

Recently in France, important popular demonstrations in favor of the autonomy took place in Corsica, a small island in the south of France. Corsica is a relatively underdeveloped part of French territory. For a long time, there has been a terrorist movement in Corsica demanding the independence of Corsica. Currently, the question of the autonomy of Corsica is much discussed by the French government.

Among the Corsican claims, there is the linguistic question. The Corsicans would like the Corsican language to become the official language of Corsica, but in the state of French legislation, this is not possible. French is the language of the French Republic, there is only a single French people. To a certain extent, the situation of the Corsicans is comparable to that of the Uighurs in China. I myself published in the *People's Daily* an article on the Uighurs,[15] Xinjiang Province is also an underdeveloped region, where the Chinese government has done a lot to develop infrastructure. It enjoys independent status.

Since the 1980s, there has been a movement in international law in favor of the legal and political protection of linguistic minorities. There are thus several texts: the United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; the European Charter for Regional or Minority Languages, the Framework Convention for the Protection of National Minorities; the Universal Declaration of the Three Indigenous Peoples of the United Nations in 2007, etc. Most of these documents have common points: the right to public services in a minority language when a minority constitutes a significant percentage of the population; right to public schools where education is offered in a minority language; right to publish or display in a minority language in private activities.

What is France's language policy?[16] The Provençal poet Mistral, defender of the autonomy of Provence, a region in the south of France, wrote in 1861: "If a people falls into slavery face down, if he holds his tongue, he holds the key that delivers him from the chains." He wrote his works in Provençal. Today, Provençal is practically no longer spoken. It is taught in universities.

In 1992, the European Charter for Regional or Minority Languages, not ratified by France, defined them as languages traditionally practiced on the territory of a state by nationals of this state constituting a group numerically lower than the rest of the population of the country. "Minority languages are other than the official State language; including neither the dialects of this official language nor the languages of migrants."

In 1996, the Council of State, a highest French administrative Court, issued an unfavorable opinion concerning France's accession to the Charter, deemed to be contrary

[15] See Norbert Rouland, *About the Uygurs' Situation in Xinjiang: a Legal Point of View*, People'Daily on Line, http://en.people.cn/n3/2022/0223/c90000-9961740.html (accessed on May 20, 2022).

[16] See Norbert Rouland, Les politiques juridiques de la France dans le domaine linguistique, 9(3) *Revue française de droit constitutionnel* 451, 517-562 (1998).

to the constitutional text making French the language of the Republic. France does not recognize the existence of national minorities or indigenous peoples in his territory. French citizens have the right to speak local languages in private, but under the French Constitution of 1958, amended in 1992, the language of the Republic is French.

This corresponds to a national tradition. In 1636, the foundation of the French Academy demonstrated the will of the political power to control languages. Under Louis XIV, the annexations of foreign territories to France were accompanied by legislative measures fighting against local languages. Once the Republic was proclaimed, in the following years (in 1793), the central power wanted to fight against local languages. These local languages must be eliminated in favor of French alone.

Once again, it is necessary to study what happens in reality. Until the end of the 19th century, the French continued to speak the local languages. In 1870, 13 million French people, more than a third of the population, did not speak French.

What about the 20th century? The Constitutional Council explained itself very clearly in 1999 on the French position. It pointed out that the constitution affirmed: France is an indivisible, secular, democratic and social republic. It deduced that: "these fundamental principles are opposed to the recognition of collective rights for any group whatsoever, defined by a community of origin, culture, language or belief." France was indeed a unitary State. In 1992, an amendment to the Constitution defined French as the language of the Republic. France was the only European State to refer in its constitution to an exclusive official language. A 1994 law enacts: "Any inscription or announcement affixed or made on the public highway, in a place open to the public or in a means of public transport and intended for the information of the public, must be formulated in French." This was also the case for private places intended to receive the public, such as restaurants, cafés, shops, cinemas, etc. The same law recalls that French is the language of instruction. Several decisions of the Council of State affirm the primacy of French.

However, the Constitutional Council, in 1994, made a more liberal decision. It decided that in the name of freedom of expression, we could not impose linguistic uniformity. Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789 states: "The free communication of thoughts and opinions is one of the most precious rights of man: every citizen can therefore speak, write, print freely, except to answer for the abuse of this freedom in the cases determined by law."

We can compare certain articles of the Chinese Constitution:

Article 33: The State respects and guarantees Human Rights.

Article 35: Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of marching and of demonstrations.

Article 41: Citizens of the People's Republic of China have the right to make criticisms and suggestions to all state bodies and workers (…) but it is not allowed to invent or distort the facts to make false accusations.

In France, this amounts to tolerating regional and minority languages, provided that they are not used in the public space. A regional language may not be used before public services or before judges. However, there is a teaching of minority languages. What about overseas, that is to say in some of the former French colonies which have chosen to remain French? In these territories, there is a large proportion of European population, but also Chinese communities, and also indigenous peoples (for example, the Tahitians in Polynesia or the Kanaks in New Caledonia). Multilingualism is the rule in Tahiti and New Caledonia.

French remains the official language, but local languages can be used. However, their education is not compulsory.

What is the current situation at the start of the 21st century?

Corsica: Some 90,000 people, or 45% of the island's adult population, say they speak Corsican with friends or family. In primary school, three hours of teaching on the Corsican language and culture are compulsory. In secondary school, Corsican becomes optional.

Alsatian: there are some 600,000 speakers of the Alsatian dialect out of 1.8 million. There is a network of private bilingual schools (about ten) and several hundred joint public bilingual schools.

Basque: With 30.5% of people speaking and/or understanding it in 2011 (against 37% in 1991), Basque is in decline in the French Basque country.

Breton: The number of people speaking Breton in the four Breton departments and Loire-Atlantique (4.5 million inhabitants) is estimated at 200,000, a figure that is falling because Breton is mainly spoken by elderly people. However, local television stations offer programs in Breton.

Catalan: Spoken mainly in the Pyrénées-Orientales and in rural areas, it is in decline.

Flemish: After an accelerated fall in the use of Flemish since the 1980s, there would remain in French Flanders, according to statistics from cultural associations, a maximum of 20,000 regular speakers.

Occitan or langue d'oc: The area of diffusion of this roman language is the south of France. According to a 2010 study, 14% of Midi-Pyreneans speak Occitan well enough to have a simple conversation and 4% have a very good command of it. The number of speakers would be in decline.

Polynesia: Although most Polynesians speak French, some older people speak only Polynesian languages. In secondary school, they are offered as an option.

Antillean Creole: this language is widely used on a daily basis in both work and friendly relations. Creole has been taught at school (from middle school to high school) since the 1980s, as an option, as well as at university.

Reunionese Creole: 53% of the 800,000 Reunionese say they only speak Creole in their daily lives. It is the most widely used regional language in the overseas departments. Since the early 2000s, Creole has been taught at school.

New Caledonia: In New Caledonia, around thirty languages are spoken by some 70,000 people (2009 figures), out of a population of 245,600 inhabitants. The Kanak languages are integrated into primary school curricula. Some are also taught at the University of New Caledonia.

The recognition of a very broad autonomy for Corsica would suppose a revision of the Constitution, not to include it in Article 74 (which only concerns overseas communities such as Polynesia or New Caledonia, that Corsica is not) but to devote a special article to it on the basis of which an advanced autonomy status would be granted to it. Unfortunately, the government is probably not ready to adopt this measure. It could then justify the recognition of a status of advanced autonomy for Brittany, Alsace, etc. And the French state is based on the principle of the indivisibility of the territory, as it is against separatist movements. This hostility to separatism is also perceptible in French law about religions.

Religious symbols and clothing should not appear in public life. In 2021, a law against separatism was enacted. The state strictly controls religious associations (in France, many mosques are financed by foreign Muslim states). France prohibits the issuance of residence

permits to foreigners practicing polygamy. It also prohibits doctors from issuing certificates of virginity to women, as is done for certain religious marriages. A fundamental French principle is that of assimilation. In 2021, Gérald Darmanin, French Interior Minister, published a book against about Islamic separatism.

In practice, France is like China a multi-ethnic state: it has around 8 million Muslims. French soldiers, if they are Muslims, can go on pilgrimage to Mecca. In the hospitals, the patients have at their disposal representatives of the great religions. Though, the Islamist terrorist threat is very real, and has resulted in several attacks in recent years. The principle of secularism is therefore a necessary precaution against extremist identity movements. Everyone is free to practice a religion or not in their private life. Everyone is free not to have a religion.

Religious demonstrations must not disturb public order. This principle was already found in the Declaration of the Rights of Man of 1789. Article 10: "No one shall be disturbed for his opinions, even religious ones, provided that their manifestation does not disturb the public order established by law."

5. Conclusion

It is very difficult to conclude on such vast problems, both in time and in space. Chinese civilization and French civilization differ on many points, in particular the place of law. Yet, history moves on, and China is today the second largest economy in the world. The law is no longer despised there. There are many legal professions. In cities, young Chinese women are often similar to young Westerners. We have also seen that part of Chinese youth adopt very different behaviors from those of their parents and grandparents.

However, a key difference when it comes to a comparison between Chinese and European families in recent and even current history concerns the size of the rural population in China. In France, it is only 7%; in China, 47%, even if more and more migrants are coming to the cities. This Chinese rural population still has very different lifestyles from urban populations.

I learned a lot about this by reading very good current Chinese novels, translated into French, which I have already quoted. On the other hand, as I pointed out, China has its national minorities on its territory. In France, you have to go far into the overseas territories to find very different family customs, as in New Caledonia. Moreover, as we have seen, family customs often resist changes decided by state policies and legislative measures. This seems to be the case in China. In France, the situation is probably different. Fertility control policies have never been compulsory: they are simply incentive policies.

Finally, in terms of legal reforms of the family, the law has often followed the evolution of mores and then consecrated it. This movement also exists in China, as we have seen in the recent legal reforms concerning the status of women.

Obviously, this article is limited by the fact that I do not understand the Chinese language, and therefore the first-hand documents are inaccessible to me. I hope, however, that I have not made too many mistakes in my description of Chinese families.[17]

[17] The author: I haven't been back to China since 1997. At the time, I was able to visit Beijing with Professor Zhiping Liang, who now teaches in Hangzhou, not far from Shanghai.

Strengthening China's Diplomatic Soft Power: Taking the Basic Categories of International Law as the Path

Bei Feng & He Jiang[1]

Abstract: As the in-depth development of globalization has been promoting the democratization and rule of law of the international society, China's foreign policy and its practice are now being deeply influenced by soft power and international law. Under the background of China's peaceful rise, it will help China to assume the responsibilities as a great power and provide international public goods by strengthening China's diplomatic soft power in the logic of the basic categories of international law. The Chinese idea of building a Community with a Shared Future for Mankind will enhance the human subjectivity of international law and the inter-subjectivity of states. The conception of harmony in Confucianism will promote the diplomatic practice of the new security conception of a Community with a Shared Future for Mankind and achieve universal security and eternal peace in mutually beneficial cooperation and substantive equality. In the logic of ontology and operation theory, China's diplomatic soft power will depend on its international discourse power, international law-making capabilities, and international dispute resolution capabilities. The primitiveness and openness of international law determines the critical role of international politics in diplomatic practice, so it has also become the premise and foundation for the strengthening of China's diplomatic soft power. That is, to improve the ability of global governance based on the effective interaction between international law and balanced politics among great powers.

Keywords: Diplomatic Soft Power; The Basic Categories of International Law; A Community with a Shared Future for Mankind; The Conception of Harmony; International Law-making Capacity

1. Introduction

Peace and development are the two major trends for international society. The interdependence caused by economic globalization has increasingly weakened the dominant role of military powers in international relations. The free movement of goods, services, persons, and capital in the international market and the spill-over effects of economic integration have increased the proportion of national culture, ideology, and political value in the overall strength of a state. In the context of globalization, China's economic rise has not eased its disputes with neighboring countries, but instead, the complex geopolitics and extra-regional factors have caused the flux and reflux of those disputes. Obviously, hard power is not the only determinant of pursuing national interests and effectively solving international disputes, but diplomatic soft power is playing an increasingly important role. Since the market economy is also an economy of the rule of

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law, the development of economic globalization and international market forces have gradually flattened the world. The League of Nations and the United Nations, with maintaining international peace and security as their common ultimate purpose, have shaped the global legal order through law-making treaties. The application of the principle of state sovereignty has promoted the democratization of international relations. International law has not only become the result of national diplomatic activities and the coordination of states' will, but also gradually functions as the legal basis of state diplomatic behavior and affects its efficacy. Therefore, an elaboration on the formulation and implementation of foreign policy along the path of the basic categories of international law will undoubtedly contribute to the enhancement of China's soft power in the international society, and thus effectively pursue the core interests of the state and maintain the global peace and security as well.

2. Correlation between Diplomatic Soft Power and Basic Categories of International Law

In the process of economic globalization, the world market has boosted a complex economic interdependence between different states. At the same time, the negative externalities of modern technology and global economic activities have also led to the survival crisis of mankind, in which all the states face many global problems and common challenges that are difficult to be solved alone. The strengthening of international cooperation and the democratization of international relations have made the rule of law an inevitable trend in international society. In this context, a state's diplomatic soft power has become an essential dimension of its comprehensive strength. In the meantime, the interaction between international law and state diplomacy has grown. The concept of national soft power and the basic categories of international law have a logical correlation within a specific scope. The theoretical coordinates defined by these basic categories reveal an important path for the construction and strengthening of national diplomatic soft power.

2.1 Conceptual Definition of National Soft Power

In the context of economic globalization, the accurate definition of soft power helps to reveal the communication between international law and international politics within the framework of the basic categories of international law. The balance of power between great powers is the basis for the operation of international law.[2] However, as soft power plays an increasingly important role in comprehensive strength, it continues to enhance a country's diplomatic strength along the path of the basic categories of international law. At the same time, international law regulates the diplomacy and politics of the great powers. National interests and the comprehensive strength of a state determine its foreign policy. The balance of the strength of the great powers has also profoundly shaped the primary contents of international law and affected its efficacy. The four freedoms of movement in economic globalization have promoted the germination of international civil society,[3] and the spillover effects of complex interdependence and regional integration have allowed

[2] See Lassa Oppenheim, *International Law: A Treatise* (Volume 1), Longmans, Green and Co., p.73 (1912).
[3] In the process of economic globalization, the four freedoms of movement promoted by the international market refer to the free movement of goods (products), persons, services, and capital.

political cooperation among sovereign states to expand and deepen quickly.[4] Therefore, it has become the common interests of the international society to cope with the human survival crisis and security challenges. The national strength has become more complicated and can be divided into more constituent elements in which soft power has gradually become its key independent variable.

The combination of hard power and soft power constitutes the comprehensive strength of a state. Hard power refers to the ability to force others to do things that are contrary to their original intentions through threats of different coercive forces such as military or material and other means of rewards. This is defined as a "big stick" policy and a "carrot" policy in international relations. The most authoritative concept of soft power comes from American scholar, Joseph Nye, who believes that soft power is the ability to attract others to do what they want others to do by attracting and persuading them, not by coercing or giving them the ability to achieve desired results.[5] In international relations, this usually manifests itself in the ability to set agendas and formulate institutions for other states through the attraction of their own ideas or culture attractions or issues. As of result, allowing other states to emulate themselves voluntarily or actively accept the norms of their international systems, and thereby indirectly urging other states to benefit themselves through the adjustment of value preferences and foreign policy. In a nutshell, the underlying connotation of soft power lies in the ability to make others meet their goals through attraction rather than coercion. Compared with hard power, soft power has three main characteristics: universality, conceptual influence, and interdependence. During globalization and localization, the universality of soft power reveals its generality. If the particular characteristics of its own local or national values and institutions cannot be accepted by the international society voluntarily, they should not be defined as soft power. In terms of the influence inherent in soft power, attraction and appeal are the two elements that reveal the proactive recognition of this power by other states. This also reflects the degrees of active recognition and interdependence for the transition from attraction to emotional appeal or charisma. Under the background of globalization, the interdependence of soft power stems from the commonality of human civilization and the common interests of the international society, especially the common response to the threat of human survival. The three characteristics of soft power are not independent from each other and there is a certain interactive relationship between them. Interdependence and universality both reflect certain objectivity, while the conceptual influence of attraction and appeal indicate voluntary recognition and subjective dependence among the subjects.

A state's diplomatic practice indicates the major intentions, basic characteristics, and main constituent elements of soft power. These elements rely on the resource dependence and the available path of soft power. Some scholars believe that the acquisition of national soft power mainly depends on three kinds of resources: the country's culture, political values, and its foreign policy.[6] However, foreign policy overlaps with the former two

[4] "Spillover Effect" is the core concept of new functionalism, which means that international cooperation will expand within or between functional areas such as economics, technology, and society, and cooperation in these functional areas will continue to expand to the political field and eventually achieve full integration. See Lexian Fang, *New Functionalism Theory and European Integration*, 8(1) Chinese Journal of European Studies 13, 18-19 (2001).

[5] See Joseph S. Nye, *Power in the 21st Century*, https://www.worldpoliticsreview.com/articles/8260/%20power-in-the-21st-century (accessed on June 3, 2022).

[6] See Joseph S. Nye & Jisi Wang, *Hard Decisions on Soft Power Opportunities and Difficulties for Chinese*

resources, and they determine the substantive contents and procedures of foreign policy. Therefore, for the nation-state, taking the interaction between international law and national diplomacy as the context, the constituent elements of soft power are embodied in four aspects: first, the attraction of national culture; second, the influence of political values and realistic political system; third, the international discourse power and the ability to set international agenda; forth, the capacity of leading international organizations and the ability to formulate international systems and norms. In the international society, due to the multi-level nature of all the states' strength and various ranking of the priority of its components in different historical stages, the four aspects above can be both statically independent and systematically interactive. In theory, static independence is usually viewed as the main extension of soft power, while their systematic interaction is understood as the constituent elements. In diplomatic practice, the "construction" of soft power of a particular state at a certain historical stage corresponds to the meaning of the main extensions, while reinforcement of soft power corresponds to the meaning of the constituent elements. The latter embodies the internal interaction and dependence among the four elements and the coherence of specific elements in historical development.[7]

2.2 The Basic Categories of International Law and the Strengthening Path of Soft Power

Category is the basic concept of philosophy, which reflects the depth and breadth of human's understanding of specific social phenomena and the degree of scientific abstraction. Taking the dynamic development of the human legal systems in history and reality as the logic, the legal category system, based on the theory and practice of domestic law, can be divided into six categories: subjectivity theory, axiology, ontology, object theory, operation theory, and evolution theory.[8] The social foundation of international law and its primitiveness and openness cause the particularity of its category system, and subject theory, axiology, ontology, object theory, and operation theory constitute the basic categories of international law,[9] while others are secondary and complementary. Among them, the object theory of international law will be fully reflected in ontology and operation theory. Therefore, subject theory, axiology, ontology, and operation theory and their intrinsic correlation constitute a logically self-consistent theoretical trajectory, which indicates an important path for the strengthening of diplomatic soft power in the light of the mapping relationship between the major categories of international law and the constituent elements of diplomatic soft power.

2.2.1 The basic categories of international law and their inherent correlation

The subject theory category is the understanding and generalization of the practice

Soft Power, 31(2) Harvard International Review 1, 19 (2009).

[7] The distinction between the "construction" and "strengthening" of soft power is only meaningful when comparing the internal composition and main extension of soft power. Regarding the soft power in the title of the article, the "strengthening" of diplomacy, in reality, covers the development process of "construction" as a whole, and the microscopic local "construction" is regarded as the component of macroscopic "strengthening".

[8] See Wenxian Zhang, *Study of the Categories of Legal Philosophy*, China University of Political Science and Law Press, p.13 (2001).

[9] See He Jiang, *The Basic Categories of International Law and China's Traditions for their Practice*, China University of Political Science and Law Press, p.6 (2014).

subject and value subject of law and their mutual relationship.[10] The subject theory of international law is the basic category for studying the legal personality of international law and its subjectivity.[11] States used to be the exclusive subject of international law, but with the diversification and complication of international relations, the subjects of international law have also changed. International organizations have developed as the derivative subject of international law, and individuals have become the legal subjects in the field of international human rights protection. Human beings are naturally social animals and political animals. The historical evolution of domestic law and international law demonstrates that the legal subjects of non-natural entities are the result of human legal personification, and the ultimate goal is to realize the social and political values of human beings as the natural subjects. The category of value theory is the understanding and generalization of the subjects' purposes expected from the law, the meaning of the law to the subject, and the need for the law to satisfy the subject.[12] The value theory of international law mainly studies the subjective purpose pursued by international law according to its subjective initiative and the objectivity of the objects. In domestic law, the basic values of law mainly include justice and order in which justice is considered as the ultimate value of law, whereas order is the formalistic value of law.[13] The subject of international law determines the value of international law. Nation-states are the basic political units of the international society and primary subjects of international law. At the same time, a state is also a cultural community. Therefore, the diversity of national cultures and their coexistence make it impossible for the subjects of international law to reach a consensus on international justice. As the most important law-making treaty, the purposes of the Charter of the United Nations define the foremost value of international law, namely international peace and security.[14]

The ontological category is the understanding and generalization of the existence and essence of law. Legal norms, legal principles, rights, obligations, and legal systems all belong to the category of ontology.[15] The ontology of international law mainly studies the normative system of international law that is made or developed by the actors of international relations in the light of their basic values. The scope of the operational theory is the understanding and generalization of all aspects of the operation or application of the law, from its formulation to enforcement.[16] The operational theory of international law focuses on its broad implementation, including the application of international law and the resolution of international disputes. Because of the coexistence of legal theories, there is a particular connection between ontology and operationalism. If ontology is about "the law in books", operationalism can be associated with ontology due to its nature as the law in

[10] See Wenxian Zhang, *Study of the Category Consciousness, Category System and Cornerstone Category of Jurisprudence*, 12(3) Law Research 1, 4 (1991).

[11] The subjectivity of law refers to the scope of rights created by the law as subjects and its degree of realization or the state of satisfaction of the legal values pursued by the legal subjects through the legal ontology.

[12] See supra note 9, at 4.

[13] See supra note 7, at 195-197, 203-204.

[14] See supra note 8, at 167.

[15] See supra note 7.

[16] See supra note 9, at 4.

society or "the law in action".[17] Objectively speaking, the ontology of law is the objective target or textual basis for legal operation. In the international society, without a unified super-national democratic legislative body, international customary rules are difficult to be identified and proved. The boundaries between international hard law and soft law are vague. Those factors that affect the operation and efficacy of international law also affect the dynamic process of the formulation of international norms.

The subject theory, value theory, ontology, and operation theory of international law are inherently correlated and interactive. This dialectical relationship is rooted in the unity of opposites between individuals and society, as well as natural law and positive law, and at the same time is determined by the social foundation of the existence and development of law. The pursuit of social and human subjectivity and the value of justice acts as the historical impetus for which natural law never annihilates. Much concern about individual subjectivity and empirical law makes ontology and operational theory the core of legal research. The rise and fall of natural law and positive law, and the intrinsic correlation between the four basic categories of international law, all depend on the social foundation of corresponding legal systems. Law is a bunch of compulsory and binding social norms, with social norms as its upper concept, which contributes to its substantive links with social norms such as moral norms and religious norms. Meanwhile, all norms also share the inherent logical commonality in procedures. The openness and correlation of the legal study is based on the systemic and professional levels of the relevant laws. The law in its embryonic stage is open and primitive. Therefore, their correlation research is of vital importance. When the closeness of the legal system is gradually enhanced, its correlation research will be replaced by complex, specialized ontology research, such as civil law and criminal law in a domestic legal system. For international law, its primitiveness and fragmentation have become common sense or established facts.[18] As a result, many "non-legal" factors have affected the social practice of subject theory, value theory, ontology, and operational theory of international law. The social factors closely related to international law and their development trends have profoundly revealed the systemic and interactive degree of the basic categories of international law. In the era of globalization, the formation and development of the normative system of international law has relied on balanced politics among great powers, strength of global markets, and cultural integration between nation-states. In terms of the foremost value of international law, balanced politics between great powers has profoundly shaped modern international law. Economic

[17] Nathan Roscoe Pound, who is a well-known law sociologist, once put forward the concept of "the law in books" and "the law in action". He advocated that the life of law lies in the implementation of law and emphasized the social effectiveness of law. The law in books refers to the mandatory norms of conduct formulated by the national legislature, while the law in action refers to the operation of legal norms in the real society, especially in the judicial trial activities of judges, just like what Holmes stated: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." See Nathan Roscoe Pound, *Law in books and Law in Actions*, 44(1) American Law Review 1, 15 (1910); Nathan Roscoe Pound, *The Scope and Purposes of Sociological Jurisprudence*, 25(3) Harvard Law Review 512, 512 (1912); Oliver Wendell Holmes, *The Path of the Law*, 10(5) Harvard Law Review 994, 994 (1897).

[18] In 2002, the 54th Session of the United Nations International Law Commission decided to include "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" as the topic of its long-term work program and established a special research group to conduct systematic research on the issue. Some scholars have translated the fragmentation of international law into "unsystematic", which is in stark contrast to the constitutional legal system with a clear hierarchy of effectiveness in domestic law.

globalization has led to the complex interdependence between different states and its negative externalities have made international public products and the responsibility of great powers an essential topic for the study of international law. The integration of national cultures has developed the intentions of justice for the values of order and equality of international law, and then promotes the formation and application of international norms and the effective settlement of international disputes.

2.2.2 National soft power in perspective of basic categories of international law

The constituent elements of national soft power can be divided into internal elements and external elements in general. For instance, the cultural attraction of the nation-state and the influence of political values and political system are intrinsic elements, while external elements include the international discourse power, the ability to set international agendas, the steering ability of international organizations, and the ability of creating international institutions. The external elements can also be taken as the extensions of soft power extension emanating from the international society. International law is a system of norms for regulating international relations. The instructive logic of the basic categories of international law for the strengthening of a state's soft power is mostly indicated in the external components of national soft power. Obviously, the internal and external elements of soft power will interact with each other. For example, the attractiveness of a state's culture can enhance its international discourse power while the lack of international discourse power will weaken the attraction of culture. This role also applies to the relationship between a state's international discourse power and its political attraction. Exploring the internal constituents and external correlative factors of a state's soft power, and actively promoting their interaction in diplomatic practice, is of vital importance for the effective enhancement of a state's comprehensive international strength. If the hard power and soft power, as well as the internal and external elements of soft power are optimized, a state's power will be naturally multiplied. Otherwise, it is only the sum of the two instead of the product. The prioritization and interactive integration between the hard power and soft power, as well as the internal elements of soft power, can make the state's strength grow geometrically, which eventually develops into smart power.[19] The smart power and "sharp power" are not so much a single national strength,[20] but rather the result of the best optimization of the hard power, soft power, and their internal elements.

Effective foreign policy will have the hard power and soft power multiplied as a comprehensive strength, which means that the two multipliers are indispensable. However, the prerequisite for promoting the interaction between international law and soft power is to understand the objective background of the international society in order to prioritize

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[19] The term "smart power" was first proposed by Suzanne Nossel in the article "Smart Power" published in "Foreign Affairs" in 2004. See Suzanne Nossel, *Smart Power*, 83(2) Foreign Affairs 131, 131 (2004). Joseph Nye, a professor at Harvard University, published the article "Rethinking Soft Power" in "Foreign Policy", stating that "it is a mistake to rely on hard or soft power alone. The ability to combine them effectively might be termed smart power." Smart power means "competing strategy ability combined with hard power and soft power." See Joseph S. Nye, *Think Again: Soft Power*, http://foreignpolicy.com/2006/02/23/think-again-soft-power/ (accessed on June 3, 2022).

[20] The National Endowment for Democracy used the concept of "sharp power" to accuse China and Russia of "A Widening Scope of Authoritarian Influence" and "A Particular Threat to Vulnerable Democracies". See National Endowment for Democracy, *Sharp Power: Rising Authoritarian Influence*, https://www.ned.org/sharp-power-rising-authoritarian-influence-forum-report (accessed on June 3, 2022).

hard power and soft power and to optimally combine the two powers and their internal elements according to the particular circumstance or specific functionality of an event. In an ideal mathematical model, when the hard power is zero, no matter how great the soft power is, the multiplication or product of the two is zero. In practice, when the two multipliers may be infinitely small or infinitesimal but not zero, the sum of the two may be larger than the product of the two. In the real context of globalization, the minimal hard power suffices to ensure the growth of global economic profits and effectively respond to financial risks. Surely, it is also necessary to guarantee a strategic deterrent in terms of military power. Beyond this limit or purpose, China should transform its hard power into soft power. With the democratization of international relations, the development of economic globalization, and the improvement of national integration, the interaction between international law and national soft power will be further enhanced.

The subject theory and value theory of international law focus on the conscious subjective initiative of the subjects and its value pursuit centered on concept construction and subjective identification, while the ontology and operation theory pay more attention to the objective legal text and the actual power operation. The former demonstrates soft power; the latter mainly lies in hard power. Ideas control or dominate actions. In the light of the logic from the legal culture to legal principles and legal rules, and then to "law in action", the internal subject theory and value theory can enable soft power to develop the abilities in the external formulation and implementation of international law. The subject theory and value theory of international law reveal the internal sources of diplomatic soft power and the logical starting point for its reinforcement. The subject of international law and the integrity of its legal personality determine the original motivation of international law practice. Individuals in international law and international organizations pursue different legal values and then develop different legal norms, which thereby enhances or weakens the legitimacy of a state's diplomatic behaviors. It is an important approach for China to strengthen its diplomatic soft power by means of beautifying its international image and enhancing its cultural attraction and political influence through international discourse and international agenda-setting. In the practice of international law, this approach is mainly demonstrated as the ability of subjectivity molding and value the reconstruction of international law. Furthermore, promoting the interaction between balanced politics among great powers and international law and providing international public goods to assume the responsibility of a great power is also a prerequisite to enhancing the charisma of China's foreign policy and strengthen its diplomatic strength.

3. A Community with a Shared Future for Mankind and Strengthening of Soft Power: Subjective Initiative of Subjects and Values of International Law

The subject theory of law is the starting and anchor point of other primary categories. Natural persons are the subjective origin of all legal personalities in history and reality. Natural persons are born to be legal subjects. All legal values originate from the pursuit of the value of legal objects by natural persons, and the differences in legal values for different subjects lead to major legal schools such as natural law school and positive law school. As a legal personality, a nation-state is a political community, an economic community, and a cultural community. Democracy, the rule of law, and cultural homogeneity develop the values expected from most natural persons or citizens as the substantive value pursued by

the state. In the autocratic system, the will of the tyrant or minority determines the legal value pursued by the state. In addition to natural persons and states, other legal personality pursues the legal value of a particular function or field. For example, the primary value pursued by a multinational is efficiency. Therefore, to some extent, the ability of a legal subject also indicates the ability to construct legal values. In an anarchic society, the subjectivity of international law and its function of value shaping are of vital importance.

3.1 The Subjective View of a Community with a Shared Future for Mankind and the Strengthening of Diplomatic Soft Power

After the end of the Cold War, economic globalization has brought about various challenges to non-traditional human security along with promoting world peace and security. International terrorism, cyber security, and global climate change all threaten the survival of humankind. In order to adapt to the two major trends (peace and development), China has proposed the conception of a Community with a Shared Future for Mankind, which will help China to strengthen its diplomatic soft power along the logic of the subject theory of international law. In September 2015, President Jinping Xi comprehensively expounded the main ideas and major intentions of the conception at the 70th United National General Assembly. In January 2017, President Jinping Xi delivered a keynote speech on joint building of a Community with a Shared Future for Mankind at the United National Headquarters in Geneva, explaining that the Chinese solution is to build a Community with a Shared Future for Mankind that embraces general principles, clearer objectives, and more systematic security concept.[21] A new conception of security of a Community with a Shared Future for Mankind is the embodiment of human subjectivity for legal value. It originates from the idea of harmony in Confucianism, and in the same vein they all strengthen the discourse power of Chinese diplomacy in international law. For many states, the universal acceptance of building a Community with a Shared Future for Mankind and the active participation in this process shows that this conception has enhanced the soft power of China's diplomacy through its international practice of subjective views.[22]

A Community with a Shared Future for Mankind is the inheritance and development of the Five Principles of Peaceful Coexistence, which is mainly reflected in the progress from "mutual" to "common" in the subjectivity. It transcends the political confrontation between small and great powers and promotes the development of human consciousness or its subjectivity. In the context of economic globalization, the "complex interdependence" between different states and the negative externalities of global economic activities are increasing.[23] The common threat of survival and security risks develop the common

[21] See Jinping Xi, *The Governance of China (Volume II)*, Foreign Languages Press, pp.521-526, 537-539 (2017).

[22] In February and March 2017, the United Nations Economic and Social Council, the Security Council and the Human Rights Council successively incorporated "Building a Community of Human Destiny" into their resolutions. See the United Nations Economic and Social Council Social Development Committee: New Partnership for Africa's Development The social dimension of the relationship (Report of the Fifty-fifth Session), E/CN.5; the United Nations Security Council: Resolution 2344 (2017), S/RES/2344 (2017); the United Nations Human Rights Council: Achieving Economic, Social and Cultural Rights in All Countries, A/HRC/RES/34 /4; The Right to Food, A/HRC/RES/34/12.

[23] "Composite interdependence" is the core concept of neo-realism. Its connotation is as follows: With the rapid development of the free flow of transnational goods, currencies, people, and information, countries

interests and destinies for mankind. The international humanitarianism is also the basic principle to build a Community with a Shared Future for Mankind.[24] The lexical homology of "humanitarian" and "human" in English also reflects the humanistic sources of human subjectivity.[25] In this social context, from a community of interests, a community of responsibility to a community of destiny, the internal logic of the expansion of the social community is demonstrated. From the dialogue and consultation between equal partners to the co-building and co-sharing in the spirit of multilateralism, from economic development and prosperity to human inclusiveness and mutual learning, and finally to a green planet shared by mankind,[26] the "coexistence" of the Five Principles of Peaceful Coexistence is developed into "co-prosperity" in the light of the "spill-over effect" of integration towards the subjectivity of mankind.[27]

As a conception, the grand narrative of a Community with a Shared Future for Mankind will enhance the charisma of China's foreign policy, which calls for the political construction of human subjectivity in its diplomatic practice. The protection of human subjectivity and common interests rely on its operational mechanism and institutions. Otherwise, its subjectivity will become a castle in the air, and the legal norms reflecting its subjectivity will not be applied as "laws in action". Based on the non-alignment policy, strengthening the subjective role of developing countries is the diplomatic practice of the subject conception of a Community with a Shared Future for Mankind in the context of economic globalization. Throughout the history of international relations, the outbreak of world war is the result of the deteriorating confrontation between traditional military alliances. The policy of alliances often leads to the grouping military purposes, which makes peace and security of the international society more vulnerable. More importantly, the development gap formed in the economic globalization dominated by developed countries has finally triggered various security crises that threaten the survival of mankind. Therefore, the diplomatic practice of a Community with a Shared Future for Mankind means the strengthening of the subject status of "developing countries". The subjectivity of developing countries has been fully practiced in international law in the fields of World Trade Organization laws and the laws of the sea.[28] The social background of a Community with a Shared Future for Mankind reveals China's confirmation and concern of the status of the "developing countries". This is, to a certain extent, conducive for China to assume the historical mission as a responsible great power, which has also greatly enhanced China's diplomatic soft power and facilitated the interaction between soft power and legal subjectivity.

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have formed intricate interdependence and glory and loss. The main assumption of compound interdependence is that "actors other than states participate directly in world politics"; "a clear hierarchy of issues does not exist"; "force is an ineffective instrument of policy". See Robert O. Keohane & Joseph S. Nye, *Power and Interdependence*, Pearson Education Inc., p.20 (2012).

[24] See supra note 20, at 539.

[25] The English words humanitarianism (humanitarian) and humanity (human) are derived from the same root word--human.

[26] See supra note 20, at 541-544.

[27] See supra note 3, at 13-16.

[28] In the World Trade Organization legal system, developing countries enjoy the privilege of generalized system of preferences. In the 1982 United Nations Convention on the Law of the Sea, developing countries have specific rights on the development system for human-inherited heritage in the submarine region, especially the distribution of economic interests.

In the construction of the social foundation for human subjectivity, the promotion of the development of non-governmental organizations and their public diplomacy for the purpose of building a Community with a Shared Future for Mankind will contribute to fostering the international civil society consciousness corresponding to the subjectivity of mankind.[29] Along the basic logic of the subject theory of international law, international non-governmental organizations and public diplomacy will contribute to enhance states' soft power and protect their basic rights and interests. In the field of international humanitarianism and environmental protection, in order to protect the common interests of mankind or fundamental human rights, international non-governmental organizations can promote the active and creative construction of a Community with a Shared Future for Mankind. "The Belt and Road Initiative" is an important initiative in the construction of a Community with a Shared Future for Mankind,[30] and the "people to people bond" is the social foundation of the principle of "wide consultation, joint contribution and shared benefits", which upgrades "economic development belt" to "civilization blending innovation belt". This is conducive to shape the national image through public diplomacy in the light of a Community with a Shared Future for Mankind and will eventually enhance China's diplomatic soft power comprehensively.

In the practice of international relations, the legal personality construction of international organizations representing the common interests of mankind should be improved to broaden their legal competencies. For example, in the area of the law of the sea, the subjectivity of the Seabed Authority should be strengthened for the purpose of compliance with the legal principle of the common heritage of mankind, and the functions and capacities of the Seabed Authority should be developed in line with the review system under Article 154 of the 1982 United Nations Convention on the Law of the Sea.

The development of the subject of international law will surely promote its value transformation. The subject conception of a Community with a Shared Future for Mankind has defined a new conception of common, comprehensive, cooperative, and sustainable security.[31] Common security, in contrast to military alliances and traditional collective security system, indicates the interdependence of nations for the security order and human rise and fall together. Comprehensive security embraces the positive peace in the sense of non-traditional security, which makes it particularly important to eliminate the development gap in economic globalization. Only when all states achieve substantive equality in a fair international economic order and develop win-win international cooperation on this basis can the authors establish a harmonious relationship between

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[29] Public Diplomacy refers to the public relations activities of a government directly promoting the international image of a country. It mainly uses cultural communication as the primary method, with mass media, non-governmental organizations and networks as the main carriers. Figuratively, it is a kind of "soft diplomacy", an international exchange intended to enhance the public's awareness and reputation of the foreign public. See Qianjin Wu, *Soft Power and Public Diplomacy in the Transition of International Order*, 1(2) International Relations Studies 13, 15 (2013). With the rapid development of international civil society, more and more non-governmental organizations and citizens of different countries have become the mainstay of public diplomacy. This public-public exchange model has enhanced the trend of depoliticization of public diplomacy.

[30] See Yi Wang, *On "the Belt and Road Initiative": the Common Practice of Building a Community with a Shared Future for Mankind in the Common Cause of Lifting Up the Sleeves Together*, http://www.fmprc.gov.cn/web/zyxw/t1443973.shtml (accessed on June 3, 2022).

[31] See supra note 20, at 542.

different states. Sustainable security is the embodiment of the harmonious relationship between man and nature. Therefore, a new conception of common, comprehensive, cooperative, and sustainable security is the intermediary between the conception of a Community with a Shared Future for Mankind and the harmony of Confucianism.

3.2 The Conception of Harmony and Value Basis of China's Diplomatic Soft Power

In domestic legal system, the value of the law is rooted in its homogeneous legal culture and political traditions. Justice is often defined as the ultimate legal value while order is regarded as the most important formal or procedural value. In the international society, the diversity of national cultures makes it impossible for sovereign states to reach a consensus on justice, and there is no "international constitution" to interpret the basic values of international law. The identification of the value of international law can only rely on text analysis of the United Nations Charter (hereinafter referred to as the Charter). As the most important international law-making treaty, the basic purpose of the Charter is undoubtedly the authoritative expression of the values of international law. The first three paragraphs of Article 1 of the Charter state three substantive purposes with inherent logic and prioritization, among which international peace and security are the foremost values of international law. Therefore, the maintenance of international peace and security and promotion of its value transformation along the internal logic of the value system of international law will effectively enhance China's international discourse power. With the deepening of globalization, the unfair international economic order and hegemonic politics resulted in substantive inequality between developing countries and developed countries as the subject of international law. The hot pursuit of profit for capitalism and its conquest of nature lead to an ecological crisis and threaten human survival. In this context, the conception of harmony of Confucianism is conducive to the practice of the new security conception of a Community with a Shared Future for Mankind and enhances China's diplomatic soft power along the path of the value theory of international law.

Compared with Western civilization, the most outstanding contribution of Confucianism to human civilization lies in its conception of harmony. Harmony is a state of order in domestic law (just like its counterpart in international society world peace and security), but the harmony conception of Confucianism is closely related to the subject theory of law. Social responsibility and the introversion of subjective reflection is an essential feature of Confucianism. It originates from the ethical conception of "moral self-cultivation to nourish nature". The five Confucian Bonds — benevolence, righteousness, courtesy, wisdom, and faith lay moral and ethical foundation for shaping human subjectivity and maintaining social order. For "the World of Great Harmony" of Confucian culture, along with the logic of subject theory, the harmonious society is first based on the individual internal physical and mental harmony and then expands to the relationship between person and person, man and nature. This kind of subject expansion that emphasizes inner spiritual cultivation develops "the self-cultivating, family-regulating, state-governing and then world peace-making" as the essence of Confucianism. Although Confucianism has certain historical disadvantages for the ideal of the rule of law, its conception of harmony will contribute a lot to the construction of a harmonious world. With the complication of social relations and the development of international law, the conception of harmony runs through different spatial levels of social relationship in the

logic of family relations, the relationship between different domestic legal personalities, and international relations. Confucianism, in a word, is characterized by the basis of peace, the core of benevolence, and the spirit of harmony.[32] The history of international relations demonstrates that the introversion of Chinese civilization is externally expressed as peace-loving. The extroversion of culture is not necessarily active or benign. When the extroversion of national culture is utilized by capitalism, it becomes colonial expansion in different forms, from political or comprehensive colonization in history to economic colonization and then to financial colonization in the era of globalization. Introversion does not necessarily mean social seclusion of the nation or state. The feature of self-discipline and self-cultivation makes Confucianism extremely inclusive. Under the background of China's peaceful rise, the inclusiveness of Confucianism is conducive to lasting peace and universal security in the global multicultural reality.

Western civilization is centered on individualism. In the anarchic international society, individualism comparatively plays a negative role totally differently from the positive one in the domestic society. From John Locke's theory on natural rights of property to neo-liberalism promoted by Western countries, global integration is economic globalization in its nature, and it is just the globalization of multinationals of Western countries. Western globalization alienates the subjectivity of natural persons and states, which breeds terrorism in an unequal international economic order and increasingly marginalizes developing countries in the negative externalities and profit growth of global economic activities. Equality for products and capital shares the supremacy over the substantive equality of individuals and states in the international society. In international relations, multinationals, and their home countries have developed individualism into anthropocentrism through neoliberalism. As a result, the conquest of nature has led to survival crises such as climate change and the threat of biodiversity. Although economic globalization has contributed to the interdependence of different states, world peace, and security just reduce to an indicator of the formalistic values of equality for products. This kind of peace is negative peace for the subjectivity and intersubjectivity between individuals and states are alienated and distorted by the development gap and the digital divide. Such an international order does not show any implication of justice in its intentions and cannot be regarded as the harmony defined in Confucianism. Compared with the former, harmony is an order with an intention of justice. It indicates the substantive equality between the subjects and is also embodied in the inclusiveness and respect of different national cultures in the international society.

The first three paragraphs of Article 1 of the Charter, define the inherent logic and priority of the value system of international law. The negative peace pursued by the collective security system of Paragraph 1 constitutes the primary value of international law. The friendly relations between states emphasized in Paragraph 2 demonstrates a transition from negative peace to positive peace provided in Paragraph 3. Paragraph 3 highlights non-discriminatory respect for human rights and fundamental freedoms of all human beings through the international cooperation in the economic, social, and cultural fields. The integration of national cultures will promote the consensus or identification of international justice and develop justice as a new intention for universal peace.[33] The first three

[32] See supra note 8, at 46.

[33] See He Jiang, *A Community with a Shared Future for Mankind and the Security Cooperation in the South China Sea: From the Perspective of the Transformation of Values in International Law*, 57(3) Law and Business Research 148, 155 (2018).

paragraphs of Article 1 of the Charter display the diachronic trend of the development of the value of international law. The eventual objective of the development of negative peace and friendly relations is to realize basic human rights. The right to peace, the right to development, and environmental right are thus defined as the collective human rights of the "peoples".[34] The positive peace or peace of justice embodies the harmony conception of Confucianism. The construction of a "harmonious world" and a Community with a Shared Future for Mankind are both the diplomatic practices of the harmony conception in international relations.[35] Therefore, the conception of a Community with a Shared Future for Mankind and "the Belt and Road Initiative" will promote the internal interaction between the two trends of peace and development, and subsequently eliminate the development gap of economic globalization in order to build a new type of international relations characterized by equality, mutual benefit, and win-win cooperation. Thus, attaining positive peace and universal security in its substantive equality. Meanwhile, the harmony between man and nature in Confucianism will contribute to building a sustainable green world through a low-carbon economy.

The strengthening of China's diplomatic soft power rests with the political motivations and cultural resources in the logic of subject theory and value theory of international law, which results from the diplomatic combination of a Community with a Shared Future for Mankind, "the Belt and Road Initiative" and harmony conception of Confucianism. In turn, this approach will promote Chinese culture and enhance the soft power of China's diplomacy.[36] At the same time, in international relations, the strengthening of diplomatic soft power also suggests that China should advance the development of international law along the path of ontology theory and operation theory, and effectively promote the realization of international rule of law and protection of its national rights or benefits by means of international law-making capacities and international dispute settlement abilities. More importantly, the openness of the sources of international law and the dependence of international law on the balanced politics among the great powers are conducive to China's construction of an international soft law system of soft law through a Community with a Shared Future for Mankind and the role of China as a responsible great power. Only in this way can China enhance its diplomatic soft power of global governance in the positive interaction between international law and balanced politics among great powers.

4. Legally Strengthening Path of China's Diplomatic Soft Power: Ontology Construction and Operational Efficacy of International Law

With the development of democratization and legalization of international relations, international law provides legitimacy for national diplomatic behaviors. To some extent,

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[34] See Lingliang Zeng & Zhonghai Zhou, *International Public Law*, Beijing Higher Education Press, p.261 (2016).

[35] Chinese former President Jintao Hu proposed the idea of building a "harmonious world" at the summit meeting of the 60th Anniversary of the Founding of the United Nations. In addition, Chinese leaders have advocated the establishment of "harmony world" in the APEC Informal Leadership Meeting, the G8 Summit, the Asia- Europe Summit, and other diplomatic occasions.

[36] See Yifu Lin, *The Great Rejuvenation of the Chinese Nation and "the Belt and Road Initiative"*, 34(6) Journal of Shanghai University of International Business and Economics 1, 9 (2018).

the protection of national interests, the improvement of national image, and the appeal of foreign policy depend on the national practice of international law, including the formulation of international law and the peaceful resolution of international disputes. In the logic of the ontology theory of international law, diplomatic soft power is manifested in the state's initiative to pursue national interests actively through the creation of rights in international law. According to the logic of the operation theory of international law, the diplomatic soft power is mainly manifested in the fact that the state passively safeguards the national rights and interests through the international dispute settlement mechanism. The former is a kind of ex-ante abstract "legislative" behavior, and the latter is an ex-post specific "judicial" relief behavior. As far as the "law in action" is concerned, the ontology and operation of international law are inseparable. At the same time, the operation of international law is premised on a static ontology. Because of the openness of international law and the correlationism, the "legislation" of the international society is also dynamic. The creation and implementation of international norms and their interaction will jointly strengthen a state's diplomatic soft power.

4.1 Development of International Law-making Ability: Taking the Dynamic Sources of International Law as the Path

The subject of international law determines the development of ontology. The primitiveness and openness of international law are rooted in the openness of legal subjects. There will be no social relationship regulated by law without the communication between the subjects. Economic globalization has promoted the four freedoms of movement in the international society. The social relations regulated by international law have continuously extended to the social relations originally regulated by domestic law, and the primitiveness of international law has gradually opened to the modernity of domestic law. The diversification of the international legal personality and their enhanced subjectivity have laid a social foundation for the development of international soft law. The intentions of the concept of law determine its basic characteristics, whereas its extensions are expressed as sources of law in practice. The domestic legal system has a logical correspondence with the type and the hierarchy of the law, while the ontological research of international law is largely an empirical analysis that relies on its legal sources. The dynamic and interactive nature of international law sources as a system provides a possibility and a realistic path for China to enhance its law-making capacity in international law.

4.1.1 Strengthening of international law-making capacity: Framed by Article 38 of the ICJ Statute

In an anarchic international society, there is no constitution to define the sources of international law, so in practice, Article 38 of the Statute of the International Court of Justice (hereinafter referred to as Article 38 of the Statute) is interpreted as an authoritative expression of the source of international law by most jurists.[37] In fact, the wording of

[37] This article states: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not

Article 38 of the Statute does not stipulate it as "the source of international law", but only as the law that the court should apply for its dispute settlement. At the same time, the International Court of Justice shares no universal compulsory jurisdiction, and its jurisdiction is based on the consent of the contesting sovereign states. Therefore, on the one hand, Article 38 of the Statute is regarded in jurisprudence as the extension of the source of international law; on the other hand, the source of international law is open, and it is not exhausted or limited to Article 38 of the Statute. The former "jurisprudential interpretation" makes the traditional source of international law develop new intentions and extensions in judicial practice, while the latter, as an open system, develops different forms of separate legal sources. The two approaches or understandings make the sources of international law a dynamic system in its entirety.

The negotiation process of Article 38 of the Statute and its historical disadvantages determine its dynamic and progressive nature as the sources of international law, which in fact helps China to enhance its ability of international law-making and strengthen its power of international discourse.[38] First of all, the fragmentation of international law and the complexity of the treaty-making process provide opportunities for China to play its initiative of diplomacy. Both the accurate grasp of the development trend of the international community and the control of international discourse power will affect the agenda setting of international "law making". Once the subject of the treaty is determined, the draft version, as the basis for further negotiations among states, is particularly important. In practice, a draft version may be suggested by expert committees of international organizations concerned, or by the relevant leading powers or certain group of states in their respective texts for negotiation. Effective control, influence, or participation in international organizations especially their decision-making processes are very important for the experts to draft the text for adoption, and proposals from their own standpoints are also an important manifestation of the ability to create international norms. Treaties are the results of will coordination between contracting parties. The negotiating ability of diplomats will affect the substantive rights created by the treaty and the limits to which the treaty is applied and interpreted. Therefore, China should educate diplomatic talents who have a great command of the knowledge of international law and international politics, the competence to accurately define the national interest spectrum and its priority, and great command of foreign languages and outstanding abilities of negotiation as well. Secondly, in the area of international customs, China should improve the systematic research on international general practice and judicial cases, thereby promoting the identification and formation of international customs beneficial for China's interests, and negating or weakening international rules against China at the jurisprudential level. Thirdly, in terms of general principles of law, a comparative study of the world's major legal systems should be made from the perspective of comparative law, and Confucianism should play an active

prejudice the power of the Court to decide a case ex aequo et bond, if the parties agree there to." See Depei Han, *Modern International Law*, Wuhan University Press, p.6 (1992).

[38] Article 38 of the Statute completely copied the stipulations of the Statute of the International Permanent Court that adopted few decades ago. However, the international community has undergone tremendous changes in the past 100 years, which has made Article 38 of the Statute somewhat unrealistic that need further development. In addition, there have been serious differences between the representatives of countries in negotiating Article 38, paragraph 1, especially regarding the definition of "general legal principles". See D. J. Harris, *Cases and Materials on International Law*, Sweet and Maxwell, p.49 (1998); V. D. Degan, *Sources of International Law*, Kluwer Law International, p.47 (1997).

role in China's peaceful rise. Only in this way can the contributions of Chinese civilization to the international rule of law be demonstrated in the practice of general principles of law. Finally, in the area of international soft law, the role played by Chinese judges in classic international cases, important cases ruled by Chinese judiciaries in the practice of international law, as well as the cultivation of international authoritative publicists will indirectly affect the creation and formation of rules of international law.[39] However, the role of these factors must be based on the commonality of human legal civilization and the subjective recognition or acceptance of other states.

4.1.2 Expansion of international law-making capacity: Focusing on New Sources of International Law

The openness of the subjects of international law will eventually bring about the development of the ontology of international law. The international legal personality of international organizations and individuals, as well as the growing visibility of international non-governmental organizations, has promoted the expansion of the extensions of the sources of international law. Due to the enhanced subjectivity and competence of international organizations, their resolutions have developed into a new source of international law.[40] For example, some anti-terrorist resolutions of the United Nations Security Council are generally regarded as universally legal binding instruments.[41] With the development of international human rights law and international environmental law, various resolutions and declarations of international organizations or international conference have gradually developed into international soft law.[42] From international soft law to the subsidiary sources of international law, and then to the primary sources of international law, the power of international discourse and the ability to control international organizations are essential for the application and interpretation of international law. For example, there are different interpretations of the legal nature of the Universal Declaration of Human Rights,[43] and which interpretation is more convincing depends, to some extent, on the international soft power of the interpreter.

The international soft law can be developed into a separate source of international law through treaties or international customs, and it can also enrich the intention and extension of the subsidiary sources of international law. Compared with the international hard law, the extension of the international soft law is larger than the scope of the subsidiary sources

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[39] In the history of international law development, authoritative international jurists, such as Grotius and Kelsen, are usually premised on their extensive and profound accomplishments in the fields of constitution and jurisprudence. Therefore, the statute is worded as "publicist". According to this knowledge composition and research field, there are few can be regarded as authoritative publicists in China in the context of Article 38 of the Statute.

[40] See Xianshu Wang, *International Law*, China University of Political Science and Law Press, p.22 (2012).

[41] For example, Resolution 1373 and Resolution 1540 adopted by the United Nations Security Council are "quasi- legislation" in nature because of their targeting of the general situation and binding of all countries. See Jia Wang, *The expansion of the security council's functions: from the perspective of anti-terrorist resolutions*, 13(4) International Forum 11, 12-13 (2011).

[42] See Antonio Casses, *International Law* (translated by Congyan Cai), Law Press, p.261 (2009).

[43] Some scholars believe that the Universal Declaration of Human Rights is only a political declaration adopted by the United Nations General Assembly and does not have the legal binding force of the treaty; some believe that it constitutes an authoritative interpretation of the human rights provisions of the United Nations Charter and is legally binding; the other scholars believe that it is the codification of international customs and is legally binding.

specified in Article 38 of the Statute. Therefore, the expansion of soft law will inevitably lead to the emergence of new subsidiary sources in the practice of international law. International organizations, international conferences, non-governmental organizations, and international civil society have all contributed to the formation of international soft law. In the practice of the conception of a Community with a Shared Future for Mankind and "the Belt and Road Initiative", China can vigorously develop public diplomacy through the shaping of the common interests of mankind and the blending of national cultures, so that international NGOs and the world are willing to listen to and accept China's claims and demands, and thus actively support the Chinese solutions. International organizations and diplomatic conferences are the catalysts of international soft law. Both the real operation of international organizations and the agenda control of international conference will help states market their normative claims, thereby improving the state's diplomatic soft power.

Different from domestic legislation, the formation of international soft law and international customs usually takes a long time. During this period, China's diplomatic soft power will play a vital role in the formation of international rules. First of all, the power of international discourse can develop or highlight the concerns of international public opinions or ignore certain international issues, and crystalize the rules of international soft law and its interpretation context through the agenda-setting of international law. Secondly, from the international soft law to international treaties, as well as in the different stages of the treaty conclusion, the capacity of agenda-setting in international law, the ability of rule-formulating for draft treaties, and the capability of procedural-control of international organizations and diplomatic conferences can all strengthen China's soft power in the construction of the ontology of international law. Through this international law-making ability, China can indirectly create more rights for itself in international law.

4.2 Protection and Reinforcement of the Rights in International Law: Framed by Static Sources of International Law

The operation theory of international law begins with its ontology theory, that is, the application of international law is based on the static sources of international law. In the context of domestic law, the broad sense of legal application embraces the active observance of the subjects, the enforcement of the executive, and the application of judicial organs in its narrow sense. In the international community, the operation of international law is decentralized, and its coercive sanction is different from that in domestic background. On the whole, the operation of international law mainly includes the observance of international law by sovereign states, the implementation or supervision of international law by international organizations, and the application of international law by dispute settlement bodies. The dualist nature of state sovereignty and its evolution reveal the realistic path for states to acquire international rights. Balanced politics between great powers effectively protect their sovereign rights and interests in the interaction between global governance and international law. Competitive and collaborative academic research and the participation and control of international organizations will enhance China's ability to settle international disputes.

4.2.1 Transformation of State Sovereignty and Rights in International Law

"*Par in parem non habet jurisdictionem*" and state sovereignty has a power attribute internally and a right attribute externally. Although sovereign states can be compared to

holders of natural rights in international law, only several great powers have *de facto* dominance in international relations. They dominate the formation of positive rules of international law and influence the efficacy of international law.[44] In different historical periods of productivity development, specific networks of social relations and its underlying elements enable great powers to instinctively transform the potential right attribute of sovereignty into the real power in international relations. Throughout the history of the rise and fall of great powers, military, economic, and soft power have in turn become the decisive factors for international empowerment of their sovereignty.[45] In international relations, power transformations of the great power's sovereignty necessarily correspond to the relativization of the sovereign rights of small states.[46] However, with the progress of human civilization, international law regulates international politics along a spiraling path. The complex interdependence of globalization, international organizations and their legal systems have gradually weakened the sovereign powers of the leading states, and it has, in turn, strengthened the sovereign rights of small states. According to the rule of sovereignty evolution under the background of globalization, China should shape the subjectivity of mankind through the conception of a Community with a Shared Future for Mankind on the basis of minimum hard power and promote the value transformation of international law through the initiative of "the Belt and Road Initiative". China's foreign policy should not only adhere to the right attribute of sovereignty to oppose international hegemony, but also promote the transformation of sovereign powers through the modernization of Confucianism, thus providing a realistic power basis for the protection of its national rights and interests.

The power transformation of a great state's sovereignty can be achieved through the interpretation and application of treaties, as well as the crystallization of international customs. In addition to the indirect impacts of international discourse power and international procedural dominance, China's primary strategy for enhancing diplomatic soft power in the operation of international law is to strengthen the competitive research on general theories of international law and the pragmatic research of think tank. Only by improving the synergistic study between international law and international politics like a hundred flowers in bloom can the diplomatic think tank draw up an effective diplomatic road map according to different treaties and specific international situations, enhance China's discourse competence in the practice of international laws, and interpret and apply treaties along a path that is conducive to protecting its national interests. At the same time, this strategy can justify favorable international customary rules and weaken unfavorable ones. The diversity of diplomatic proposals lies in the competitive and synergistic academic research, but the responsibility for prioritization is borne by the diplomats. Therefore, establishing an accountability system for diplomatic decision-making can help strengthen states' diplomatic soft power. As an "intermediary" between the study of general theories and diplomatic practice, the diplomatic think tank should (on a macro level) optimize the combination of long-term planning and short-term interests, as well as that of hard power and soft power, and maximize the protection of national rights and interests in the interaction between diplomatic games and compliance with international law. The

[44] See He Jiang, *Modern Maritime Rights in the Framework of International Law and China's Maritime Rights Protection*, 32(1) Law Review 92, 94 (2014).
[45] Id., at 95.
[46] Ibid.

advantages of authoritative international jurists and excellent diplomats rely on the collaborative and innovative education of international law and the cultivation of compound diplomats in universities.

In the diplomatic games in international relations, the strengthening of sovereign powers of larger states corresponds to the weakening of the sovereign rights of small states. Balanced power among great powers has laid the social and operational foundation of positive international law, and it is also a realistic motivation for the maintenance of world peace and security. For example, the United Nations Security Council's decision-making system in the prevention of aggression or war also amounts to the weakening of the sovereign rights of small states. Balanced politics among great powers is an objective historical stage in the development of international relations, and it has progressive significance as well as historical limitations. Balanced politics among great powers transcends hegemonic politics and power politics in perspective of democracy or rule of law. However, if it takes natural law and substantive equality of states as the starting point, balanced politics among great powers share some positive attributes of power politics, and it will reduce to hegemonic politics under some historical circumstances. Whether maintained by military power or economic strength, it is eventually impossible for the global hegemony to get rid of the security dilemma caused by the international "natural state".[47] Therefore, while instinctively pursuing national interests, a responsible great power following the historical tide should provide safety and other public goods to the international society. In other words, if great powers or hegemonic powers blindly and constantly turn the rights of small states into their own powers without shouldering any corresponding international responsibilities, such kind of diplomatic strategy is not sustainable and small states will sooner or later unite together and counterattack in group. Only by bearing the responsibility of a great power will its foreign policy be appealing and attractive, and its diplomatic soft power will grow correspondently. The conception of a Community with a Shared Future for Mankind is a Chinese solution in pursuit of peace and development as well as their interaction in the context of economic globalization. Both the Confucianism and the history of international relations indicate that the Chinese are peace-loving people. The practice of "the Belt and Road Initiative" Initiative aims to eliminate the development gap of economic globalization and achieve substantive equality of all states, thereby establishing a fair international economic order for the strengthening of sovereign rights of small states.

4.2.2 Enhancement of international dispute settlement capability: Interaction between Balanced Politics among Great Powers and International Law

In recent years, China's economic strength has grown rapidly, but disputes between China and its neighboring states have also arisen one after another. Rethinking the diplomatic practice of balanced politics among great powers and enhancing the ability to settle international disputes have become realistic considerations for the strengthening of

[47] According to the social contract theory in the context of municipal law, in order to avoid the natural state of "war of all against all", people can transfer their rights by concluding a contract to establish a "Leviathan" (that is, the state) that can protect their lives and property and provide legitimacy for it, though there is no such a "Leviathan" in the international community, and it is difficult to form a common will to establish such a super-state.

China's diplomatic soft power. According to Article 33 of the Charter,[48] there are mainly legal methods and political methods for peaceful settlement of international disputes. In other words, settling disputes through balanced politics among great powers is also an important practice for international dispute settlement. Political method is also known as diplomatic method. Both political and diplomatic behaviors are macroscopic and cross-functional, while the substantive and procedural norms of legal methods find their sources in specific international treaties or customary rules. Therefore, political methods can resolve specific international disputes through cross-domain negotiations or transactions. There is an inherent paradox for the international dispute settlement mechanism in Article 33 of the Charter, which is rooted in the dual nature of state sovereignty. Both diplomatic methods and legal methods are lawful means of dispute settlement in international law, but these two methods have no absolute exclusivity or priority against each other in practice. Diplomatic methods respect state sovereignty, while legal methods limit state sovereignty because of their supranational dispute settlement mechanisms. Great powers tend to resort to negotiation and conciliation for dispute settlement, which is mainly based on the inevitable logic of the principle of state sovereignty, that is, without the consent of the state, it is not bound by any third-party compulsory dispute settlement mechanism. However, the fact that small states prefer legal methods is also based on the principle of state sovereignty, that is, all states are equal, no matter they are large or small. Only in the international dispute settlement mechanisms will the contesting parties be truly equal; in diplomatic negotiations, the comprehensive strength is more favorable for great powers to pursue their interests. The capability of diplomatic negotiation is an important manifestation of a state's diplomatic soft power. It relies on the power of international discourse, the control of international procedures, and the ability of diplomats to apply the rules of international law. Although legal methods and diplomatic methods are procedurally opposite and contradictory, they are inseparable in the argument for substantive claims. Moreover, diplomatic negotiations always run through the mandatory dispute settlement mechanism such as that of World Trade Organization, and the consent of both contesting parties can also terminate such judicial activities at any time by diplomatic consensus.[49] In diplomatic negotiations, China should refer to international law more frequently to advocate and justify its own claims in order to enhance the persuasiveness of the negotiations, thereby more effectively protecting its national rights and interests.

"*Pacta sunt servanda*" is the "basic norm" of international law,[50] and the principle of

[48] Article 33 of the Charter provides methods for the peaceful settlement of disputes, such as negotiation, inquiry, mediation, reconciliation, arbitration, judicial settlement, as well as resorting to regional organ or regional arrangements, etc.

[49] The dispute settlement mechanism of the WTO mainly reflects the legal characteristics in terms of operational procedures. Prior to the establishment of the expert group, the diplomatic methods or political methods between the parties to the dispute have been judicialized. There is no mandatory time limit for traditional diplomatic negotiations or consultations, nor does it reflect the free will of sovereign states. However, the deadline set by the WTO dispute settlement mechanism for diplomatic negotiations and consultations, and its unique consensus-based procedures, will undoubtedly make its political methods judicial.

[50] The "basic norm" is the theoretical basis for the monistic priority theory of the international law proposed by Kelsen. He believes that the legal order is logically a hierarchical system composed of different norms. In this system, higher-level norms create lower-level specifications, and all different levels of specification end with one of the highest norms in the system. This ultimate norm is the "basic norm". See Hans Kelsen,

fulfilling international obligations in good faith is the basic principle of international law. Therefore, under the premise of accepting the compulsory jurisdiction of third parties, conforming to the historical trend of judicial settlement of international disputes is conducive to improving China's soft power and its national image. For example, in the practice of WTO dispute settlement, China has gradually developed its ability to settle international trade disputes in the process of adapting from passive response as defendant to active charge as claimant.[51] Therefore, China should improve its training mechanism of international legal talents in a proactive manner to take precautions before it is too late, thereby improving the capacity to defend its international rights. To this end, China should train a group of outstanding international civil servants and international judges, as well as renowned international lawyers, which will help to cultivate a large number of reserve talents for Chinese diplomacy to send the young talents to international organizations for internship, temporary positions, or official appointments. It will contribute to China's soft power in defending its international rights to cultivate Chinese international judges proficient in both Chinese and Western legal cultures and enhance their discourse power and initiative in international judicial institutions. Although there are many Chinese judges in major international judicial institutions, their judicial capacity is somewhat weaker than that of judges from neighboring countries, such as Japan and Thailand.[52] In various international dispute settlements, China is reluctant to hire internationally renowned lawyers to defend its external interests directly. In recent years, there have been a number of outstanding Chinese international lawyers, especially in the field of private international law and international economic law. However, for public international law, experienced lawyers with excellent foreign language proficiency are few and far between. This is out of line with China's objective need of international legal talents for its rights protection.

To cultivate excellent talents for international rights protection, and provide feasible proposals for diplomatic actions, China should strengthen the international dispute settlement capability of its legal practitioners through the synergistic education of international law and foreign languages. This includes the cognitive ability of international norms, the ability of logical reasoning in international law, and foreign language proficiency. The openness of the source of international law calls for synergistic innovation research in relevant disciplines. Compared with the United States and other Western countries, the disadvantage of China's right-protection proposal first lies in its lack of theoretical foundation, experience accumulation and long-term planning; then of synchronic overall view, diachronic sustainability, and interdisciplinary collaborative innovation, which eventually leads to its poor feasibility and effectiveness in dispute

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General Theory of Law and State (translated by Zongling Shen), China Encyclopedia Press, pp.125-127, 141 (1996).

[51] See Bo Du, *Assessment of the enforcement of the WTO dispute settlement mechanism ruling: Considerations for Compliance or Not*, 33(2) Journal of Shanghai University of International Business and Economics 1, 15 (2017).

[52] Over the past decade since China's accession to the World Trade Organization, there have been as many as 20 Chinese experts in its dispute settlement mechanism. However, Zhang Yuqing is the only person who has been appointed as an expert to hear the EU banana case, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/ai_new_dev_e.pdf (accessed on June 3, 2022). Judges from India and Japan play a more important role than Chinese judges in a large number of maritimedisputes heard by the International Court of Justice, http://www.icj-cij.org/en/list-of-all-cases (accessed on June 3, 2022).

settlement practice. As far as the level of international law study is concerned,[53] China is fully engaged in the positive study of international rules concerned and the legal claims of the contesting parties. Therefore, the strengthening of China's soft power of international right protection depends to some extent on the initiative and creative study of relevant cases, that is, the development of international soft law to justify China's diplomatic claims in the comparative study of international judicial cases. At the same time, China should also focus on the study of general theories for various international law practices, promote the solidification of relevant international customary rules through the balanced politics among great powers, and improve the subject of international law study from the hard law level, such as treaty rules to the soft law level such as international judicial rulings and potential international customs. Only in this way can China continuously strengthen its international dispute settlement capability and diplomatic soft power.[54]

5. Conclusion: Enlightenment of Primitiveness and Openness of International Law

The openness of the legal subjects and the incompleteness of its subjectivity will lead to the openness of the legal system. The primitiveness and openness of international law provide a realistic possibility for China to strengthen its diplomatic soft power. The diplomatic practice of the conception of a Community with a Shared Future for Mankind and the value of Confucian harmony is conducive to the formulation of other basic categories of international law along the path of its subject theory, thereby strengthening China's power of international discourse and the capacity of international right-formulation. From openness to closeness, the social foundation for evolution of law is its determining factor. The expansion of social relations in terms of geographical scope and professional depth will lead to qualitative and quantitative changes of legal rules. The complexity of the social relationship between the legal subjects and the degree of realization of its subjectivity determines the openness extent of the legal system. When the openness degree of the legal system is greater, the specialty of the ontology is weaker, and the development of the law depends more on the social foundation or its surrounding resources. The inverse wane and wax between the openness and closeness of international law provides China with a basis of quantitative analysis for its smart and full use of hard power and soft power. As the openness is increasingly weakened and the closeness turns out to be stronger, the proportion of soft power will gradually share the supremacy over the hard power. The openness of international law calls for correlationism study such as balanced politics among great powers, and the diachronic identification of the correlative elements along the path of subject theory, value theory, ontology theory, as well as operational theory indicates an approach to the strengthening of national soft power. The simultaneity of the openness

[53] The research level of international law can be divided into three levels. The first level is to study the international conventions of law-making nature and the basic principles of international law through the use of foreignism or legal transplantation. The second level is to take the main international treaties in specific fields as the core, study the specific rules of sectoral international law, and safeguard their legitimate rights and interests in specific disputes. The third level is to systematically study all international law cases and state practices, to create their general norms in combination with their own international interests and legal culture, or to develop basic theories of international law that can demonstrate their legitimate rights and interests from similar cases and practices.

[54] See supra note 42, at 98.

and the closeness of international law makes global governance the predominant paradigm to regulate international relations. The diplomatic game between great powers and small states and the interaction between positive international law and natural international law have both established diplomatic coordinates for China to achieve an optimized combination of hard power and soft power. Global governance is the unity of dialectical interaction between international rule of law and balanced politics among great powers. The reality of the subjectivity of great powers, small states, developed countries, and developing countries has caused the primitiveness and openness of international law, and the balanced politics between great powers have profoundly affected the operation or application of international law. As far as the maintenance of world peace and security is concerned, there is a positive interaction between balanced politics among great powers and international law. However, from the standpoint of small states, politics between great powers and international law are often opposite and contradictory. Making politics between the great powers acceptable to the international community is an important prerequisite for China to strengthen its diplomatic soft power. By fulfilling international obligations in good faith and providing international public goods to assume the responsibility as great powers, balanced politics among great powers will promote the development of positive empirical international law in reality. Meanwhile, China should improve its soft power. Otherwise, its diplomacy as a responsible great power will be misinterpreted as power politics by the international society, and China will inevitably be demonized. As a result, its diplomatic soft power will eventually be weakened.

Free Trade Agreements and China's Economic Emergence: The Chinese Perspective

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Abstract: Multilateralism and regionalism are two seemingly contradicting words. While the efforts toward multilateralism stalled, regionalism seems to prosper. China took an active part in both the global economy and regional trade, and the world has witnessed China's economy thriving since the first announcement of China's open-door policy. China's attitude towards FTAs seems to have changed radically, and the reasons driving its FTA strategy are economic development, demand for natural resources, and geopolitical considerations. Currently, China has signed FTAs with 26 countries and regions, and its FTA partners are gradually stretching from the neighboring countries to the whole world, moving from regionalism to multilateralism. Also, China devotes itself to upgrading its FTAs' content, which now involves many sensitive issues such as environmental protection, intellectual property protection, and many others. The consensus between China and its FTA partners presents a trend of "deep integration", which would finally contribute to multilateralism. China has shown the intention to move multilaterally and regionally toward international trade. It has seen FTAs as a means to achieve further integration in the international trade and investment practice and as a means to build a strong network of negotiating partners worldwide. If China continues to develop its FTAs at the same pace, it will gain a more interesting seat in international trade affairs.

Keywords: Multilateralism; Regionalism; China FTA; Deep Integration

1. Introduction

Multilateralism and regionalism are two major trends in world economic development. The main support mechanism for globalization is the World Trade Organization (hereinafter referred to as WTO), while the main support mechanism for regionalization is Regional Trade Agreements (hereinafter referred to as RTAs). Despite initial optimism, the Doha Round negotiations which represent the effort toward multilateralism stalled early in the process, as disagreements between major trading countries in the developed and developing worlds impede progress. While some issues seem to be difficult to tackle in WTO multilateral agreements due to the discrepancy between different countries, they can be easily dealt with under the regional frameworks as each country would have more discourse power in regional agreements and national conditions of neighboring regions are often similar. More and more attention has been paid to ways of regional integration nowadays, especially Free Trade Agreements (hereinafter referred to as FTAs), and these are gradually and increasingly regarded as a building block, despite debates, both in academia and practice.

Lester Thurow proclaimed that "GATT is dead"[2] and the world would shift to a tripolar system with three blocs centered on Europe, the United States (hereinafter referred

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[2] The General Agreement on Tariffs and Trade, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf (accessed on June 29, 2022).

to as the United States), and Japan, which would have free trade internally but managed trade among them.[3] Though he is pessimistic about regional economic integration, his prophecy seems to have turned into reality, and the only difference is that China replaces Japan in Asian affairs. In earlier times when TPP,[4] TTIP[5] and RCEP[6] were being negotiated, they were reshaping international trade orders. These FTAs included the world's most important economies, namely the United States, the European Union (hereinafter referred to as EU) and China. They played a pivotal role in the world especially in trade rules, also global economic and political structure. The the United States took the North American Free Trade Area (hereinafter referred to as NAFTA, which has been replaced by USMCA, signed November 2018) as the main body, and used the TPP and TTIP strategies to seek North America to Europe and even eastern Asia, and promote the goal of the "Great Western Strategy"; the EU intended to lead the TTIP to integrate with the American economy, thereby ensuring the United States and the EU absolute leadership in the world. China and East Asian countries actively conducted RCEP negotiations to enhance the level of East Asian economic cooperation, avoiding the negative impact of the initial TPP. Though the United States withdrew from the TPP under the auspices of the Trump administration and TPP evolved into CPTPP which China has applied to join, this overall pattern and the developing trend of regional economic blocs has not changed. There has been a debate between legal scholars and economists whether economic considerations are the most important factor in China's decision to pursue FTAs or the main motivation seems to have been geopolitical considerations. Today, FTAs are no longer determined merely by mutual economic benefits. Geopolitics factors such as peripheral stability are also one of the factors which propel countries to sign FTAs, and future FTA cooperation will also exist for competition for national strength.

China, which eagerly participates in and contributes a lot to the global economy, has also been a currently active member in regard of FTAs. As part of its growing influence, China has been actively engaging in the negotiation of bilateral trade and investment agreements as well as its strong participation in the world community. The establishment of the People's Republic of China (hereinafter referred to as PRC) took place in 1949. Since then, not only has China undergone an extraordinary economic and social transformation domestically, but it has also met rapid economic growth that propelled it into the position of the second-largest economy, only after the United States. Since China embarked on the reform and opening economic policy in the late 1970s, its economic development has been remarkable and astonished the world. China's open policy reflects

[3] See Lester Thurow, *Head to head: The Coming Economic Battle Among Japan, Europe, and America*, Granite Hill Publishers, p.65 (1992).

[4] Trans-Pacific Partnership, or Trans-Pacific Partnership Agreement (TPP), was a proposed trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United Statesthe United States, signed on February 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (accessed on June 29, 2022).

[5] The Transatlantic Trade and Investment Partnership (TTIP) was a proposed trade agreement between the EU and US, with the aim of promoting trade and multilateral economic growth, https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154477.pdf (accessed on June 29, 2022).

[6] Regional Comprehensive Economic Partnership (RCEP) is a free trade agreement among the Asia-Pacific nations of Australia, Brunei, Cambodia, China, Indonesia, Japan, South Korea, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand, and Vietnam, https://rcepsec.org/ (accessed on June 29, 2022).

its recognition of economic interdependence among nations and its desire to open itself to the outside world and revitalize its domestic economy by inviting foreign investment and expanding trade relations.[7] In 2020, China's share of the world economy had risen from 4% to 18%,[8] and its real Gross Domestic Product (hereinafter referred to as GDP) grew at an average annual rate of 2.3% while that of the world is suffering a -3.363% in the era of the COVID-19 pandemic.[9] China also recorded a Current Account surplus of 1.90 percent of the country's GDP in 2020,[10] and trade has been a major factor in the country's economic growth. The Chinese trade reached a total of $2.59 trillion in 2020, surpassing the $1.432 trillion figure of the United States,[11] helping the recovery and revitalization of the global economy. And today, China pays close attention to regional trade integration to help bolster exports and secure economic reforms and development.[12] There are both economic and political reasons why China engages in FTAs.[13] It is the elimination of trade tariff barriers that urges China to negotiate FTAs[14] and also the strong will to consolidate an Asian regional trading system.

China is a latecomer to RTAs but has become an active participant compared with Europe and America that have a longer experience in FTAs/RTAs. China, although it signed its first FTA in 2003, has played a significant role in the field of economic integration in the East Asia region and has posed a lot of implications for the region and beyond. Thus, it is very important not only for the Asian countries but also for other developed and developing countries worldwide to understand China's FTA strategy.

China FTA studies mostly take the form of in-detail analyses of certain FTAs, focusing on certain fields, applying different models to assess or predict certain effects on prices, trade volumes, production, consumption and welfare resulting from certain FTAs. Tuxhorn and Kim-Lee point out several supporting factors fostering Canada-China FTA.[15] Ahmed, Arsalan, Jianhong Qi, and Hassan Tahir explore the effect of the Pakistan-China FTA on the export value and dual margins of trade for Pakistan and China.[16] Heng Wang looks back on China-ASEAN FTA to find possible results of RCEP that has recently entered into force.[17] Xixiang Song and Peng Wu probe into the dispute settlement mechanism of the

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[7] See Guiguo Wang, *China's Investment Laws: New Directions*, Lexis Law Publishing, pp.1-3 (1988).

[8] See Minghao Zhao, *How the Epidemic Affects Sino-US Economic and Trade Relations*, http://chinawto.mofcom.gov.cn/article/br/bs/202002/20200202936732.shtml (accessed on Febuary 9, 2022).

[9] See World Bank, *National Accounts Data GDP Growth*, https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?name_desc=false (accessed on January 9, 2022).

[10] See Trading Economics, *China Current Account to GDP*, https://tradingeconomics.com/china/current-account-to-gdp (accessed on January 9, 2022).

[11] See World Bank, *National Accounts Data Trade*, https://data.worldbank.org/topic/trade (accessed on January 9, 2022).

[12] Ibid.

[13] See Ross P. Buckley & Vai Io Lo et al., *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements*, Kluwer Law International, p.63 (2008).

[14] See Won-Mog Choi, *FTAS and Safeguard Norms: Their Variation and Compartability*, 6(1) Asian J. WTO & Int'l Health L & Poly 81, 81 (2011).

[15] See Kim-Lee Tuxhorn, *NAFTA Renegotiations and Support for Canada-China FTA*, 26(1) Canadian Foreign Policy Journal 57, 57-72 (2020).

[16] See Ahmed & Arsalan et al., *Analysis of Pakistan–China FTA by Propensity Score Matching With Difference in Differences*, 1(7) SN Business & Economics 1, 1-29 (2021).

[17] See Heng Wang, *Building Towards the RCEP? Reflections on the ASEAN-China FTA, ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms*, Cambridge University Press, pp.18-74 (2018).

EU[18] and NAFTA to analyse CAFTA dispute settlement.[19] However, the characteristics of Chinese FTAs summarized from a certain FTA may inevitably be biased and cannot represent all FTAs in China. Recent studies also follow this path and seem to be limited in scope, merely focusing on the utilization of several FTAs and are not available to all FTAs China has signed. Also, China has added more and more content to its FTA. For this content, the existing research only selects a specific field to research, but has ignored the overall trend of development.

Relatively little research has been done concerning the whole field and developing trend of China FTAs. Agata Antkiewicz and John Whalley first conduct research on the characteristics of China's FTAs based on all the FTAs China has signed before 2005, recognizing the diversity in form and coverage of China's FTAs as one of its distinguishing characteristics.[20] However, their another conclusion that "most of the contents of China FTAs are very brief and vague, and no explicit and clear dispute resolution procedure is stipulated" is far from today's reality as these issues have improved in present China FTAs and will be detailed discussed in this article.

Existing FTA literature has not been able to provide satisfactory analysation of the reason behind China's FTA policy that fosters the formation of its FTAs when political factors are important in modern global society. Baldwin first introduces the political-economic perspective and contends that several important factors such as tariff-cut policies resulting from a high degree of interdependence have resulted in the under-utilization of FTAs in Asia, especially of China.[21] Larry Qiu and Ying Xue introduce the history of China's participation in FTAs since it joined WTO in 2001, especially how China's WTO entry influences its FTA formation.[22] Henry Gao conducts a survey introducing the evolving China's FTA web until 2011, emphasizing political considerations rather than economic factors, and counts FTAs as China's tool towards its goal of "peaceful rise", points out the paradoxical relationship between these two factors and that strategy behind China FTAs may elucidate some policy implications for other developing countries.[23] While all these studies seem to have taken political factors into consideration, China's attitude towards regionalism and multilateralism has been neglected.

What strategy has China taken, especially in the regional and global economy, that has made it so successful, judging from its shocking economic emergence? And what experience can other countries draw on? The most important question is: Is it leading China to lean towards world trade liberalization or not? These questions have not been researched in an overall view yet, to address important topics in relation to China's FTAs and to help analyse the FTA policies of China. Also, information in this regard is high timeliness as

[18] The European Union (EU), a unique economic and political union between 27 European countries, https://european-union.europa.eu/index_en (accessed on June 29, 2022).

[19] See Peng Wu & Xixiang Song, *The Dispute Settlement Mechanism of China-ASEAN Free Trade Area*, 4(5) Present Law Science 91, 91-98 (2006).

[20] See Agata Antkiewicz & John Whalley, *China's New Regional Trade Agreements*, 28(10) The World Economy 1539, 1539-1557 (2005).

[21] See Richard E. Baldwin, *Asian Regionalism: Promises and Pitfalls, East Asian Economic Regionalism: Feasibilities and Challenges*, Springer, pp.157-174 (2005).

[22] See Larry Qiu & Ying Xue, *Understanding China's Foreign Trade: A Literature Review (I),* 7(2) China Economic Journal 168, 168-186 (2014).

[23] See Henry Gao, *China's Strategy for Free Trade Agreements: Political Battle in the Name of Trade*, Edward Elgar Publishing, p.971 (2011).

China is signing more and more FTAs over time, so updating and analysing new FTAs signed by China is very necessary. This article's particular objective is to probe into the evolution of the most recent developments in China's free trade strategies from a Chinese perspective, to equip readers with a basic understanding of China's policies in relation to the concept of regionalism and FTA strategies, and to reach a conclusion whether China is developing towards a more liberal future.

The study looks at China's economic emergence since the start of China's open-door policy first announced by one of the Chinese leaders, Xiaoping Deng, in December 1978, and its positive attitude toward both multilateralism and regionalism. Analysing the policies of the Chinese government in relation to multilateral and regional trade, China has already initiated a remarkable change in its regional trade and investment policies and it has also proved its intent to actively participate in FTA negotiations. This article is divided into 5 parts. The first part introduces the topic and generates a literature review. The second part shows the overview of China's economic development, especially the formation of China FTA and contemplates its strategy to form FTAs from East Asia gradually to the whole world. The third part delves into its FTAs and finds a trend of deeper integration towards global integration while also some problems. The fourth part analyses China's economic development from a perspective of multilateralism and regionalism. The fifth part reaches a conclusion.

2. Inter-connected Open Policies: From East Asia to the World

Since the initiation of economic reforms in 1979, China has been trying different ways and evolved to develop its economy, and China has achieved great success judging from the fact that it is now the world's largest growing market as well as investment partner. China's open policy reflects its recognition of economic interdependence among nations, its desire to open itself to the outside world and its ambition to revitalize its domestic economy by inviting foreign investment and expanding trade relations.[24] China's economic development required the Chinese legal system to conform to the international system by process of selective adaptation.[25] For this reason, China has demonstrated a willingness to learn from the experience of the developed economies in respect of establishing a market-oriented economy.[26] In addition, the economic relations with foreign countries and China's accession to the WTO gradually made the Chinese market an important part of the world economy for its large population. The introduction of new market elements and the obligation on transparency after China's accession to the WTO demanded less interference by the state in the newly established investment and trade partnerships.[27]

In 2001, when China joined WTO, the Chinese government promulgated the development of a socialist legal system with Chinese characteristics to be completed by 2010. The revolutionary changes in economic policies have resulted in a boom in China's foreign trade and foreign investment within the country and China has become an active

[24] See supra note 7.
[25] See Pitman B. Potter, *The Chinese Legal System: Globalization and Legal Culture*, Routledge, pp.1-15 (2001).
[26] See Guiguo Wang, *Business Law of China*, LexisNexis, p.7 (2003).
[27] See supra note 7, at 66-69, 211-214.

international business partner.[28] The liberalization of China's domestic economic system has provided a more favorable environment for foreign investment,[29] and the result of the blooming external trade comes as no surprise.

China's decision to join the WTO in 1999 was a catalyst in its economic emergence as a powerful global partner in international trade, but it had not signed any FTA until then. China's attitude towards FTA seems to have changed dramatically during this period. By the end of 2000, China (including Chinese Taiwan, Hong Kong) along with Japan and South Korea were the only ones of the 30 leading economies in the world that were not members of any FTAs, and all these are Asian countries. In the wake of the Asian financial crisis in 1997 and 1998, China started more consistently to focus on its international foreign policies. The government not only has passed regulations to facilitate the country's economic liberalization, but also has provided incentives[30] in target businesses.[31] And only after the financial crisis in Asia in 1997 and its prolonged accession procedures to the WTO, China did begin to contemplate developing a regional economic group. In the 1990s, China took an increasingly powerful place in the Asian region both by establishing new organizations, such as the Shanghai Cooperation Organization,[32] and by actively participating in its multilateral commitments including various forms of economic liberalization.[33]

The reasons why China started its first talks on FTAs in the early 90s are owed to an array of factors. First of all, there was little interest in FTAs in the 70s and 80s. It was only in the 90s when the most important FTAs such as the EU, NAFTA, MERCOSUR and ASEAN took their form. In addition, until then, the majority of Chinese exports went to developed countries since China's export volume was low. Thus, taking the country's trade structure into consideration, China would have difficulty finding negotiating partners.[34] Last but not least, China was one of the 23 original contracting parties to the GATT in 1948 and its application for re-admission to the multilateral trading system dates in the year 1986. However, after its decision in 1949 to leave the GATT, PRC notified the GATT of its wish to resume its status as a GATT contracting party and its willingness to proceed with negotiations for its membership. A working party to examine China's status was established in 1987 and it met over 20 times but without reaching any conclusion. With the establishment of the WTO in 1995, the GATT working Party was converted into a WTO Working Party on the Accession of China, which after 18 meetings concluded the decision

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[28] See Jari E. Vepsäläinen, *Foreign Investment in the Peoples Republic of China: A Detailed Legal and Practical Analysis of Permissible Forms of Investment and Commercial Transactions*, Finnish Lawyers Publishing Company, pp.1-14 (1989).

[29] See Françoise Lemoine, *FDI and the Opening Up China's Economy*, Centre dEtudes Prospective s et dInformations Internatioales Working Papers, pp.9-30 (2000).

[30] The government uses financial as well as non-financing and fiscal incentives to encourage and guide priority OFDI projects.

[31] See Leonard K. Cheng & Zihui Ma, *China's Outward FDI: Past and Future*, http://www.nber.org/books_in_progress/china07/cwt07/cheng.pdf (accessed on January 9, 2022).

[32] See Claude Barfield, *The Dragon Stirs: China's Trade Policy for Asia and the World*, 24(1) Ariz. J. Int'l & Comp. L. 93, 93 (2007).

[33] See Jun Zhao & Timothy Webster, *Taking Stock: China's First Decade of Free Trade*, 33(1) U. Pa. J. Int'l L. 65, 65-68 (2011-2012).

[34] See Henry Gao, *China's Strategy for Free Trade Agreements: Political Battle in the Name of Trade*, http://www.networkideas.org/ideasact/dec09/pdf/Henry_Gao.pdf (accessed on January 9, 2022).

on the Accession of China in November of 2001.[35] Taking into consideration these long-lasting multilateral negotiations and China's attitude to FTAs until the early 90s, one can assume that China's non-participation in any FTAs until that time could be a strategic choice.[36] Even if China had the capacity to start FTA negotiations during the negotiations of its accession to the WTO, this could create problems and doubts about China's real motives regarding its participation in the international trade arena as there have already been great concerns concerning "China threat" as the increase in its national power. On the other hand, any interest in FTAs would cast concerns on China's commitments to the multilateral trading system and this would pose obstacles to its WTO accession process.[37]

However, important changes came in the early 1990s mainly because of the increased concern about the slow progress of China's accession to the WTO. In the mid-90s China's trade volume had increased and the emergence of regionalism was a fact. During that time, China could not ignore the slow process in Geneva, the emerging economic integration in Latin America, Southeast Asia and North America and Europe.[38] In its 9th Five-Year Plan, China made evident its will to "actively participate and develop regional economic cooperation".[39]

Following the East Asian financial crisis and China's losing faith in the International Monetary Fund and World Bank, China started considering the possibility of entering FTA negotiations by giving the same emphasis on multilateral and regional trade. As part of its efforts to participate in the global economy, China began negotiations for the development of a regional economic group with the commitment to the creation of a closer economic partnership. In November 2000, during the Fourth China-ASEAN Leadership Forum in Singapore, the then Premier Rongji Zhu proposed the establishment of a China-ASEAN FTA, which received a warm acceptance. China made its first important steps toward RTAs in 2001 when it began negotiations with ASEAN to set up a free-trade area. In 2002, a framework Agreement on China-ASEAN Comprehensive Economic Cooperation was signed and the China-ASEAN FTA[40] took effect for China and Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand in January 2010. This agreement is considered to be a milestone in the history of economic cooperation of the two entities, as it is the first FTA agreement for both.[41]

This raising interest in the path of negotiating and participating in FTAs is based on the Chinese authority's consideration that RTAs serve as a complement to the multilateral trading system. It provides China with new opportunities to gain advantages within the process of globalization.[42]

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[35] See Jeffrey L. Gertler, *What China's WTO Accession is All About*, https://documents1.worldbank.org/curated/en/578141468770462057/310436360_200503981000324/additional/298970PAPER0China010the0WTO.pdf#page=37 (accessed on April 21, 2022).

[36] See supra note 34.

[37] Ibid.

[38] Ibid.

[39] See Chinese Government's Official Web Portal, *The 9th Five-Year Plan (1996-2000)*, http://english.gov.cn/2006-04/05/content_245690.htm (accessed on January 9, 2022).

[40] See Chinese Ministry of Commerce, *China FTA Network*, http://fta.mofcom.gov.cn/topic/chinaasean.shtml (accessed on January 9, 2022).

[41] See China Daily, *Free Trade Ahead*, http://www.chinadaily.com.cn/bw/2008-06/23/content_6785388.htm (accessed on May 2, 2013).

[42] Ibid.

FTAs are a common tool to achieve regionalism[43] and to form region-wide economic areas, an objective that figures prominently in China's trade policy strategy to create a powerful Asian trading bloc by enhancing its position in Asia.[44] It is difficult for China to confirm its own position and move forward multilaterally especially if everyone else is signing FTAs and China is not. Although China has been following a multilateral approach to world trade, which is evident in its WTO negotiations and the rule-making process, China certainly does not want to be left out of the economic integration by not participating in regional agreements.

As part of China's strategy to extend its influence in the Asian-Pacific area, China joined with ASEAN in 2004 in an agreement that paved the way for establishing itself as the world's largest consumer population and demonstrated a new model of regionalism in world trade.

In January 2006 commissioner Deshui Lie of the PRC's National Bureau of Statistics announced that due to strong investments and record exports, China's economy had grown by 9.9% in 2005 and overtaken Great Britain as the fourth-largest economy in the world.[45] In 2007 China's economy had expanded at the fastest pace in 13 years at a rate of 11.4%.[46]

The "go global" policy has been highly successful as it has achieved great acceleration in China's Outward Direct Investment (hereinafter referred to as ODI). Starting with not virtually ODI in 1979, China's ODI flows have increasingly expanded in the last 25 years,[47] especially after the adoption of the Going Global policy in 2000. From 2000 to 2006, China's ODI flows rose to a level more than 19 times as large as the 2000 flow level.[48] The Going Global policy, which was also stressed in the 11th Five-Year Plan (2006-2010),[49] encouraged Chinese enterprises to take a more active part in global capital market and to invest overseas to enhance their competitiveness.[50]

Rapid economic growth and active participation in the global trade, FDI in China and Chinese investments abroad have been China's key goals for its integration with the global economy.[51] Furthermore, structural reforms including trade liberalisation as well as its effort to promote its domestic and foreign policies have led China to increase its use of FTAs.

In recognition of the global trend toward the coexistence of multilateral, regional, and bilateral arrangements,[52] Chinese leaders decided in 2007 to accelerate implementation of

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[43] See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49(2) Harvard International Law Journal 323, 331-332 (2008).

[44] See Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11(2) Chi. J. Int'l L. 597, 597 (2010).

[45] See Lutz-Christian Wolff, *Mergers & Acquisitions in China: Law and Practice*, CCH Limited, p.1 (2008).

[46] Ibid.

[47] See Andreas Lunding, *Global Champions in Waiting, Perspectives on China's Overseas Direct Investment*, https://www.finanzaonline.com/forum/attachments/messaggi-archiviati-fol/609608d1155396663-il-trend-16-6-06-a-prod0000000000201318.pdf (accessed on January 9, 2022).

[48] See supra note 30, at 66.

[49] Id., at 83.

[50] See Mitchell Silk & Richard Malish, *Are Chinese Companies Taking over the World*, 7(1) Chi. J. Int'l L. 105, 112 (2006-2007).

[51] See Alan Beebe & C. Hew et al., *Going Global-Prospects and Challenges for Chinese Companies on the World Stage*, IBM Institute for Business Value-School of Management at Fudan University, p.1 (2006).

[52] See Guiguo Wang, *China's FTAs: Legal Characteristics and Implications*, 105(3) Am. J. Int'l L. 493, 493 (2011).

the strategy of building free trade areas and promoting infrastructure connectivity with neighboring countries.[53] This free trade area strategy, which was for the first time officially established by China in 2007, was also set as one of China's national strategies for economic development in 2012.[54]

China's FTA strategy has been seen as an alternative avenue to China's peaceful rise by the Chinese leaders. During the 18th Party Congress, which was held in November 2012, Chinese leaders strengthened the importance of China to develop socialism with Chinese characteristics through creative practices.[55] The Chinese economy has developed steadily and rapidly, and China's overall national strength has grown considerably. For this reason, China in order to enhance its economic structural reforms and adopt a sustainable growth model has to increase the vitality and competitiveness of its economy.[56]

Overall, China was a latecomer to FTAs, which may be a result of the fact that China has benefited a lot and deeply believes in multilateralism before it has become an active participant then as it realized its importance. China has developed an export-oriented strategy at that time and was eager to participate in the global division of labor system, emphasized the importance of WTO and strived to join the WTO family. At that time, China had not signed any FTA agreement with other countries. And with the China-ASEAN FTA as a starting point, China has concluded the two Closer Economic Partnership Arrangements (hereinafter referred to as CEPA) with Hong Kong, China[57] (signed June 2003, entered into force January 2004) and Macau, China[58] (signed October 2003, entered into force January 2004). The CEPA with Hong Kong is the first RTA between two customs territories of one country to be created under the framework of the WTO and it provides for a zero-tariff application to 1,263 products (from January 2006). Similarly, the CEPA with Macau also provides for a zero-tariff application to 1,215 products from January 2006, for which consultations on Rules of Origin have been completed.[59] China has notified the WTO of its involvement in 11 FTAs/RTAs while it is in negotiation proceedings with several other countries including Australia, Norway, etc. China has also concluded an FTA with Chile (November 2005),[60] Pakistan (November 2006),[61] New Zealand (April 2008),[62] Singapore (October 2008),[63] Peru (April 2009).[64]

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[53] See China Daily, *Full Text of Hu Jintao's Report at 17th Party Congress*, https://www.chinadaily.com.cn/china/2007-10/24/content_6204564.htm (accessed on January 9, 2022).

[54] See Xinhua News, *Hu Jintao's Report at 18th Party Congress*, http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_2.htm (accessed on January 9, 2022).

[55] Ibid.

[56] Ibid.

[57] See Chinese Ministry of Commerce, *Mainland and Hong Kong Closer Economic and Partnership Arrangement*, http://fta.mofcom.gov.cn/topic/enhongkong.shtml (accessed on January 9, 2022).

[58] Ibid.

[59] See World Trade Organization, WT/TPR/S/264/Rev.1, p.201.

[60] See Chinese Ministry of Commerce, *China-Chile FTA*, http://fta.mofcom.gov.cn/topic/enchile.shtml (accessed on January 9, 2022).

[61] See Chinese Ministry of Commerce, *China-Pakistan FTA*, http://fta.mofcom.gov.cn/topic/enpakistan.shtml (accessed on January 9, 2022).

[62] See Chinese Ministry of Commerce, *China-New Zealand FTA (including upgrade)*, http://fta.mofcom.gov.cn/topic/ennewzealand.shtml (accessed on January 9, 2022).

[63] See Chinese Ministry of Commerce, *China-Singapore FTA*, http://fta.mofcom.gov.cn/topic/ensingapore.shtml (accessed on January 9, 2022).

[64] See Chinese Ministry of Commerce, *China-Peru FTA*, http://fta.mofcom.gov.cn/topic/enperu.shtml (accessed on January 9, 2022).

China has also signed three new FTAs since 2009, i.e., the FTA with Costa Rica (signed April 2010, entered into force August 2011),[65] the Cross-Straits Economic Cooperation Framework Agreement,[66] and the FTA with Iceland (signed April 2013).[67] With the development of its economy, China further signed a few new FTAs with Switzerland (signed July 2013),[68] Korea (signed June 2015),[69] Australia (signed June 2015),[70] Georgia (signed May 2017),[71] Maldives (signed November 2017),[72] Mauritius (signed October, 2019),[73] Cambodia (signed October, 2020),[74] and signed Regional Comprehensive Economic Partnership (hereinafter referred to as RCEP, signed November 2020)[75] afterward.

As of January 2022, China has signed FTAs with 26 countries and regions, and it is in the process of negotiations with numerous other countries including the Gulf Cooperation Council (hereinafter referred to as GCC), Japan, Korea FTA, Sri Lanka, Israel, Norway, Moldova, Panama, Palestine and others while there are also more FTA considerations.[76]

With several FTAs behind its belt and more to come, China's FTA strategy including its negotiating approach has become an increasingly interesting field for research. Chinese officials and legal scholars have regarded China's attitude toward regionalism to be dominated by the desire for the promotion of a peaceful international and regional environment. The idea for a free trade area strategy, which was officially adopted in 2007, was established by China as "a national strategy for economic development".[77] The reasons why China engages in FTAs and how it selects its negotiating partners make the study of China's FTAs more attractive, which could be categorized in three general perspectives: economic development, demand for natural resources and geopolitics. Apart from their diversity and flexibility in terms of coverage, content and approaches, China's existing FTAs share certain similarities and common strategies.

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[65] See Chinese Ministry of Commerce, *China-Costa Rica FTA*, http://fta.mofcom.gov.cn/topic/encosta.shtml (accessed on January 9, 2022).
[66] See supra note 59, at 203.
[67] See Chinese Ministry of Commerce, *Iceland's Ministry for Foreign Affairs*, http://www.mfa.is/media/fta-kina/China_fact_sheet_enska_15042013_Final.pdf (accessed on January 9, 2022).
[68] See Chinese Ministry of Commerce, *China-Switzerland FTA*, http://fta.mofcom.gov.cn/topic/enswiss.shtml (accessed on January 9, 2022).
[69] See Chinese Ministry of Commerce, *China-Korea FTA*, http://fta.mofcom.gov.cn/topic/enkorea.shtml (accessed on January 9, 2022).
[70] See Chinese Ministry of Commerce, *China-Australia FTA*, http://fta.mofcom.gov.cn/topic/enaustralia.shtml (accessed on January 9, 2022).
[71] See Chinese Ministry of Commerce, *China-Georgia FTA*, http://fta.mofcom.gov.cn/topic/engeorgia.shtml (accessed on January 9, 2022).
[72] See Chinese Ministry of Commerce, *China-Maldives FTA*, http://fta.mofcom.gov.cn/topic/enmaldives.shtml (accessed on January 9, 2022).
[73] See Chinese Ministry of Commerce, *China-Mauritius FTA*, http://fta.mofcom.gov.cn/topic/enmauritius.shtml (accessed on January 9, 2022).
[74] See Chinese Ministry of Commerce, *China-Cambodia FTA*, http://fta.mofcom.gov.cn/topic/encambodia.shtml (accessed on January 9, 2022).
[75] See Chinese Ministry of Commerce, *Regional Comprehensive Economic Partnership*, http://fta.mofcom.gov.cn/topic/enperu_recp.shtml (accessed on January 9, 2022).
[76] See Chinese Ministry of Commerce, *China FTA Network, China's Free Trade Agreements*, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (accessed on January 9, 2022).
[77] See supra note 52, at 493.

In relation to the economic considerations for China to negotiate and sign FTAs, economic considerations are one of the primary purposes for China to engage in such agreements. China is a country with a strong economy and a demanding need to expand its trade volume abroad as well as to enter multiple export markets. It also has a demanding need to attract foreign investments and foreign capital as well as to develop its outward investment policies. All these concerns are behind the general policies the Chinese government adopts as a strategic motivation to enter and negotiate FTAs with developed and developing countries. In general, the Chinese government is in support of the general scope of FTAs, and it aims at further eliminating tariffs, import quotas and preferences on the majority of the goods and services traded among economies that have signed it as well as creating new business and investment opportunities. In fact, most of the country's FTAs have promoted bilateral and multilateral trade between trading and negotiating partners. Taking into consideration the acceleration of economic globalization and the integration of the world market, the enhancement of economic interdependence among countries and regions and the development of regional economic cooperation and trade liberalization, the Chinese government actively boosted the construction of FTA. China has established an FTA network "covering three continents and owning a population of 2.18 billion".[78] In the year 2010, this network for free trade, "with the GDP of US$7.44 trillion, respectively accounted for 19.3% of China's foreign trade, 56.3% of China's overseas investment and 56.4% of foreign investment in China".[79]

On the other hand, the Chinese free trade strategy is also driven by increased demand for energy and raw material resources.[80] China's rapid economic growth during the past years has increased the country's demand for natural resources and has created the need for expansion and openness to new markets. Rapid urbanization along with an aggressive domestic economy as well as an increasing demand for oil and natural gas, raw materials and foreign capital is important key driver for Chinese investors and the Chinese government to seek new markets abroad.[81] Accordingly, Chinese officials seem to have had a strategic plan in choosing their negotiating partners and the regions with which the Chinese Government, finally, signs its FTAs. Nowadays, China is the world's largest importer of oil while a few years ago it was East Asia's largest oil exporter.

Energy and other natural resources are essential for economic development, and achieving a stable, sustainable supply has been regarded as an essential factor in China and other countries.[82] In general, China is usually pushing its FTA partners to negotiate on supply resources issues and it is accepted that the FTAs with Australia, the GCC, Chile, ASEAN, and the South African Customs Union (hereinafter referred to as SACU) are all obviously aimed at obtaining resources.[83]

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[78] See Chinese Ministry of Commerce, *Vice Minister Yi Xiaozhun's Speech in China-New Zealand FTA Workshop*, http://fta.mofcom.gov.cn/enarticle/ennewzealand/ennewzealandnews/201007/3095_1.html (accessed on January 9, 2022).

[79] Ibid.

[80] See Robert D. Kaplan, *Geography of Chinese Power: How Far Can Beijing Reach on Land and at Sea?*, 89(3) Foreign Affairs 22, 22 (2010).

[81] See David Zweig & Jianhai Bi, *China's Global Hunt for Energy*, http://china.lbl.gov/publications/evaluation-China's-energy-strategy-options (accessed on January 9, 2022).

[82] See supra note 52, at 507.

[83] See Jiang Yang, *China's Free Trade Agreements: Domestic Constraints and International Learning*, http://www.wasedagiari.jp/sysimg/imgs/200808si_15_yang_paper.pdf (accessed on January 9, 2022).

However, China's trading and ODI interest are not only limited to the hunting of natural resources. Chinese enterprises are interested in a much wider range of industries than just energy.[84] According to the 2008 OECD Investment Policy Review, Chinese ODI projects are mainly driven by five major motivations, namely projects seeking natural resources, product markets, diversification projects as well as projects seeking strategic assets and efficiency.[85] This could pose one more motivation for the Chinese Government when participating in FTA negotiations to ask for a broader content of its FTAs regarding the agreements covered areas.

Based on China's FTAs' general strategies, geopolitics is also an important perspective for China to negotiate and engage in FTAs. China's economic emergence in the last few years and its development as the second-largest economy in the world, has created many concerns among its neighbors. However, China following its model for "peaceful" development has seen regional agreements as a means to achieve further integration and create a friendly environment in the Asian region. Thus, the conclusion of the FTA with ASEAN has been a catalyst for China's further economic development in the region.

By implementing its FTA strategy, China has concluded FTAs, or entered negotiations, with countries in the six continents of the world including Europe (Iceland and Norway), North America (Panama), South America (Chile, Peru and Costa Rica), Africa (SACU), Asia (GCC, Korea, HK, Macau, ASEAN, Singapore, Pakistan and India), and Oceania (New Zealand and Australia). China's selection of trading partners also indicates the country's strategy to actively participate in the development of regional arrangements as well as to obtain trading partners in strategic geographical areas for its economic and political benefits.

As developed countries have stronger economic power, one could expect that China is more willing to engage in trade activities and free-trade negotiations with developed countries. However, practice shows that by taking into consideration existing China's FTAs, only three have been signed with developed countries, namely with New-Zealand, Singapore and Iceland. The majority of China's FTAs are with developing countries with strategic geographical positions. This practice could be based on the Chinese government's consideration to choosing smaller sized economies for FTA negotiations not only because negotiations with developed countries could be proved harder and more complicated but also China has no experience in FTA negotiations previously. China is comparatively a new player in the field of FTAs and knows that FTA negotiations with developed countries could more likely lead to comprehensive terms of agreement to include trade in goods, trade in services and others.[86] Since China is facing the danger of a trade war due to industrial upgrading and other contradictions, it is even more necessary to find allies that it can form extensive cooperation with.[87]

Similarly, China's demand for its recognition as a "market economy" by its FTA partners, a prerequisite that can be found in all its existing FTAs, is also hidden behind the

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[84] See Kenny Zhang, *The Why, When, Where and How of Chinese Companies Outward Investment Intentions*, The Asia Pacific Foundation of Canada, p.26 (2005).

[85] See supra note 30, at 93-102.

[86] See Junji Nakagawa & Wei Liang, *A Comparison of the FTA Strategies of Japan and China and Their Implications for Multilateralism*, http://www.indiana.edu/~rccpb/Working_Paper/Liang%20Nakagawa%20RCCPB%2011%20FTAs%20PUB.pdf (accessed on January 9, 2022).

[87] See Huang'an Fu & Xiaofu Li, *New Changes in the Sino-US Trade War and China's Legal Response*, 11(2) Journal of WTO and China 108, 125 (2021).

official line of China's FTA strategy. China's increasingly active participation in FTAs reflects the country's strategy to involve in international economic relations and international economic affairs as well as to slowly achieve recognition from other WTO members as a market economy. What is also noticeable is that there is still no FTA signed between the EU and China today, which is surprising as the cumulative EU Foreign Direct Investment (hereinafter referred to as FDI) flows from the EU to China over the last 20 years have reached more than €140 billion. For Chinese FDI into the EU the figure is almost €120 billion. EU FDI in China remains relatively modest with respect to the size and the potential of the Chinese economy.[88] It has long been expected that China and the EU will commence trade negotiations, but it hasn't become a reality. From this, China's consideration is more than economic reasons or resources can be seen clearly, for that even though the EU is a main investment partner, China still won't sign FTA when potential problems seem huge. China has obtained recognition as a market economy by all its FTA partners but not from its major trading partners such as the United States, the EU and Japan. China chooses its FTA partners carefully, and in relation to China's demand to be recognized as a market economy, this is one of the factors or strategies that China takes into consideration before entering into FTA negotiation proceedings. China indeed seeks to obtain recognition of market economy status from FTA partners. China has seen FTAs as an effective means in order to seek market economy status recognition from individual countries, which is usually a precondition to starting FTA negotiations.

Nevertheless, China hopes that more developed countries and WTO members will recognize its market economy status, and this will be crucial for its status in the WTO and it will further prevent WTO members' actions to filing anti-dumping suits against China. When Deng Xiaoping announced China's open-door policy in the late 1970s, no one expected that the country would take steps to reform its planned economy to a market economy recognized by openness and integration.[89] With its membership in the WTO and in other major world and regional organizations, China has transformed into an important part of the world trade community. China agreed to be labeled as a non-market economy until 2016, and after that, China's leadership has long been pursuing that recognition as a "market economy", and China's conclusion of FTAs is a sign that it has gained the confidence to participate in international trade and international investment relations and that it is willing to promote regionalism in parallel with multilateralism in order to expand its foreign and domestic policies.

In general, China's FTA strategies are driven by various considerations, namely its economic considerations, demand for natural resources and geopolitics factors, and nobody can explain or understand China's FTAs policies by ignoring the Chinese perspective behind China's FTA strategy. In practice, although the main purpose of FTAs is to promote free trade, countries do not engage in FTAs by only expecting the advantages of free trade, but it is a mere fact that FTAs have a wider impact. In relation to China, it is commonly accepted that the Chinese State has strong interest in forming FTAs for politico-strategic and economic reasons. China is a country that demands trade liberalization in the

[88] See Sophie Dirven, *Key Elements of the EU-China Comprehensive Agreement on Investment*, https://ec.europa.eu/commission/presscorner/detail/es/ip_20_2542 (accessed on January 9, 2022).

[89] See Yongnian Zheng, *Globalization and State Transformation in China*, Cambridge University Press, p.1 (2004).

international trade and investment environment as well as a country that keeps the strategy for "peaceful" expansion and development in the Asian region and worldwide.

It can be concluded from the fact that the promotion of China's FTA strategy is prudent, first based on neighboring countries and regions, laying a solid foundation, and the scope is gradually expanded. From the chronological order of China's FTA negotiation, it can be discerned that when considering the partners of the FTAs, the first consideration is Hong Kong and Macau, ASEAN, and then expand to Singapore, Pakistan and other countries in Southeast Asia and South Asia, from Asia to Oceania, Latin America, Europe and North America.

Also, viewing from the perspective of the type of countries that China has signed FTAs with China mainly preferred developing countries at the beginning and subsequently turned to many other developed countries. It has changed from signing South-South FTAs to signing both South-South and North-South FTAs.

It seems that China is gradually transforming from a bilateral perspective to a multilateral perspective. The most recent FTA entered into force is RCEP, on January 1, 2022, receiving extra attention from the world in the post-COVID-19 era. Launched in 2012 by ASEAN and substantially concluded in November 2019, RCEP went through 31 rounds of negotiations for eight years. In November 2012, leaders of ASEAN and its free trade partners, including China, released the Joint Declaration of Launching RCEP Negotiations, putting forward the goal of reaching agreement in 2015, and the negotiations were officially launched henceforth. On November 15, 2020, RCEP was officially signed in the presence of Chinese Premier Li Keqiang and the leaders from Japan, ROK, Australia, New Zealand and 10 ASEAN countries.[90] At the opening ceremony of the RCEP online training program organized by The Ministry of Commerce of the PRC (hereinafter referred to as MOFCOM), Minister Wang stressed the need to fully recognize the strategic, historical and practical meaning of RCEP in terms of advancing the overall economic and social development, while bearing in mind the profound global changes unseen in a century and the great rejuvenation of the Chinese nation. "Taking RCEP as an opportunity, we should advance high-level opening-up, boost regional trade and investment, keep industrial and supply chains stable, and foster new strengths in international economic competition and cooperation. The comprehensive effects of RCEP should be maximized. In conjunction with relevant authorities, commercial departments at all levels should take full account of regional development strategies and real needs and align RCEP with Belt & Road cooperation, and with the development of their own working fields in their own regions, so that all market players could be fully involved in the huge market of RCEP. Meanwhile, promotion and training programs should be proceeded to deliver more benefits of RCEP to businesses on a broader scale."[91] All these speeches show China's positive attitude towards RCEP, and during the whole process of negotiation, China devoted itself to discussions to promote RCEP to come into reality, together with ASEAN and other partners.

China will use the regional RCEP to cement its dominance in the Asia-Pacific region. RCEP serves as a good opportunity for China, because it not only fulfills China's strong

[90] See Chinese Ministry of Commerce, *Minister Wentao Wang Delivered Video Remarks at the Opening Ceremony of the RCEP Online Training Program Organized by MOFCOM*, http://fta.mofcom.gov.cn/enarticle/enrelease/202101/44358_1.html (accessed on January 9, 2022).
[91] Ibid.

will to consolidate an Asian regional trading system, but also improves the relationship among all the member countries, contributing to peace in Asia. RCEP is also of huge importance to Asia, because it would be helpful to eliminate the Spaghetti Bowl Effect, a term coined by Bhagwati in 1995 to illustrate the phenomenon that the increasing number of FTAs between countries would affect their trade relations, a side effect that has already gradually emerged in Asia during the past years. It is not merely an attempt to solve the current problems existing in Asia's economic cooperation, but also aims at extending the existing regional cooperation framework. It is a comprehensive agreement that covers trade in goods, services trade, investment, economic technology, cooperation, intellectual property rights, e-commerce and other fields.

RCEP has also provided a meaningful pattern for regional and even multilateral negotiations, The path offered by RCEP would contribute to the development of multilateralism. In its provisions, it provides those less developed countries with flexible choices to make specific strategies tailored to them. It involves many countries now in totally different stages of development and found a way to reach an agreement on all those tough issues.

Another important fact is that China has submitted its CPTPP application on September 16, 2021, after two years of signalling its interest in joining the pact. The predecessor to the CPTPP is the TPP, which at first has been regarded as a tool for the United States to affirm its place in the world trading system and to confront a rising China. However, the United States formally abandoned the TPP in January 2017 because of some domestic political factors. This suggests that China is not only satisfied with signing FTAs with its previous trade partners and neighboring countries but also seeks cooperation with more countries, and to expand its influence over the world. China is transforming from a regionalism perspective toward a multilateralism one.

Moreover, China is a country that has consistent economic policies. China FTAs and Belt & Road cooperate with each other to form an all-around pattern of China's opening to the outside world.[92] China has an overall consistent economic foreign policy, and its FTA strategy is inter-connected with its other policies. It aims to actively develop economic and trade partnerships with countries along the route and seek common development and prosperity in the international environment of mutually beneficial cooperation. Its economic policies would bring far more benefits, which would likely raise functions of free convertibility, trade, circulation, and reserve of China's currency, RMB, in a geographical area. Currently, it does not specifically refer to the currency integration of RMB in the Asian region, still, it refers to the long-term cooperation between RMB and currencies in the region and competition to become a key currency in the region and play the function of a key currency in regional even gradually into global finance and trade. China seems to use FTAs as a tool to develop, with its partners expanding from East Asia to the world.

3. Trend of Being in line with the Global Society through Deep Integration

[92] See Qinghe Luo & Jing Zeng, Research on the "One Belt and One Road" and China Free Trade Area Construction, 32(1) Regional Economic Review 40, 40-46 (2016).

There are four different stages of economic integration. The first is an FTA, then a Customs Union (hereinafter referred to as CU), then a Common Market, and finally an Economic Union.[93] FTA represents the most basic form of regional economic integration, which is a commitment to remove tariffs across certain member countries, while having independent external tariffs.

The term "deep integration", first raised by R.Z. Lawrence, is a concept as opposed to "shallow integration". He believes that the elimination of border barriers such as tariffs and quotas and the realization of cross-border trade is "shallow integration", while "deep integration" eliminates other laws or policies hindering cross-border trade.[94] As to the definition defined by Bernard Hoekman and D.E. Konan, "deep integration" means explicit government actions to reduce the market-segmenting effect of domestic regulatory policies through coordination and cooperation and is becoming a major dimension of some regional integration agreements led by the EU.[95]

Throughout the history of global economic growth, the deepening of the international division of labor and the degree of interdependence of the economies of all countries over the world fostered global trade liberalisation. While in today's world, as regional cooperation thrives, it seems that a trend of deep integration emerges in the most basic form of regional economic integration FTA. Governments are signing FTAs all over the world, trying to reach a consensus on certain issues concerning laws or policies either to further ensure the prosperity of cross-border trade or due to some other political reasons. Among those FTAs signed, formed are not only deeper economic cooperation but also some basic form of global consensus on some high-sensitive issues such as environmental standards, intellectual property rights, agriculture, labor, competition policy and others, which require a high level of compromising. Developed countries sometimes use their advantages on these issues as a means to expand their political influence, but it is undeniable that since developed countries have paid attention to these areas earlier, the rules they gradually formed in their practice have become some kind of reference for other latecomers. Also, their progress of standard formation in these areas more or less symbolizes the trend of development compared to those less-privileged developing countries. It can be perceived that the characteristics of provisions of FTA concerning these areas are becoming more and more converging, and when the regional cooperation achievement is leaning towards a global standard, it seems that the destination of deep integration would be globalization. By tackling these global issues properly, sustainable global development will be achieved. Globally, there are three types of practices of regional economic integration: North-North, North-South, and South-South.[96] Overall, this trend of deep integration is more pronounced in FTAs signed between North-North and North-South countries, and less visible between South-South countries.

The FTAs signed by China show its effort toward the trend of deep integration in general, and this trend is more evident in its updated FTAs. China has upgraded several

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[93] See Bela Balassa, *The Theory of Economic Integration*, Routledge Revivals, p.173 (2011).

[94] See Robert Z. Lawrence, *Regionalism, Multilateralism, and Deeper Integration*, https://www.brookings.edu/book/regionalism-multinationalism-and-deeper-integration/ (accessed on January 9, 2022).

[95] See Bernard M. Hoekman & Denise Eby Konan, *Deep Integration, Nondiscrimination, and Euro-Mediterranean Free Trade*, World Bank Publications, p.171 (1999).

[96] See Yan Dong & Weijiang Feng et al., *Deeper Intergration: New Trend in the Strategy for China's Free Trade Area*, 18(4) Journal of contemporary Asia-Pacific Studies 110, 110-136 (2009).

FTAs signed earlier in recent years, such as China-New Zealand FTA, China-ASEAN FTA, China-Chile FTA, China-Singapore FTA. And also, China-Pakistan FTA is now in the second phase. Signing the Upgrade Protocol is an important move to "adopt a strategy to upgrade FTAs and build an open and high-standard FTA network" and seems an action toward deep integration, which is elevated to the goal put forward at the 5th Plenary Session of the 19th Central Committee of the Communist Party of China. Take the China-ASEAN FTA Upgrade, signed in 2015 as the first upgrade agreement of China, as an example. Its development goals would further accelerate the construction of closer regional economic integration. It covers a wide range of areas including goods, services, investment, economic and technological cooperation, future work plans, etc. The original Rules of Origin stipulated that the regional value component shall not be less than 40% of the total value of the product, which was simple and strict. While according to the new stipulations, the upgrade protocol enriches the original agreement and adds several new standards, change in tariff classification and De Minimis Standard, lowering the threshold to apply the Rules of Origin. The procedure process has also been improved, and the number of the required copy files is cut down from 3 to 2. The deadline and retention period for the submission of the certificates of origin to customs have been prolonged. A considerate interim arrangement for the smooth and stable implementation of the new Rules of Origin is also made.[97] Higher level of economic cooperation can be seen by cutting and removing tariff and non-tariff barriers, such as customs procedures and trade facilitation, which weren't included in the former agreement, is also taken into consideration. In the aspect of trade and services,[98] the third package of specific commitments of each party is now combined as an integral part of the TIS Agreement. The open areas of the service sector are expanded. China commits further improvements in the sectors of engineering services, securities, construction and engineering, general engineering, tourism, etc. The ASEAN countries also made a higher level of commitments to China concerning commerce, construction, transport, communications, finance, environment, education and tourism. New regulations substitute for the old ones, stating the methods to combine each party's force, aiming at the promotion and facilitation of investment, enhancing the liberalisation and facilitation of bilateral investment level.[99] Basic principles, new areas, resources, and implementation of economic, technical cooperation under the framework, also e-commerce are listed in the protocol.[100] Considering that many countries participated in the China-ASEAN FTA Upgrade, also their varying national conditions, a grace period is given, in the chapter of Future Work Programme, to allow all parties to negotiate within a period of time from the date when the agreement entered into force, and find a way which is suitable for their own national conditions.[101]

The upgrade version also represents a transformation towards "deep integration", showing that China's concern has changed from promoting simple measures such as removing tariffs to deeper economic cooperation, as nearly all of these upgraded new chapters concern Rules of Origin, electronic commerce, competition, environment and trade, and some product specific rules. In contrast to former signed FTAs, China's FTAs

[97] See China-ASEAN FTA Upgrade, Annex 1.
[98] Id., at Chapter 2.
[99] Id., at Chapter 3.
[100] Id., at Chapter 4.
[101] Id., at Chapter 5.

expand their scopes and are no longer limited to trade in goods and services. Today's FTA negotiation content is gradually expanding, not only involving trade in services and investments, but also including environmental standards, intellectual property rights, agriculture, labor, competition policy and other sensitive areas. While WTO members always fail to reach a consensus on these issues due to different levels of economic development, social systems and cultural backgrounds between developed countries and developing countries, FTA members are more likely to reach an agreement on sensitive issues because there are fewer participants and more fully consultations.

Many environmental problems exist in the progress of trade. As environmental concerns are an important part of global development, it is a global trend to be expected that FTA would regulate the environmental issues. Compared to other environmental treaties that may be vague, FTAs usually have a specific dispute settlement mechanism. So environmental clauses in FTA are more enforceable once a country fails to fulfill its responsibilities in this regard. Also, FTA highly concerns a country's own welfare, so every country would treat it seriously. NAFTA was the first to state environmental provisions among all FTAs, which introduced environmental issues into the framework of FTA. It includes environmental protection in three places: First in its preamble, it points out a consensus of the parties to dedicate themselves to combining economic development goals with environmental protection. Secondly, it clearly but flexibly stipulates clauses of environmental standards, aiming at higher environmental standards than international standards but endows the parties the right to determine the level of environmental protection according to their own national conditions. Thirdly, in Chapter 11 Investment, the "Environmental Exception" Clauses and the "No Lowering of the Standards" clauses are also stipulated. Fourthly, a subsidiary agreement concerning environmental problems is signed, namely the North American Agreement on Environmental Cooperation, which further complements NAFTA's environmental provisions. After NAFTA, the United States always adds environmental clauses to varying degrees when signing FTAs with other countries, and other countries have also followed this trend to add environmental problems to their own FTA considerations. Even if the emphasis on environmental protection differs from country to country, it has also become an international trend to introduce environmental protection issues into FTAs. China's FTA content concerning environmental problems reflects China's increasing emphasis on the environment, which fits into this world trend.

In the aspect of environmental issues, there are ways in which the environmental problem is concluded in China FTAs, according to different levels of emphasis on environmental issues. The first level is to refer to environmental protection in the "Preamble" and "General exceptions" parts. For instance, environmental problems are pointed out in the "Preamble" of China-Pakistan FTA. "Recognizing that this agreement should be implemented with a view toward raising the standard of living, creating new job opportunities, and promoting sustainable development in a manner consistent with environmental protection and conservation; and committed to promoting the public welfare within each of their countries."[102] And in China-Costa Rica FTA mentions environmental problems in Chapter 15 "General exceptions". "The Parties understand that the measures referred to in Article XX (b) of GATT 1994 include environmental measures necessary to

[102] See China-Pakistan FTA, Preamble.

protect human, animal, or plant life or health, and that Article XX (g) of GATT 1994 applies to measures relating to the conservation of living and nonliving exhaustible natural resources, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in goods."[103] This kind of stipulation is seemingly vague, and only expresses a positive attitude, rather than measures at the practical level, but they are also the most common, which can be seen in China-ASEAN FTA, China-Chile FTA, China-New Zealand FTA, China-Singapore FTA, China-Iceland FTA, China-Switzerland FTA, RCEP and others. It already exists in earlier FTAs China signed, and these FTAs are mostly signed with "Southern" countries. At that time, China seems to be cautious when talking about environmental problems, obviously paying little attention to environmental issues and focusing on trade-related issues.

The second level is environmental clauses scattered in other chapters. In China-Chile FTA, in the Chapter of Cooperation there is a clause stating that "The Parties shall enhance their communication and cooperation on labor, social security and environment through both the Memorandum of Understanding on Labor and Social Security Cooperation, and the Environmental Cooperation Agreement between the Parties."[104] In China-Singapore FTA, economic cooperation is deeply connected with environmental concerns. "Noting that the flagship Sino-Singapore Tianjin Eco-city project is another key step forward in bilateral cooperation in regional development, both Parties agree to work closely with a view to developing the city as a model for sustainable development and enhance cooperation in areas including environmental protection and resource and energy conservation."[105] Also, some clauses exempt possible liability due to environmental objectives. Especially in the case of "expropriation" in investment, the Annex of China-Chile FTA states that "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[106] As is stated in China-Singapore FTA, "Each Party shall allow at least sixty (60) days for the other Party to present comments in writing on any notification except where considerations of health, safety, environmental protection or national security arise or threaten to arise to warrant more urgent action." Environmental protection is one of the reasons for using interim measures. This kind of environmental provision also exists in China-New Zealand FTA, China-Iceland FTA.

And the third level is to set up a special chapter on environmental problems, which shows a high concern for environmental problems. China-Switzerland FTA is the first to set a chapter especially for environmental issues. It detailedly discusses multilateral environmental agreements and environmental principles, promotion of the dissemination of goods and services flavoring the Environment, cooperation in international fora, bilateral cooperation, resources and financial arrangements, implementation and consultations. Also, in China-Georgia FTA and China-Korea FTA, there exists a chapter named "Environment and Trade". It is noticeable that it is clearly stated in all these agreements that the issues concerning environmental problems can not resort to dispute settlement mechanism.

[103] See China-Costa Rica FTA, Article 159.
[104] See China-Chile FTA, Article 108.
[105] See China-Singapore FTA, Article 87.
[106] See China-Chile FTA, Annex 1.

Considering all the FTAs currently signed by China, the first level exists in the earliest FTAs formed by China, the second level is mostly seen in the FTAs signed in former times, while the third level is exactly the form most of China's recently signed FTAs have. It can be deduced that China has gradually moved from the first level towards the second level, then to the third level, showing its increasing concern for the environmental topic. Environmental protection has changed from a seemingly vague slogan presented in the first level, to certain enforceable standards and requirements in the third level, though there still leaves room to be improved by ways of further specifying the statutes, in order to effectively put them into practice.

Similarly, there are different forms of China's FTA regulations on intellectual property. One of them is to scatter these contents in other chapters, such as in China-Chile FTA. And the other kind is to make provisions in special chapters, and nearly all the FTAs signed in most recent years have an independent chapter of intellectual property except the China-Cambodia FTA, which shows more attention intellectual property problems have received.

In the aspect of intellectual property, the Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement (hereinafter referred to as TRIPs) plays a role in regulating and guiding China's intellectual property field as a WTO member. TRIPs is almost the lowest standard for intellectual property rights as it was born from compromises of all participating country, which also means that the improvement of TRIPs is highly restricted, and it would be difficult to deal with the emerging problems in reality. Most developed countries such as the United States use FTAs as a tool to form "North-North" alliances, enhancing the protection of intellectual property, in an attempt to control the development of intellectual property rights at the global level.

Comparatively, China starts late in the field of intellectual property and its legislation also differs from TRIPs in certain aspects. Two types of intellectual property clauses in the FTAs are noticeable. The first is the "TRIPs-plus" mode, in which the provisions in FTAs are beyond the TRIPs standard, especially in terms of the protection period of intellectual property rights. Many developed countries, again represented by the United States, dedicates to adding stronger intellectual property rights standards to promote free trade, which can be seen in the Korea-US FTA and many others. The second mode is more of a mere re-declaration of TRIPs, in which there is no standard beyond. China's current model is mainly the latter. In most of the China FTAs, the provisions concerning intellectual property rights merely repeat the content in other international treaties. But in some FTAs including China-Switzerland FTA, there seems to be a possibility to develop to TRIPs-plus terms as it states, "The Parties shall periodically review in the Joint Committee progress achieved in pursuing the objectives set out in this chapter, considering relevant international developments."[107] Also the term of protection granted to broadcast is prolonged from the bottom line of 20 years to 50 years while TRIPs stipulates that "The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place."[108] And in China-Switzerland FTA, "The term of protection to be granted to broadcasting organisations under this Agreement shall last, at least, until the end of a period of 50 years computed from the end of the year in which the broadcast took place."[109] The other exceptions are China-Korea FTA and China-

[107] See China-Switzerland FTA, Article 12.8.
[108] See Trade-Related Aspects of Intellectual Property Rights Agreement, Article 14.
[109] See China-Switzerland FTA, Article 11.6.

Australia FTA, in which some TRIPs-plus clauses in regard to the scope of intellectual property protection and the term of protection can be seen. But those provisions concerning intellectual property based on TRIPs represent the global trend of increasing intellectual property protection.

Compared to former signed FTAs, China's FTAs also have comparatively clear dispute settlement proceeding at present, which is deeply connected with the WTO system. Which is in conformity with the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (on RTAs) stipulates that "The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area."

China has set forth several methods for dispute settlement in FTAs, which emphasize cooperation, have a clear scope of application and clear stipulations for the forum of dispute setting such as resorting to the WTO for settlement, for consultations, for good offices, conciliation and mediation, and for arbitration as well. Various forum choices also raise the concern that if the disputing parties fail to reach an agreement on the settlement method, the potential for conflict of jurisdiction would exist though have not turned into the fact. There are some problems excluded from FTA dispute settlement methods when there are no professional courts to solve these specialized disputes such as intelligence property. From a legal analysis, trade measures have pervasive effects, and FTAs are often based on WTO rules, and a trade measure deemed to violate FTA is likely (but not necessarily) also deemed to violate WTO rules. But sometimes conflicts may exist in WTO methods and FTA methods for dispute settlement, and when confronting conflicts, all the parties should either choose either WTO methods or FTA methods in order to efficiently solve the problem. Many WTO members have foreseen this kind of jurisdictional competition during the FTA negotiation and there is usually a clause specifically dealing with the choice of dispute settlement venues, which is often referred to as the "Exclusive Forum Clause" or "Forum Selection Clause". The core of such a clause is that, for a dispute that can be referred to multiple dispute settlement venues, if one is chosen, the applicability of the other venues is of course excluded.[110] China has also made an effort to solve this problem by defining the choice of forum, in many of its FTAs there is a clause that regulates the choice of forum, and once the complaining party has chosen a forum under the agreement where both parties are party, other choices of forum should be excluded. Such as in China-ASEAN FTA, there is a clause stating: "Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute."[111]

However, when WTO dispute settlement system itself is facing a crisis in resolving disputes between its members, the dispute settlement mechanism should be taken into careful consideration again. WTO rules set forth that an appeal "court" is the final arbiter on such disputes, and three judges have to hear each case, and only one is left and the

[110] See Wenhua Ji & Cui Huang, *Competitiveness and Coordination of WTO and FTA Dispute Settlement Jurisdiction*, 29(7) LAW 37, 37-42 (2006).

[111] See China-ASEAN FTA, Agreement on Dispute Settlement Mechanism, Article 2.

number goes below the required standard, which means it is about to become unable to function. The the United States has refused to allow the recruitment of new judges, neglecting other WTO member countries' proposition of selection procedure. So, integrating WTO dispute settlement rules into FTA dispute settlement mechanism may be a practical way, as applied in current China FTAs.

Also, uncertainties exist in the globalized world. Due to the change of the ruling party of the Maldives, China-Maldives FTA is in danger, and the detailed content of China-Maldives FTA can no longer be found on the official website of MOFCOM. Other issues such as pandemics, are also great problems, as some viruses can be spread through global supply chains and would affect import and export trade. The stability and integrity of the global economy will be severely impacted by the epidemic as is shown during the COVID-19 pandemic. Some FTAs signed by China involve chapters of sanitary and phytosanitary measures, such as RCEP.[112] Some developed countries have gradually localized and decentralized their supply chains in the post-epidemic period, which will cast influence on their trade partners. China, which is an active participant in the global economy, is bound to be affected by these factors. That force majeure should be taken into consideration when signing FTAs. Guided by the principles of multilateralism and international cooperation to fight the epidemic, China and ASEAN jointly issued the "China-ASEAN Economic and Trade Ministers' Joint Statement on Fighting the New Coronary Pneumonia Epidemic and Strengthening Free Trade Cooperation" on May 29, 2020, making a strong response to the new coronary pneumonia epidemic. The two sides recognize that despite the slow global economic growth affected by the COVID-19 pandemic, China-ASEAN trade and investment have maintained strong growth. Ministers reiterated the importance of the China-ASEAN Free Trade Area in promoting trade and investment and ensuring stable and inclusive growth in the region and pledged to promote the implementation of the China-ASEAN FTA to promote the free flow of goods and services, promote two-way investment, and maintain supply chains whole.[113]

From all these aspects, it can be concluded that China has improved its FTA by expanding the field, refining the contents and providing practical methods, following the international trend of deeper integration. But problems such as how to tackle force majeure still exist and wait to be improved.

4. China's Economic Development: Multilateralism vs. Regionalism

FTAs are believed to be common tools to achieve regionalism.[114] The literature concerning FTAs from a perspective of regionalism versus multilateralism is growing, since economists and political scientists raised the question of whether regional integration arrangements are beneficial or not for the multilateral system. It has long been debated whether its long-term consequences should be considered "stumbling blocks" or "building

[112] See Regional Comprehensive Economic Partnership, Chapter 5.

[113] See Chinese Ministry of Commerce, *China and ASEAN jointly issued the "Implementation Report on the 10th Anniversary of the Comprehensive Construction of the China-ASEAN Free Trade Area"*, http://fta.mofcom.gov.cn/article/chinadm/chinadmnews/202011/43467_1.html (accessed on January 9, 2022).

[114] See supra note 43.

blocks" toward world trade liberalisation,[115] and whether FTA between certain countries would benefit these countries at the cost of world's welfare.

Economists have developed several theories about this issue. Trade creation, an economic term related to international economics in which trade flows are redirected due to the formation of an FTA or a CU, is first brought into discussion by Jacob Viner, together with the trade diversion effect. It refers to the phenomenon that after the formation of economic union, the cost of the goods considered is decreased, leading to an increase in the efficiency of economic integration. Hence, trade creation's essence is in elimination of customs tariffs on inner border of unifying states (usually already trading with each other), causing further decrease in the price of the goods, while there may be a case of new trade flow creation of the goods between the states decided to economically integrate. The opposite takes place in case of trade diversion, when the trade flow is diverted from actually cost-efficient partner state to less efficient one — but which became a member of economic union and made its goods cheaper within a union, but higher compared to the rest of the world. In practice, both trade creation and diversion effects take place due to formation of economic union. Efficiency of economic integration of specific union right now is assessed as a final outcome between trade creation and diversion effects. According to FTAs, if the trade creation of certain FTA overtakes the trade diversion, then certain FTA is cost-effective and beneficial to multilateralism and vice versa.

Supporters for FTAs stem from the belief that they can assist in furthering multilateral trade liberalisation. FTAs can help countries integrate into the multilateral trading system since they are a distinctive feature of the international trading landscape. As a result, more and more international trade is covered by such agreements, which sometimes go beyond existing multilateral commitments, or cover areas not yet included in the WTO agenda.[116] The proponents of FTA assert FTA as "WTO-plus" arrangements fostering freer trade worldwide among like-minded trading nations. Conversely, FTAs are regarded, on a firm ground of multilateralists, huge departure from the Most-Favored-Nation (MFN) principle of the General Agreement on Tariffs and Trade (GATT) and detract from true liberalisation, which means the beginning of the end of multilateralism.[117]

Currently, FTAs are mostly regarded as an integral part of international trade, operating alongside global multilateral agreements under the WTO, and their proliferation has prominently increased recently. FTAs have their legal basis under the WTO system. GATT Article XXIV[118] allowed countries to grant special treatment to one another by establishing a customs union or free-trade association, in favor of developing and least developed countries.

FTAs, permitted by the Article XXIV of the GATT, in some aspects are still exceptions to the basic rule of WTO, namely the most favored nation principle which requires Members to accord the most favorable tariff and regulatory treatment given to the product of any one Member at the time of import or export of "like products" to all other Members,

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[115] See Jagdish Bhagwati, *New dimensions in regional integration, Regionalism and Multilateralism: An Overview*, Cambridge University Press, pp.22-50 (1993).

[116] Ibid.

[117] See Anne O. Krueger, *Problems with Overlapping Free Trade Areas, Regionalism Versus Multilateral Trade Arrangements*, 6(1) Regionalism versus Multilateral Trade Arrangements, NBER-EASE 9, 9-24, (1997).

[118] See World Trade Organization, *The General Agreement on Tariffs and Trade*, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf (accessed on January 9, 2022).

which is a founding principle of the WTO.[119] Along with preferential trade arrangements, FTAs are considered compromises of WTO members because they allow the parties to preference and grant each other exclusive benefits. FTAs forming free-trade areas generally lie outside the realm of the multilateral trading system. However, WTO members must notify the Secretariat when they conclude new FTAs and in principle the texts of FTAs are subject to review under the Committee on RTAs.[120] Although a dispute arising within free-trade areas does not subject to litigation at the WTO's Dispute Settlement Body, "there is no guarantee that WTO panels will abide by them and decline to exercise jurisdiction in a given case."[121]

It has long been ignored that there are strict limits on the aspect of signing FTAs. Duties and other regulations maintained in each of the signatory parties to a free trade area, which are applicable at the time such free trade area is formed, to the trade with non-parties to such free trade area shall not be higher or more restrictive than the corresponding duties and other regulations existing in the same signatory parties prior to the formation of the free-trade area. In other words, the establishment of a free trade area to grant preferential treatment among its member is legitimate under WTO law, but the parties to a free-trade area are not permitted to treat non-parties less favorably than before the area is established. A second requirement stipulated by Article XXIV is that tariffs and other barriers to trade must be eliminated to substantially all the trade within the free-trade area.[122] In the context of GATT's (WTO's) rules, RTAs must comply with a three-part test (Article XXIV). First, third countries that are signatories of the GATT must receive detailed notification about the agreement; second, "substantially all" trade between partners must be involved within the agreement; and third, the agreement must not raise trade barriers toward third countries. Additionally, in spite of the fact that GATT provisions requiring the RTA to be on balance trade creating, "... the presumption that an FTA must be more trade creating than trade diverting has been incorporated into GATT working party reviews of FTA notifications, and is now generally considered the key standard by which to judge the value of FTAs to third countries."[123] However, it is crucial to point out that most trade agreements that have been studied by GATT's working parties have not reached conclusive results on their compatibility with GATT rules, especially as it was discussed above, political interests trumped economic objectives in many countries' attempts to sign FTAs, including China, which takes political consideration as a great part in its FTA negotiation. As expressed by Schott, "[s]ince 1948, a total of 69 FTAs and preferential trade agreements, and subsequent amendments, have been examined by the GATT under the provisions of Article XXIV of GATT working parties have reported on each of these agreements. Only four agreements were deemed to be compatible with Article XXIV requirements; on the other hand, no agreement has been censured as incompatible with GATT rules." This ambiguity has often been perceived as a factor encouraging the formation of new RTAs; political considerations

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[119] See World Trade Organization, *Most-Favoured-Nation Treatment Principle*, https://www.meti.go.jp/english/report/data/2015WTO/02_01.pdf (accessed on January 9, 2022).

[120] See World Trade Organization, *The Committee on Regional Trade Agreements*, https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed on January 9, 2022).

[121] See Céline Todeschini-Marthe, *Dispute Settlement Mechanisms Under Free Trade Agreements and the WTO: Stakes, Issues and Practical Considerations: A Question of Choice?*, 13(9) Global Trade and Customs Journal 387, 387 (2018).

[122] See supra note 117.

[123] See Jeffrey J. Schott, *More Free Trade Areas?*, Institute for International Economics, p.27 (1989).

and the recognition that most GATT members take part in such agreements, persuade affected countries of the futility of criticizing them. A large number of countries devote increased efforts to developing and establishing RTAs as a defensive reaction before the strengthening of trade blocs in different parts of the world. The risk of being left aside is too high for a country to remain passive in pursuing some form of integration.

Looking back through the history, China's economic development has also been deeply connected with these two seemingly conflicting words: multilateralism and regionalism. Countries like the United States try to maximize their own interests by signing the FTA, forming the so-called small minilateralism.[124] The proliferation of FTAs poses a threat to the WTO goal for free trade because political considerations may override economic implications.[125] Regionalism is not a problem in and of itself; rather it can supplement multilateralism. However, regional trade arrangements followed by political implications raise the question of whether they create complex trade regimes that could threaten multilateral trade.

The interference between multilateralism and regionalism is complex and one could say that although China participates in the international multilateral arena or it shows preference for regional arrangements during the last few years, it is still in the middle aspiring to enjoy all the fruits of both multilateralism and regionalism. China needs both multilateralism and regionalism in order to succeed in further economic expansion and actively participate in international trade liberalisation.

China has joined many intergovernmental international organizations and has committed to an array of multilateral treaties. At the international level, while globalization continues to develop, China makes great efforts to achieve recognition from developed and developing countries as well as to keep a dominant position in international trade affairs. China's commitments to multilateral trade and its support for a liberalized international trade and investment environment started to become more evident after its accession to the WTO. However, the WTO, a direct result of globalization, can make no progress in the Doha Round negotiations. As a result, since deeper integration cannot be achieved at the multilateral level, not only developed but also developing countries have started to actively participate in regional and bilateral arrangements for liberalising trade and investment. From a broader perspective, China's grand strategy is arguably about "multipolarity" and the protection and promotion of the countries' interests worldwide. Joining the WTO was always the policy priority of the Chinese government since it was seen as a commitment to the western countries for China's open-door policy and its integration into world trade. However, if multilateral trade continues to weaken, the likelihood of the boom in FTAs proliferation as well as the emergence of an East Asian Free Trade Area will be inevitable. Chinese leaders always promoted that a peaceful and harmonious environment is an important condition for China's economic development and prosperity. For this reason, China's engagement in both multilateral and regional arrangements has always been considered the way for China to implement its international foreign policies in order to expand its economic power. Nowadays, commitments to multilateral but more often to bilateral FTAs are an increasingly common phenomenon.

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[124] See Wei Shen & Yaohui Hu, *US Minilateralism and Its Remolding of the Global Trade System*, 24(1) International Forum 3, 21 (2022).

[125] See M. Ulric Killion, *Chinese Regionalism and the 2004 ASEAN-China Accord: The WTO and Legalized Trade Distortion*, 31(1) N.C.J. Int'l L. & Com. Reg 1, 1 (2005-2006).

The proliferation of FTAs is a response to the new global and regional factors, including the slow liberalisation progress of the WTO Doha Round, China's economic development and the competition between rising and existing economic powers.[126] China is a newcomer to both regional institutionalizations of economic and political relations and to the FTA proliferation for which it maintains that it follows the principle of inclusiveness and openness. Chinese authorities promote that RTAs serve as a complement to the multilateral trading system while the country pursues its opening-up policy. China has seen FTAs as a way to deepen its regional integration further, to achieve domestic and international objectives and to enhance its trade diplomacy by acquiring experience in trade negotiations. As a matter of fact, several countries in different parts of the world work intensively on their regional integration and free trade. In general, "Chinese leaders and strategists have preferred the predictability and manipulability of bilateral relationships to the inherent messiness and complexity of multilateralism."[127]

In the 9th Five-Year plan published in 1996, the Chinese government for the first time raised that "China shall actively participate and develop regional economic cooperation, as well as promote and develop the economic and trade cooperation with developing countries."[128] The same plan, however, also calls for China to "actively participate and defend the global multilateral trading system, develop both bilateral and multilateral trade, so that they can promote each other and the market can be diversified." [129]

Multilateralism and regionalism are both parts of international trade. With this concept, FTAs are an integral part of international trade, and they contribute to the gradual development of the concept of free trade. Alternatively, FTAs may be more likely to create incentives for trade liberalisation and competitive liberalisation, especially in developing countries.[130]

China is a developing country, and its position is particularly interesting. Having spent twenty years joining the WTO and having had a clear interest in the successful evolution of the non-discriminatory international trading system, China has shown an unexpectedly strong interest in regional and bilateral trade initiatives.[131]

China presents an anomaly as a developing country, because it proposes the world's largest FTA, comprising solely developing Asian economies. A relevant question involves China's motivations behind its regional integration and its multilateral trade. China is a country where political motivations override economic considerations in regional trade negotiations and the question if this practice threatens multilateral trade still exists. The concerns of many developed and developing countries about whether China's involvement in regionalism is a threat to the multilateral trading system will exist until China reveals its real motivations for its regional and international arrangements. However, until then, China will always be considered a threat to the international trade system because despite its

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[126] See Anna Turinov, *Free Trade Agreements in the World Trade Organization: The Experience of East Asia and the Japan-Mexico Economic Partnership Agreement*, 25(2) UCLA Pac. Basin LJ 336, 336 (2007).

[127] See Rafael Leal-Arcas, *On China's Economic Rise: Multilateral Versus Regional Attitudes in Trade Agreements and the PCA With the EU*, 27(1) Chinese Taiwan Y.B. Int'l L. & Aff. 12, 19 (2009).

[128] See supra note 86, at 17-18.

[129] Ibid.

[130] See Sayantan Gupta, *Changing Faces of International Trade: Multilateralism to Regionalism*, 4(3) JICLT 260, 260 (2008).

[131] See Andrew L. Stoler, *Regionalism v. Multilateralism – A View from the Asia-Pacific Region*, http://www.iit.adelaide.edu.au/docs/Santiago_ver1_151006_SUB.pdf (accessed on January 9, 2022).

minimal involvement in multilateral trade and its only recent engagement in RTAs, China managed to succeed in what other countries could see as “a dream” namely a rapid and stable economic development so as nowadays to be the second-largest economy in the world, behind only the the United States. However, when considering whether China’s FTA is a “stumbling block” or “building block” toward world trade liberalisation, the facts analysed above can’t be ignored. Geopolitical reasons indeed weigh a lot in its FTA consideration and even overweigh economic factors in the very beginning, it is expanding the geologic scope of its FTA partners to the world and has formed a trend of deeper integration in line with the global standards. China’s participation in building FTAs has demonstrated the country’s efforts in realizing free trade, creating business opportunities and a better trade environment, especially in a period of increasing protectionism and trade competition. It is true that when facing uncertainties in the global society, some countries act based on open or disguised protectionism, focusing on their own welfare, actually building trade barriers to other countries. But FTAs can also be used as a tool to support the deepening development of global trade liberalisation through multilateral RTAs negotiations. As proclaimed by China, as well as supported by facts, China’s choice is the latter.

In conclusion, China has a strong will to consolidate an Asian regional trading system and accelerate the development of free trade areas with its major trading partners. For this reason, the Chinese government has taken many steps to push its FTA strategy by promoting trade liberalisation and China’s economic integration in the world community. China’s globalization and its FTA strategy are closely related to its rising influence in regional and global affairs.

5. Conclusion

The Doha Round negotiations representing the efforts towards multilateralism stalled because of the discrepancy between the developed and developing countries. Meanwhile, most countries resort to FTAs contributing to regionalism. FTAs are a common tool to achieve regionalism and to form region-wide economic areas. However, Chinese authorities promote that RTAs serve as a complement to the multilateral trading system while the country pursues its opening-up policy. On the other hand, although China follows a multilateral approach to world trade, which is evident in its WTO negotiations and the rule-making process, China certainly does not want to be left out of the economic integration by not participating in regional agreements. It is difficult for China to move forward multilaterally, especially if everyone else is signing FTAs and China is not. China has seen FTAs as a way to deepen its regional integration further, to achieve domestic and international objectives and to enhance its trade diplomacy by acquiring experience in trade negotiations.

China is an active participant in the international trade arena and has been trying different ways and evolved to develop its economy, and China’s attitude towards FTA changes from skepticism to enthusiasm. In spite of the fact that China is a latecomer to FTAs, it has been proved that China has been evolved into an important player in FTA negotiations. It now has 19 FTAs with 26 countries and regions. Most of the studies conducted on China FTAs focus on certain issues while this article throws light on China’s FTA policy that has made it so successful and its attitude towards regional and global economy, from which other developing countries could learn some experience.

China has inter-connected open policies, and its FTA strategy is prudent. Economic development, demand for natural resources and geopolitics factors are all driving forces in the formation of China's FTAs and are carefully taken into consideration. Seen from chronological order, the formation of China's FTAs expands from neighboring countries and regions to the world, stretching from developing countries to developed countries gradually.

Though China's most important achievements in FTA exist in trade in goods and services, its FTAs' contents are expanding, including many tough issues such as environmental standards, intellectual property rights, agriculture, labor, and competition policy. And all these changes represent a trend of Deep Economic Integration, showing China's effort to embrace the international standard and be in line with the global society.

China has shown the intention to move multilaterally and regionally toward international trade. It has seen FTAs as a means to achieve further integration in the international trade and investment practice and as a means to build a strong network of negotiating partners worldwide. China's increasingly active participation in FTAs reflects the country's strategy to involve in international economic relations and international economic affairs. China's conclusion of FTAs is a sign that it has gained the confidence to participate in international trade and international investment relations and that it is willing to promote regionalism in parallel with multilateralism in order to expand its foreign and domestic policies.

Today, China pays close attention to regional trade integration, although it has little experience in RTAs in comparison with the United States and the EU. Its strategic policies in relation to its engagement in FTAs are not only led by both economic and political reasons but also by the strong will to consolidate an Asian regional trading system. If China continues to develop its FTAs at the same pace, it will gain a more interesting seat in international trade affairs.

Equal Rights of Chinese Farmers on the Path of Obtaining Urban Residentship: A Comparative Perspective between China and the West

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Abstract: China has achieved remarkable urbanization in the last decades. Farmers, who have contributed as an important part of the urbanization, however, have encountered various barriers on their path of obtaining the urban residentship.[2] The principle of equality before the law has not been applied in reality. Many developed countries in the West took the lead in completing urbanization. Their experiences and lessons in this process have important implications for farmers to obtain legitimate citizenship in China. This article studies the equal rights of farmers on the path to gain urban residentship from the perspective of comparing China and the West, aiming to seek an effective way to protect the basic rights and interests of farmers while China continues its urbanization.

Keywords: Urbanization; Citizenship of Farmers; Urban Residentship; Equal rights; Comparison of China and the West

1. Introduction

Joseph Stiglitz, the winner of the Nobel Prize in Economics, once asserted that China's urbanization will be one of the two major events affecting the world development in the 21st century.[3] Indeed, China's urbanization has made rapid progress in the past four decades since the reform and opening up. The development of urbanization mainly

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[2] For readers from China, Western countries, and throughout the world to fully understand the significance of this analysis, a brief description of the concept of "citizen" in the Western world, including the United Statesthe United States, the United Kingdom, and other countries, and the more complex meaning of citizenization in China is necessary. A citizen in the United Statesthe United States is a person born or naturalized in the United Statesthe United States, subject to its jurisdiction and the state where he or she resides. Citizens all enjoy the same rights and privileges under the laws of the United Statesthe United States and the state where they reside. They are free to live and move anywhere in the country, without legal restriction. There are no distinctions or classes of citizens, generally. However, citizen is distinguished from the term's "resident" and "inhabitant". The concept of citizenization in China is more complex and is rooted in the existence of different social systems that are in effect between urban and rural areas. Specifically, it is based on one's classification as a rural immigrant or registered urban dweller, which is determined by China's household registration system. This classification determines the availability of one's political rights, public services, and social security policies, and other benefits. It also impacts the immigration of people from rural areas to urban areas. Citizenization in Chinese Mainland can be defined as the process where rural immigrants change their location from rural to urban through the household registration system and their vocation from agricultural to non-agricultural work in urban centers and achieve permanent residence status and full access to the same political rights and social welfare that urban residents have. The concepts in this term do not apply to Western countries or their citizens' participation in urbanization. The concepts of citizen and citizenization are governed by legal policies and are distinguished from the concept of urbanization, which refers to the overall process by which people move from rural areas to cities, as more fully described below. The implications of urbanization are more economic and social than legal.

[3] According to Stiglitz, urbanization in China and high-tech development in the United Statesthe United States are the two events that will shape the course of human society in the 21st century. But both technology and urbanization are booming in China.

involves two elements: population and land. The proportion of urban residents to the total population is an important criterion for measuring the level of urbanization of a country. Therefore, because of the large population of farmers in China, it can be said that urbanization is, in a certain sense, a road for farmers to become urban residents. However, equality, one of the basic legal values, has encountered a severe test in this process, which has been reflected in the development of both China and Western countries. Many developed Western countries have taken the lead in completing urbanization, and how their farmers have succeeded in achieving full political, economic, and social equality can give China some vital inspirations.

2. The Relationship between Urbanization and Equal Rights of Farmers on the Path to Urban Residentship

For urbanization, it is generally believed to be a process of the transformation of an agricultural population into a non-agricultural population, the transformation of rural areas into non-agricultural areas, and the transformation of agricultural activities into non-agricultural activities. Views of urbanization can vary from one discipline to another. Sociologists believe urbanization is the transformation of people's lifestyles and the process of changing rural lifestyles to urban lifestyles;[4] economists think urbanization is the result of industrialization and the process of transition from rural economy to urban industry; demographers argue that the urbanization is the transformation of people's identity, which is manifested by the increase of the proportion of people living in cities;[5] geologists define urbanization as a process of urban expansion, which means the expansion of urban land. Whatever the view is, urbanization mainly involves two elements: population and land.

The relationship between these two elements and urbanization is as follows: Urbanization means the exploitation and utilization of land, which in turn drives to the development of urban suburbs and the establishment of small cities. The construction of residential areas and spaces for activities determines the demand for non-agricultural land. In "zero-value agricultural labor theory", Arthur Lewis believes, "In traditional agriculture, a part of the labor force is in a state of hidden unemployment. They are formally employed, but their actual productivity is zero. Extracting it from agriculture will not reduce production."[6] This means that there are abundant labor resources hidden in the countryside. In the process of urbanization, the development of industry is a call to the labor force, which determines the urban migration of a large number of rural surplus laborers. Urban expansion means accommodating the internal migrants and rural surplus laborers into cities, both of which need land to meet the space for their survival and activities. In order to ensure the city's load capacity for the population, it is inevitable to expand the land supply.

These two elements of land and population in urbanization are closely related to farmers' rights. In terms of land, one of the goals of urbanization is land urbanization. Therefore, the land that originally belongs to farmers will be used for urban construction and industrial and commercial development. Even practical agricultural activities will inevitably become intensive now with smaller lands. This creates the need for land

[4] See Louis Wirth, *Urbanism as a Way of Life*, 44(1) The American Journal of Sociology 1, 1-24 (1938).
[5] See Christopher Wilson, *The Dictionary of Demography*, Oxford University Press, p.225 (1986).
[6] See Quanhong Sun & Yongli E, *Strengthen Guidance and Standardized Management to Promote Orderly Transfer of Rural Land Management Rights Under Contract*, 19(2) Rural Management 35, 36 (2009).

transactions. The legal status of both parties in the transaction will determine the distribution of the benefits in the transaction. The rights and interests of the farmers can only be guaranteed if the farmer, as the subject of one party, has the same legal status as the other party; otherwise, the farmers' legal rights will be deprived and violated.

Another goal of urbanization is population urbanization. Urbanization stands as a threshold in the development of human civilization. The degree of population urbanization in a country or region is an important measure of the levels of economic, social, cultural and technological development of the country or region. It is also a significant symbol of the levels of a country or region's social organization and management. Population urbanization is a process in which the non-urban population is transformed or concentrated into cities and live as urban residents. For example, farmers migrated into cities and then enjoyed equality with the native residents. To be more specific, population urbanization is reflected in the fact that whether farmers have the same rights, status, and interests as the original urban residents. This essentially requires the transformation of farmers into urban residents thus offering them the same content of rights as the original residents, which is the realization of equal rights.

Both China and the West went through the realization of equal rights in the process of achieving equality of farmers, but the forms of inequality are different due to historical differences. This is directly related to the different concepts of equality in China and the West.

3. The Threat to Chinese and Western Farmers on Their Path to Equality

The achievements of urbanization in Western countries today were achieved overnight; the process has experienced twists and turns. So has the process in China. Although the forms of inequality encountered by Chinese and Western farmers are different, the essence of inequality is almost the same. These problems form the reality of social exclusion,[7] which makes farmers excluded from institutions, services, social networks and development opportunities for a long time. This has become the root of inequality in the process of Chinese farmers gaining urban residential rights.

3.1 Different Forms of Infringement on Chinese and Western Farmers' Equal Rights on Their Path to Equality

The rights of Western farmers have been seriously violated during the early stage of urbanization, mainly in the loss of property rights (mainly land), while in China, violations occurred in restrictions based on personal status imposed by traditions.

3.1.1 Loss of western property rights exacerbates inequality of legal status

The primitive accumulation of developed capitalist countries lies in the expropriation of land. As Karl Heinrich Marx said, "The expropriation of the agricultural producer, of the peasant, from the soil, is the basis of the whole process."[8] Urbanization is no exception. In the early stage of urbanization in Western countries, serious issues arose regarding land

[7] See John Pierson, *Tackling Social Exclusion: Promoting Social Justice in Social Work,* Routledge, p.7 (2001).

[8] See Karl Heinrich Marx, *Capital (Volume I),* Penguin Books, p.876 (1976).

and farmers. Considering land owned by farmers, during that time in Britain, the United States and France, land was highly concentrated in nobles and large landlords, and situations of arable land was severely damaged. The most typical example was Britain's Enclosure Movement, which was even supported by Parliament.[9] The development of urbanization in the United States is accompanied by the occupation of rural land. Therefore, the farmers lost their most basic means of production.

At the same time, food prices rose, social wages fell, and the distribution of agricultural income favored landlords. The laborer's share of income continued to decline, leading to severe social inequality. Karl Heinrich Marx describes the circumstances of contemporary French farmers, "The former allotments are now only a pretext that allows the capitalist class to draw profit, interest and rent from agricultural lands, and to leave to the farmer himself the task of seeing to it that he can knock out his wages."[10] Friedrich Engels argues that the French farmers were brutally exploited by commercial capital, heavily levied by the state, and inevitably burdened by usurers. "Their position is absolutely hopeless as long as capitalism holds sway, that it is absolutely impossible to preserve their smallholdings for them as such."[11] Poverty dragged them inevitably into bankruptcy and converted them into proletarians. It can be said that in the early stage of urbanization in Western countries, due to the unequal social status, farmers continued to lose their most basic property rights. Stark Oded and J. Taylor Edward argued that migration can be seen as a response to "relative poverty".[12] This explains why the mass migration of people to cities during Western urbanization.

3.1.2 Status results in differences in equal rights

Constitution of the People's Republic of China stipulates that all people with the nationality of the People's Republic of China are citizens of the People's Republic of China, and all citizens of the People's Republic of China are equal before the laws. Based on this, whether urban or rural residents or those becoming new urban residents, since they are all citizens of the People's Republic of China, they are supposedly equal before the laws. However, the "hukou" — household registration system has drawn a distinction between farmers and urban residents for a long time, while farmer is a social status.

Early in the Warring States Period, China had divided the population into "four peoples". The four peoples not only had to live apart, but also had to settle their careers. There was a saying that "the son of a farmer is always a farmer".[13] The word "民" (people) has connotation of closing eyes, going blind, or turning dark, all of which contain maliciousness or a distinction between the noble and the lowly.[14] Even today, this distinction has not completely disappeared. Before the reform of the household registration

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[9] In the first decade of the 19th century, Parliament enacted 906 enclosure acts. See Peter Lane, *The Industrial Revolution: The Birth of the Modern Age,* Book Club Associates, p.42 (1978).

[10] See Karl Heinrich Marx, *The Eighteenth Brumaire of Louis Napoleon*, Dodo Press, p.101 (2009).

[11] See Frederick Engels, *Marx & Engels Collected Works (Volume 27)*, Lawrence & Wishart Publishers, p.498 (2010).

[12] See Oded Stark & J. Taylor Edward, *Relative Deprivation and International Migration*, 26(1) Demography 1, 1-14 (1989).

[13] "Guoyu" is the earliest national history in ancient China. "Guoyu·Qiyu" is based on dialogue and tells the history of the State of Qi. "The son of a farmer is always a farmer" is from the four people of Guan Zhong's "scholars, farmers, industrialists, and merchants".

[14] See Wenlan Fan, *General History of China (Volume 1)*, People's Publishing House, p.23 (1994).

system, "the household registration system is the source of the 'farmer' becoming a status symbol".[15] However, although it is now unified as a resident "hukou", "Nongmin Gong" and "Nongmin Qiyejia", which literally means peasant workers and peasant entrepreneurs, are terms of a strongly derogative stigmatization. There are also situations in which "farmers" are used as swear words in life. From the perspective of academic use, the word "farmer" also implicitly implies status. In English, "Nongmin" can be translated into either "peasant" or "farmer". Chinese academic circles have chosen "peasant", which can be used as a verb meaning "depend or enslave" in ancient English or a noun meaning "bad guy", rather than "farmer", which means "farm worker" (including rancher).[16] That is to say, in the semantic selection of the word "peasant", the understanding from the perspective of "occupation" is abandoned and the understanding from the perspective of "status" is chosen again. This also aggravates the status symbol of the word "Nongmin".

It can be seen that farmers in China are closely related to their status. This inequity in status is obvious. On the contrary, the ternary social structure formed under the name of "citizen-to-be" is in a frozen state during the current urbanization. There are still differences in status between city denizens and farmers who are on the road to urban residentship.

3.2 Manifestation of Inequality in Social Rights when Farmers Are Urbanized

The concentration of land in the process of urbanization in the West caused the migration of rural population into the cities. In the 18th century, with the rapid development of urbanization, the proportion of urban population increased year by year in Britain.[17] In the process of urbanization in the United States, not only native farmers but also foreign immigrants poured into cities.[18] France was in the fastest stage of urbanization, with an urban population growth rate above 2.22%.[19] The living conditions of Western farmers were catastrophic after they left the countryside and land. Compared with urban residents, farmers who entered the city did not share the fruits of urbanization equally. On the contrary, the life of the farmers after entering the city was extremely bad, and their social rights were not confirmed and guaranteed by law. From the perspective of economic situations, the farmers who entered the cities were mostly in the lower classes of society. Friedrich Engels once pointed out, "the state of misery and insecurity in which they live now is as low as ever, if not lower. The East End of London is an ever-spreading pool of stagnant misery and desolation, of starvation when out of work, and degradation, physical and moral, when in work. And so, in all other large towns — abstraction made of the privileged minority of

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[15] See Jiahui Wang, *The Jurisprudence of the Protection of Farmers' Rights in Contemporary China*, China Social Science Press, p.78 (2009).

[16] See Yuxia Zhao, *Research on Several Issues of Farmer's Development in China — Based on the Perspective of Marxist Humanistic Research*, China Social Science Press, p.23 (2012).

[17] The proportion of urban population rose from 18.7% in 1700 to 22.6% in 1750 and 30.6% in 1801. See Penelope J. Corfield, *The Impact of English Towns:1700-1800*, Oxford University Press, pp.8-11 (1982).

[18] Between 1820 and 1924, 34.64 million immigrants entered the United Statesthe United States, nine times the population of 1790. See Jonathan Hughes, *American Economic History*, Glenview, London, Scott, Foresman and Company, p.167 (1987).

[19] See United Nations, *World Urbanization Prospects: The 2005 Revision*, https://digitallibrary.un.org/record/622619 (accessed on June 24, 2022).

the workers."[20] Also, in British Parliamentary Papers from the mid-19th century, research reports on the health conditions of the major cities used lots of surprisingly simultaneous words such as "dirty" "stinky" "dark" and "fever" to describe the working-class districts and the tenements (slums).[21] The same was true in France. The exploitation of farmers was only from one state of exploitation to another. The embarrassment and predicament of the farmers' lives remained the same. In general, the early stage of Western urbanization is the process in which the subjects (farmers) completely lose their own objective existence, and the subjects lose both their material wealth and their spiritual home. The farmers lose the land on which they depend for their survival in the countryside, become dependent on the nobles and big landowners, and basically lose their personal freedom. And the farmers who enter the cities do not have the same living conditions as the citizens. In addition to the extremely poor living environment and lack of corresponding education, medical and other facilities, they are even discriminated by urban residents.

The welfare system, social security system, etc., which are compatible with the persistent urban-rural dual structure, intuitively reflect that those farmers are bound by their status. Thus, inequality exists between farmers and native urban residents in terms of specific rights after farmers enter the city. As we all know, economic development in cities has attracted a large number of rural surplus labors to enter cities and become denizens-to-be; however, in the early stages of urbanization in China, as a consequence of "urbanizing land rather than population", farmers separate from the land work and live in cities but do not enjoy the status of urban residents and the corresponding political, economic, and cultural rights. They are separated from the urban and rural areas and independent of both. They become a special new social group, which is commonly known as "Nongmin Gong", migrant peasant workers. In terms of political rights, the migrant workers work and live in cities, but they rarely have the opportunity to enjoy corresponding political rights. Even if it has been proposed to allow migrant workers to take the civil service examination, it is only a gesture of equality, not substantive equality. For cultural rights, it is difficult for migrant workers to integrate into the atmosphere of urban cultural life due to the gap between income level and educational level. For social rights, a prominent manifestation is the inequality of labor rights. Migrant workers in China work harder and do more tiring jobs than urban residents but are not rewarded with commensurate wages and benefits. Even worse, their right to rest and leisure is not guaranteed to a certain extent. This in turn is closely related to the right to education. Urbanization is the process of realizing the transformation of farmers into urban denizens, and migrant workers (that is, denizens-to-be) should become urban denizens sooner or later. However, due to the factors such as group mechanism,[22] market mechanism and adaptability,[23] farmers are socially excluded, and the transformation from farmers to urban denizens is slow or even frozen in reality. They have been on the fringes of cities for a long time, and they are at the bottom social status and are even discriminated against and segregated by native denizens. As Professor

[20] See supra note 11, at 318.

[21] See Side Wang & Hongtu Li et al., *General History of the World: The Rise of Industrial Civilization — World History from the 16th to the 19th Century*, East China Normal University Press, p.109 (2001).

[22] The group mechanism can be regarded as prejudice and discrimination of urban residents against migrant workers.

[23] The market mechanism is reflected in the fact that migrant workers are on the edge of market competition, which further leads to the exclusion of urban consumer markets.

Hui Qin, a famous Chinese economist, pointed out, "Before they fail to integrate into the urban mainstream society, they can only exist in the form of urban 'marginal people'".[24] Most migrant workers even isolate themselves from the rest of the city, forming migrant workers' communities one by one in the city.

4. The Realization of Western Farmers' Equal Rights on Their Path to Achieving Equality

When urbanization accelerates rapidly, Western capitalist countries no longer only focus on how to accelerate the progress. On the contrary, in order to soundly develop urbanization, they have established unique paths for urbanization by implementing various countermeasures and a relatively complete legal system to protect the rights of farmers.

4.1 Important Manifestations

The most significant impact on the protection of farmers' rights is the grant and guarantee of their equal rights, which can be seen from the perspective of land rights and social rights.

4.1.1 Farmers have autonomy in land transactions

Britain and America have consistent attitudes towards farmers' freedom of land transactions. In the United Kingdom and the United States, the law is antithetical sed to provisions restricting transfer or restricting future transfers. Free transfer will hinder the maximization of land use. The acquisition of the majority of land needed for urban development in the United States is accomplished by voluntary transactions between private individuals. As long as it complies with urban planning and legal permission requirements, the government does not interfere with a transaction.[25] Under the United States bottom-up self-governing system, the United States citizens have considerable autonomy as long as they do not violate the provisions of the Constitution of the United States of America. The the United States has clear boundaries of property rights for private land owned by farmers (whether purchased or gifted), and the private ownership of land is stable and guaranteed.[26] This makes the transaction of land in the United States free from legal restraints or governmental intervention. The two parties to the transaction negotiate and determine the price of the sale or lease by themselves, regardless of whether the land is public or private. Other levels of government do not participate in the transaction of private land. The ownership of any private land recognized by law and registered at the county [local] government will be transferred as long as the land buyer and seller reach an agreement and the county [local] government registers the change.[27] On the other hand, it is reflected in the formation of the transaction price. "The purchase and sale price of private

[24] See Hui Qin, *Incorporating "Farmers entering cities" into the Development of the City*, 18(5) Exploration and Free Views 10, 11-12 (2003).

[25] See Guanzhong Wen & Yingchun Xu, *The American Experience of Farmland Expropriation and Expropriation under the Framework of the Market System and the Rule of Law*// the Macroeconomic Research Office of the Institute of Rural Development, Chinese Academy of Social Sciences, *Rural Land System Reform: An International Comparative Study*, Social Scientific Literature Press, p.41 (2009).

[26] See Ling Wu & Sishan Zhou et al., *The Enlightenment of Land Circulation System in Developed Countries to China*, 27(1) Journal of Suzhou University 18, 19-22 (2012).

[27] See Qiang Chai, *Land Systems and Policies in Different Country (regions)*, Beijing Economics Institute Press, p.136 (1993).

land is completely evaluated by the buyer and the seller according to the economic value of the land, or a private evaluation company helps the two parties reach an agreement. Once disputes arise from the sale and purchase, they should be resolved by law. "[28]

It can be seen that the transaction of private land in the United States is entirely a matter between private individuals, and the transaction parties have equal legal status. Both parties complete the transaction out of their own free will and pay prescribed taxes to the government. All the procedures are registered–simple as that. Disputes arising in the transaction are also resolved through legal channels; the intervention of administrative power in land transactions is thus further excluded. The situations in the United Kingdom and the United States are basically the same, and the land transaction is the result of the autonomy of the will: In the leasehold right, the content and duration of the land rights are determined in the form of contracts or agreements. During the lease period, the determined land rights and the content cannot be changed at will, and freehold owners cannot interfere at will.[29] The autonomy of farmers in land transactions not only spurs the positive role of market laws, but also realizes the value of land transactions. At the same time, farmers' autonomy also avoids the government's arbitrary intervention and reduces the potential damage to farmers' rights and interests to the land. The equal rights of farmers in the land are realized on the basis of free will.

The freedom and autonomy of farmers' land transaction come from the protection of land property rights by legislation. This is often illustrated in Western theories. The distribution pattern of property rights prescribes the norms of behavior of people connected with things.[30] The closer the subject gets to complete property rights, the more it will look for favorable ways to use resources.[31] And from a transaction point of view, if the transaction cost is indeed zero, then the description of rights can be ignored.[32] But that is not the case, so transaction costs are the costs of establishing and protecting property right.[33] Western countries define property rights through legislation to protect the freedom of independent management and utilization of land. At the same time, legislation was adopted to ensure the long-term nature and stability of agricultural land management. The proportion of land owned by farmers who directly managed land in different types of land holdings in Britain increased from 14.4% in 1887 to 70.4% in 1983.[34]

Clear property rights and freedom of trade have become an important part for the protection of farmers' rights in the later period of Western urbanization. The farmland is no longer to meet the needs of farmers' own families, but to win the agricultural market. This provided conditions for the development of professional farmers.

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[28] Ibid.

[29] See Yi Zhu, *Learning from the British Experience to Improve the Circulation of Land Property Rights in China*, MA Dissertation, Suzhou Institute of science and technology, p.25 (2007).

[30] See Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Study of Recent Literature*, 10(4) Journal of Literature 1137, 1137-1162 (1972).

[31] See Horald Demsetz, *Towords a Theory of Property Rights*, 57(2) The American Economic Review 347, 347-359 (1967).

[32] See Cheung & Steven Ng-sheong, *On the New Institutional Economics*// Lars Wrin and Wijkander, *Contract Economics*, Blackwell Publishing, p.54 (1992).

[33] See Douglas W. Allen, *What Are Transaction Costs?*, 14(1) Research in Law and Economics 1, 1-18 (2021).

[34] See David Girgg, *English Agriculture: An Historical Perspective*, Blackwell Publishing, p.104 (1990).

4.1.2 Legal recognition and protection of social rights

The Process of farmers becoming urban residents is not only a process of farmers joining urban organizations, but also a process of farmers blending into a unique urban lifestyle.[35] The equal right is an important embodiment of peasants' integration into cities and gaining recognition. To some extent, it can form the identification and solidarity that go with belonging.[36] Social rights are freedoms acquired through the state.[37] In the later stages of urbanization in Western countries, the flow of population has greater freedom. There are no institutional obstacles to the movement of rural population into cities, and no household registration control for urban population. Urban residents have little discriminatory attitude towards residents who have moved from rural areas; the government does not have an urban bias policy.[38] On the contrary, the state has also promulgated a series of laws and policies to guarantee the equal rights of farmers after they become urban residents. Scholars enriched the content of urban residentship, including the right to decent work and legally protected working conditions.[39]

The first is to develop education and scientific technology to promote equal opportunities. An important part of Rawls's theory of justice is equality of opportunity. After the 19th century, Western countries changed their disgust and suspicion of schooling the working people. A large number of technical schools, night schools, etc. were set up, and a certain degree of free education was provided. In the 1930-40s, the United Kingdom even added the relevant provisions on schooling for minors into the Factory Act. This provided conditions for the population moving into the city to receive a higher education, allowing them to better integrate into the city and obtain the same job opportunities. In addition, western countries promulgated a large number of farmers vocational education related legislation. The United Kingdom and the United States also implemented Education Priority Area[40] and Education Compensation Plan respectively.[41] These measures not only provided a legal basis for farmers' career development, but also helped promote social equity and justice.

The second is to gradually narrow the gap between urban and rural areas, improve the living environment. In the later stage of western urbanization, it has become the common behavior choice of all countries to restrain the gap between urban and rural areas and the polarization between the rich and the poor in cities through government efforts. By the 20th century, modern facilities and equipment as well as urban lifestyle were popularized, and

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[35] See Louis Wirth, *Urbanism as a Way of Life*, 44(1) American Journal of Sociology 1, 1-24 (1938).

[36] The right of equality is conducive to the formation of farmers' sense of belonging in the city. What the author discusses is the "transnational labor citizenship", among which the principle is the same. See Jennifer Gordon, *Transnational Labor Citizenship*, 80(3) Southern California Law Review 503, 504 (2006).

[37] See Zygmunt Bauman, *Freedom From, In and Through the State: T.H. Marshall's Trinity of Rights Revisited*, 9(4) Theoria 13, 13-27 (2005).

[38] Lipton proposed the "Urban Bias Theory" in 1968. See Subrata Jatak, *Development Economics*, Commercial Press, p.12 (1989).

[39] See Thomas Hamphrey Marshall, *Citizenship and Social Class and Other Essays*, Cambridge University Press, pp.15-23 (1950).

[40] In 1967, The Plowden Report issued by The Central Advisory Council for Education, which put forward the idea of "priority areas for Education". See Erik Olin Wright, *Classes*, New Left Books, pp.37-76 (1985).

[41] In the Elementary and Secondary Edue Act (1965), the United Statesthe United States put forward "education compensation plan". See W. A. L. Blyth & Maurice Chazan, *Compensatory Education*, 21(3) British Journal of Educational Studies 340, 340 (1973).

urban civilization basically covered both urban and rural areas in developed countries. Western countries had also adopted legislation to control pollution emissions from enterprises, improve housing conditions, strengthen food quality supervision and other measures to ensure a good living environment for farmers after becoming urban residents through government intervention.

The third is to establish a social security system to ensure living standards. The United Kingdom promulgated the Employee Compensation Act and the Pension Protection Act, etc. The the United States is committed to actively promoting the establishment of a compensation system regarding farmers' withdrawal from the land. This ensures migrant farmers lead a life the same as that of the native residents. In addition, the governments of various countries have passed a series of laws and policies for farmers who enter the city. The United Kingdom, for instance, enacted bills such as Housing of the working class or Public Health Act, etc. The the United States government promulgated laws and policies such as shortening working hours, increasing wages, and improving the benefits of industrial workers. On the one hand, it had guaranteed a virtuous circle of free flow of urban and rural labor force in the process of urbanization; on the other hand, equal employment opportunities and living conditions of farmers after entering the city had been continuously promoted. The equal rights of farmers in personal aspects were guaranteed by the national system.

4.2 The Reasons

After experiencing various social problems caused by the lack of equal rights of farmers in the early stage of urbanization, Western countries gradually began to pay attention to the rights of farmers to seek a better way of urbanization. This transformation benefited from the Renaissance and the dissemination of justice and human rights theories in Western countries. The ideas of freedom and equality inspired farmers, especially those who had been exploited and oppressed in the urbanization process, to resist and pursue equality.

4.2.1 The dissemination of the concept of justice

The concept of justice in Western society first appeared in ancient Greece. After the Renaissance, the idea of justice was widely spread in the developed capitalist countries. Within the principles of justice lies a tension between the concepts of freedom, equality and rights, which gradually exhibits itself. Equality is often considered to be the core element in the idea of justice.

After the Renaissance, humanists have begun to observe society and the country with "human eyes". Human values, human rights, and human freedoms have been recognized and liberated. Meanwhile, humanism, based on the premise that all men are created equal, suggests that only based on this premise can rights and freedoms be truly realized. The bourgeois Enlightenment thinkers put forward the theory of innate human rights on this basis and have engaged in a more incisive discussion on this. Contract theory thinkers all take the "state of nature" and "natural man" as the premise and build a system from the point of view of human beings. They believe that human rights are inherent natural rights of human beings. This has laid the foundation for the modern concept of equality. The bourgeois revolution was also built on this foundation, turning the idea of equality into a clear political demand. "All men are created equal" in the United States Declaration of

Independence in 1776 and "Les gens naissent et sont toujours libres et égaux en droits" (men are born and remain free and equal in rights) in the Déclaration des Droits de l'Homme et du Citoyen (The Declaration of the Rights of Man and of the Citizen) in 1789 have further consolidated the legal status of equal rights. The right to equality is particularly evident in the reform of American land law. The advocacy of everyone's right to equality stimulated reforms in the field of land law, especially such reforms as the 1827-1828 amendments to the real estate laws of New York State, which eliminated factors related to feudalism and expressed the determination to establish a free, open, and of flexible market mechanism.[42] In a series of reforms of American property law, the implementation and simplification of the Tenancy in Common have provided convenience for the free transfer of land. Moreover, American property law and contract law are mainly derived from English common law. From the legal system of the United States, it also has a glimpse of the concept of freedom and equality reflected in the relevant system of the United Kingdom.

It can be said that with the spread of the concept of justice, the free trade emphasized in the land-related legal systems of various Western countries has completely ended the violation and exploitation of farmers' rights. Farmers have obtained equality in property rights. The above-mentioned laws and policies successively promulgated by various countries to improve education, living and working environment, and social security are also the institutional basis for farmers to gradually obtain equal rights with urban residents in life and work after entering the city.

4.2.2 The liberalism and farmers' autonomy

The rise of liberalism laid a theoretical foundation for the changes of the Western land legal system. It was believed that liberty was the highest value associated with the idea of justice. On this basis, the land transaction system of modern developed capitalist countries gradually formed.

Economic liberalism emerged in the first half of the 19th century. This trend can be traced back at least to Locke, who placed property rights at the heart of the state's qualifications for existence. Property rights naturally include freedom of contract. People in this period revered the freedom of contract and believed it rejected any revision to or even a very slight restriction on the operation of the market.[43] From Adam Smith, author of An Inquiry into the Nature and Causes of the Wealth of Nations, to a group of scholars including David Ricardo and Thomas Malthus, they further developed the classical school of political economy. This school opposes state intervention in economic life and emphasizes complete free competition and free trade. Classical political economy became the mainstream economic theory at that time and had a substantial impact on real economic life. Liberalism, primarily aiming to guarantee freedom, believes that individuals have certain natural rights and can freely exercise natural rights to obtain benefits. Therefore, it can make a logical inference that this liberalism, when implemented in the field of land law, can manifest itself as the freedom or autonomy of land transactions.

What it cannot deny is that free or autonomous transactions are obviously based on the autonomy of the two parties, and the source of this autonomy is both parties' right to equality.

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[42] See Qinhua He, *The Development of American Legal System*, Shanghai People's Publishing House, p.142 (1998).

[43] See Yujin Wu & Shirong Qi, *World History*, Higher Education Press, p.293 (1992).

4.2.3 The Civil Rights Movement and the struggle for farmers' rights

According to the theory of social conflict, every area of any society experiences universal conflict.[44] The process of farmers entering cities is the same, which needs to be adjusted in specific ways. When urbanization began in Western developed capitalist countries, bourgeois revolutions broke out in various countries one after another. In the face of the impact of urbanization on the countryside, farmers defended their rights by organizing Civil Rights Movements such as protests. Although most Peasant Movements were limited to resistance and fights, and their purpose was to combat the exploitation of monopoly capital and fought for greater economic interests, to a certain extent, the far-reaching impact they had produced on reform of the land system and protection of farmers' rights in various countries could not be denied.

As the victims of the primitive accumulation of British capitalism, the farmers who lost their land became the earliest proletariats in Britain while being exploited by both feudalism and capitalism and were a main force in the British bourgeois revolution. The growth of the ranks of the proletariats and the deepening poverty spurred the farmers' struggle against exploitation. At the beginning of the 19th century, the proletariat class began its struggle for better living conditions and democratic rights. By the 1830s and 1840s, the proletariats in Britain, France, and Germany had gradually grown into a huge political force and began to shift from daily economic struggles to large-scale political struggles.[45] The British working class started the People's Charter Movement in 1835; Lyon workers in France initiated two uprisings of in 1831 and 1834; and the textile workers rose in rebellion in Silesia, Germany in 1844. During this period, democratization was rapidly strengthened through the development of the Civil Rights Movement. The voice of the main class enjoying democratic rights continued to become louder. This created preconditions for this class to enjoy autonomy and free economic activities. Farmers' movements, such as the American Farmers Association, the Greenbacks Party, the Farmers' Union and the People's Party, have played an important role in securing farmers' rights and promoting reform of the land legal system.

5. Lessons from the West

Though twists and turns arose when farmers in the Western countries attempted to obtain political, economic and social equality, their equal rights were finally guaranteed. To avoid detours and ensure farmers' equal rights as soon as possible, China should reflect upon and learn from lessons and experiences of the West.

5.1 From a Status to an Occupation

Under the long-existing urban and rural binary pattern, the word, "farmer" has dual connotations, both as a profession and a social identity. "Urbanization of farmers" refers to how "farmers" become "urban residents" with the above two functions develop corresponding abilities, adapt themselves to cities and endow themselves with basic qualities of being a city denizen.[46] In Chinese Mainland, the most direct and effective way

[44] See Dahrendorf Ralf, *Class and Class Conflict in Industrial Society*, Routledge, p.162 (1959).
[45] See Kang Fan & Zexing Song et al., *Brief Economic History of Major Capitalist Countries*, People's Publishing House, p.19 (1973).
[46] See Hangsheng Zheng, *Farmers' citizenization: An important research issue for the contemporary China's sociology*, 26(4) Gansu Social Sciences 4, 4-8 (2005).

to achieve the right to equality for farmers is to change their occupation on the premise of breaking the shackles of farmers' status, so as to give farmers legal freedom and equality.

In a modern society ruled by law, ensuring equality among people is a universal value and the goal of law. As a result, in the current legal system, it is essential to realize the substantive equality between farmers and urban residents on the premise of equal status given to all men and women. Today, "farmer" refers to an occupation in various countries around the world, which relieves the shackles of land on farmers. As far as China's current situation is concerned, the profound reform of the household registration system can remove the system's restrictions on farmers' status, truly realize the legal meaning of "residents" and guarantee farmers' freedom to migrate and choose occupation and trade in the market of land rights. The transformation from "status to contract" in rural society can thus be truly accomplished. Specifically, the role of the urban "hukou" needs to be weakened; interests need to be separated from the "hukou"; and the "hukou" system needs to become only a means of census. Policies and laws need to be implemented to eliminate various benefits attached to the hukou system, as well as various social and economic differences attached to the hukou system, so that the household registration is completely disconnected from various welfare benefits and status will be uniform in the society. Professionalizing farmers is an important symbol of promoting urban-rural integration. This is because, after getting rid of the shackles of status, farmers can work in agriculture just like urban residents working in cities. It is much easier in both theory and practice to promote equal employment and equal pay for equal work, to achieve full coverage of social security, and to improve the transferring and continuation of social security accounts.

In analyzing the various factors that determine agricultural productivity, Karl Heinrich Marx believed "This (productivity of labor) is determined by a wide range of circumstances; it is determined amongst other things by the workers' average degree of skill, the level of development of science and its technological application, the social organization of the process of production and the conditions found in the natural environment."[47] At the same time, he re-divided the scale and efficiency of the means of production, arguing that "The agricultural smallholding, by its very nature, rules out the development of the productive powers of social labor, the social concentration of capitals, stock-raising on a large scale or the progressive application of science."[48] Karl Heinrich Marx also pointed out that "All modern methods, such as irrigation, drainage, steam ploughing, chemical treatment and so forth, ought to be applied to agriculture at large."[49] This shows the importance of scale operation to agricultural production. National laws and policies have always supported the development of moderate-scale operations.

Land scale operation needs two elements: one is land circulation; the other is professional farmers. Land circulation needs not only clear property rights, but also the autonomy of farmers to trade. Studies by Western scholars show that, clear land property rights can reduce transaction costs [50] and increase farmers' enthusiasm for land

[47] See Karl Heinrich Marx, *Capital (Volume I)*, Penguin Books, p.130 (1976).
[48] See Karl Heinrich Marx, *Capital (Volume III)*, Penguin Books, p.943 (1992).
[49] See Karl Heinrich Marx & Frederick Engels, *Karl Marx & Frederick Engels Collected Works (Volume 23)*, International Publishers, p.132 (1988).
[50] See David Feeny & Gershon Feder, *Land Tenure and Property Rights: Theory and Implications for Development Policy*, 5(1) The World Bank Economic Review 135, 136-140 (1991).

investment.[51] Land transaction should be carried out freely in the market.[52] Excessive government intervention will damage farmers' rights,[53] but the government should play a positive role to help farmers avoid market risks, otherwise farmers will reduce transaction willingness based on market risks.[54] For the farmers becoming urban residents in China is not only farmers entering the city life, but also local urbanization. The local urbanization is inseparable from the development of agricultural industry and the operation of land market. The state further defines and protects farmers' land rights through legislation and develops the land transaction market, which is an important part of the development of farmers' local urbanization. The formation of professional farmers requires education and training. The experience of western countries in farmer vocational education inspires China to promote the formation of professional farmers from the following aspects: first, promote the special legislation of farmer education, including the content of farmer education in lifelong education; Second, the government is the leader of farmer education, the government has the ability and responsibility to investigate, discover farmers' needs and market requirements, so as to adjust the curriculum design and learning content of farmer education to adapt to the development of rural economy and society. Thirdly, a multi-channel funding source of farmer vocational education should be formed, which is mainly funded by the state financial input and supplemented by the input of farmer specialized cooperative economic organizations.

5.2 Implementation of Social and Cultural Rights

In addition to the inequality in status, the obvious unequal relationship in living environment, wages, social security and other aspects after the farmers became urban denizens have become the main differences in equality between farmers and denizens. Therefore, it is necessary to immediately return to the idea of "should be" and guarantee that farmers enjoy the same as citizens do. The government plays a leading role in the process of resocialization of land-lost farmers,[55] and the important role of the state in the urbanization of farmers should be strengthened.

First, the laws and regulations in the field of social and cultural rights for migrant workers and their children should be further improved. At present, China has a series of laws and policies to ensure that the children of migrant workers receive education locally, which has laid a foundation for the realization of equality in the right to education. However, household registration and school registration still cause problems such as those related to attending schools of a higher grade. The state should continue to promote policies to ensure the equality of all levels of education. In addition, to achieve equal opportunities in employment, the relevant principles of equality in the current Labor Law of the People's Republic of China and Promotion of Employment Law of the People's Republic of China

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[51] See Shouying Liu & Michael Carter et al., *Dimensions and Adversity of Property Rights in Rural China: Dilemmas on the Road to Further Reform*, 26(10) World Development 1789, 1789-1806 (1998).

[52] See James Kai-sing Kung, *Off-Farm Labor Markets and the Emergence of Land Rental Markets in Rural China*, 30(2) Journal of Comparative Economics 395, 395-414 (2002).

[53] See Loren Brandt & Scott Rozelle et al., *Local Government Behavior and Property Rights Formation in Rural China*, 160(4) Journal of Institutional and Theoretical Economics 627, 627 (2002).

[54] See Terry van Dijk, *Scenarios of Central European Land Fragmentation*, 20(2) Land Use Policy 149, 149-158 (2003).

[55] See Chuanfeng Chen, *A study on Landless Peasants' Social Psychology and Urbanization*, China Agriculture Press, pp.45-60 (2005).

should be refined to facilitate implementation.

Second, the social security system should be perfected. In view of the social security systems of developed countries, they all have a sound legal system and complete legislation.[56] Equality in social security when farmers are on the road to urbanization mainly emphasizes the integration and unification of urban and rural social security. This is not a matter of achieving uniformity in terms of what to guarantee and how to do it, but a matter of connecting current systems. By determining how to bring rural and urban social security together, it is possible to integrate and unify urban-rural social security. Specifically, the first thing is to implement a balanced distribution of resources and narrow the gap between urban and rural areas. Especially in the process of treating land as a form of capital, the state should set reasonable standards to compensate farmers and appropriate methods to distribute resources to promote infrastructural development and improve public services in rural areas. The second thing is to manage and reduce the cost of urban and rural transferring and continuing scientifically and uniformly. Social security-related affairs in urban and rural areas should be managed by the same department to avoid differences in collecting information, handling business, and even using the system between different departments, which will artificially affect management and supervision costs. It is also conducive to the realization of sustainable development between urban and rural areas. The third thing is to break through the funding bottleneck of farmers' social security and increase financial input into rural social security. The state should clarify the principle that the central government, the local government and the insured farmers themselves should contribute to the funding and determine their proportions together. The important role the state plays in supporting finance in rural social security should also be made clear. Finally, the state should incorporate the social security of rural areas and farmers into the national unified and standardized social security system, provide farmers and urban residents with undifferentiated and equal social security, truly liberate farmers from the land, and treat the land less as a guarantee and more as a capital asset.

6. Conclusion

Clark Kerr et al. said, "once industrialization begins, it will inevitably destroy the traditional pre-industrial society."[57] Measured from the perspective of the proportion of the urban population in the total population, China's urbanization has entered the final stage,[58] and in modern society, farmers cannot turn around on the path of becoming urban residents. This is not a matter of "rural-to-nonrural hukou", but a systematic project involving political, economic, cultural and other aspects. Its essence is a continuous socialization and modernization process of land-lost farmers in new urban community

[56] See Wangjun Zeng & Feiyue Liu, *Validity Analysis and New Conception of Current Migrant Workers' Rights Protection Measures*, 21(1) Journal of Wuling 44, 45-46 (2006).

[57] See Clark Kerr & John T. Dunlop et al., *Industrialism and Industrial Man*, Oxford University Press, p.42 (1973).

[58] The rising share of urban population in the total population is an important indicator of the level of urbanization development. On December 30, 2021, the Institute of Population and Labor Economics of the Chinese Academy of Social Sciences released the "Green Paper on Population and Labor: Chinese and Labor Problem Report No.22", which predicts that the peak rate of China's urbanization rate is about 75% to 80%. According to the China Statistical Yearbook 2021, the urban population account for 63.89% of the country's total population in 2020.

environment.[59]

In a modern democratic society ruled by law, equality is the core value. Western countries have gradually guaranteed farmers' equal rights through legal regulation. To prevent history from repeating itself, there is still a long way to help farmers obtain full urban residentship by reflecting upon and learning from the Western experience.

[59] See Jianhua Huang, *Media Dilemmas and Countermeasures During the Citizenization of Land-Lost Farmers*, 11(6) Canadian Social Science 197, 197 (2015).

Shale Gas Development in China: Legal Issues and Legal Development

Lida Shen[1]

Abstract: After the success of commercial shale gas exploitation by the United States oil companies in the last decade, other countries with rich shale gas reserves also started to participate in this thriving industry. Since 2007, China, which is estimated to have large reserves, has shown great interest in the exploitation of shale gas in order to get rid of its over-reliance on traditional energy such as coal and oil. In the Sichuan Basin, Chinese National Oil Companies (hereinafter referred to as NOCs) and International Oil Companies (hereinafter referred to as IOCs) cooperated to launch early-period investigations and developments on shale gas. When entering this market, most IOCs choose to form joint ventures with NOCs, which was proved to be beneficial to both parties. Due to the lack of laws and regulations, there are flexible spaces open for negotiation, allowing both parties to reach a satisfactory agreement on all aspects. The Chinese government is promoting legislation on the energy industry by posing a draft Energy Law in 2020, in which for the first time the law encourages the economical and effective development of shale gas. Backed up by the support from the government, Chinese NOCs are gradually expanding production capacity and developing new technologies to reduce the costs of exploitation. Due to the undesirable exploitation results, most IOCs have exited from the Chinese shale gas market. Since 2020, the Chinese government has accelerated the steps of opening up in the energy sector. On one side, the restrictions on foreign investments in the energy sector have been gradually lifted. On the other side, by extending preferential policies and providing subsidies, the government is encouraging capitals to enter this new energy sector. To ensure the growth of the shale gas industry, the legislators need to solve multiple issues in the practice and provide a unified law to follow.

Keywords: Shale Gas; Energy Law; Production Sharing Agreement

1. Introduction

This paper aims to discuss the legal issues and regulations of the shale gas industry in China. Although the production capacity is small compared with the United States, the amount of shale gas that is technically recoverable in China has been estimated to be the largest in the world. In recent years, the Chinese government started to pay more attention to this traditionally unconventional energy resource for various reasons. With the increasing investment from NOCs, the future development of shale gas appears to be rewarding and promising. However, there are also challenges and difficulties in the legislation and exploitation of shale gas in China, reminding foreign investors of the potential risks. This paper has three chapters discussing Chinese shale gas from different perspectives.

Chapter I will mainly focus on the exploitation of China's shale gas resources in the Sichuan Basin which is estimated to have the largest technically recoverable shale reserves in China. Unlike the United States where the shale gas reserves are distributed evenly, in

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the Sichuan Basin, most of the shale gas is buried in the deep ground of mountainous areas. The complicated geographical condition is a tough challenge to even experienced IOCs. With the fast development of the shale gas industry, as a populous district, the growing concerns about environmental protection and livelihood of residents become distractive to the exploitation. Multiple challenges have to be solved before the exploitation of shale gas could be deemed as profitable.

Chapter II will discuss the current status of shale gas legislation and development in China. Considering that China hasn't published an energy law regarding petroleum or gas, it will be hard for law practitioners to find a written statute as a reference. From a positive perspective, less regulation means that there will be flexible space for negotiation in the business. When negotiating an agreement, the negotiator and the lawyer should pay attention to multiple provisions. With the publication of the Draft Energy Law in 2020, the government support on shale gas development was first written into a statute.

Chapter III is about the future development of the shale gas industry in China. The Chinese government places great hope on shale gas, as it believes that shale gas may one day become a pivotal resource in the energy industry. Therefore, the Chinese government keeps providing preferential policies for shale gas and is expected to increase its support in the future. Meanwhile, the success of shale gas in the United States also inspired Chinese NOCs to collaborate with IOCs. However, due to undesirable drilling results and high costs, until now, BP is the only IOC remaining in the Sichuan Basin. The collaboration between BP and China National Petroleum Corporation (hereinafter referred to as CNPC) in exploiting shale gas seems uncertain. Nevertheless, after 2020, the further opening-up on the energy sector might attract foreign investors back to the table.

Over the last decades, the worldwide trend of liberalization has introduced privatization and competition into those industries traditionally operated by the government or the monopoly NOCs. In the United States, where the energy market has been restructured into an open market, energy law has become an independent subject to many scholars. William Boyd points out in his article that markets and price mechanisms have always been driven by political instruments, even and especially when they are represented as natural or efficient solutions to the problem of the economy.[2] Whether the energy law could manage the competitive energy market has been a concern since the open market has higher price volatility.[3] The existing energy law has to evolve constantly to meet the increasing demands for clean energy and decarbonization.[4] From a global view, due to different domestic energy policies, the regulation of energy in international law is fragmented and incoherent, which fails to meet the increasing needs of international energy trade.[5]

The research on Chinese shale gas mainly focuses on the field of geography and exploitation technology. By searching China National Knowledge Infrastructure (hereinafter referred to as CNKI), the largest electronic platform that collects Chinese

[2] See William Boyd, *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105(2) Minnesota Law Review 739, 740-759 (2020).

[3] See David B. Spence, *Can Law Manage Competitive Energy Markets*, 93(4) Cornell Law Review 765, 767-776 (2008).

[4] See Shelley Welton, *The Bounds of Energy Law*, 62(7) Boston College Law Review 2339, 2366-2382 (2021).

[5] See Thomas Cottier & Garba Malumfashi et al., *Energy in WTO Law and Policy*, NCCR Trade Working Papers 1, 2-4 (2009).

academic journals in all aspects, it could be found that there are roughly 20,000 results with the keyword "shale gas", while there are only 5,000 results with the keyword "energy law". Unlike Western countries which have taken energy law as an independent category of law for many years, the Chinese energy market has been long-time restrained under the absolute administrative power of the government which deemed energy as a sort of strategic resource more than commercial goods available in the free trade. Fortunately, with the opening up of the Chinese energy market, as will be discussed in the chapters, the participation of foreign investors and private capitals has drawn the interests of a few scholars to share views from various perspectives.

With the rising concerns on environmental protection in China, some scholars specializing in environmental protection law point out that the potential risks of pollution during the drilling and exploitation of shale gas might become a tough issue. In case of the occurrence of pollution during shale gas exploitation, at present, the parties have to refer to the laws regulating the general issue of environmental protection such as the Law on Prevention and Control of Atmospheric Pollution and Land Administration Law.[6] However, these laws merely provide a general principle of dealing with pollution in different industries, lacking the specified guidance on the pollution in shale gas exploitations.[7] The common suggestions are to enhance the environmental protection laws and regulations in the shale gas industry and set up an industry standard for oil companies to follow.[8]

The reform of the Chinese energy markets another concern for a part of Chinese scholars. Someone believes that by transforming the energy market from a government-leading market to a capitalized market, the shale gas industry will benefit from the increasing competition and private investments.[9] Concerns are also focusing on the protection of private rights in the shale gas industry. Although the mining right and exploration rights are private rights, these rights are significantly limited by the government. Under Chinese law, the transfer of mining rights is prohibited unless the application of transfer is approved by the administrative department. Meanwhile, the administrative department owns the sole authority of issuing and revoking the licenses of mining rights, which is deemed as an offense to the private rights by some points of view.[10] Another concern is the rent-seeking phenomenon between NOCs and the local government. As giants in state-owned enterprises, Chinese NOCs possess the monopoly on most energy resources including the mining rights of shale gas. NOCs could lobby the local government for support on many aspects such as regulations, subsidies, and preferential policies to kick those competitors out of the market. The urgent need for energy reform is to eliminate the

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[6] See Chao Liu, *Perfection of Legal System for Environmental Risk Regulation in Shale Gas Development*, 41(3/4) Environmental Protection 67, 67-69 (2013).

[7] See Yanfang Zhang & Zhengwei Sun et al., *Study on the Legal System of Environmental Protection for Shale Gas Development in China*, 28(5) Safety and Environmental Engineering 154, 154-160; 175 (2021); Yanfang Zhang & Honghong Xun, *Discussion on Legal Protection of Water Resources in Shale Gas Development in China*, 14(26) Legal System and Society 143, 143-144 (2019).

[8] See Qun Du & Lili Wan, *The Environmental Legal Regulation on the Energy Development of Shale Gas in the United Statesthe United States and Its Enlightenment to China*, 9(6) Journal of CUPL 146, 146-158 (2015).

[9] See Guoxin Xiao, *Legal Choice of Energy Capital Transformation*, 39(7) Law Science 70, 70-82 (2021).

[10] See Wenjing An, *The Analysis on Reform Route of Shale Gas Mining Right System in China*, 42(8) Future and Development 51, 51-55 (2018).

monopoly of NOCs on mining rights of shale gas and set up a free market allowing fair competition.[11] Furthermore, the energy reform should bring benefits to the local region which provide labor force and convenience for the exploitation. In the past, most energy resources will be transported to the regions of Eastern China to meet the rocketing demands for electricity. The energy reform should allow local governments to balance the production and the "export". By setting up a profit-sharing mechanism, the livelihood of local citizens could be improved due to their support towards shale gas exploitation.[12] The scholars are calling for a comprehensive energy law to regulate the industry, and the government should strengthen law enforcement and disclosure of environmental information.[13]

When coming to the phase of exploitation on the spot, there are multiple issues concerning laws and regulations by scholars. In addition to arguing the nature of mining rights, one scholar points out that China's shale gas resources are mainly buried in rocks below 3,500 meters from the surface, and more than 70% of shale gas is vertically overlapped with conventional oil and gas resources with shallow burial depth.[14] How to balance the overlapping among different mineral rights is the issue that has to be solved by Chinese legislators. Meanwhile, China lacks the law dealing with the damages to the environment caused by the exploitation of shale gas. The authority should set up a comprehensive regulatory system for potential environmental disasters.[15] Furthermore, in consideration of the unique technologies applied by shale gas exploitation, regulations and technical standards for hydraulic fracturing and water use should be established to supervise the exploitation activities.[16] Some scholars believe that establishing a more profound financial and tax system to support the development of the shale gas industry is necessary.[17] Before the advance in technology allows shale gas production to be commercial, subsidies from the government and preferential policies are still necessary for the growth of the shale gas industry.

2. Exploitation of China Shale Gas

2.1 Geographic Characteristics of China Shale Reservoirs

Shale gas is a mixture of naturally occurring hydrocarbon gases produced from the decomposition of organic matter (plant and animal remains) found in shale deposits, where

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[11] See Zhe Sun, *On the Legal Realization of the Fair Distribution of Shale Gas Mining Rights*, Ph.D. Dissertation, East China University of Political Science and Law, pp.1-150 (2017).

[12] See Jingyu Nan, *Policy and Law of Shale Gas in-situ Use in Sichuan Province*, 17(3) Journal of Anyang Institute of Technology 8, 8-12 (2018).

[13] See Farah, Paolo Davide & Tremolada, Riccardo, *A Comparison between Shale Gas in China and Unconventional Fuel Development in the United Statesthe United States: Health, Water and Environmental Risk,* 41(2) Brooklyn Journal of International Law 579, 579-654 (2016).

[14] See Nan Guo, *The Logic of Legal Regulation on the Development and Utilization of Unconventional Energy Resources — Based on the Analysis of Shale Gas Resources*, 1(1) Energy Rule of Law 143, 143-157 (2021).

[15] See Jingjing Fu & Xuejie Pan, *Legal System Response to Environmental Risk of Shale Gas Development*, 23(4) Journal of Southwest Petroleum University (Social Sciences Edition) 9, 9-16 (2021).

[16] See Zhong Wang & Yuyan Luo et al., *Problem Orientated Analysis on China's Shale Gas Policy*, 11(11) Energies 1, 1-17 (2018).

[17] See Yanfang Zhang, *Status and Measures of Improvement of Legal Regulation on Shale Gas Development in China*, 26(5) Safety and Environmental Engineering 80, 80-84 (2019).

it is trapped in microscopic or submicroscopic pores.[18] Over the past few years, shale gas has been one of the hottest topics among worldwide energy industries. The low price of shale gas makes it an attractive investment option for individuals and companies. After the successful exploitation of shale gas by Americans, many countries also have published their policies supporting the development of shale gas. According to the United States Energy Information Administration (hereinafter referred to as EIA), China has the world's largest shale gas reserves, even exceeding the United States reserves. Although China has abundant resources of shale gas, these resources are not located evenly on the Chinese land. Most of the shale gas in China is located in the Sichuan Basin and Tarim Basin. EIA estimates from its recent study and reports on shale oil and gas resources that China's technically recoverable shale gas reserves are 1,115 tcf, the largest shale gas reserves in the world.[19] However, there are also undeniable difficulties to be solved by Chinese engineers. Hydraulic fracturing, the technology revolution invented by the Americans, could not be simply used in Sichuan Basin or Tarim Basin to exploit shale gas. On one hand, hydraulic fracturing requires the usage of huge amounts of water which may ruin the local environment system, especially in Tarim Basin. On the other hand, both Sichuan Basin and Tarim Basin are populous areas, which means the noise and quake would cause much trouble to the residents. It is unrealistic for Chinese NOCs to directly copy how American companies developed shale gas.

Despite all the difficulties mentioned above, the future of Chinese shale gas production is still rewarding. Due to the forecasts made by multiple research institutions, China's shale gas output will increase significantly in the coming decades. By 2030, it is believed that shale gas will become a large part of the Chinese energy supply chain, in which the NOCs shall be the dominant leaders. The commercialization of shale gas exploitation will reduce the Chinese domestic demands for imported petroleum. China's reliance on coal for electricity might also be reduced due to the emergence of shale gas, and the air environment will be improved. For now, most of the exploitations of shale gas in China are located in the Sichuan Basin.

2.2 Advantages of Sichuan Basin in Shale Exploitation

Sichuan Basin is now the most popular region for shale gas development in China not only for its support from the government but also for vast amounts of investment from both NOCs and IOCs. According to the EIA report, China held its first shale gas licensing round in 2011 for four blocks in the Sichuan Basin and awarded the tenders to two Chinese companies: China Petrochemical Corporation and Henan Coal.[20] Exploitation is available not only to NOCs but also to private and local companies, and foreign investors may participate indirectly if they hold production sharing contracts (hereinafter referred to as PSC) with a participating Chinese firm.[21] The State Council released shale gas from the jurisdiction of the NOCs, allowing the Ministry of Natural Resources of the People's Republic of China (hereinafter referred to as MNR) to open larger second bidding round

[18] See BGS Research, *Shale Gas*, https://www.bgs.ac.uk/geology-projects/shale-gas/ (accessed on March 17, 2022).
[19] See EIA, *China International Analysis (2015)*, p.19, https://www.eia.gov/international/content/analysis/countries_long/China/archive/pdf/china_2015.pdf (accessed on March 9, 2022).
[20] Id., at 20.
[21] Ibid.

in mid-2012, and then the MNR awarded 19 blocks to 16 domestic companies, mostly to coal producers, power companies, and local energy firms.[22] Considering that the master of necessary techniques in exploiting shale gas is the ticket to enter this market, without such techniques and experienced employees, these small companies had to partner with those NOCs or IOCs to take full advantage of their licenses.

China launched its first study on domestic shale gas exploitations in 2007 by CNPC and cooperated with New Field CO. on the geographical investigation of shale resources. The first successful fraction horizontal test well with the codename "Wei 201-H1" was designed and constructed by CNPC in the Sichuan Basin in 2011.[23] By applying the new technologies, CNPC managed to prove that the shale rocks in the Sichuan Basin meet the standard of commercial production compared with the United States, which inspired the Chinese government to focus on the possibility of exploiting shale gas to reduce its over-reliance on imported petroleum and natural gas.

In 2014, China Petrochemical Corporation announced that the company made a significant breakthrough in the exploration and development of shale gas in China and is planning to develop the Fuling shale gas field into China's first shale gas field with an annual production capacity of 10 billion cubic meters by 2017.[24] Until 2016, the annual production capacity is 7.8 billion cubic meters, which is less than the amount predicted by China Petrochemical Corporation. The fast-growing speed of shale gas production accelerates the steps of China's reform on the energy industry. In the future, the large amounts of cheap shale gas might help China reduce its reliance on coal in the northern area and control air pollution. With its low carbon emissions, the air quality of Chinese urban areas shall be improved. In terms of environmental protection, the completion of a shale gas field with an annual capacity of 10 billion cubic meters will reduce carbon dioxide emissions by 12 million tons per year, equivalent to planting 110 million trees or reducing one year's worth of emissions from 8 million economy cars.[25]

One of the inspiring examples of shale gas exploration is China Petrochemical Corporation's success in JiaoShiBa (hereinafter referred to as JSB) field of the Fuling Block on the eastern edge of the Sichuan Basin. JSB area could provide over 1.5 billion cubic meters in the first quarter of 2019, which shows that Chinese NOCs like China Petrochemical Corporation have the independent technical ability to exploit shale gas. This example proved that a relatively small area, like JSB project, could produce sufficient volumes of shale gas for the purpose of commercialization. The success of JSB area and Fuling Block signals the breakthrough of NOCs on the mass production of shale gas in the Sichuan Basin. Table 1 provides the annual production of Chinese shale gas from 2016 to 2020, showing that Chinese shale gas production has a steady speed of growth with investments from NOCs.

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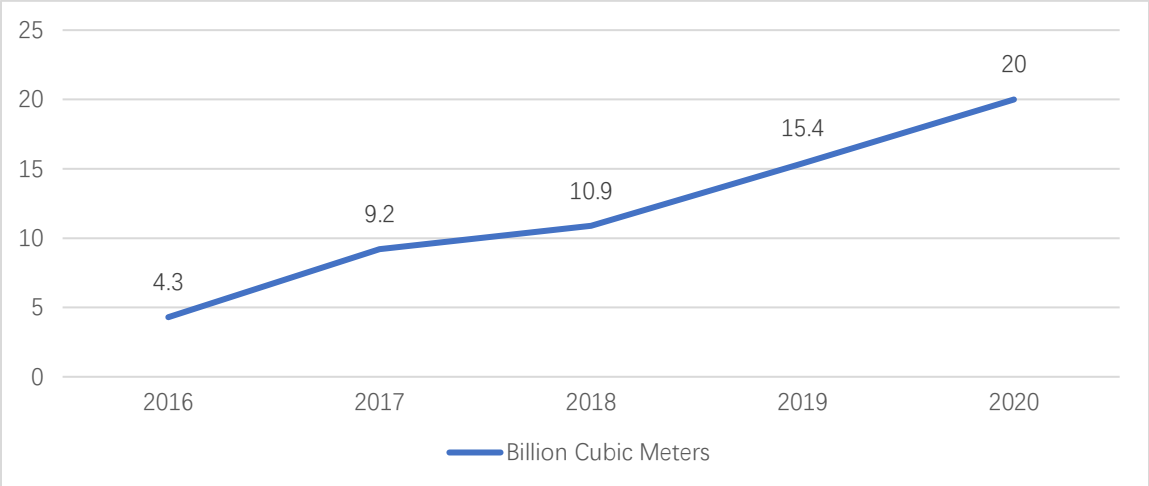
[22] Ibid.

[23] See CNPC, *the First Shale Gas Horizontal Well in China, "Wei 201-H1", Has Completed Fracturing in Section 11*, http://www.sasac.gov.cn/n2588025/n2588124/c4055575/content.html (accessed on March 6, 2022).

[24] See China Petrochemical Corporation Press Release, *China's First Large-scale Shale Gas Field Enters into Commercial Production, Ahead of Schedule*, https://www.docin.com/p-841712744.html (accessed on March 1, 2022).

[25] Ibid.

Table 1: 2016-2020 Annual Production of China Shale Gas[26]



2.3 Potential Risks and Challenges

CNPC is the leader of Chinese NOCs in the early period of shale exploration in the Sichuan Basin. As far as we know from the EIA report and BP assessment, CNPC has made a series of technical progress in exploring shale gas in deeper rock than in the United States. During the early period of exploration, the study showed that there are huge differences in shale reserves between the United States and China. First, in the United States, almost all bottom sediments are marine deposits, while in China, marine deposits are limited. Marine Deposits are the bottom sediments of modern and ancient seas. They are more common than continental deposits and constitute more than 75 percent of the volume of the sedimentary shell of the earth's continental crust.[27] In conclusion, marine deposits are much easier to explore shale gas than continental deposits. All reported successful shale gas plays are maritime so far. Second, the United States has a younger formation of soils, much later than Devonian with less chance to be lost. China has older formations of soils such as Cambrian and Ordovician. Third, the lands of the United States having shale reserves tend to be the area with less plate activity. In China, the Sichuan Basin is an area with structured, fragmented, and large plate activities. To sum up, shales in the United States are geologically younger than those found in China and are technically more convenient for exploitation.

Under this circumstance, Chinese NOCs have to invent new technologies to find a safe way for the exploitation of shale gas considering that hydraulic fracturing is not suitable in China. As aforementioned above, JSB area now could provide over 1.5 billion cubic meters in the first quarter of 2019, which shows that Chinese NOCs such as China Petrochemical Corporation are technically independent to exploit shale gas. However, the challenge remains. The announcement of China Petrochemical Corporation in 2014 predicted that the Fuling shale gas field could reach an annual production compacity of 10 billion cubic meters.[28] While the fact is that with the development of technology, the

[26] Made by the author of this article.
[27] See The Free Dictionary, *Marine Deposits*, https://encyclopedia2.thefreedictionary.com/Marine+Deposits (accessed on February 12, 2021).
[28] See supra note 19.

annual production capacity of the Fuling shale gas field is still far above the expectation China Petrochemical Corporation made in 2014. On the other side, the growing speed of shale exploitation is also frustrating to the Chinese government which once made a prediction of an annual production capacity of 30 billion cubic meters in 2020. This prediction was made by the National Energy Administration of the People's Republic of China (hereinafter referred to as NEA) in the report on shale gas development announced in its 13th Energy Sector Five-Year Plan in 2016.[29] Wood Mackenzie provided a reasonable analysis of China's shale gas production capacity in 2018, predicting that Chinese shale gas production would almost double in two years.[30] Then in 2020, as shown in Table 1, the production reached roughly 20 billion cubic meters, two-thirds of the ambitious target set by NEA in 2016. Since 2014, with the advances in technologies, the costs of developing a commercial well have been gradually reduced. In this period, the main player of Chinese shale gas development has changed from IOCs to Chinese NOCs. Through applying innovations in drilling technologies in the practice, Chinese NOCs are getting familiar with the complicated geographical environment of the Sichuan Basin. The analyst of Wood Mackenzie pointed out that "They have adopted pad-based drilling, fracturing, and production process, which reduces the footprint of the well sites on the mountains. This practice, combined with more indigenous technology and drilling and completion techniques – fracturing trucks, drillable bridge plugs, and drilling trajectory control know-how for example – have helped to save drilling time and reduce costs, while wells are becoming larger."[31] Table 2 is a summary of the unique characteristics of Chinese shale gas, which aims to provide a clear comparison of the differences between China and the United States during the development of shale gas.

Table 2: The Unique Characteristics of China Shale Gas[32]

Underground	1. Deeply buried and significantly fractured; 2. Hard to be detected by normal technologies used in the United States; 3. More costs to dig and maintain the wells.
Aboveground	1. More plate activities arising from geological characteristics; 2. Rising concerns upon environmental protections; 3. High population density.
Business Model	1. Mainly controlled by Chinese NOCs, foreign investments are limited to enter this industry to some extent; 2. The gas price and production is controlled and regulated by the authorities; 3. Lack of detailed laws and regulations.

Due to China Natural Gas Development Report (2021) published by NEA, in 2021, the output of shale gas exceeded 20 billion cubic meters, up 32.6% compared with 2020.[33] With the increasing output of shale gas, Chinese NOCs improved their technologies in

[29] See NEA — Shale Gas Development Plan (2016-2020), Chapter 3 (2016).
[30] See Wood Mackenzie, *Chinese Shale Gas Production Will Almost Double in Two Years*, https://www.woodmac.com/zh/news/editorial/chinese-shale-gas-production-will-almost-double-in-two-years/ (accessed on March 3, 2022).
[31] Ibid.
[32] Made by the author of this article.
[33] See NEA, *China Natural Gas Development Report*, Petroleum Industry Press, p.4 (2021).

detecting and exploiting the shale gas in the deep layer of soils. The newly detected reserves of shale gas are estimated to be 1.46 trillion cubic meters.[34] NEA announced in the report that Chinese NOCs have mastered the key technologies of exploiting shale gas in the shallow layer of soils above 3,500 meters.[35] CNPC has built the largest shale gas production field in the southern area of the Sichuan Basin in China with an annual output of 10,029 million cubic meters.[36]

When the Chinese government is striving to take full advantage of shale gas to support its domestic energy supply, opponents are protesting.

The magnitude 8.0 Sichuan Earthquake, which happened in 2008, was one of the largest earthquakes in human history. The destruction of houses via shaking and landslides contributed to one of the highest death tolls (7^{th}) in the last 100 years worldwide, which was astonishing to every Chinese at that time.[37] After the Sichuan Earthquake, a series of small earthquakes with lower magnitude also happened in Sichuan annually, causing life threats to local citizens and severe loss to properties.

In February 2019, a county in southwestern China ordered a halt to shale gas mining amid fears it may have helped cause an earthquake in the area that killed two people.[38] The magnitude 4.9 quake hit Rongxian county, damaging thousands of buildings, injuring 12 people, and affecting more than 13,000 people, which was the third earthquake above magnitude 4 to strike the area in two days.[39] Rongxian county is a part of the Weirong block, which was famous for shale gas drilling activities conducted by China Petrochemical Corporation. In addition to this quake, other five quakes had hit the area since January including two on Monday above magnitude 4, prompting some residents to gather outside the government's offices to call for a halt to shale gas exploitation.[40] Although the expert said that there was no evidence to prove that shale gas mining caused these earthquakes, the possibility of industrial mining could not be ruled out. Most residents who live in the exploitation areas have little confidence in the safety of industrial mining by Chinese NOCs. From their perspectives, the exploitation of shale gas does not bring them any benefits since most shale gas exploited was transformed into Southern China to meet the dramatically increasing demand for electricity. In China, natural resources belong to the country. Therefore, residents could make no profits from the successful industrial mining of shale. The opposing pressure from the residents would undoubtedly increase the exploitation costs of NOCs such as hiring local workers and conducting prospects. The local government and NOCs should balance the interests between the increasing energy demand in China and the residents' livelihood with caution.

Besides objections from the public, as a newly born industry, there are multiple challenges for the oil companies to resolve before the exploitation of shale gas could be

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[34] Id., at 7.
[35] Id., at 11.
[36] See Gang Peng, *CNPC has Built the First Shale Gas Production Field with Annual Output Exceeding 10 Billion Cubic Meters*, http://news.cnpc.com.cn/system/2020/11/26/030016956.shtml (accessed on March 2, 2022).
[37] See BBC News, *Sichuan 2008: A Disaster on An Immense Scale*, https://www.bbc.com/news/science-environment-22398684 (accessed on February 24, 2022).
[38] See Reuters, *Chinese County Stops Shale Gas Mining Amid Quake Fears: Xinhua*, https://www.reuters.com/article/us-china-quake-shalegas-idUSKCN1QF046 (accessed on February 23, 2022).
[39] Ibid.
[40] Ibid.

proved profitable in China. Compared with the United States, the industrial chain of shale gas is immature in China. Without the downstream chemical industry, most of the exploited shale gas is solely used as fuel. Concerning the population density and geographical characteristics of the Sichuan Basin, the average cost of exploiting shale gas is 30% higher than the United States.[41] The policy of reimbursements from the Chinese government upon the shale gas industry shall remain valid until 2023. Without the reimbursements from the government, the profits could only cover the costs, making the commercialization of shale gas exploitation merely impossible.[42] The complicated administrative approval procedure is another concern. Since 2016, the Chinese government has set up a redline to preserve the basic agricultural land. Due to the specialties of underground natural resources, the exploitation of shale gas has to take over those agricultural lands, which requires a sophisticated procedure conducted by the State Council.[43] Furthermore, the mineral rights of shale gas and other minerals always overlap in part. MNR requires that the oil companies shall sign an agreement to make commitments that the overlapping mineral rights will not affect each other.[44] However, due to the differences between local policies, in practice, the signing of this agreement is a long-time struggle that could delay the registration of mining rights of shale gas.

3. Shale Gas Legislation and Development in China

3.1 Limited Laws and Regulations

China is pushing forward to publish the energy law regulating the whole energy market. However, at present, the laws and regulations on energy in China are limited. Chinese NOCs dominate the domestic shale gas industry. Before 2020, foreign capital could only participate in the conventional upstream market by entering into PSCs with those NOCs. In 2011, MNR issued Announcement No.30, defining shale gas as an "independent mining resource" instead of "conventional natural gas", allowing private and foreign companies to invest in the shale gas industry through forming a joint venture with NOCs. In the shale gas field, IOCs tend to choose CNPC or China Petrochemical Corporation as the cooperator. CNPC and China Petrochemical Corporation are well-positioned to be the controllers for two main reasons. One is that most of the discovered shale gas fields in China are controlled by CNPC and China Petrochemical Corporation at present. The other reason is that both enterprises own substantial monopolies over existing pipelines in China.[45] On one side, by cooperating with the giants of the domestic energy industry, IOCs could be able to take full advantage of the resources held by Chinese NOCs. On the other side, CNPC and China Petrochemical Corporation are also eager to work with IOCs such as Chevron, Shell, and BP, which have rich experiences in exploiting shale gas around the world. The lack of laws and regulations also makes it easier for both sides to reach a flexible agreement that could satisfy both parties.

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[41] See Research Group of Sichuan Shale Gas Industry Development Research, *Insights into Shale Gas Industry Development of Sichuan Province*, Sichuan Provincial Conditions, 20(10) Sichuan Provincial Conditions 48, 50-51 (2021).

[42] Ibid.

[43] Ibid.

[44] Ibid.

[45] See Lehman, Lee & Xu, *FAQ about Shale Gas*, http://www.lehmanlaw.com/resource-centre/faqs/energy-and-resources-law/faq-about-shale-gas.html (accessed on February 24, 2022).

The regulating regime of the shale gas industry is covered and overlapped by multiple administrative departments. Among all departments, MNR and NEA are the most important regulators overseeing the shale gas industry. MNR is liable for the registration and issuance of exploration licenses, while NEA is liable for designing shale gas policies and promoting the development of the shale gas industry. The validity of the exploration license is three years and needs to be renewed by submitting applications to MNR.[46]

As for now, there are no effective laws or regulations detailing the exploitation or utilization of shale gas. If an issue arises, the common opinion of the resolution is to apply the Mineral Resources Law, which widely governs the exploitation of different kinds of mineral resources. The environmental issues that happened during the mining process could be governed by the Environmental Production Law. The shale gas industry policy published by NEA provided general guidance on multiple aspects of shale gas including industrial supervision, construction of demonstration zone, industrial technology policy, etc.[47] The Chinese government is still working on designing specific laws and regulations to supervise the shale gas market.

3.2 Flexible Space for Negotiation

The lack of laws and regulations regarding the exploitation of shale gas in China has brought flexibility for business negotiations. Due to Chinese laws and business considerations, foreign investors who are interested in investing and exploiting shale gas in China, tend to form a joint venture with Chinese NOCs like CNPC and China Petrochemical Corporation.

Generally speaking, most contracts on shale gas exploitation between IOCs and Chinese NOCs are PSCs. The feature of PSC is that the IOC is entitled to recover contract costs and the government is the owner of petroleum.[48] In a standard PSC, the host government, sometimes the NOC, entitles the IOC to investigate, explore and develop a designated region for specified energy resources such as oil and shale gas. The IOC shall bear the risks of exploration and exploitation while paying royalties to the NOC as expenses. After the successful exploitation, the output will be divided into two parts: "cost oil" and "profit oil" as per the arrangement in the PSC. The part of "cost oil" shall cover the expenditures of the IOC on development, while the part of "profit oil" shall be split due to the PSC between both parties. This cooperation mode allows the host government and NOCs to take full advantage of domestic energy resources and maintain control over IOCs' exploitation activities.

In China, since CNPC and China Petrochemical Corporation are authorized by the government to cooperate with foreign companies to exploit shale gas, it is salient to understand the interests and concerns of Chinese NOCs. Chinese NOCs have enough funds and workers to exploit every acre of the Sichuan Basin. However, without the advanced technology of IOCs, Chinese NOCs are unable to exploit shale gas buried under the soil of the Sichuan Basin. Compared with the United States, most China shale is buried in the deeper ground. The less-pressured geographic conditions make it expensive to maintain

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[46] See Measures for the Administration of Registration of Mineral Resources Exploration Blocks, Article 10 (2014).

[47] See NEA, Shale Gas Industry Policy, Chapter 2-7 (2013).

[48] See Wikipedia, *Production Sharing Agreement*, https://en.wikipedia.org/wiki/Production_sharing_agreement (accessed on February 24, 2022).

the well integrity. In addition, because Sichuan is a place where most of the lands are mountainous areas, finding a sweet spot with high pressure could be a task tougher than engineers' original expectations. Therefore, Chinese NOCs need to cooperate with IOCs to gain their advanced technology in exploitation. During a negotiation, Chinese companies might be willing to make compromises on another side to gain the support and training of IOC's experienced experts in the shale field as an exchange.

The first issue that needed to be carefully discussed during the negotiation is the members of the Joint Management Committee (hereinafter referred to as JMC). JMC is created to help both parties to manage the whole exploitation process of shale gas. By creating a committee comprised of members coming from both Chinese NOC and IOC, JMC is authorized to approve important decisions of the exploitation process and provide advice to those actions which are relatively less important. The provisions could ask NOC and contractor to each appoint an equal number of members on JMC.[49] Chairman and vice-chairman should come from different sides. In the PSC of shale gas, the way to organize a JMC is just like other PSCs of oil and gas. However, considering that the contractor is making a deal with the Chinese NOC which is supported by the Chinese government, the contractor should also figure out how this committee works and casts reasonable limitations on the power of the Chinese NOCs. For example, when negotiating the terms of JMC, the contractor needs to take care of a unanimous vote. A unanimous vote means the affirmative vote of representatives representing partners holding 100% of the total percentage interests, which is designed to ensure that every salient business decision could be supported by everyone from both sides. However, in the practice, IOC is responsible for assuming geologic risks and needs to follow the mandatory work program to exploit shale. This provision may increase unnecessary time and costs in waiting for a unanimous vote and reaching mutual consent with the Chinese NOC. When the contractor needs to make an emergency change to the development operation to deal with urgent issues, the contractor must convince the government first, which might cause the failure of avoiding unnecessary damages. Considering that national-owned enterprises are not famous for their efficiency, the contractor should not underestimate the potential risk of a tardy response from Chinese NOCs.

The second issue could be other discoveries during the exploitation process. When discovering the shale gas in a specified area, the contractor may also find other natural resources which are not required or mentioned by the contract. In this situation, a provision concerning these newly found hydrocarbons could be helpful to protect IOC's rights. For instance, in case the contractor has discoveries of hydrocarbons other than shale gas during the exploitation, the contractor shall negotiate with NOC and request to participate in the exploitation of other hydrocarbons discovered by the contractor, then as per the PSC provision, the contractor might be able to exploit other hydrocarbons at a favorable rate because it is the contractor who makes these discoveries.[50] It is reasonable to expect that during the mining process, other hydrocarbons such as oil, natural gas, or other resources might be discovered by the contract. By adding this provision, the contractor may recover the potential loss of failing to discover shale.

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[49] See Center on Global Energy Policy at Columbia University SIPA, *Model Shale Gas Production Sharing Contract*, https://energypolicy.columbia.edu/sites/default/files/Attachment%20A%20China%20Shale.pdf (accessed on March 1, 2022).

[50] Ibid.

The third issue is the determination of commerciality. After the contractor find that the production of shale could meet the demand of making profits, then it could announce the commerciality of this field. Generally speaking, there is a timeframe in the contract underlying the process of discovery and production. When negotiating with NOCs about the determination of commerciality, the contractor should also pay attention to the provision of sole development. For example, "If the Contractor does not consider the certain Sub-area to have commercial value, the NOC may develop the field, and Contractor can later decide to participate before the DCCP by paying its share of the development costs plus an additional fee.[51] If the Contractor does not participate before the DCCP, the field will be excluded from the Contract Area — but development and production operations should still be carried out by the Contractor.[52] If the NOC does not consider a sub-area to have commercial value, the Contractor may solely develop the field at its costs and risks, and without NOC working interest."[53] Here the sole development provision offers the contractor an opportunity to develop the field without collaboration with Chinese NOCs. In addition, the provision may also allow IOC to expand multi-pad drilling productions at its own risk for the purpose of encouraging the development of shale gas. Pad drilling was one of the most advanced techniques used by American oil and gas companies to exploit shale gas in the last decade. This technique allows rig operators to drill groups of wells more efficiently because improved rig mobility reduces the time it takes to move from one well location to the next while reducing the overall surface footprint.[54] A drilling pad is a location that houses the wellheads for a number of horizontally drilled wells, and the benefit of a drilling pad is that operators can drill multiple wells in a shorter time than they might with just one well per site.[55] Before the application of drilling pad technology, the developer had to drill one well by one drilling rig, then disassemble the drilling rig and move to another location for reassembling so that the rig could drill another well, which was burdensome and costly in the practice. By introducing the drilling pad technology, nowadays, oil companies are able to drill multiple wells in one specified area without disassembling and reassembling drilling rigs. Instead, after drilling a well, the drilling rig could be directly moved to the next location in a short distance. By allowing the Contractor to use multi-pad drilling at its sole risk, the contractor could save costs and time in developing shale gas. However, these activities shall be approved by the JMC under the consideration of avoiding any interference to the processing exploration itself.

The last issue of concern is the provision of training and technology transfer. The main reason why Chinese NOCs are collaborating with IOCs to explore and develop shale is that Chinese companies don't have the required technologies and enough experienced engineers to exploit shale gas on their own. Therefore, the provision of training and technology transfer must be detailed and well-considered. For example, the Chinese NOCs may ask the contractor to train Chinese personnel and require the transfer of critical technologies. When negotiating with NOCs regarding this provision, the contractor shall

[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] See EIA, *Pad drilling and rig mobility lead to more efficient drilling*, https://www.eia.gov/todayinenergy/detail.php?id=7910# (accessed on February 26, 2022).
[55] Ibid.

balance the weight of such intellectual properties and the potential benefits of exploitation. Nevertheless, the common arrangement is that all technologies and experiences transferred to the NOC remain the property of the contractor and are subject to confidentiality restrictions.[56] Foreign companies always worry about China's reputation for compulsory technology transfer. In 2020, the Foreign Investment Law (hereinafter referred to as FIL) came into force, signaling a new era for the compliance of foreign investments in China. In response to the criticism on intellectual property protection from the foreign investors, Article 22 of the FIL stipulates that the state protects the intellectual property rights of foreign investors and foreign-funded enterprises and protects the lawful rights and interests of owners of intellectual property rights and relevant rights holders; and for infringements of intellectual property rights, strictly holds the infringers legally liable according to the law.[57] Accompanied by other articles and Implementation Regulation for the FIL, the legislator has paid full attention to the intellectual property protection issue to eliminate the doubts from investors.[58] It could be expected that the infringements of intellectual property will be strictly punished in China.

3.3 Engagement of Various Investors

During the discovery and development of shale gas, although Chinese NOCs play a significant role in the whole exploitation, other companies such as IOCs and non-oil domestic operators are also willing to invest in this thriving market. Based on their advanced technology, IOCs cooperate with Chinese NOCs to engage in the discovery and exploitation of shale gas. Meanwhile, by introducing various investors and capitals, the Chinese government believes that a competitive market could ensure the fast growth and best interests of shale development.

In the past few years, international oil companies including Shell, ConocoPhillips, and Eni have once shown interest in discovering and developing shale gas in Sichuan Basin. However, just like what has been mentioned above, in China, foreign companies are not allowed to solely enter the energy market, which means IOCs could not do the discovery and exploitation of shale gas by themselves. In the past, international oil companies have to form a joint venture with Chinese NOCs to get the permission of entering the Chinese upstream market. Under the PSC, IOCs must do those complex exploration works which are full of risks. If there is commercial output, then the Chinese NOCs have the right to take a portion of it. One example is that in 2013, the Ministry of Commerce of the People's Republic of China approved the PSC between Shell and CNPC in the Fushun-Yongchuan Block in Sichuan Basin, which was the first shale PSC in China, a key milestone for foreign investors seeking a foothold in China's shale gas industry.[59]

In addition to the IOCs around the world, other Chinese non-oil companies also showed great interest in investing in this newly born energy industry. MNR has tried to encourage the competition by the second round of bidding on auctioning blocks. This round of bidding was open to all companies regardless of their experience in the energy industry.

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[56] See supra note 44.

[57] See Foreign Investment Law of the People's Republic of China, Article 22 (2020).

[58] See Implementation Regulations for the Foreign Investment Law of the People's Republic of China, Articles 23-25 (2020).

[59] See Duke Suttikulpanich & Ying Wang et al., *Standard Chartered — China Shale Gas: Potential Unearthed*, p.71, https://vdocuments.mx/china-shale-gas-2014.html (accessed on March 8, 2022).

Bidders in the second-round shale gas block auction included coal companies, power companies, and privately-owned project developers. Companies with little experience in the upstream industry may choose to hire the services of private exploitation companies or subsidiaries of Chinese NOCs to do the actual work.[60] For example, in May 2013, Shenhua Group, a Chinese company, hired China Petrochemical Corporation's oilfield service to conduct the 2-D seismic survey for the block it was awarded (the Baojing Block in Hunan Province).[61] The participation of multiple non-oil companies, even though their capitals and technologies are insufficient compared with NOCs and IOCs, will increase the variety of the shale gas industry and bring more competition to this highly centralized market.

3.4 Trends in Draft Energy Law

In April 2020, NEA announced the new draft Energy Law of PRC seeking public comments. This new draft provides general instructions on the reform of one of the largest energy markets in the world. While some scholars argue that the lack of details on applications and the vague principles could not clarify the goals of the legislation,[62] this intentional blank left in the draft might be interpreted as the guidance on energy policies of the authorities in the near future.

Before this draft, the first version of Energy Law was announced in 2007 seeking public opinions, which raised controversies and disagreements in many aspects. One of the most controversial chapters is Chapter II, which provided the basic structure of a unified energy regulatory department. In this chapter, the 2007 version draft ruled that an independent regulatory department of energy shall gain full authority in managing all energy affairs including implementing the national energy strategy, formulating and implementing energy planning and policies, managing all energy industries in the country, and being liable for the development and reform of the energy industry.[63] There were opinions that setting up a new department is unnecessary at that time. NEA was established in 2013, while back in 2007, there was no independent department that was legally or administratively liable for overlooking the energy sector. The power was divided by several departments such as NDRC and MLNR. Under opposition from various sides, the legislation of Energy Law was paused. After several rounds of reshuffling in the Chinese government, the newly established NEA picked up the pending legislation works. As for now, NEA does not gain full administrative power in the energy sector. In the 2020 version, the old chapter II was removed, with some articles dispersing into other chapters. This arrangement might indicate that the Chinese government has not yet decided whether a unified and centralized department regulating energy affairs is necessary.

Compared with the 2007 version, the content of the 2020 version has been reduced from the original 15 chapters and 140 articles to 11 chapters and 117 articles, covering almost all aspects of the energy industry.[64] The most significant change lies in the swift of energy policies over the last decade. For example, the 2007 version contained separate

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[60] Id., at 35.
[61] Id., at 36.
[62] See Qian Chen, *On the Legislative Purpose of China's Energy Law — Comment on Article 1 of the 2020 Energy Law (Exposure Draft)*, 14(1) Chinese Journal of Environmental Management 123, 123-129 (2022).
[63] See the Energy Law of the People's Republic of China (Draft for Comment), Chapter 2 (2007).
[64] See Jun Xu & Michael G. Pollitt et al., *China's Energy Law Draft and the Reform of its Electricity Supply Sector*, p.8. https://www.eprg.group.cam.ac.uk/eprg-working-paper-2028/ (accessed on March 8, 2022).

chapters on energy conservation, energy development in rural areas, energy reserves, and energy emergency response, which were the guiding policies of energy at that time.[65] The 2020 version re-organized these articles into different chapters and added new contents concerning energy security and renewable energy, which are the top priority issues of the Chinese government at present.

Chapter VI of the 2020 version clearly states that the Chinese government plans and coordinates the energy security, incorporates the energy security strategy into the national security strategy, optimizes the energy layout, enhances the construction of facilities for energy security reserves and peak load regulation, strengthens the energy supply and emergency response regulation capacity, improves the energy security and emergency response system, and comprehensively promotes the energy security assurance capacity.[66] Besides the general requirements, it should be noted that although the Chinese energy market is taking reform, the nature of this market determines the domination of administrative power. Unlike the United States where the private energy companies could adjust the price and supply according to the market, the draft Energy Law provides that energy production or supply enterprises shall, in accordance with laws, administrative regulations, and energy supply contracts, supply energy on schedule and by volume, and shall not suspend or stop energy supply without authorization, nor shall they raise prices or reduce the volume of energy supply without authorization in order to ensure the basic needs of the national economy and the people's livelihood.[67] Meanwhile, with the fast development of technologies, as one of the leading countries in renewable energy, the legislator laid more emphasis on encouraging renewable energy and non-fossil energy. The 2020 version provides that the relevant departments under the State Council shall take measures to promote the development of non-fossil energy such as renewable energy and nuclear energy and monitor the indicators for the proportion of non-fossil energy in primary energy consumption on an annual basis.[68] The government gives priority to the development of renewable energy, formulates national medium and long-term targets for the total volume for the development and utilization of renewable energy and targets for the proportion of renewable energy in the primary energy consumption, and incorporates in the obligatory indicators of the national economic and social development plan and the annual plan which shall be implemented by all provinces, autonomous regions and municipalities directly under the central government.[69] The relevant articles reflect the legislators' concerns about climate change, environmental protection, and diversified energy supply.

It is the first time that shale gas is mentioned in the draft Energy Law. In Article 40, it rules out that the State encourages the economical and effective development of unconventional and low-grade oil and gas resources such as tight oil and gas, shale oil, shale gas, and coalbed methane, and encourages the research on new theories and the research, development, and reserve of new technologies concerning the exploration and

[65] Id., at 9.
[66] See Announcement of the National Energy Administration on Seeking Public Comments on the Energy Law of the People's Republic of China (Draft for Comment), Article 70 (2020).
[67] Id., at Article 73.
[68] Id., at Article 43.
[69] Id., at Article 44.

development of oil and gas.[70] On the premise of protective development, market players meeting the access requirements are allowed to participate in the exploration and exploitation of oil and gas.[71] Given that the Chinese government takes energy security as its priority, the diversified energy supply undoubtedly becomes a necessary piece in the future plan of the energy industry.

To sum up, compared with the 2007 version, the new Draft Energy Law turns its attention to energy security and diversified energy supply in accordance with the new political trend. The arrangement of chapters becomes more centralized. Due to the concerns about ensuring an independent energy supply instead of relying on sole energy, the new draft focuses on promoting the development of unconventional energy. It could be foreseen that the investment in shale gas will acquire more protection from the authorities in the future.

4. The Future of China Shale Gas Industry

4.1 Dilemmas of Shale Gas Exploitation

In 2014, IOCs were crowding into Sichuan Basin to discover and exploit shale gas. They believed that they could copy the roadmaps of the United States on shale gas development. However, unlike the United States, when discovering shale gas, many unexpected difficulties emerged. After several years, many international oil companies gave up on shale gas exploration in China and went elsewhere because of poor drilling results.

Until 2019, BP became the only IOC remaining in China's shale gas industry. In March 2016, BP reached its first contract with CNPC to exploit and develop shale gas in the Neijiang-Dazu block in Sichuan. It reached a second PSC in the north Rongchang block later in 2016. CNPC was the operator in both deals. Nevertheless, the drilling result was not satisfactory since BP may underestimate the complexity and difficulty of shale gas exploitation in the Sichuan Basin. According to the latest news, BP is planning to exit from two PSCs because of poor drilling results. BP's Chief Executive Officer Bob Dudley said at a conference in Shanghai that the Sichuan projects faced "great challenges" because of its complex geology.[72] With BP and the other oil majors gone, PetroChina Co, CNPC's listed arm, and China Petrochemical Corporation are likely to dominate China's shale gas sector using low-cost technology and services developed domestically.[73] Provided that the failure of BP is true, the Chinese NOCs will become the main player in the Chinese shale gas industry again.

Nevertheless, the temporary withdrawal of IOCs does not solve the dilemmas distracting the exploitation and commercialization of shale gas. There are multiple challenges needed to be overcome by the pioneers.

The first challenge is the high costs of drilling wells. As aforementioned above in other chapters China's shale gas is buried in the deeper ground compared with the United States. China's shale gas reserves are believed to be 2,000-3,000 meters deep, versus 1,000-

[70] Id., at Article 40.
[71] Ibid.
[72] See Meng Meng & Aizhu Chen, *BP latest oil major to exit China's shale gas after poor drilling results*, https://www.reuters.com/article/us-china-shale-bp-idUSKCN1RN11R (accessed on March 8, 2022).
[73] Ibid.

2,000 meters in the United States, which will result in higher drilling costs when combined with other factors. The problem of high costs in operation is common in the oil and gas field. Ordinarily speaking, this challenge could be solved in two ways. The first is introducing technological innovations to improve working efficiency, which takes time. The second is to use local content. In the PSC between NOC and IOC, there is always a provision detailing the use of local content: "Preference shall be given to employment of Chinese personnel and procuring goods and services from Chinese subcontractors (provided their conditions are competitive)."[74] For example, based on the research conducted by Charter Standard, in the United States, the cost of drilling a well to exploit shale is estimated to be c.USD 9mn. In China, the drilling well constructed by PetroChina and its foreign partners like Shell is far more expensive, estimated to be more than c.USD 16mn. However, during the discussion with CNPC's officials, they told the investigator with confidence that the cost of drilling a well in the Sichuan Basin could be reduced to c.USD 8mn if CNPC could fully take advantage of local manpower and equipment.[75] In some aspects, the dense local population helps reduce the cost of hiring workers. Local field service engineers are 80% cheaper than their international counterparts in China.[76] By maximizing the potential of local content, the costs of discovery and exploitation in China could be reduced up to 50% less than wells with the intense foreign partnership.

Other challenges include topography, population, and water resources. Most parts of the Sichuan Basin are mountainous regions. Although Sichuan Province is famous for its density of population, which is 166 people per square kilogram, there are still many undeveloped roads without careful maintenance. The inconvenience of transportation may cause trouble to deliver large-scale drilling equipment such as pressure pumps and drilling rigs. Many Chinese companies have been aware of this business opportunity and started to design and manufacture the equipment which is suitable for China's topography. The rich resources of manpower could provide enough workers for oil companies and reduce the costs of operation. Besides, the exploitation of shale gas needs a huge amount of water. A typical well developing shale gas needs c.4mn gallons of water, mostly during the fracking process.[77] Therefore, as in the United States, the above-average local water resources are helpful to the development of shale. Because of the complexity of construction in shale gas well in China, these wells may require more consumption of water compared with the United States. Whether the local environment could endure such heavy pressure remains unclear.

The challenges facing the unconventional energy industry always include technology. As a kind of commercial exploitation just like other kinds of oil and gas development, shale gas exploitation itself must be able to make commercial outputs to attract investments, which makes technological innovation and upgrade salient to improve the working efficiency and reduce operating costs. For example, enhanced drilling solutions helped shale pioneer Mitchell Energy cut drilling costs by half, allowing exploration projects to reap a 10% return with wellhead gas prices.[78] For now, Chinese NOCs still lack the

[74] See supra note 44.
[75] See supra note 54, at 38.
[76] Id., at 39.
[77] Ibid.
[78] Id., at 42.

necessary technical ability to conduct massive commercial exploitation of shale gas in the Sichuan Basin.

4.2 More Investments from NOCs and the Government

Over a long period, the Chinese NOCs like CNPC and China Petrochemical Corporation will play a significant role in shale exploitation. NOCs have most of the shale gas resources and a greater capability of taking risks, which could boost the growth of Chinese shale gas. Meanwhile, the government also provides solid support to NOCs to ensure that the output of shale gas could help China to complete the energy reform.

CNPC and China Petrochemical Corporation will become the dominator in the Chinese shale gas market because of their huge advantages in different aspects. According to the assessment of the Ministry of Land Resources, CNPC and China Petrochemical Corporation own about 75% of China's shale gas resources. More funds are available for NOCs to invest in the costly exploration project. Besides, these NOCs could better utilize local manpower and other resources. With multiple access to pipelines connected to every corner of China, CNPC and China Petrochemical Corporation could further reduce the costs of transportation. Although the growing speed of the annual production capacity of shale gas is not as ideal as the Ministry of Energy predicted in 2014, NOCs still made solid progress in technology innovation and equipment improvement. For example, in 2014, China Petrochemical Corporation announced that the company made a significant breakthrough in the exploration and development of shale gas in China and was planning to develop the Fuling shale gas field into China's first shale gas field with an annual production capacity of 10 billion cubic meters by 2017.[79] Although China Petrochemical Corporation failed to achieve this positive goal, it manages to maintain a steady growth of the annual production capacity of shale gas.

The Chinese government has led efforts to initiate R&D campaigns and set up experimental projects. NEA, China's top energy policy authority, designated CNPC to set up the National Energy Shale Gas R&D (Experiment) Centre in August 2010, to oversee China's technological capacity building. The center covers almost the whole shale gas value chain, from reservoir assessment/analysis, block development solution design, drilling, and stimulation to well completion. Meanwhile, the faster demand growth in China will also contribute to the development of the shale gas market. It is believed that China will become the country with the largest energy consumption in the next decade. China has been unsatisfied with its heavy reliance on the import of oil and natural gas for a long time and keeps trying to change the situation. Shale gas is a great opportunity for China to reduce its reliance on the import of energy resources.

Furthermore, the poor reputation of China's air quality and environment also pushes the Chinese government to care about the environmental issue. In China, coal is still one of the biggest sources for making electricity. In the northern part of China, during winter, the air pollution caused by burning coals is serious, which catches the public's attention every year. In recent years, the Chinese government is making efforts to transfer its industrial mode. By encouraging the use of clean energy and closing those factories which don't meet the standard of emissions, the air quality could be significantly improved. Therefore, under this circumstance, shale gas is considered a sort of clean energy which is

[79] See supra note 19.

much more environmental-friendly than coal. The growing demand for cheap and green energy drives the Chinese government to provide a more favorable policy towards the shale gas market.

4.3 Eased Regulations and Preferential Policies

The trade war and coronavirus pandemic have caused great adversarial impacts on the growth of the Chinese economy and speeded up the steps of opening up and reform towards private and international investors. In the energy industry, the government further eased the regulations upon the energy sector and encouraged higher investments in more technically challenging upstream hydrocarbon areas such as shale gas and renewable energy projects.[80] As for now, the technologies NOCs have are not sufficient to make shale gas a profitable enough business to lure private money.[81] China has been seeking ways to attract more private investment in the energy sector by streamlining the project approval processes, implementing policies to improve energy transmission infrastructure to link supply and demand centers, and relaxing some price controls.[82]

NDRC and the Ministry of Commerce removed restrictions on upstream oil and gas activities in the 2019 Special Administrative Measures for Foreign Investment Access, which is also known as the "Negative List". The 2019 Negative List removed ownership restrictions under which foreign companies were required to enter a joint venture or partnership with Chinese companies for upstream oil and gas activities., and they will now be able to operate fully-owned entities in the country.[83] Then in 2020, MNR further lifts the restrictions on the oil and gas exploration and exploitation market, providing that any domestic or foreign company registered within the territory of the People's Republic of China with net assets of not less than 300 million yuan is qualified to obtain the oil and gas mining right according to the relevant provisions.[84] Those engaged in the oil and gas exploration and exploitation shall comply with the requirements and provisions on safety and environmental protection and have the corresponding technical capacity for the oil and gas exploration and exploitation.[85] In the past, the exploration rights and mining rights of oil and gas were dominated by NOCs. Considering that the exploration and exploitation of oil and gas, especially shale gas and other unconventional gas, require large amounts of funds and advanced technologies, the involvement of foreign funds will boost the development of this traditional industry. While the intentions of IOCs re-entering the Chinese shale gas market remain uncertain, the opening-up and reform of the energy market will bring more investors back to the table. In 2021, the Ministry of Finance and

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[80] See EIA, *Country Analysis Executive Summary: China (2020)*, p.1, https://www.eia.gov/international/content/analysis/countries_long/China/china.pdf (accessed on March 9, 2022).

[81] See Aizhu Chen & Muyu Xu, *China aims to rev up shale gas drive, wean itself off imports amid U.S. trade row*, https://www.reuters.com/article/us-china-energy-naturalgas/china-aims-to-rev-up-shale-gas-drive-wean-itself-off-imports-amid-u-s-trade-row-idUKKCN1VN0V6?edition-redirect=uk (accessed on March 8, 2022).

[82] See supra note 75, at 2.

[83] See Oceana Zhou & Eric Yep et al., *Analysis: China eases foreign ownership rules in oil and gas upstream, city gas distribution*, https://www.spglobal.com/commodity-insights/en/market-insights/latest-news/oil/070319-china-foreign-ownership-oil-gas-upstream (accessed on March 8, 2022).

[84] See Opinions of Ministry of Natural Resources on Matters to Promote the Reform of the Administration of Mineral Resources (for Trial Implementation), Article 5 (2019).

[85] Ibid.

Administration of Taxation announced that the preferential tax policy upon shale gas extended until 2023, which poses a 30% reduction on the resource tax of shale gas production.[86] Meanwhile, the government maintains its subsidy policy towards shale gas production by using special funds to reward and supplement the exploitation and utilization of unconventional natural gas such as coalbed methane (coal mine gas), shale gas, and tight gas on a basis of production.[87] Provided that the production exceeds that of the previous year, a cascade award will be given according to the incremental productions.[88]

Besides policies from the central government, to bolster the local economy, some local governments also use administrative power to encourage shale gas exploitation. For example, as a province famous for its oil production, Heilongjiang Province put the shale gas exploitation into the long-term development scheme of the province, which aims to exploit shale gas and shale oil in Daqing Oilfield.[89] A goal to build a national natural gas (shale gas) 100 billion cubic meters capacity base in the near future. By cooperating with different cities and departments in the province, Sichuan Province has set up a magnificent plan to develop shale gas and a low-carbon economy. In 2022, Sichuan Province and Chongqing Municipality have reached an agreement on joint development of oil and gas resources, including promoting the joint construction of important clean energy bases in China, creating high-quality clean energy development demonstration zones, and the national natural gas (shale gas) production base of 100 billion cubic meters, improving the exploration and development of natural gas (shale gas) and enhancing the benefit-sharing mechanism of shale gas development.[90]

5. Conclusion

In 2014, almost all international oil companies were rushing into China, expecting that the success of shale gas in the United States could be copied in another country. However, until 2021, most of them chose to exit the China shale gas market because of unexpected failures. It is true that China has rich shale gas resources and is willing to develop them as a supplementary to the domestic energy supply. However, the commercialization of shale gas turns out to be a tough challenge for all oil companies. There is still a long way to go for Chinese shale industry to fully take advantage of its potential.

According to EIA, China has the largest shale gas reserves in the world with its shale gas resources mainly located in Sichuan Basin and Tarim Basin. Since 2014, the Sichuan Basin has become the most popular region for attracting IOCs and NOCs to conduct shale gas exploitation activities. However, compared with the United States, in the Sichuan Basin,

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[86] See *Announcement on Extension of the Implementation Period of Certain Preferential Tax Policies*, http://www.chinatax.gov.cn/chinatax/n810341/n810825/c101434/c5162506/content.html (accessed on March 8, 2022).

[87] See Interim Measures for the Administration of Special Funds for Clean Energy Development, Article 12 (2020).

[88] Ibid.

[89] See *Suggestions of Heilongjiang Provincial Committee of the Communist Party of China on Formulating the 14th Five-Year Plan for National Economic and Social Development and the Long-term Goals for 2035*, para.73, https://www.hlj.gov.cn/n200/2020/1207/c35-11011966.html (accessed on March 8, 2022).

[90] See General Office of Sichuan Provincial People's Government, *Joint Action Agreement of Chengdu and Chongqing on Emission Peak and Carbon Neutrality*, http://www.cq.gov.cn/zt/cydqscjjq/zcwj/202202/t20220223_10426102.html (accessed on March 8, 2022).

the shale gas was buried in the deeper layer of soils with more complicated geographical characteristics. Many IOCs failed to foresee these challenges and difficulties. As of now, Chinese NOCs are the dominant leaders in the exploitation of shale gas in the Sichuan Basin. By applying new technologies, Chinese NOCs manage to keep a steady growth of the annual production capacity of shale gas. Meanwhile, with the increase of drilling activities, protests from residents against drilling in fear of earthquakes keep surging, and the costs of exploitation could not be reduced to the amount that makes massive production of shale gas profitable. Furthermore, the growing concerns on the issue of environmental protection might burden the expansion of drilling activities.

China is working on drafting laws regulating natural resources and the energy field. Due to the lack of laws and regulations at present, IOCs may have more flexible space when negotiating with Chinese NOCs to form a joint venture in exploiting shale gas. Just as PSCs in other conventional energy resources, the shale PSC also should focus on limiting the power of NOCs and giving IOCs enough protection during the exploration period. Meanwhile, because Chinese NOCs are eager to get the advanced technology of shale exploration which belongs to IOCs, it could be expected that there will be a detailed chapter or provision concerning the technology transfer and training. Sichuan Province is famous for its dense population. By carefully negotiating the provision of local content, IOCs may significantly reduce the costs of exploration if they could fully utilize the abundant local human resources. The 2020 Draft Energy Law represents the direction of policy and reform in the energy field of the Chinese government. In this draft, the encouragement on the exploitation of shale gas was first recorded as a written article in the law. Furthermore, the new draft focuses on two new areas: energy security and renewable energy, which are both in favor of shale gas development. As a sort of unconventional energy, shale gas could further enhance domestic energy diversity and energy security.

After a wave of investments, IOCs are facing dilemmas at present. On one side, because of poor drilling results, IOCs could not afford the high costs and low returns, which makes the commercialization of shale gas an impossible mission. On the other side, IOCs will not simply give up the Chinese market and want to keep in touch with the Chinese government for their potential business in the future. In 2019, Shell has entered China's shale oil sector again, signing a joint study agreement with China Petrochemical Corporation to study an East China block, part of the nation's early efforts to unlock the potentially massive unconventional resource.[91] In 2021, the vice president of Wood Mackenzie concluded that the performance of Chinese shale gas production is credible and higher than the expectations even though the production did not reach the original target of the Chinese government.[92] Chinese NOCs are playing a dominant role in the shale gas industry. With support from the Chinese government, CNPC and China Petrochemical Corporation are improving technologies and mastering the geographical condition of the Sichuan Basin to overcome the challenges and reduce the costs per well. Meanwhile, due to the shock of the economy, the Chinese government is gradually lifting the restrictions from laws and regulations. IOCs could form a fully-owned entity instead of a joint venture when conducting an upstream oil and gas business. The subsidies and preferential policies

[91] See Aizhu Chen, *Shell Enters China's Shale Oil Scene with A Joint Study with Sinopec*, https://www.reuters.com/article/us-sinopec-shell-shale-oil-idUSKCN1RK146 (accessed on March 4, 2022).

[92] See Gavin Thompson, *There's Still Life in China's Shale Gas*, https://www.woodmac.com/news/opinion/theres-still-life-in-chinas-shale-gas/ (accessed on March 20, 2022).

on shale gas development were extended, and local governments issued their own policies supporting the local shale gas industry. Despite all these factors, the core challenge facing China's shale gas industry is whether the energy reform could provide a well-designed statute for all oil companies to follow. Only under legal regulation instead of administrative intervention could China transfer its largest shale gas reserves into the most profitable and productive shale gas exploitation in the world.

Noble Motives, Unjustified Reasoning: A Comment on Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)

Yue Cao[1]

Abstract: The International Court of Justice recently delivered its Provisional Measures Order on the Ukrainian Genocide case, demanding an immediate suspension of the Russian military operation against Ukraine. This article examines three legal issues deriving from this order. Firstly, it evaluates the establishment of the ICJ's *prima facie* jurisdiction under the compromissory clause of the Convention on the Prevention and Punishment of the Crime of Genocide. It finds that the Order inexplicably departed from the ICJ's jurisprudence in the Legality of Use of Force cases, and that the existence of indispensable external *jus ad bellum* issues in the present case should have deprived the ICJ of its jurisdiction. Secondly, it assesses the plausibility of the rights sought, and finds that there is no plausible right under the Convention on the Prevention and Punishment of the Crime of Genocide to be free from military attacks based on a claim of preventing and punishing, since the parties could not have intended so. Thirdly, it analyzes the link between the claimed rights and the provisional measure granted and finds that this requirement is not satisfied in this case because the provisional measure indicated will also protect a right under *jus ad bellum*, which falls outside the ICJ's jurisdiction. In view of the above, this article argues that although the Order might achieve the political objective of mitigating the conflict, the ICJ's reasoning has been unconvincing or at least incomplete in legal terms, which risks undermining the ICJ's reputation and reliability as well as the coherence and credibility of international law.

Keywords: Ukraine; The Convention on the Prevention and Punishment of the Crime of Genocide; The International Court of Justice; Compromissory Clauses; Provisional Measures

1. Introduction

On March 16, 2022, the International Court of Justice (hereinafter referred to as the ICJ) delivered its Order on the Request for the indication of provisional measures submitted by Ukraine in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (hereinafter referred to as the Order).[2] The ICJ, by thirteen votes to two, ordered that Russia shall "immediately suspend" its military operations against Ukraine and ensure that the relevant armed forces "take no steps in furtherance of the military operations"; it also unanimously ordered that both Parties shall refrain from any action which might "aggravate

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[2] See International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf (accessed on March 16, 2021).

or extend the dispute".[3] This case was originally filed on February 27, 2022 by Ukraine as a response to Russia's "special military operations" against Ukraine beginning on February 24, 2022. In its application, Ukraine creatively invoked the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the Genocide Convention) as the basis for the ICJ's jurisdiction and indication of provisional measures, arguing that Russia has violated the Genocide Convention by falsely accusing Ukraine of committing genocide and by using force based on such a false claim.[4]

The case raises several interesting issues concerning the procedural law of the ICJ, as reflected in both the individual opinions of judges and academic literature.[5] This article examines three of those issues, namely the establishment of the ICJ's jurisdiction under a compromissory clause (Section 2), the plausibility of the rights sought (Section 3), and the link between the claimed rights and the provisional measure (Section 4). It then argues that although the Order might achieve the ICJ's political objective of mitigating the conflict, its reasoning has been relatively weak, or at least incomplete, which risks undermining the ICJ's reputation and reliability as the world's principal judicial organ.

2. The Court's *Prima Facie* Jurisdiction

The ICJ may indicate provisional measures only if it has *prima facie* jurisdiction over the merits of the case.[6] At this stage, the ICJ is not required to definitively establish its

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[3] Id., at 20.

[4] See International Court of Justice, *Allegations of Genocide under the Convention on the Preventi on and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application Instituti ng Proceedings*, https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf [hereinafter Ukrainian Application] (accessed on February 27, 2022); *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures*, https://www.icj-cij.org/public/files/case-related/182/182-20220227-WRI-01-00-EN.pdf [hereinafter Ukrainian Request for Provisional Meas ures] (accessed on February 27, 2022).

[5] See International Court of Justice, *Allegations of Genocide under the Convention on the Preventi on and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Declaration of Vic e-President Gevorgian*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-01-E N.pdf [hereinafter Declaration of Vice-President Gevorgian] (accessed on March 16, 2022); *Declara tion of Judge Bennouna*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02 -EN.pdf [hereinafter Declaration of Judge Bennouna] (accessed on March 16, 2022); *Declaration of Judge Xue*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf [her einafter Declaration of Judge Xue] (accessed on March 16, 2022); *Separate opinion of Judge Robi nson*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf (accessed o n March 16, 2022); *Declaration of Judge Nolte* , https://www.icj-cij.org/public/files/case-related/182/ 182-20220316-ORD-01-05-EN.pdf [hereinafter Declaration of Judge Nolte] (accessed on March 16, 2022); Marko Milanovic, *Russia's Submission to the ICJ in the Genocide Case; Russia's Withdraw al from the Council of Europe*, https://www.ejiltalk.org/russias-submission-to-the-icj-in-the-genocide-c ase-russias-withdrawal-from-the-council-of-europe/ (accessed on April 6, 2022); Marko Milanovic, *IC J Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelle d from the Council of Europe*, https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia -in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/ (accessed on April 6, 202 2); Matina Papadaki, *Complex Disputes and Narrow Compromissory Clauses: Ukraine's Institution of Proceedings against Russia*, https://www.ejiltalk.org/complex-disputes-and-narrow-compromissory-cl auses-ukraines-institution-of-proceedings-against-russia/ (accessed on April 6, 2022).

[6] See International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, para.17 (2017) [hereinafter *ICSFT and CERD*, Order,

jurisdiction, which means that it may find jurisdiction if the evidence is not "*obviously* excluding its jurisdiction".[7] In fact, the ICJ has on 3 occasions reversed its finding of *prima facie* jurisdiction and eventually dismissed the case during the proceedings of preliminary objections.[8]

In this case, the jurisdictional basis invoked by Ukraine was Article IX of the Genocide Convention, a compromissory clause accepted by both parties that confers on the ICJ's jurisdiction over disputes "relating to the interpretation, application or fulfillment" of the Genocide Convention.[9] Obviously, the key question is whether Ukraine's allegations (and Russia's opposition, respectively) constitute "disputes" within the meaning of this provision. While there is little doubt that Ukraine's allegation of Russia's false genocide accusation falls under this clause and hence the ICJ's jurisdiction,[10] it is much more questionable to establish jurisdiction over the legality of Russia's use of force under the Genocide Convention.

2.1 Unexplained Departure from the Legality of Use of Force Cases

It should be recalled that the ICJ used to be faced with a situation similar to the present one during North Atlantic Treaty Organization's bombing campaign against Yugoslavia in 1999. In the midst of the conflict, Yugoslavia instituted proceedings against 10 North Atlantic Treaty Organization states before the ICJ, claiming *inter alia* that the bombarding has constituted genocide under the Genocide Convention, over which the ICJ had jurisdiction under the compromissory clause of the Genocide Convention.[11] The ICJ held in its Provisional Measures Order that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention", and since the ICJ was not convinced that the bombings "indeed entail the element of intent, towards a group as such, required by the provision", it held that the alleged acts were not "capable of coming within the provisions of the Genocide Convention". Therefore, no *prima facie* jurisdiction could be found under the

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Provisional Measures]; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, para.16 (2020) [hereinafter *The Gambia v. Myanmar*, Order, Provisional Measures].

[7] See Interhandel (Switzerland v. the United States of America), Order, Provisional Measures, 1957 I.C.J. Rep.105, 117, 119 (Oct. 24) (separate opinion of Lauterpacht, J.).

[8] See International Court of Justice, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Rep.93 (1952); International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Rep.70 (2011); International Court of Justice, R*equest for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Rep.3 (2009).

[9] See Convention on the Prevention and Punishment of the Crime of Genocide.

[10] What makes this claim somewhat exceptional is the fact that it is essentially a "reverse complia nce" claim, i.e. one that asks an adjudicatory body to declare that the applicant did not violate int ernational law. Such claims, albeit relatively scarce, are not entirely unprecedented, especially in W orld Trade Organization disputes; there seems no persuasive reason why "reverse compliance" clai ms cannot fall under jurisdictional clauses. See Deepak Raju, *Ukraine v Russia: A* "*Reverse Compl iance*" *case on Genocide*, https://www.ejiltalk.org/ukraine-v-russia-a-reverse-compliance-case-on-genocide/ (accessed on April 6, 2022).

[11] See International Court of Justice, *Legality of Use of Force (Yugoslavia v. the United States of America), Application instituting proceedings*, https://www.icj-cij.org/public/files/case-related/114/7173.pdf (accessed on April 29, 1999).

compromissory clause of the Genocide Convention.[12]

Despite Russia's explicit reference to these precedents in their submission,[13] the ICJ did not discuss these cases anywhere in the order. In his Declaration, Judge Nolte elaborated on this point and suggested that the ICJ distinguished the present case from the *Legality of Use of Force* cases due to the different content of disputes: while the former concerned whether the use of force with the stated purpose of preventing and punishing genocide violated the Genocide Convention, the latter concerned whether the use of force amounted to "genocide" and thus violated the Genocide Convention, and only the former was "capable of coming within the provisions of the Genocide Convention".[14]

Such reasoning, however, seems confusing. What the ICJ did in the Legality of Use of Force cases was essentially to deny the existence of a dispute based on the unlikelihood of satisfying a condition of the alleged substantive violation of the Genocide Convention. Yet, it is by no means clear that it would be easier to successfully establish Russia's alleged violation of the Genocide Convention in the present case. Moreover, and more importantly, such an issue of non-fulfillment is supposed to be relevant only to the determination of the merits of the case, or perhaps at most the plausibility of the applicant's claim that needs to be examined before indicating provisional measures, but in no way related to the existence of a "dispute" falling within the compromissory clause. Indeed, in the 2017 Ukraine v. Russia case, the ICJ found similarly the unlikelihood of the alleged violation of the Convention for the Prevention and Punishment of Terrorism; however, it did not thereby deny the existence of a "dispute" concerning that Genocide Convention, only rejecting the plausibility of the rights claimed by Ukraine under the Convention for the Prevention and Punishment of Terrorism and accordingly refused to indicate provisional measures based on that Convention.[15] In the author's view, this case has in effect overruled the Legality of Use of Force cases, and the ICJ should have clarified and reaffirmed this correct position in the present order, rather than simply putting the issue aside or drawing an artificial distinction between the precedent and the present case.

2.2 Parallel Disputes and Indispensable External Issues

Another argument made by Russia against the ICJ's jurisdiction (and perhaps the strongest one) was that the only dispute between the parties was about the legality of Russia's use of force against Ukraine under the Charter of the United Nations and customary international law, which had nothing to do with the "interpretation, application or fulfillment" of the Genocide Convention.[16] In response, the ICJ simply quoted its conclusion in Alleged Violations of the 1955 Treaty, stating that "certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty", and the existence of such parallel disputes does not deprive the ICJ of jurisdiction over one of them.[17]

Such reasoning, however, seems to have missed the point. For one thing, since Russia

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[12] See *Legality of Use of Force (Yugoslavia v Belgium)*, International Court of Justice, paras.40-41 (1999).

[13] See Russian Federation, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf (accessed on March 7, 2022).

[14] See Declaration of Judge Nolte, supra note 5, at 1.

[15] See *ICSFT and CERD*, supra note 6.

[16] See supra note 13.

[17] See supra note 2.

made clear in its submission that "the Genocide Convention does not provide a legal basis for any military operation…simply because they are beyond its scope of application",[18] it can be reasonably argued that the dispute between the parties as to whether the Genocide Convention can authorize Russia's use of force no longer exists, and hence no jurisdiction for the ICJ.[19] For another, even assuming the existence of the dispute, the reasoning quoted by the ICJ was built on a presumption that a single set of factual circumstances has generated parallel disputes concerning different but separable bodies of international law (e.g. a single military operation simultaneously violating *jus ad bellum* and *jus in bello*), but this is not the situation before the ICJ in the present case. The plain text of the Genocide Convention mentioned nothing about the legality of the use of force, and in the author's view, Ukraine has essentially been arguing that Russia's military operation has violated the Genocide Convention *because* it has violated the Charter of the United Nations and customary rules on the use of force.[20] That is to say, the legality of Russia's military operation under *jus ad bellum* is not separable from its legality under the Genocide Convention; it constitutes a precondition for the determination of the latter issue, and is thus an "indispensable external issue".[21]

It is generally accepted that the existence of three types of indispensable external issues does not affect the jurisdiction of a court or tribunal under a compromissory clause: (1) the external rules are referred to by an express *renvoi* provision in the original treaty; (2) the external rules are utilized as consideration in treaty interpretation; (3) the external rules applied are secondary rules of international law, e.g., those concerning treaty interpretation or state responsibility.[22] This is understandable since these external issues should have been predicted by state parties as an integral part of resolving disputes "relating to the interpretation and application" of a treaty, the jurisdiction over which can

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[18] See supra note 13.

[19] See supra note 5. But note that Ukraine may argue that Russia has only denied the *applicability* of the Convention to its military operations, but has never accepted that its use of force constitutes a *self-standing violation* of the Convention, the latter being the essential assertion of Ukraine; therefore, a dispute between the parties regarding the Convention still exists. On this possibility, see the analysis *infra*.

[20] Ukraine has expressly connected the legality of Russia's use of force under the Genocide Convention to that under *jus ad bellum* in its written submissions, stating that "Article VIII of the Convention further indicates that a Contracting Party taking action with the purported basis of preventing and punishing genocide cannot do so in a manner that violates the United Nations Charter…Russia's military action against a sovereign State based on a manifestly *false* claim of genocide is not consistent with either the Convention, or the provisions of the Charter referred to in Article VIII of the Convention, and thus exceeds the limits permitted by international law." See Ukrainian Request for Provisional Measures, supra note 4. It seems unlikely that Ukraine is claiming a self-standing violation of the Genocide Convention by Russia which is independent of its legality under *jus ad bellum*, because it is almost impossible for that claim to succeed: states could not have intended that a military operation justifiable as self-defence would nevertheless be unlawful under the Genocide Convention simply because one of its stated purpose involves the prevention of genocide.

[21] Legal scholarship has used various terminology of such issues, including "incidental questions", "implicated issues" and "incidental determinations". See Fabian Eichberger, *Give a Court an Inch and It Will Take a Yard? The Exercise of Jurisdiction over Incidental Issues*, 81(1) Heidelberg Journal of International Law (ZAÖRV) 235, 239 (2021). This article uses the term "indispensable external issue" to emphasize that the determination of such issues is inseparable from the alleged issues and that such issues arise from legal sources other than the original treaty.

[22] See Callista Harris, *Incidental Determinations in Proceedings under Compromissory Clauses*, 70(2) International and Comparative Law Quarterly 417, 426-430 (2021).

be evidently presumed to be contained in states' consent expressed in compromissory clauses.

However, as to indispensable external issues not falling within these categories, the law has been rather unclear, and a clear divide exists as to the outcome of relevant judicial decisions. In one line of cases, the mere existence of indispensable external issues seems capable of depriving the adjudicatory body of its jurisdiction. For example, the ICJ has explicitly and implicitly denied its jurisdiction over a delimitation dispute due to an indispensable issue regarding the entitlement of islands to a continental shelf and that over a sovereignty dispute due to an indispensable issue of maritime delimitation;[23] in South China Sea the arbitral tribunal stated in its *dicta* that jurisdiction over a dispute under the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) might be denied if such a dispute would have required "an implicit decision on sovereignty".[24] In another line of cases, courts and tribunals have also rejected their jurisdiction, whereas they have done so not merely because certain indispensable external issues existed, but because they formed the "real" issue rather than a "minor" or "ancillary" issue in the case. For example, two UNCLOS arbitral tribunals have denied jurisdiction over one dispute concerning legality of the declaration of a marine protected area and that over one about violation of coastal state rights within maritime zones, since the "real issues" in the cases were indispensable external disputes concerning sovereignty.[25] In a third category of cases the existence of indispensable external issues failed to affect the jurisdiction of the respective fora. For example, the Permanent Court of International Justice has exercised jurisdiction both over the legality of expropriation of certain property under a bilateral treaty and the external issue concerning the owner of the property under another treaty.[26] UNCLOS arbitral tribunals and the International Tribunal for the Law of the Sea have exercised jurisdiction both over UNCLOS disputes and external issues of immunity or the legality of use of force;[27] several international courts and tribunals appeared to have ruled simultaneously on the delimitation of the outer continental shelf and the external issue of the delineation of the outer limits of those continental shelves.[28]

While this article does not intend to engage in a lengthy debate over the exact legal

[23] See Aegean Sea Continental Shelf (Greece v. Turkey), International Court of Justice, Rep.3, paras.83-90 (1978); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia Singapore), International Court of Justice, Rep.12, para.299 (2008).

[24] See The South China Sea Arbitration (Philippines v. China), Permanent Court of Arbitration Case No. 2013-19, Award on Jurisdiction and Admissibility, para.153 (October 29, 2015).

[25] See Chagos Marine Protected Area (Mauritius v. U.K.), Permanent Court of Arbitration, paras.220-221, (2015); Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation), Permanent Court of Arbitration, paras.195-196 (2020).

[26] See Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Preliminary Objections, Judgment, 1925 P.C.I.J. (ser. A) No.6, at 18 (August 25).

[27] See The 'Enrica Lexie' Incident (Italy v India), PCA Case No. 2015-28, Award, para.808 (May 21, 2020); M/V Saiga (No.2) (St. Vincent v. Guinea), ITLOS Case No.2, Judgment, paras.155, 159 (July 1, 1999); Guyana v. Suriname, PCA Case No. 2004-04, Award, paras.405, 406, 487 (September 17, 2007); M/V Virginia G (Pan. v. Guinea-Bissau), ITLOS Case No.19, Judgment, paras.54, 362 (April 14, 2014).

[28] See e.g. Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Case No.16, Judgment, para.394 (March 14, 2012); Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), PCA Case No.2010-16, Award, para.83 (July 7, 2014).

effects that should be attributed to indispensable external issues,[29] it suffices here to suggest that one way of reconciling the aforementioned case law is to tackle this question as essentially a task to interpret the scope of consent (usually impliedly) given by state parties in compromissory clauses.[30] In the present Ukraine–Russia litigation, it is highly unlikely that the parties signing the compromissory clause of the Genocide Convention have consented to have an implicated dispute concerning *jus ad bellum* adjudicated by the ICJ; there is no textual or contextual evidence that supports an expansive reading of that provision either.[31] This also seems to be the principal reason that led 3 of the judges to express suspicion of the ICJ's jurisdiction over the present case in their Declarations.[32] Of course, as suggested above, the ICJ is not required to go into a detailed analysis of its jurisdiction at the phase of provisional measures, but it could have at least identified this issue and briefly expressed its attitude rather than merely omitting the issue as a whole, as it did in the present order. Such omission, if taken seriously, will erode the quality of the ICJ's reasoning and in turn the ICJ's professionalism.

One final comment will be made as to the implications of *Oil Platform*, a precedent involving the packaging and shoehorning of a *jus ad bellum* dispute into a compromissory clause akin to the instant case. In that case, Iran claimed that the United States attacks on its offshore oil platforms violated *inter alia* and its obligation to ensure the "freedom of commerce and navigation" between the territories of the two states under article X(1) of the Treaty of Amity, Economic Relations and Consular Rights between them (hereinafter referred to as the 1955 Treaty).[33] In determining whether such violation exists, the ICJ focused on interpreting Article XX(1)(d), an exception clause which precludes the unlawfulness of measures "necessary to protect its essential security interests", expressly connected this provision to an external issue about the legality of the United States attack under the Charter of the United Nations and customary rules on self-defense, and held that its jurisdiction deriving from the compromissory clause of the 1955 Treaty extends to the determination of the latter issue.[34] One may wonder if a similar line of reasoning may apply to the present case so as to enable the Court to determine the external *jus ad bellum* issue in the name of treaty interpretation. This author believes that the answer is no. For

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[29] For representative contributions on this topic, see e.g. Peter Tzeng, *Supplemental Jurisdiction under UNCLOS*, 126 (1) Yale Law Journal 242, 242-260 (2016); Peter Tzeng, *The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction*, 50(2) New York University Journal and International Law and Politics 447, 447-507 (2018); Callista Harris, *Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty*, 18(3) The law and Practice of International Court and Tribunals 279, 279-299 (2019).

[30] A similar point was also made by Judge Robinson in his dissent in Enrica Lexie. See The 'Enrica Lexie' Incident (Italy v India), Permanent Court of Arbitration, para.52 (2020).

[31] See the Vienna Convention on the Law of Treaties.

[32] See Declaration of Vice-President Gevorgian, supra note 5; Declaration of Judge Xue, supra note 5; Declaration of Judge Bennouna, supra note 5.

[33] See Oil Platforms (Islamic Republic of Iran v. the United States of America), International Court of Justice, Rep.161, paras.21-26, 31 (2003).

[34] The Court stated that "when Article XX, para.1 (d), is invoked to justify actions involving the use of armed force, allegedly in self-defence, the interpretation and application of that Article will necessarily entail an assessment of the conditions of legitimate self-defence under international law", and that "its jurisdiction under Article XXI, para.2, of the 1955 Treaty…extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law." See Id., at 40, 42.

one, the approach taken in Oil Platform has not escaped the criticism by individual judges and commentators as overstepping beyond the jurisdictional limit established by the compromissory clause,[35] and such an expansive approach would only discourage states from participating in adjudication before the ICJ.[36] For another, it is arguably conceivable that the obligation to ensure the "freedom of commerce and navigation" under the 1955 Treaty is distinct and separable from the Charter and customary obligation not to use force. Thus, the ICJ could have rightfully exercised its jurisdiction (limitedly) over the dispute about the 1955 Treaty without controversially determining the external *jus ad bellum* issue;[37] however, the same is not true for the current dispute over the Genocide Convention, as it is unlikely that the Genocide Convention can, or has intended to, create an obligation not to use force that is not identical to its counterpart under *jus ad bellum*. Therefore, it is also difficult for Ukraine to establish the ICJ's jurisdiction relying on a comparison with *Oil Platform*.

3. The Plausibility of the Rights Invoked

To indicate provisional measures, the ICJ shall also be satisfied that "the rights asserted by a party are at least plausible".[38] What this requirement actually entails, however, is somewhat obscure. In some cases, the ICJ seemed to be satisfied when the asserted rights plausibly exist *in abstracto* under international law, and did not require the applicant to show the prospect of success on the merits; in other cases, the applicants were required not only to prove that the asserted rights existed, but also to establish that there is a level of probability that they had been breached according to the evidence presented.[39] It is suggested that the latter approach "lies at the edge of prejudgment with questionable origin, contours, confines and legitimacy, which has the effect of challenging the ICJ's jurisdictional limits and judicial integrity".[40]

Nevertheless, under either definition, while there arguably exists a right "not to be

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[35] As for individual opinions of ICJ judges, Judge Higgins argued that the ICJ has 'invoked the concept of treaty interpretation to displace the applicable law', see Oil Platforms (Islamic Republic of Iran v. the United States of America), International Court of Justice, Rep.161, para.49 (2003); Judge Oda argued that the dispute over the United Statesthe United States attack "could not be seen as falling within the scope of the 1955 Treaty" since it is "by its very nature irrelevant to the scope of the Treaty, and that the United Statesthe United States" had certainly not intended…to confer jurisdiction upon the Court to deal with such a dispute simply by having concluded such a treaty, see Oil Platforms (Islamic Republic of Iran v. the United States of America), International Court of Justice, para.22 (1996). As for academic comments, see James Green, *The Oil Platforms Case: An Error in Judgment?*, 9(3) Journal of Conflict & Security Law 357, 376-377 (2004).

[36] Ibid.

[37] It is not at all impossible that a forcible action is a violation of the United Nations Charter and customary international law, but not a breach of the 1955 Treaty. Indeed, the Court itself held in that case that the United Statesthe United States could not justify its attack as a lawful self-defence, but at the same time it also did not violated its obligation to ensure the "freedom of commerce and navigation" under Article X(1) because there was no commerce between the parties at the time. See supra note 33; Jorg Kammerhofer, *Oil's Well that Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case*, 17(4) Leiden Journal of International Law 695, 704 (2004).

[38] See International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, International Court of Justice, Rep.139, 151, para.57 (2009).

[39] See Dimitris Kontogiannis, *Provisional Measures in Ukraine v. Russia: From Illusions to Reality or a Prejudgment in Disguise?*, https://www.ejiltalk.org/provisional-measures-in-ukraine-v-russia-from-illusions-to-reality-or-a-prejudgment-in-disguise/ (accessed on April 6, 2022).

[40] Ibid.

subject to a false claim of genocide" under the Genocide Convention, the right "to be free from…military attack…based on a claim of preventing and punishing genocide", in the author's opinion, is barely plausible. Ukraine has essentially put forward two arguments in support of the existence of the latter right, one is that it is a necessary implication of the good faith and non-abusive performance of the duty to prevent and punish genocide (the "good faith" argument), and the other is that the right derives from an implicated requirement that the duty to prevent and punish genocide must be consistent with other rules of international law, including the law on the use of force (the "reference to other international rules" argument).[41] The ICJ sustained both arguments and held in favor of Ukraine in the order.[42]

However, the credibility of these two arguments is questionable. Firstly, although the principle of good faith has been discussed and applied by various international courts and tribunals, to the author's knowledge there has been no decision where a bad faith performance of an obligation alone could give rise to an independent cause of action.[43] Secondly, the reference in the Genocide Convention to the Charter of the United Nations only grants the parties a right to ask the competent organs to prevent and suppress genocide, the ordinary meaning of which does not incorporate the prohibition of the use of force into the Convention.[44] Neither did the ICJ's prior statement that "every State may only act within the limits permitted by international law" when discharging the duty to prevent genocide intend to bring those rules into the Genocide Convention; it was simply a reference to rules extrinsic to the Genocide Convention. Thirdly, it is unreasonable to suggest that the parties have expected to create an implied rule prohibiting the use of force in the disguise of preventing genocide under the Genocide Convention. To do so is simply unnecessary and unintended — the rules use of force has been fully and exclusively provided for under *jus ad bellum*, and no state or commentator seems to have (during the extensive discussions of the legality of humanitarian intervention over the past decades) argued that treaties prohibiting inhumane acts by states like the Genocide Convention authorizes or prohibits the use of force to defuse humanitarian crisis.

To put it simply, it is clear that the Genocide Convention does not *authorize* Russia's use of force against Ukraine, but it does not *prohibit* the use of force either. Such distinction is important. The ICJ, however, seems to have mixed up the two, and inferred a prohibition from a rule of non-authorization.[45] Such confusion risks creating a slippery slope that every forcible operation in the name of enforcing another state's treaty obligation would constitute a violation of that treaty itself, although in fact those acts are simply unregulated

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[41] See supra note 4, at 5.

[42] See supra note 2, at 13.

[43] The good faith principle may arguably generate an obligation not to defeat the object and purpose of the treaty. See Robert Kolb, *Good Faith in International Law*, Hart Publishing, pp.68-71 (2017). However, a violation of this obligation is a violation of general international law, not the treaty in question *per se* that has been argued by Ukraine.

[44] See supra note 9, at Article VIII.

[45] Indeed, after (rightfully) concluded that "it is doubtful that the Convention, in light of its object and purpose, *authorizes* a Contracting Party's unilateral use of force…for the purpose of preventing or punishing an alleged genocide", the ICJ immediately reached a follow-up conclusion that "Ukraine has a plausible *right* not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine." See supra note 2, paras.59-60.

by those treaties.[46] Accordingly, it is submitted that Ukraine should not be regarded as possessing a plausible right under the Genocide Convention to be free from military attacks based on a claim of preventing and punishing genocide.

4. The Link between the Rights and the Measures Requested

If the ICJ is to indicate provisional measures, there must also be a link "between the rights whose protection is sought and the provisional measures being requested".[47] In other words, the ICJ should not indicate provisional measures that address issues other than the rights claimed by the applicant which fall outside the ICJ's jurisdiction.[48] For example, in Bosnian Genocide the ICJ limited its provisional measure to one that only restrained genocide-related acts of the respondent, and dismissed all other requests regarding violation of *jus ad bellum*, international humanitarian law, etc.;[49] similarly, in Georgia v Russia the ICJ restricted its language of the provisional measures to the protection against racial discrimination, which was the sole subject matter that the ICJ might have jurisdiction over under the relevant compromissory clause despite Georgia's request which contained protection in other aspects of international humanitarian and human rights law.[50]

In the present order, the ICJ held that the core provisional measure sought by Ukraine, i.e. the suspension of Russia's military operation, are "by their very nature…aimed at preserving the right of Ukraine that the ICJ has found to be plausible", and thus the link requirement is fulfilled.[51] However, as analyzed above, the only plausible right sought by Ukraine that the ICJ is competent to determine is the right not to be subject to a false claim of genocide, and accordingly the related provisional measure should be one that only requires Russia to withdraw its accusation of genocide. The suspension of the military operation, on the other hand, is certainly unrelated to and goes beyond the protection of this right. Even if we, for the sake of argument, admit that Ukraine has a plausible right not to be subject to an attack based on a claim of preventing and punishing genocide, it should be noted that the need to prevent genocide was not the only justification claimed by Russia for its military operation, and the legality of Russia's attack cannot be determined without assessing the law of self-defense, over which the ICJ has no jurisdiction. Therefore, the requested provisional measure — the cessation of hostilities — will also protect a right not to be subject to an attack not justifiable as self-defense, which falls outside the ICJ's competence in this case and has thus failed the link test. In this sense, the ICJ's unhesitating decision to indicate a provisional measure demanding the immediate cessation of hostilities is comparable with its previous controversial ruling in the Temple of Preah Vihear (Interpretation) case, which generated severe backlash from individual judges and

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[46] Judge Gevorgian made a similar point that if one follows the interpretation advanced by Ukraine, "any purportedly illegal act, including the unauthorized use of force, could be shoehorned into a random treaty as long as the subject-matter regulated by this treaty had some role in the political considerations preceding the respective act". See Declaration of Vice-President Gevorgian, supra note 5, para.7.

[47] See *The Gambia v. Myanmar*, Order, Provisional Measures, para.44.

[48] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Order, Provisional Measures, 1993 I.C.J. Rep.3, 18-19, paras.33-35 (April 8).

[49] Id., at 24.

[50] See International Court of Justice, *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Order, Provisional Measures, para.149 (2008).

[51] See supra note 2, at 14.

scholars.[52] Consequently, it is doubtful that the provisional measures granted by the ICJ have met the link requirement as it firmly proclaimed in its order.

5. Conclusion

The Ukraine-Russia conflict has absolutely been a humanitarian tragedy. So far, the conflict has resulted in at least 3,776 civilian casualties and over 4.2 million refugees.[53] It is thus understandable that the ICJ felt the need to indicate an order demanding an immediate ceasefire, for all possible political or moral motives to pressure Russia into ending its invasion. However, as reflected in the analysis above, despite Ukraine's undoubtedly excellent lawyering, the ICJ has failed to provide satisfactory legal reasoning for its far-reaching conclusion in the order; it has simply created "a bad precedent of manipulative reasoning" to achieve certain political objectives.[54] It must be borne in mind that the ICJ is not the only pathway through which the conflict can be resolved, and that invaders will "remain in any event responsible for acts attributed to them that violate international law" even if their acts may not fall within the ICJ's competence.[55] All international actors including the ICJ should make every effort to foster peace in the region, but should definitely not do so in a way that undermines the coherence and credibility of the already fragile international legal system.

[52] In that case, the Court established in its provisional measures order a demilitarized zone comprising approximately 17 square kilometers surrounding the temple, whereas the parties only disputed whether Thailand's forces in the "vicinity" of the temple, an area of about 5 square kilometers, should be withdrawn. The provisional measure indicated was strongly criticized as pronouncing on rights falling outside the jurisdiction *ratione materiae* of the Court. See Cameron A. Miles, *Provisional Measures before International Courts and Tribunals*, Cambridge University Press, pp.421-423 (2017).

[53] See The Office of the High Commissioner for Human Rights, *Ukraine: civilian casualty update April 6, 2022*, https://www.ohchr.org/en/news/2022/04/ukraine-civilian-casualty-update-6-april-2022 (accessed on April 6, 2022); The office of the United Nations High Commissioner for Refugees, *Ukraine Refugee Situation*, https://data2.unhcr.org/en/situations/ukraine (accessed on April 6, 2022).

[54] See Alexander Orakhelashvili, *Anything Goes? The ICJ's Provisional Measures Order in Ukraine v Russia*, https://blog.bham.ac.uk/lawresearch/2022/03/anything-goes-the-icjs-provisional-measures-order-in-ukraine-v-russia/ (accessed on April 6, 2022).

[55] See Declaration of Judge Xue, supra note 5, at 5.

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