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The Foundation for Law and International Affairs (FLIA) is an independent, nonpartisan, nonprofit organization incorporated in Washington, D.C. in 2015. FLIA is an educational, academic, and consultative think tank, as well as a professional network for law and international affairs. FLIA is mandated to promote the international communication, education, and cooperation at the intersection of law and international affairs.

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International Symposium

The Future of Security in the Post-Pandemic Era: Marine Security and Cyber Security[1]

On October 22, 2022, the international symposium, "The Future of Security in the Post-Pandemic Era: Marine Security and Cyber Security" was successfully held.

The School of Marine Law and Humanities at Dalian Ocean University collaborated with the Foundation for Law and International Affairs Review to carry out related academic activities. This international symposium aimed to shed light on two important security issues in today's global governance system: Marine Security and Cyber Security. Scholars, practitioners, and students from around the globe gathered to address these issues from different perspectives, discuss how to better cope with emerging challenges as a collective group, and explore how the younger generation can prepare themselves in the Post-Pandemic Era through education and better understanding of world governance.

Opening Remarks

Zhaobin Pei (Dean and Professor, School of Marine Law and Humanities, Dalian Ocean University) :

Distinguished guests, good morning. I am Professor Zhaobin Pei, the Dean of the School of Marine Law and Humanities at Dalian Ocean University. Thank you for participating in this international conference, and I wish this conference great success. The School of Marine Law and Humanities is a young powerhouse with many capable young professors and researchers. They have achieved significant teaching and research results in China. We regularly engage in academic exchanges with universities and organizations worldwide. Welcome to our beautiful Dalian Ocean University, and I hope we can have more cooperation in the future.

Shaoming Zhu (Founder and President, Foundation for Law and International Affairs) :

[1] Transcribers: Yanyan Pan, Kai Yao, Ruoyan Shen, Yifan Wu, Furong Wang, Xinyi Gu, and Yuchen Luo (all from East China University of Political Science and Law).

Thank you so much, Professor Pei, I'm very honored to be here. I'm also a visiting professor at Dalian Ocean University, thanks to the invitation. I am proud to be a member of this community, and I know there are so many wonderful things about the university, the school, and the city. As one of the members of Dalian Ocean University, I would like to extend my invitation to scholars and practitioners from other countries to visit Dalian city, China, and to visit our university. Thank you very much for that message. Today we will have three panels. The first panel will focus on maritime security issues, the second one will focus on cyber security issues. As many of you probably know it is our tradition at FLIA conferences to always have a panel addressing educational issues. So, in the afternoon we were going to have Panel 3 to discuss issues related to online teaching methodology during the pandemic. We will also have scholars from other universities talking about their clinical work or employment issues related to how students find jobs in the job market in the post-pandemic era. So that's the basic schedule for the day.

Before that, I would like to introduce our very special guest today, Admiral Mark Mellet. It gives me great pleasure to introduce him to our conference this year. Admiral Mark Mellet was the Chief of the Navy and the 31st Chief of Defense of Ireland. He has served in Ireland for nearly forty-eight years in Ireland's Regular and Reserve Forces. He has been widely recognized as a change leader, contributing to the ongoing transformation and positioning of the Irish forces in the post-modern setting. He is also known for his leadership in the response of the Irish Defense Forces throughout the spread of the COVID-19 pandemic. In addition to his role as Ireland's highest-ranking military officer, Admiral Mark Mellet is also Dr. Mark Mellet and Professor Mark Mellet. He holds a doctorate degree in Political Science and a master's degree in Government and Public Policy, specializing in Ocean Governance and Sustainable Development. He's also an adjunct professor of Law at University College Cork and has a great passion for supporting education and empowering the younger generation in leadership skills and mindset. Admiral Mark Mellet is very vocal and supportive of the collaboration and partnership among research institutions, militaries, enterprises, and state bodies. He founded Green Compass to provide strategic advice and support to different stakeholders on environmental, social, and governance opportunities. Additionally, he has extensive experience in leadership roles and received numerous awards for his service and work not only in Ireland but also in the European Union and across the globe. Now, I would like to pass the floor to Admiral Mark Mellet to give us a direct talk. Welcome, Mark! Thank you so much for joining us so late at night in Ireland.

Mark Mellet (Former Irish Naval Service Admiral and Chief of Staff of Ireland's Defense) :

Shaoming, thank you very much. It's a privilege to be here and I want to thank Professor Pei, the Dean of the School of Marine Law and Humanities at Dalian Ocean University. I would also like to thank the Foundation for Law and International Affairs Review, and you, Dr. Shaoming, for this opportunity. It is great to be with such a distinguished audience. It is quite early here in Ireland, but I know there are many people in different time zones. So, I will push on if you like and just try to share my screen here. I will talk to you for about 30 minutes, and then, if necessary, I'm quite happy to take questions.

Keynote Speech

Topic: Ecosystem-Based Ocean Governance —Are we too late?

Speaker: Mark Mellet

My aim is to discuss Ecosystem-Based Ocean Governance in a simple way. Using the term "simple" may seem contradictory since it is actually one of the most complex concepts to consider. And I'll try to come to a point at the end to deal with this, but there are three kinds of factors I want to approach it from: where we've come from, where we are, and what we must do.

Looking back in terms of where we have come from, for centuries, the law of the sea has been, I suppose, conflicted by two different polar principles, that of Mare Clausum and Mare Liberum. If you look at Hugo Grotius, who advocated for the Dutch trade in the early 1600s, "the sea is one of those things which … cannot become private property … no part … can be considered as the territory of any people whatsoever …." That was the principle that led to the overall riding of Mare Liberum of *Freedom of the Seas,* as we know it is still to this day. It is also said that everyone can understand how a river can be exploited for its fish, but such a measure could never happen in the ocean. Unfortunately, he got that wrong, and we see today a major stress on the Russians. But there were others who also had conflicting views and the concept of Mare Clausum, has been very much advocated by Portugal and Spain and others who wanted to see state jurisdiction as a defining principle that would underpin the governor's regime for our oceans.

So, rolling on 3, 400 years and into the latter half of the last century, here is a remark from Sir Alan Beasley, who was the Chair of the United Nations Conventional Law of the Sea III (UNCLOS III) Drafting Committee, "the law of the sea was in a state of disorder bordering on chaos". So, one of the most remarkable and comprehensive multilateral legal institutions was born: the United Nations Convention Law the Sea (hereinafter refers to UNCLOS). Initially, I think the fact that 86 signatories on the first day rose to over 168 today can be described as the constitution for our oceans by the president of the law of the sea convention, Tommy T.B Koh, who is from Singapore. So, there we have it, in terms of the United Nations Convention on the Law of the Sea and legal framework setting out some of the norms and principles that govern how we approach today defining our territorial seas as 12 nautical miles from the baseline or contiguous zone for 24 nautical miles, exclusive economic zones out to 200 nautical miles, and the continental shelf defined by certain principles. Depending on where you are and which you wish to use, such as the gardener formula, designed by a fellow diplomat from Ireland that actually worked on the sediment stickiness given extended commission on the limits of continental shelves into the ocean.

So, if we look at that today in the context of a typical stage, this is from my own country in terms of Ireland for most of my career within the service within the military.

We were primarily concerned with our exclusive economic zone, where we had sovereignty and sovereign rights at your ease, edge of sovereign rights of the seabed's, the sub-seabed's resources and resources in the water column. When you go beyond 200 miles which equals an exclusive economic zone, you can then lay a claim with the Commission on the Limits of Continental Shelf (hereinafter refers to CLCS) for additional jurisdiction where we have sovereign rights over the seabed and sub-seabed resources out to the limits of our extended continental shelves. So, that's where we've come from.

So where are we now? My key point here is that a legal framework does not deliver good governance. It's merely a starting point, an architecture. We need to examine the driving forces that will actually establish a governance framework capable of meeting the requirements of governments and civil society.

Allow me to share a personal story that illustrates a point about ecosystems. I grew up over 60 years ago in the beautiful county of Mayo in the west of Ireland. Things were much simpler back then, although I didn't fully grasp it at the time. Now I understand that every breath I took, I unknowingly inhaled about 313 parts per million of carbon into my lungs. Our biodiversity seemed so much richer along the west coast of Ireland, and I had no idea that such an ecosystem existed.

It was only later, during my time in the Navy and involvement in fisheries protection, that I witnessed the presence of deep-sea treasures during fishing vessel trials. Cold-water corals, like the ones you see here in this picture, and the fish swimming among them have endured for centuries. Some of these fish were alive and swimming when Darwin was aboard the Beagle, pondering the evolution of mankind. Due to their slow metabolism and the depths they inhabit, some of these fish can live for over 200 years. The combination of these fish and the incredibly rich and vulnerable marine ecosystem they reside in defines the essence of life and the importance of biodiversity.

However, when I look at this ecosystem today, I am filled with sorrow. What I see is a rubbish field, where the cold-water coral, which took 8000 years to form, was destroyed in a matter of minutes by deep-water trolling. The once abundant orange roughy fish has been fished to extinction because its exploitation was not sustainable. This tragedy of biodiversity loss has been eloquently articulated by the World Wildlife Fund in their recent report, which states that up to 60% of our biodiversity has been lost in the last 50 years. It's not just in this specific area where we observe a collapsed and dying ecosystem. We witness conflicts of interest driving externalities throughout our oceans, be it in fisheries, shipping, security, or the threat to critical infrastructure such as cables, gas pipelines, and the tragic terrorist event that took place in the North Sea, resulting in the venting of LNG into the atmosphere, further contributing to our carbon emissions.

Conflicts of interest also arise in terms of military marine protected areas and offshore renewable energy, both of which are growing requirements in our offshore

activities. Additionally, we have to consider the hydrocarbon energy heritage and the presence of war graves scattered around the world. When we examine these conflicts of interest, we often find that the costs are borne by other parties, creating externalities.

One such externality, which extends beyond just the oceans, is the rise in carbon dioxide levels. When I was born, the atmosphere contained approximately 313 parts per million of carbon dioxide. Today, that figure has reached almost 420 parts per million, mainly due to carbon emissions derived from the burning of fossil fuels. This increase in carbon dioxide not only affects our atmosphere but also impacts our oceans, which are crucial for sustaining life on Earth. Our oceans have played a vital role as resilient absorbers of carbon, enabling our species to survive. However, this situation is changing. Our oceans are becoming more acidic, posing greater challenges to vulnerable marine ecosystems.

As we push beyond 1.1 degrees Celsius towards 1.2 degrees Celsius above pre-industrial levels, the impacts are significant and widespread. The impact is significant across our crisis sphere, in places like the Arctic and the Antarctic, and particularly around Greenland. We will witness damage to glaciers and a potential threat of rising sea levels, which also affects flora and fauna, impacting biodiversity and making it more vulnerable. We have witnessed terrible flash floods and catastrophic flooding in Asia, Europe, and even in my own country, which hampers our response capabilities and costs billions and billions of euros or dollars in societal expenses. Climate fires are also on the rise, not only in the United States but also here, like this climate fire in Ireland. They occur in Asia and Australia as well, driven by climate change. In this summer alone, we experienced extraordinary temperatures in India, putting immense pressure on civil society and people's survival. While obtaining accurate statistics is still challenging, there are reports of certain religious and stress-related deaths as a consequence of climate change. Pollution's impact is evident in many societies, as well as severe weather events affecting our coastlines, such as this tragic photograph. Additionally, we face the growing challenge and burden of climate migration and forced displacements due to resource degradation. This problem will continue to escalate in certain societies. As an example, in my own naval service, while working in the Mediterranean, our sailors were responsible for rescuing over 20,000 people, many of whom were in dire circumstances. We witnessed hundreds of people drowning, and we recovered numerous bodies. This demonstrates the cost of climate change as we move forward.

If we reflect on our current situation, we find that the top three risks are climate relations, climate action failure, extreme weather, and biodiversity loss. Additionally, we can consider secondary effects of climate change on resources, such as social cohesion erosion and livelihood crises. This is the reality we face. If we look back over millions of years, we can observe twenty or maybe thirty mass extinction events, but there are five major extinction events recognized. If we specifically focus on the last two, no one would

argue that reptiles and dinosaurs were not responsible for those extinctions. They were unaware of what was going to happen, and even if they knew, they couldn't have done anything to prevent it. Today, we are dealing with two anthropogenic-driven mega-trends: climate change and biodiversity loss. Regardless of the domain, whether it's on land, in the ocean, or in the atmosphere, our response has been lackluster. We need to adopt a campaign mindset, similar to the response seen in coverage. While we possess the necessary technology, which I will discuss later in terms of optimism, the real challenge lies with people and institutions. The catalyst for progress is courageous leadership for our oceans. I won't claim that this presentation alone can save the world, but I aim to focus on the oceans. However, if we implement the ideas I will present regarding our oceans, it will have a significant positive impact on our land as well.

So, what should we do? When it comes to governance, I consider three overlapping institutions: social institutions, which include government and policy; civil society, encompassing people and values; and markets and enterprise. In terms of an ecosystem-based ocean governance regime, we need a legal framework that allows for consultation at the societal level, aiming to develop an innovation policy at the national level. This framework should incorporate various secure perspectives, whether related to shipping and transport, biodiversity protection, economic aspects such as fisheries, or offshore renewable energy. By doing so, we can establish an oceans act that consolidates the necessary framework for a state to act and deliver a tailored action plan specific to its jurisdiction. At this stage, regional sea plans can be implemented using an integrated course and zone management approach.

There are other aspects that I find extremely exciting. Let me take you back to a point over 60 years ago when I was born. IBM had just introduced a computer in the United States that could hold 1 MB of memory and weighed one ton. This means that if we compare it to my smartphone today, my phone would weigh 2,600 tons. We live in an era of extraordinary intelligence where human beings have access to an ever-increasing amount of data. The growth of data has now reached over 100 zettabytes, compared to just 5 or 10 years ago. We have the Internet of Things, artificial intelligence augmentation, robotics automation, and numerous other technologies that offer us an extraordinary opportunity to leverage human intelligence and drive positive technological advancements.

Looking at this in the context of offshore renewables, we can address one of the significant challenges we face: the impact of carbon emissions from fossil fuels. In my own country, we have plans to generate up to 7 gigabytes (GB) of offshore renewable energy by 2030. Furthermore, we have plans for over 30 GB of renewable energy in the following decades, with some estimates suggesting we could deliver over 70 GB of offshore renewable energy. But it doesn't end there. We must also explore other technologies such as wave power. While wave power has often fallen short of

expectations in the past, I'm genuinely excited about technologies like the core power device. In Ireland, with our vast coastline, we have one of the richest accessible renewable energy environments at sea. We need to thoroughly investigate offshore renewable energy, which can capture electrons and enable us to electrify our society. It will also allow us to produce green hydrogen and enable the use of E-fuels. These advancements will help us reduce our reliance on carbon-emitting sources and combat climate change.

However, our efforts should not be limited to offshore renewable energy. We must also consider other areas. For instance, we can take action in our maritime areas, such as marshlands and seagrass. These ecosystems have incredible potential for carbon capture. Seagrass, in particular, has an estimated capacity that is 10 to 20 times greater than that of a rainforest. Additionally, the international panel on climate change suggests that we need all possible measures to reduce carbon emissions in the atmosphere. This includes technologies that can directly extract carbon from the air. I recently visited Iceland and witnessed the Climeworks technology, which has successfully demonstrated the ability to capture thousands of tons of carbon and turn it into stone. These alternatives, combined with offshore renewable energy, give us the means to address the carbon challenge.

To achieve our goals, we must bring together citizens, civil society, markets, and international, regional, and national policies and laws. These elements should not exist in isolation but rather be integrated into institutions guided by principles such as sustainability, the ecosystem approach, the precautionary principle, and subsidiarity. Integrated institutions must promote cross-sectoral approaches, ensuring coherence between various sectors at national, regional, and global levels. This approach will minimize the impact of externalities and conflicting policies across different countries. Additionally, we need to establish a security architecture to ensure compliance with these norms and principles. Without a security architecture, certain actors may not conform to the established norms and principles.

Now, the question arises: Are we too late?

I am an optimist. We need sustainability leaders who will not continue driving business as usual, as you can see here. Leaders are starting with themselves as individuals who inspire others around us and create a world we use in the Irish and Michaela language, a metaphorical team in terms of a common effort. In the article curriculum, there is no strength without unity.

So, we're looking for societal transformation building on institutions such as the Sustainable Development Goals that will minimize the risk in terms of further impact on climates. We need to drive resilience and build for the future, ensuring our ability to bring about a stable society and a stable world ahead of us. We do not want to continue on our current path. Our trajectory is frightening. The window is closing. We have truly done an injustice to younger generations, and this needs to be rectified sooner rather than later.

Some of the indications towards tipping points, such as permanent frost deterioration releasing massive amounts of greenhouse gasses, could present a challenge that becomes unstoppable.

So, let's look for a plan that enables us to live in peace and happiness on the west coast of Ireland, and for you to live in happiness with good ecosystem governance wherever you are. I'm always impressed with this remark from Mary Parker Follett who said, 'Leadership is not defined by the exercise of power, but rather by the capacity to increase the sense of power in those who lead.' The real role of a leader is to create more leaders.

Let's all be leaders in sustainability and lead in terms of the decisions required in markets, civil society, and at the government level. These decisions will provide us with the ecosystem approach and planners that we so desperately need to survive.

Thank you for listening.

Shaoming Zhu:

Thank you so much, Mark, for that wonderful speech. I'm sure many of our audience find it very inspiring. May I suggest allowing us to give a mark of a virtual plot here if you can see or hear? Thank you so much, and that was really great. I think it, at least for me, brought a much deeper and larger awareness of the sustainable issues with ocean governance. Also, the funds that you brought to us, including the combative seagrass to observe carbons, are all interesting facts and things which we, as scholars, could look into in terms of developing our scholarly ideas. I totally agree with you that markets in the public sectors, civil societies, public norms, and governmental bodies are all responsible, at different levels, for this issue. So, thank you so much. I also greatly appreciate that you included leadership issues in your presentation. I think that really laid a great foundation for our discussion this morning and this afternoon. Thank you so much. I'm sure our audience has a lot of questions for you, but it's very late. It's 2:10 a.m. in Ireland. So, thank you again for joining us, and I encourage our audience to leave your questions or comments. I will be happy to deliver these messages to our distinguished guest Mark.

Mark Mellet:

Great, Shaoming, no problem, and thanks very much for the privilege to talk to you all, and thank you for your patience.

Shaoming Zhu:

Thank you again for the speech. So, I know many of our audience are from Dalian city. Cork and Dalian city are both offshore cities, so I'm sure many of you have found a lot of the facts Mark was talking about are actually very relevant to you as well. I think it's great that we can make these issues very personal and relevant to our daily life. We can know about the ideas why we really need to talk about these things as scholars and practitioners, as people who can, in a way, try to influence education and public policy. So, without further introduction, I think we are ready for Panel 1. Let's dive into maritime law and maritime security issues. I will pass the floor to our chair for Panel 1, Professor Lili Wang, who is here now.

Panel One: Repacking Maritime Security and Maritime Law in the Post-Pandemic Era

Topic: Arctic Governance from the Perspective of "Self-Governance" Theory

Speaker: Assistant Professor Ruian Fang (School of International Law, Shanghai University of Political Science and Law)

Lili Wang (Associate Professor, School of Marine Law and Humanities, Dalian Ocean University):

Thank you, Shaoming. Welcome to Panel 1's discussion on repacking maritime security and maritime law in the post-pandemic era. There are five speakers in this section, and we will follow the order according to the agenda. Each speaker has 15 to 20 minutes, and we will have open questions at the end of this session. Now, let's welcome our first speaker, Dr. Ruian Fang, from Shanghai University of Political Science and Law.

Ruian Fang:

Good morning, and perhaps good evening to everyone. I aim to establish a link between the Arctic governance models and the institutional economics theory of self-governance proposed by Ostrom.

To provide a comprehensive overview of my presentation, I will first demonstrate the governance model of the Arctic, which aligns with the "self-governance" theory. Secondly, I will illustrate the current challenges faced by the Arctic Council's self-governance. If time permits, I will further present potential breakthroughs to address the dilemma of self-governance.

Let's begin with the first question: Why is the current governance model of the Arctic similar to the self-governance model? I will discuss three factors that contribute to the Arctic's governance model resembling a multi-centralized governance pattern. The scale of the current government model in the Arctic is relatively small, and the Arctic Council serves as the high-level forum for governance discussions. It is important to note that the Arctic Council operates based on soft law rather than hard law.

Next, I will delve into some background information on the Arctic. As we all know, the Arctic, particularly the high seas of the Arctic Ocean, represents a typical global common. The current governance model of the Arctic traces back to the Arctic Environmental Protection Strategy in 1990, followed by the Arctic Region in 1996. The

Arctic Council, established in 1996, serves as the governing body. However, unlike the Antarctic Treaty system, there is no similar comprehensive institutional arrangement for the Arctic. Thus, we can only refer to specific articles and recognize the high seas of the Arctic Ocean as a typical global common.

In the second part of my presentation, I will discuss the self-governance theory. As Professor Hardin once stated, "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons." When it comes to global commons, three governance theories exist. The first is the state model, followed by the privatization or market model, which focuses on privatizing common-pool resources to achieve efficient resource allocation. The self-governance theory proposed by Professor Ostrom, a political economy expert from Indiana University, provides a third approach that challenges the logic of collective action. Her work on "governing the commons" and other research achievements led to her winning the Nobel Prize in Economics. In essence, Professor Ostrom offers a third way to address the tragedy of the commons.

I would like to talk about the self-governance factors in Arctic governance. There is something about why the current governance model in the Arctic is very similar to the self-governance theory by Ostrom. Firstly, I would like to say that there is a multi-center governance pattern in the Arctic, which aligns with the self-governance theory. It can be observed that, for self-governance, successful cases do not involve direct regulation by a centralized authority. Therefore, the self-governance model requires a multi-center political environment. However, this external condition limitation is widely questioned by many scholars who believe that it is a questionable constraint. It appears that the external condition is illusory because, in the current stage, there is always a centralized government, and the existence of a multi-center government or no central government is very rare. For example, Guangzhou Zhu from Nanjing University of Finance and Economics argues that limiting common pool resources to remote areas is neither universal nor related to the process of social modernization. Therefore, the external conditions claimed by Ostrom not only rarely exist but also cannot be sustained by the current trends; they are similar to an illusion. Thus, the political environmental conditions required for the self-governance theory are very hard to realize. However, it is fortunate that in the Arctic, it is easy to see that there is no central government or legal system governing the region.

Firstly, the Arctic is naturally located in a remote area, and there is no treaty system similar to the economic exclusive zone or other regions. In other words, there is no systematic rule of international law to regulate it, and there is no centralized governance system as scholars discuss the illusory nature of it. As we all know, the Arctic Council, established in 1996, is primarily focused on environmental governance rather than being a regulatory international organization; it functions more like a high-level forum.

Therefore, the first and most essential factor is the multi-center pattern that exists in the Arctic.

The second factor is that the governance size should be very small. The core of the self-governance theory is that the group operating with quality resources is relatively small and stable. In the current domestic government scenario, it is challenging to achieve such a model with multiple government entities. As we all know, the islands and coastal waters of the Arctic belong to the United States, Canada, Norway, Russia, Denmark, Iceland, Finland, and Sweden. These countries have a direct interest in the Arctic Council, presenting a small but stable governance situation. Although the governance body does not fully meet the requirements of self-governance in terms of size, with only eight countries participating in the Arctic Council, including superpowers like the United States, Canada, and Russia, it becomes difficult for external forces to interfere with Arctic affairs. Despite the Arctic Council reform and the development of observer countries' status, external political pressure remains limited. For instance, Article 5 and Article 6 of the Arctic Council Observer, along with decisions made by many subsidiary bodies at various levels, are the exclusive rights and responsibilities of the eight Arctic states and the permanent participants. All decisions are made through consensus among the Arctic states. Therefore, we can see that the governance model of the Arctic Council is relatively stable due to its limited size with only eight countries and most observers lacking the authority to make substantial decisions.

The third factor of self-governance is the validity of informal rules, often referred to as soft law. Similar to another notable feature of the theory of self-governance, which emphasizes the significance of informal rules over strict legal regulations, Ostrom's new form of the game allows individuals to enter into binding contracts that commit them to cooperative speech strategies. This model of self-governance does not rely on a government regulatory agency for supervision; instead, individuals supervise each other driven by their self-interests. This approach helps avoid wrong decisions caused by incomplete information and potential capture of regulatory agency supervisors. Ostrom emphasizes the importance of working rules and self-governance theory, which may or may not lead to the establishment of formal laws through legislation, administration, and court rulings. This approach is similar to the Arctic Council and its use of informal rules to govern environmental factors, safety, and other aspects.

Therefore, the three important factors emphasized by Ostrom in the self-governance theory are all present in the current Arctic governance model. Now, let's discuss the dilemma of the current self-governance in Arctic governance. Firstly, the current political environment, both externally and internally, is becoming increasingly unstable, particularly due to the escalating conflict between the United States and Russia over Ukraine. This instability poses challenges to the Arctic Council. We are aware that several countries outside the Arctic Circle are eager to participate in Arctic governance.

For instance, Chinese scholars propose the inclusion of near Arctic States and the Arctic States, British scholars suggest the involvement of Arctic stakeholders, and Japanese scholars propose non-Arctic coastal states. The future cooperation among a large circle of participants in Arctic governance presents a major challenge due to the external political environment. Additionally, internal political instability within the Arctic Council may arise from ongoing territorial disputes among Arctic States.

Secondly, the Arctic Council faces difficulties in establishing institutional frameworks. As mentioned earlier, soft law is the primary regulatory form used in the Arctic Council and Arctic governance. However, the self-governance model requires an effective internal governance system to achieve desired outcomes. Ostrom observed that many common-pool resources lacked effective and sustainable institutional arrangements, resulting in resource degradation. Effective institutional supply usually adheres to the eight design principles outlined in her theory. Furthermore, the Arctic Council encounters obstacles in implementing institutional changes, which involve replacing older systems with new ones. Despite worldwide calls for reforming the Arctic Council and addressing various issues such as regional security, working group arrangements, funding, observer status, and climate change, the current focus primarily revolves around traditional security matters and majoring in climate change. Unfortunately, the lack of interest from the United States and Canada hampers progress. In 2017, the United States Center for Strategy conducted a study on the future direction of the Arctic Council, questioning whether it should primarily focus on maintaining the existing structure, implementing policy changes, or seeking a new design plan. Therefore, new challenges related to environmental and security issues need to be addressed, but it remains a challenging task.

Finally, credible commitments between Arctic States, as raised by Ostrom, present another concern. The active involvement of both the United States and Russia, as superpowers, in the Arctic Council is complicated due to the current instability in their international relationship. This instability could potentially affect the credibility of commitments made by Arctic States.

The last point I would like to discuss is institutional change. Perhaps we should consider adopting a "nasty enterprise" model, as proposed by Ostrom in her self-governance theory. This model suggests the establishment of supranational organizations, national-level bodies, sub-governmental entities, and non-governmental organizations to form a nested enterprise responsible for governing common pool resources, such as the Arctic governance.

We have observed the existence of supranational organizations, such as the United Nations Environment Programme, the Arctic Council, and the Barents-European Arctic Council. At the national level, we have the Arctic States along with relevant countries outside the region. Additionally, at the sub-government level, we have the Alaska Government of the United States and the Northwest Territories, Yukon, and Nunavut of

northern Canada. Lastly, non-governmental organizations like the Arctic University, the International Arctic Science Committee, and the International Union of Arctic Social Science play a crucial role.

Lili Wang:

The environmental trend is indeed a significant issue, and we appreciate Dr. Fang's insights. Now, let's welcome Professor Douglas from Lanzhou University.

Topic: Maritime Security under the Maritime Silk Road and Global Security Initiative in Post Pandemic Era: An Assessment of the Environmental Dimension

Speaker: Professor Douglas de Castro (Law School, Lanzhou University)

Special greetings to Dr. Shaoming Zhu. Thank you for inviting me to participate in this conference. I would also like to extend my greetings to Professor Lili Wang and Professor Zhaobin Pei for hosting this event. Today, my topic is maritime security under the Maritime Silk Road and Global Security Initiative in the post-pandemic era. This is part of a larger investigation that I have been conducting since before coming to China from Brazil. My interest lies in examining the transfer of legal and non-legal rules along the Belt and Road Initiative and how countries adopt environmental norms and values, particularly China's concept of ecological civilization as outlined in the Chinese Constitution Amendment of 2018, and the concept of the common shared experience of humankind, which leads to various legislative changes, especially in the Belt and Road Initiative.

I must mention that this presentation is part of my ongoing investigation, so you may encounter some dead ends, conflicting statements, and provisional statements that I hope to clarify during the Q&A session or subsequent discussions with colleagues.

To me, maritime security has two dimensions: legal and political. Regarding the legal dimension, I must warn you that my theoretical framework is rooted in the Third World approach to international law, which tends to be highly critical of the current state of international law. Thus, I believe that maritime international law has an imperialistic ontology that justifies the exploitation of natural resources and the so-called civilizing mission observed since the start of the navigation period in the 1500s and still evident in today's international institutions. This is why I decided to explore alternatives to the current international legal order. For this reason, I started investigating the Chinese approach while considering the political aspect of maritime security. Interestingly, the practices in the political sphere are similar to those in the legal realm, as they are based on the freedom to explore the oceans for resource exploitation and the promotion of Western rules and values. I believe that the securitization or the narrative of existential threats in the maritime domain is primarily propagated by the United Kingdom, the European Union, NATO, and the United States, especially after the 9/11 events and the so-called war against terrorism. On the other hand, some authors argue that when China embarked on its expansion and exploration efforts, it was more of a civilizational encounter focused on trade and exchange of experiences rather than mere plundering. Therefore, my research seeks to refute the claim that China's expansion, both historically and presently, is driven by imperialism. There is no empirical evidence to support this

argument, particularly when we consider the developing countries where China is currently involved.

To challenge this perception, we need to start from a certain point. Firstly, global cooperation is not fiction; it exists. South-South cooperation is based on solidarity, coordination, the rejection of zero-sum games, mutual respect, fairness, justice, and win-win cooperation. It offers alternative models of development that prioritize security. In this context, China provides an interesting model of economic growth, poverty alleviation, increased international projection through the Maritime Silk Road, the Global Security Initiative, and the Global Development Initiative. Moreover, China's economic growth challenges also present opportunities for addressing environmental issues. On the other hand, developed countries exhibit a lack of trust in the Global North, particularly the United States and the European Union, who are preoccupied with post-pandemic recovery. These countries are highly dependent on foreign investments within a commodity exportation model, requiring avenues for exportation. Consequently, the high seas play a crucial role in their transportation needs.

On the Chinese side, isolation is not an option for China as it stands right now. There's a new model of high-quality development. This term, which we've been examining in the 20th Party Report, will be discussed extensively in the next couple of days and over the next five years in China. Therefore, we need to pay attention to the concept of high-quality development and position ourselves as a preferred partner to achieve sustainable development. In my studies, I argue that this approach will enhance security in the economic, environmental, and military realms. To me, a path to broader security is based on pragmatism, which emphasizes "concrete actions," as stated by President Xi during the 26th United Nations Climate Change Conference of the Parties last year. China has systematically promoted environmental considerations through initiatives such as the Guidelines for Greening Overseas Investment and Cooperation and the Guidelines for Ecological Environmental Protection of Foreign Investment Cooperation and Construction Projects. These guidelines will be applied to projects under the Belt and Road Initiative, the maritime silk road, and the Global Security Initiative (hereinafter referred to as GSI), among others.

Now, turning to my case study on the maritime silk road, I will discuss my roadmap for investigation. So far, I have provided the background of my case study. My focus is on examining the connections between the Maritime Silk Road, the GSI, and the Global Development Initiative, and understanding the underlying principles that unite these concepts. For me, environmental security plays a crucial role. Specifically, the GSI emphasizes security in both traditional and non-traditional domains, with environmental security being a fundamental aspect.

My theoretical approach, as mentioned earlier, is the third world approach to international law. Therefore, I explore empirical indicators that demonstrate resistance to

the status quo of the international order and propose alternative approaches to development that enhance environmental security. Additionally, I consider translocality within my theoretical approach, examining interstate dynamics, trans-societal linkages, environmental sensitivity and vulnerability, and the enhancement of environmental security.

When I delve into concrete and empirical evidence within my case study, I focus on the port of Gwadar and the China-Pakistan Economic Corridor. It makes sense to examine the Gwadar Port to gather these empirical indications.

An exploratory study has been conducted, and book chapters have been published regarding the Belt and Road Initiative. As shown by the green arrow in the diagram, the cluster of topics related to sustainable development is closely linked to the Belt and Road Initiative, whereas the red arrow, which indicates the internationalization of RMB, signifies a separate area of investigation within the epistemic community.

Furthermore, the preliminary investigation into the guidelines for greening overseas investment and cooperation reveals a strong connection between environmental protection and the investments that China plans to undertake as part of the Belt and Road Initiative. This connection extends beyond environmental considerations within China and encompasses the countries receiving these investments. As depicted in the content analysis diagram, this connection is intertwined with other significant terms. The aim is to establish the relationship between these three platforms and their capacity to enhance environmental security along the Maritime Silk Road. Thank you for listening, and I'm happy to address any questions regarding my project.

Q&A:

Lili Wang:

Thank you very much. Professor Douglas Castro, your presentation is very interesting, and I have a question for you. Just now you talked about two dimensions of maritime security, legal and political, and you address the importance of environmental law. Do you think any legal aspects are relevant? Do you think environmental law should be the fundamental pillar here? Thank you.

Douglas de Castro:

For the purposes of my study, I'm using the international environmental law, but it has implications in many subfields of international law, such as international development law and international economic law. So, I'm looking into increasing maritime security. It is predicated on international environmental law and how the

contribution of the Chinese legislation or consents are important for a sustainable development setting. It contributes to the environmental governance as a whole, especially here regarding the ecological civilization concept. It is operationalized in other legislation, and how it spreads to others. I recently published a paper in the critical journal, Brazilian Studies. With one of my Ph.D. students in Lanzhou, regarding the contributions of China, the environmental war to the international environment. More specifically, I don't see only international environmental law receiving contributions, but other subfields of international law, as I mentioned, international development law, especially and now with the concept of high-quality development.

Topic: The Arctic in a Distrusted World
—An Analysis of How Climate Change May Affect Maritime Security

Speakers: Francisco Falsetti Xavier (Resident Specialist of Observa China)

Thank you very much, Professor. My name is Francisco. I'm from Brazil. I work as a regional representative of FLIA in Brazil and also as a resident fellow for a think tank in Brazil called Observa China. First of all, before we start, it is imperative that I explain the region that I'm going to talk about. The Arctic Circle is home to more than four million people and is composed of eight sovereign states, five of which are coastal states. It is also home to over forty different minority groups. It is a very complex region, as there are multiple actors interested in the region, such as the states themselves, NGOs, and industries. The region is rich in resources and holds a strategic position as a necessary place for navigation routes. Lastly, it is a vital ecosystem for the whole world.

Considering that the Arctic region is one of the most affected places by global warming and that global warming's effects have recently intensified the ongoing changes in the Arctic, I will pose two questions to be answered at the end. The first question is how global warming is reshaping Arctic maritime security as a whole. The second question is to what extent the Arctic situation can impact the UNCLOS, which refers to the current international law system. My hypothesis is that global warming is fueling potential maritime conflicts and gradually undermining the legitimacy of the current law of the sea.

First, let's recap some important world events that have shaped the world as it is today, events that have decreased multilateral cooperation and brought the world to a distressed situation, hence the name of this presentation. These events are, in effect, a backlash caused by globalized interdependence. We can start with the financial crisis in the United States and the European Union, the rise of China, regional conflicts, migration, and the rise of ultra-nationalist movements. Brexit, as a consequence, follows, and then we have the COVID-19 pandemic and Russia's invasion of Ukraine. It is important to mention that these two recent events have caused an energy and supply-chain crisis, leading to inflation worldwide and putting the Arctic in the spotlight due to its resources and strategic position.

Let's discuss how climate change affects the Arctic and the entire world and explore the concept of the Arctic dilemma. The effects of climate change in the Arctic have far-reaching consequences for the world. As the glaciers and ice caps in the region thaw and melt, fresh water enters the oceans, leading to rising water temperatures, sea level rise, and disruptions to the global ecosystem and weather patterns, as eloquently presented by Professor Mark. This reduction in ice extent is exemplified by the records of

minimum ice coverage, with the latest one occurring on September 18, 2022, marking the 11th record decrease in ice caps.

Now, what is the Arctic dilemma? The consequences of climate change in the Arctic extend beyond environmental concerns and have implications for geopolitics and legal matters on a global scale. Consequently, there is a growing number of stakeholders interested in the region. Additionally, I would like to highlight five main consequences of climate change-induced glacier thaw.

Firstly, the melting of ice opens up previously inaccessible resources, including oil, gas, minerals, and abundant fish stocks. Secondly, this also creates new and faster commercial routes compared to traditional routes like the Suez Canal. Notably, the Northern Sea Routes, primarily controlled by Russia, have experienced increased ship flows and cargo volume.

Territorial disputes are another significant issue in the region. Multiple countries have conflicting claims over the extension of their continental shelves, which can be exploited up to 350 nautical miles. Currently, there are five ongoing disputes involving not only continental shelves but also straits, passages, and islands. Additionally, the Northern Sea Route, also known as the Northern Passage, is subject to a claim by Russia alone, leading to further tensions.

The fourth point worth mentioning is the growing militarization of the Arctic. While the Arctic states have been bolstering their military presence since 2012, Russia's actions in Ukraine and Crimea have prompted other countries to strengthen their military presence in the region as well. This includes the United States' emphasis on enhancing military operations, Canada's military exercises with the United States, and Russia's reactivation of bases from the Soviet Union era. The escalation of tensions among Arctic countries and the revival of Cold War-era rivalries are significant concerns.

Lastly, external actors are increasingly involved in the region. In 2018, China released its first Arctic policy white paper, positioning itself as a "Near-Arctic State" to protect its commercial interests, including the development of a polar Silk Road. Similarly, the European Union has acknowledged the Russian threat and stressed the need to secure the region in their Arctic policies. While some countries primarily focus on cooperation, the evolving security situation in the region is likely to alter their positions.

Considering these complexities, it is evident that addressing these issues is a formidable challenge. Firstly, the decentralized governance structure poses difficulties. Although we have the United Nations Convention on the Law of the Sea (UNCLOS) as a legal framework for resolving disputes, the International Maritime Organization serves as a specialized agency for security, safety, and pollution prevention. Additionally, the Arctic Council, composed of eight Arctic states, along with permanent members and observers, acts as a forum for sustainable development, environmental protection, and non-binding agreements.

But aside from the decentralization of governance in the region, we have to acknowledge that there is also disruption within these governance structures. Firstly, when considering legal governance, the United States, a significant and powerful Arctic country, is not a signatory of the UNCLOS. This means that its laws are not binding on the United States. Additionally, there have been numerous controversies within the Arctic Council since the 2008 Declaration, where the five Arctic states joined to strengthen their cooperative initiative. Critics argue that this has caused a lot of controversies within the Arctic Council itself. The Arctic Five are attempting to overshadow the original organization. Moreover, there are ongoing debates regarding whether the Arctic is indeed a global common. Most Arctic countries claim that the Arctic is a global common due to a significant portion, although not a majority, of the Arctic Circle and the Arctic Sea falling within the coastal states' jurisdiction, thanks to their continental shelves and exclusive economic zones. However, there are other countries that refute this notion. Lastly, corporate activities are currently on hold due to the war between Ukraine and Russia. The effects of global warming are reinforcing great power rivalry and defensive strategies in the Arctic. Therefore, in response to my first question, it is possible that states may enter into conflicts due to the loss of trust and the rise of insecurity. However, regarding my second question, we should also consider that the consequences of global warming may lead to a disruption in the legal framework of International Maritime Law. Why? The International Maritime Law is susceptible to loopholes and changes within the Arctic Council's environment. Consequently, it may gradually become delegitimized and disrespected. The melting ice may raise concerns and the aforementioned loopholes could trigger a reinterpretation of the charter itself. For instance, Article 2, Article 3, and Article 4 state that coastal states have jurisdiction over the ice-covered areas for most of the year. However, with the melting ice, countries fear that these claims may be limited. It is also important to note that the United States is not a binding member of UNCLOS. Another issue to consider is the stumbling block problem within the government's mechanism of the commission. Whenever a country seeks to extend its continental shelf, it establishes the outer limit up to 350 miles and then submits it to the commission on the limits of the continental shelf. The commission then convenes sub-commissions to review these inquiries and provide recommendations. The stumbling block arises due to the lack of uniformity in the recommendations made by each sub-commission. Each sub-commission is distinct, and their decisions and interpretations often lack consistency. Additionally, it is crucial to recognize that the sub-commissions and the commission itself function as technical bodies. Therefore, there are situations where interpretations should go beyond the geophysical factors of the region. To further elaborate, as a constructivist, I do not believe that conflict is inevitable in the region. I believe that governance is "what we make of it." However, in order to find a unified response and reduce potential conflicts in the Arctic, we should first aim to reach an agreement on whether the area is a global

common or not. This could be achieved, for example, through the revision of the commission itself within the United Nations, by implementing more standardized procedures and mechanisms. Additionally, efforts should be made to pressure the United States to become a signatory of the charter and to establish more inclusive cooperation bodies. Thank you very much for your attention. Please feel free to contact me through any preferred channel. I will be more than happy to share the findings, references, and presentation materials.

Topic: The Realistic Basis and Path of the Implementation of the Rule of Law for Marine Biosecurity

Speaker: Associate Professor Jing Zhen (School of Humanity and Law, Northeast Forestry University)

Thank you, ladies and gentlemen. Good morning, everyone. My name is Zhen Jing. I'm from the School of Humanities and Law at Northeast Forestry University in Harbin City, Heilongjiang Province, China. I'm glad to be here to take part in today's conference. Firstly, I would like to thank Dr. Shaoming Zhu and all the professors at the School of Marine Law and Humanities, Dalian Ocean University, for their kind invitation. Secondly, I would like to express my gratitude to the Foundation for Law and International Affairs for their excellent conference organization work. Thirdly, I feel very honored to be able to come here and exchange my ideas.

I will now introduce my paper to all of you. The significant impact of marine biosecurity on social order has led to a series of serious social problems and has attracted extensive attention from society. At the same time, it also highlights the urgent need for legal protection of marine biosecurity. The key to establishing the rule of law for marine biosecurity lies in the implementation of the Biosecurity Law of the People's Republic of China. However, from the perspective of the overall national security concept, marine biosecurity encompasses a wide range of fields and is closely linked to the public interest. The implementation of the Biosecurity Law needs to explore an efficient implementation path.

Implementing the Biosecurity Law must be guided by the overall national security concept, follow the biosecurity legal norm system that has been constantly improved in practice, overcome the challenges in enforcing biosecurity regulations, optimize the biosecurity deliberation and coordination mechanisms, strictly adhere to legal procedures to enhance the judicial effectiveness of marine biosecurity, raise legal awareness of marine biosecurity risk prevention and control in society, and establish a diversified network to facilitate participation in the implementation of the Marine Biosecurity Law. This will ensure efficient implementation of the Law on Marine Biological Safety, promote the process of the rule of law in marine biological safety, and ultimately realize the pursuit of a community of shared future for mankind in harmony with nature.

I have three key questions. The first one is the "implementation of the rule of law for marine biosafety". The second one is "what is the realistic basis for the implementation of the rule of law for marine biosafety". The third one is "what is the path choice for implementing the rule of law for marine biosafety". I will now attempt to answer these questions.

The contents of my paper are divided into four parts. First, the definition of the implementation of the rule of law for marine biosafety. The implementation of the rule of

law for marine biosafety refers to the process in which state organs and their staff, enterprises, institutions, citizens, and other social subjects follow the behavioral model set by legal norms for marine biosafety, and guide their engagement in activities related to the utilization of marine life, including the legal implementation, application, and compliance with laws for marine biosafety.

Second, the realistic basis for the implementation of the rule of law for marine biosafety. The first basis is marine biological security, which is closely linked to national security. The outbreak of the COVID-19 pandemic has had a significant impact on national economic development, as well as people's production and daily lives. Consequently, the safety of marine organisms has inevitably been elevated to the level of national security. The key to establishing the rule of law for marine biosafety lies in the implementation of the Marine Biosafety Law. The construction of the rule of law for marine biosafety depends on the establishment of a sound biosafety legal system and the promotion of efficient implementation of legal norms for marine biosafety. Under the guidance of the overall national security concept, the promulgation of the Biosafety Law has filled the void of China's special laws in the field of biosafety. It clarifies the legislative purpose, legislative principles, and provides relatively complete legal rules. Moreover, it connects with the laws and regulations of wildlife and other departments, offering systematic and standardized guidance for the implementation of the biosafety law.

The third approach is to choose the path of implementing the rule of law for marine biosafety. The first step is to improve the legal and normative system of marine biological safety from the perspective of the overall national security concept, oversight, and verification. Based on the reality of the close relationship between marine biosafety and national security, we should address the inherent flaws of the legal norms and the shortcomings in China's establishment of a perfect legal system for marine biosafety. This should be done under the guidance of the overall national security concept, in order to provide a systematic response to the social reality of marine biosafety in China.

The second step is to address the issues of non-standardized law enforcement by combining it with normalized administrative law enforcement. This will become a necessary choice to optimize the coordination and cooperation mechanism of marine biosafety work and promote the efficient implementation of the biosafety law. The administrative entities should develop an awareness of marine biological safety risk prevention and control. When launching campaigns for law enforcement to address marine biological safety problems, necessary pre-procedures must be established. Through the expert advisory committee, normalized and abnormal information such as marine biological safety monitoring and early warning will be studied and assessed to distinguish normalized marine biological safety issues.

The third step is to strictly abide by legal procedures and fully utilize the effectiveness of judicial protection of marine biosafety. Throughout the process of judicial protection of marine biosafety, legal procedures should be strictly followed to maintain the dialectical unity of procedural justice and substantive justice and to effectively protect marine biosafety through the judiciary.

The fourth step is to enhance social awareness of the rule of law in prevention and control and build a network of diverse participation in the implementation of the Marine Biosafety Law. The implementation of the rule of law for marine biosafety depends not only on a country's human and financial resources, but also on enhancing the public's awareness of the rule of law for biosafety prevention and control as a whole. This will ensure the efficient implementation of the biosafety law.

That's all. Thank you for listening.

Topic: "Self-Restraint"

—A Valuable Attempt in Maintaining Maritime Security in Disputed Area

Speaker: Research Fellow Qiyue Zhang (Shanghai Institutes for International Studies)

Firstly, I would like to express my gratitude for the introduction of Professor Wang and extend my thanks to Dr. Shaoming and the entire organizing committee for giving me the opportunity to learn from other scholars and engage in discussions with professors and scholars. My name is Qiyue Zhang, a research fellow from the Shanghai Institutes for International Studies.

When addressing maritime security issues, I turn to the concept of self-restraint, which is frequently discussed in the Declaration on the Conduct of Parties in the South China Sea and the Code of Conduct in the South China Sea. Self-restraint is not only crucial in managing disputed maritime areas in Asia, but it is also a valuable approach for maintaining maritime security in all disputed areas within the international community.

My presentation will be divided into four parts. The first part will focus on the legal basis of self-restraint. The second part will highlight typical cases where self-restraint has been applied in disputed maritime areas. The third part, which is the key segment of my presentation, will delve into the self-restrained articles outlined in the Declaration on the Conduct of Parties in the South China Sea and the Code of Conduct in the South China Sea. Lastly, I will discuss measures for the effective implementation of self-restraint.

Although the doctrine of self-restraint is not explicitly stated in the United Nations Convention on the Law of the Sea (UNCLOS), it can be seen indirectly in Article 74 and Article 83. These articles require states to adhere to the spirit of understanding and cooperation, making every effort to establish provisional arrangements. During this transitional period, before the final determination of maritime delimitation, states should refrain from jeopardizing or impeding the reaching of a final agreement. Such arrangements should not prejudice the final determination. The Guyana versus Suriname case discusses these two obligations, which aim to both promote and limit activities in disputed areas. The limitation of activities aligns with the concept of self-restraint in disputed maritime areas.

I have identified several typical cases where self-restraint has been applied in maritime areas and have attempted to determine the common criteria for deciding which behaviors should be restricted. In the Aegean Sea Continental Shelf case in 1976, the International Court of Justice deliberated on whether to impose provisional measures. The court examined seismic exploration of natural resources on the continental shelf without the consent of the coastal state, which could potentially infringe upon other parties'

exclusive rights of exploration. The Turkish activities of seismic exploration were considered as such an infringement and could prejudice Greece's exclusive rights in the relevant areas. However, the International Court of Justice declined to impose provisional measures under Article 41.

Similarly, in the Guyana vs Suriname case, the arbitral tribunal declined to indicate interim measures citing three reasons: firstly, the seismic exploration did not pose any risk of physical damage to the seabed and subsoil; secondly, the activities were of a transitory nature and did not involve the establishment of installations; and thirdly, no operations involving the actual appropriation or use of natural resources had been initiated. In this context, the tribunal concluded that Turkey's conduct did not pose a risk of irreparable prejudice to Greece's rights. Here, we can observe that the tribunal applies restrictive criteria to determine which behaviors should be restricted and under what circumstances provisional measures should be imposed. The arbitral tribunal recognizes the equal importance of maintaining maritime security and promoting maritime economic activities. Therefore, the tribunal does not suggest a complete suspension of all economic development in disputed maritime areas, as economic activities are crucial for realizing the objectives and aims of UNCLOS. Such activities also represent an applicable and efficient utilization of marine resources.

During the conference, we examined Ghana v. Côte d'Ivoire case in 2017, where the International Tribunal for the Law of the Sea (ITLOS) combined explanations of self-restraint with the provisional measures outlined in Article 74 and Article 83 of UNCLOS. ITLOS emphasized the importance of exercising restraint to promote the peaceful resolution of disputes. In this case, ITLOS recognized the obligation of states to respect disputed maritime areas. Provisional arrangements were described as measures "not to jeopardize or hamper the reaching of the final." This crucial aspect determines which behaviors should be restricted, emphasizing that states should act in a spirit of understanding and cooperation.

Moving on to the self-restraint articles in the Declaration on the Conduct of Parties in the South China Sea (DOC) and the negotiations for the Code of Conduct (COC), I discovered the legal basis for self-restraint in these two documents, as well as in general principles of international law. I have summarized it as the principles of state consent and good faith.

Let's begin with the principle of state consent. Max Blank's Encyclopedia of Public International Law explains that consent is a method for establishing specific legal obligations, particularly in the international law-making process. It indicates that states are willing to abide by the rules and obligations imposed on them, reflecting their consent. When China and ASEAN states, as contracting parties, agreed to sign the DOC and future COC, it demonstrated their agreement and willingness to adhere to the provisions, including the self-restraint articles. The principle of good faith is universally recognized

and reflected in various legal systems and cultures. Good faith fosters a spirit of respect for legal order and obliges nations to consider the reasonable expectations of other members of the international community. In the present case, after China and ASEAN states signed the DOC and COC, it implies that all contracting parties should comply with the provisions in good faith and refrain from breaking the rules.

Next, let's examine the self-restraint articles in the DOC and the COC. The DOC states that parties undertake to exercise self-restraint in activities that could complicate or escalate disputes and undermine peace and stability. It provides an example of refraining from actions that would inhabit presently uninhabited geographic features and encourages handling disputes constructively. However, both China and ASEAN states feel that the other countries fail to meet the requirements of self-restraint.

I have identified five reasons for this failure. Firstly, the DOC is perceived more as a political instrument rather than a legally binding one, resulting in different interpretations and criteria for self-restraint among states, leading to varying standards of implementation. Secondly, states hold different narratives and understandings of maritime security. Thirdly, there is an incomplete enumeration of behaviors that should be restricted. While states are refrained from inhabiting uninhabited maritime features, there are other coercive acts that should also be restricted. Fourthly, claimant states tend to prioritize competing for rights before final maritime delimitation, which distracts their focus from implementing the DOC and engaging in practical cooperation to maintain maritime security. Lastly, the DOC is gradually shifting from a crisis management tool to a means for ASEAN states to collectively restrain China's actions in the South China Sea, even if those actions comply with international law.

Later, the 2011 Guidelines for the implementation of DOC focused more on joint cooperative activities and did not mention the self-restraint articles. This poses difficulties for the COC negotiation. During the COC negotiations, several countries, including Brunei, Cambodia, China, India, Thailand, and Malaysia, proposed provisions similar to those in the DOC. Thailand emphasized the peaceful purpose of utilizing the South China Sea and refrained from actions inconsistent with the spirit and principles of the DOC and the 1982 UNCLOS. Vietnam itself initiated a proposal that required all contracting parties to refrain from using force or coercive actions, constructing artificial islands, participating in or allowing territorial use, militarizing occupied geographic features, blockading vessels, declaring ADIZ, and conducting simulated acts.

It is likely that China and ASEAN states will reach a consensus in negotiating the articles of self-restraint. However, states may have different national interests and focal points, which could lead to arguments during discussions on the list of items in the articles. China is primarily concerned about illegal occupation of maritime features, conducting military and joint military actions without prior consent or notification, and exploration and exploitation potential of legal resources, which leads to severe strategic

competition. ASEAN states are concerned about China's retaking of geographic features and Chinese domestic legislation, such as the Chinese Coast Guard law, which authorizes the Chinese Coast Guard to use police equipment and weapons. This may cause conflicts between law enforcement vessels and fishing vessels. China and ASEAN states have different interpretations of dispute settlement mechanisms, particularly Article 298 of UNCLOS. States outside the South China Sea are more concerned about China's claimed excessive maritime rights and the conduct of freedom of navigation and operations by the United States. There is also a debate about China's nine-dash line in the South China Sea and its consistency with international law. These differing national interests and focal points between China and ASEAN states may lead to arguments regarding the behaviors that should be restricted, as states will have different interpretations and standards when implementing these rules.

In terms of suggestions for measures to effectively implement self-restraint and maintain maritime security, I propose the following. Firstly, states should pay attention to legislative techniques during the law enforcement process. I believe that legislation on self-restraint should consist of three parts: general provisions, an enumeration listing the restricted behaviors, and a concluding clause encompassing all possible situations. The restricted behaviors should adhere to the principles of necessity, responsibility, and proportionality in order to maintain security and fulfill the objectives of the COC. Additionally, to ensure that all parties comply with the provisions using a unified standard, all states should exercise self-restraint equally and abide by the provisions in good faith. Finally, the establishment of supervision mechanisms, reporting mechanisms, and dispute settlement articles would be beneficial in ensuring the effectiveness of the self-restraint provisions.

In conclusion, self-restraint is a valuable attempt to maintain maritime security. If successful, the self-restraint demonstrated in the DOC and COC could serve as a reference for other disputed maritime areas, helping to maintain maritime security and prevent the escalation of disputes in controversial maritime regions prior to final maritime delimitation. The standards for self-restraint should be analyzed on a case-by-case basis, ensuring that states do not jeopardize or hinder the final agreement, and that economic activities are not completely restricted. However, any physical changes should be reversible. Furthermore, self-restraint also necessitates supporting mechanisms such as dispute resolution and monitoring mechanisms to ensure proper compliance with the requirements and to maintain maritime peace and stability.

Thank you for listening.

Panel Two: The Legal Preparedness for Cyber Security in the Post-Pandemic Era

Topic: The Challenges of Cyberspace Regulation in the Face of the Global Power Dispute

Speaker: Assistant Researcher Rodrigo Abreu de Barcellos Ribeiro (Center for Studies on Contemporary China and Asia, Universidade Federal Fluminense)

Good morning, everyone. Good evening to my fellow Brazilians who are watching. I'm from Rio de Janeiro, Brazil, representing Universidade Federal Fluminense. I am deeply honored to present my research on the Challenges of Cyberspace Regulation in the Face of the Global Power Dispute.

Let me provide an overview of the key points I will cover. Firstly, I will discuss the regulation of the cyber domain. Then, I will delve into the ongoing global power dispute and the main challenges it poses to international law. Finally, I will present my conclusions.

To begin, we are currently witnessing a profound societal shift. States are becoming increasingly reliant on Information and Communication Technologies (ICTs) in various sectors, such as finance, critical infrastructure, and even their armed forces. Unfortunately, this dependency is often exploited as a vulnerability. Consequently, states have recognized cyberspace as a new strategic domain, alongside the existing domains of land, sea, air, and space.

What are the defining characteristics of this fifth domain? Firstly, attribution is a significant challenge. Both states and private actors possess the capability to conceal the true origin of cyberattacks they perpetrate. This raises a crucial issue of accountability: How can we prove which state or private actor conducted a particular attack?

Additionally, there is a lack of clear definitions regarding threats in cyberspace. States tend to refrain from employing zero-day weapons, which are only usable once, opting instead for less sophisticated tools in order to preserve them for large-scale conflicts in the future. As Mark Mellett mentioned, rapid technological advancements constantly reshape the threat landscape in cyberspace. Compared to 10-15 years ago, when the Internet of Things and advanced artificial intelligence were not as prevalent, the nature of threats has significantly evolved. Moreover, operations in cyberspace unfold at an astonishing speed. As I speak to you from the other side of the globe, our data is transmitted back and forth in a matter of milliseconds. Everything happens swiftly and instantaneously in cyberspace.

Another critical issue is the lack of international regulation. There is currently no treaty or institution with the necessary credibility to regulate permissible cyberspace activities and cyber operations, be it in peacetime or during warfare.

Consequently, this absence of international regulation has given rise to a significant number of gray zone operations in cyberspace. Competing states exploit the regulatory loopholes surrounding what is allowed during wartime and peacetime. These gray zone operations occur across all five strategic domains, but due to the aforementioned characteristics, they are particularly prevalent in cyberspace, where accountability is scarce. States, therefore, have a tendency to favor such operations.

The question arises: Where and how should we establish the boundaries between activities exclusive to peacetime and those permissible during wartime? Moreover, what should be strictly prohibited and considered a war crime, for instance?

The key here is international cooperation. We have had cooperative efforts against cyber-crimes since 2001, as shown in this document from the European Union. We have numerous legislations in bilateral and multilateral treaties, and some of you will present examples later. Additionally, there is an ongoing negotiation for a UN treaty on cybercrime. However, when it comes to regulating cyberspace operations conducted or supported by states, we don't see the same trend. While there have been some efforts like the Tallinn Manual and the Group of Governmental Experts (hereinafter referred to as GGE) Report of the United Nations from last year, these efforts have failed in some key aspects and have faced significant criticism.

Let's start with the Tallinn Manual. The Tallinn Manual 2.0 is an academic publication rather than a treaty. It consists of over 590 pages and was developed by a small number of contributors, mainly from NATO countries. The document itself was created after the Estonian attacks, making it an effort led by NATO with the involvement of scholars from other countries such as China and Belarus. However, even with a small group, they encountered difficulties in reaching consensus on key aspects, such as whether cyber espionage should be considered a violation of international law. Thus, even with a limited number of people working on this publication, consensus was already challenging to achieve.

Regarding the GGE Report as a United Nations document, it has a predominantly recommendatory nature, focusing on transparency and similar aspects. However, it fails to address what should happen to states that do not act transparently and how to enforce transparency in their cyber activities. Consequently, it is seen as a lack of real progress. This document raised high expectations, but it did not demonstrate any significant advancements in the debate.

Moving on to the ongoing global power dispute. First, I would like to clarify the concept of "hegemony" based on my research. I draw upon Antonio Gramsci's concept, which he developed in the context of Italian fascism with an interstate perspective. According to Gramsci, hegemony generally occurs when a group propagates its own values and norms to a population, which eventually adopts and spreads those values, considering them as the common good. Robert Cox expanded on this concept and applied

it to the international scenario, stating that hegemony at the international level is established through the creation of norms and institutions like the UN. Giovanni Arrighi argued that we have not yet overcome the crisis of American hegemony. The crisis of hegemony leads to systemic chaos, which refers to a situation of total and seemingly irreparable lack of organization arising when a new set of rules and norms clashes with an older set. These conflicting sets of rules collide, and the interests of states begin to diverge.

I'm sure you're all familiar with the aspects of the great power competition. But I just want to remind you of the key points here. We have the economic rise of China and the modernization of the People's Liberation Army (PLA), as well as China's involvement in Western-led institutions like the World Trade Organization (WTO). At the same time, we have seen the establishment of Chinese institutions such as the Asian Infrastructure Investment Bank.

In the past eight years, we witnessed the Russian-NATO struggle in Eastern Europe, which eventually led to the ongoing conflict in Ukraine. Additionally, there were significant economic sanctions imposed by the United States on China, particularly during the Trump Administration. As Francisco mentioned in the previous panel, we are currently facing a distressed world. Therefore, multilateral cooperation is not currently on the agenda. It is incredibly challenging to get these three main actors to cooperate, as they have different sets of rules and often clash with each other.

So, what are the effects on international law? The International Institute for Strategic Studies has raised this concern and identified the main cyber powers and their tiers. According to their classification, the United States is considered a Tier One cyber power. The Tier Two cyber powers include Australia, Canada, China, France, Israel, Russia, and the United Kingdom. As for the Tier Three cyber powers, we have India, Indonesia, Iran, Japan, Malaysia, North Korea, and Vietnam. Notably, this chart includes countries with conflicting interests, making it challenging for them to reach agreements, especially when considering countries like Israel and Iran or the United States and Russia.

There have been discussions about the creation of a new Geneva Convention on cyber operations in order to establish international law. However, for such a global treaty to be effective, consensus among nations is required. Currently, the countries I mentioned earlier are not on the same page and adhere to different sets of norms. For example, while China seeks to promote the Global Security Initiative mentioned by Professor Douglas earlier, the United States has formed new military alliances, such as with Australia and the United Kingdom. Moreover, Russia's invasion of Ukraine this year further demonstrates the lack of consensus in the international community.

One of the challenges is the attribution dilemma. When should cyber operations conducted by non-state actors be attributed to the states where these actors operate? Should it only be the case when the state has control over these actors or when they

provide financial support or sanctuary for these groups to operate? Drawing a clear line here is difficult. Additionally, we have the issue of gray zone operations. States often take advantage of the ambiguity surrounding these operations to further their own strategic, economic, and political interests. Clear regulations on cyber operations would hinder these efforts, forcing states to find alternative methods.

In conclusion, the main characteristics of cyberspace make it difficult to develop effective regulations. The proposals submitted so far, such as the Tallinn Manual and the GGE Report, are the first steps toward a treaty, but they do not fully address the current needs. Furthermore, the systematic chaos we are experiencing today impedes consensus and leads to clashes between different sets of norms and values. States also tend to benefit from the use of grey zone operations, advocating for them only when they believe their enemies or adversaries are also benefiting from such tactics.

That concludes my research presentation. On the right side, you can see the Journal of Geophysical Research-Ocean from the Brazilian Naval War College. You can scan the QR code to visit their website or contact them via email. It's a highly recommended publication from a reputable research group. You can also reach out to me through my social media accounts.

Thank you.

Q&A

Wei Shen (Professor of Law, Shanghai Jiaotong University; Editor-in-Chief, The Foundation for Law and International Affairs Review) :

Thank you, Rodrigo. It's a very interesting presentation. I have a quick question about your cyber power level, the category of cyber power. So, is this category based on any international organization's category or is it your own definition?

Rodrigo Abreu de Barcellos Ribeiro:

No, it's the international institute's study, it's not my perspective. I personally put the United States and China on the same level.

Wei Shen:

So, based on your observation, do you think the standards this institution used to categorize these countries are objective, subjective or neutral?

Rodrigo Abreu de Barcellos Ribeiro:

I mean, first of all, it's a western institute, so we always need to look at that point. And especially when we are talking about the vague definition of threats, as I have mentioned, it's hard to determine state cyberspace capabilities. But of course, being on western institution, I don't quite agree.

Wei Shen:

OK, thank you very much. I'm looking forward to reading your article.

Topic: Research on Data Exit Review Rules from the Perspective of National Security

Speaker: Assistant Professor Wei Zhao (School of Law, Tianjin Normal University)

Good morning, everyone. Please allow me to pay tribute to Dr. Shaoming Zhu and Dr. Xiaofu Li. I sincerely thank them for inviting me to the meeting. And then I'll express my gratitude to Professor Shen for hosting this panel. Now, let's start my presentation.

Firstly, I'll introduce the background of this topic. The subversion of data exit is particularly important for China. While the digital economy is booming, on the one hand, it's necessary to establish the values of data submission. On the other hand, the system of data exit supervision will directly affect the daily operations of multinational companies and overseas companies, and more deeply affect the development process of the digital economy.

With the implementation of the Cybersecurity Law of the People's Republic of China, the Data Security Law of the People's Republic of China, and the Personal Information Protection Law of the People's Republic of China, as well as the promulgation of jobs for a citation of comments on relevant laws and regulations, the legal framework of China's data exit reviews has completed the basic construction. Among them, the data exit security assessment system occupies a very important position in China's data exit system. On July 7, 2022, the measures for the security assessment of a bunch of data transfer were officially promulgated, which means that China's data access security assessment system has taken an important step from a conceptual system to a practical system, in terms of effective names.

In Part One, I will introduce the legal rules of China's data exit system. The Cybersecurity Law has initially established the basic truths for data exit security assessment in China with the promulgation of laws and regulations, such as the Data Security Law and Personal Information Protection Law. The legal framework of data exit has gradually improved, and the positioning of the security assessment system in the data exit system has gradually become clear during this period, in order to effectively implement the system norms at the legal level. Relevant departments have successfully issued documents such as cross-border routes and standard guidelines for data, clarifying the situation and practice direction of data exit compliance.

In Part Two, I'll develop the concept of "the Measures for the Security Assessment of Outbound Data Transfer." In section A, I'll introduce the situation and process of the security assessment of outbound data transfer. From an overall perspective, the measures for the data security assessment of outbound data transfer stipulate the procedure rules of security assessment. The content of the security assessment includes a series of procedural provisions, including the self-evaluation, application evaluation, and re-evaluation stipulated in the measures, as well as evaluation materials, time notice,

supplementary correction of evaluation materials, and cancellation of evaluation results. These regulations can help data processes locate their time point in carrying out the security assessment of outbound data transfer.

Section B contains the content regarding the security evaluation of outbound data transfer. The self-evaluation by data processors and relevant departments' security assessments still constitute critical and important components of the internal evaluation process. Articles 5 and 8 of the measures for the security assessment of outbound data transformation list and explain the key aspects of self-assessment. It is worth noting that the security assessment of data exit is a mandatory legal obligation for enterprises. The corresponding response to this requirement is also provided in the measures for the security assessment of outbound data transfer. We have observed that Article 5 of the official draft of the measures for the security assessment of outbound data transfer has modified the statutory conditions for enterprises to perform self-assessment and changed the original process. Therefore, we understand that in cases where the need for declaration is obviously not met or not applicable, the data exit security assessment to relevant departments and the self-assessment of data exit security risks may not be a mandatory legal obligation. However, this does not mean that enterprises do not need to exercise independent judgment before providing data overseas. Thus, enterprises can still opt for the self-assessment method. Additionally, Article 9 explains the content that should be included in the legal documents for data exit. The terms of these legal documents will also form an integral part of the self-assessment and security assessment, as indicated above. The key issues addressed in self-assessment and security assessment overlap in content. The security assessment will focus on the risks associated with outbound data as activities related to national security and public interests increase. Moreover, decisions made based on additional considerations will take into account the policies, laws, and cybersecurity environment of the country or region where the overseas recipient is located.

In Part Three, I will highlight the key points of the Measures for the Security Assessment of Outbound Data Transfer. The security of outbound data in third countries has always been a focal point in the cross-border data systems of numerous jurisdictions at the international level. It has also been continuously adjusted due to the impact of laws on the economy. For instance, recently, with the European Court of Justice's concern over the personal data of European Union citizens that may be accessed by relevant departments of United States authorities and not effectively protected, the court deemed the EU-US Privacy Shield agreement invalid. The European Union is redefining whether personal data in its data system and cross-border system is effectively protected in third countries, and a new version of the standard contract clause was released in June 2021. Consequently, it is now clear that the data exporting party should conduct a data cross-border impact assessment when transferring personal data, apply appropriate

protection measures, and assess whether the current laws and practices of third countries may affect the effectiveness of these measures. The assessment must also include an evaluation of government agencies' ability to access data in certain countries. This approach shares similarities and differences with China's data exit security assessment system, indicating that the European Union authorities have strengthened regulation through the impact assessment of the data importing party to demonstrate the effectiveness of appropriate and continuous measures.

The promulgation of the measures for the security assessment of outbound data marks that China has made great strides in implementing the data exit security assessment system and has provided a deterministic legal basis for data processors to carry out data exit security assessments. Data processors shall carry out their work in strict accordance with the prescribed procedures outlined in Article 5, Article 8, and Article 9. Among them, self-assessment plays a crucial role by providing practical requirements for the data exit complaints of each data processor. It not only serves as the fundamental and free request work for the data security assessment system but also assists in conducting daily data operations accurately. This is of great help in promoting the standard of data management, data processing, and the protection of personal information, rights, and interests.

In conclusion, the implementation of the measures for the security assessment of outbound data transfer demonstrates China's determination towards data security. Promoting development with security will become one of the primary guiding principles of digital economic development in China. At a time when data security has risen to the level of national security, enterprises need to understand and appreciate the patterns and basic principles of the national data landscape. Striking a balance between compliance and the requirements of original internationalization development, while seeking a new type of development direction, will pave the way for a new chapter in the digital economy. Ensuring security remains the primary task.

Q&A

Wei Shen:

Thank you Dr. Zhao for your interesting presentation. I have a quick question about the data outbound transfer system in China. Is that system similar to the system in other countries or is this system very unique?

Wei Zhao:

I consider the system is not unique. As it belongs to the laws and administrative

rules etc., such as our Cybersecurity Law and the Personal Protection Law. So, I think from this perspective, the system is not unique. That's my answer, thank you.

Wei Shen:

So, are there similarities between China's system and European or American's data outbound transfer system?

Wei Zhao:

I consider there is similarity in the European data outbound transfer system, but it's different from the United States' system. In the security protection and national security, we and the European Union are in very significant positions, for example, we put the exit tools taken by the data outbound party as the legitimate obligation and basic mandatory obligation. From this perspective, I think there is similarity in the European Union.

Wei Shen:

Okay, thank you very much.

Topic: Ways to Enhance Cybersecurity: Some Insights and Examples from Germany

Speaker: Assistant Professor Aiwen He (School of Foreign Studies, East China University of Political Science and Law)

Hello, everyone. My presentation is divided into two parts: first, some cybersecurity measures in Germany from which we may learn, and second, a perspective on cooperation between China and Germany.

As one of the most powerful countries in Europe in terms of information technology, Germany has attached great importance to cybersecurity from an early stage. Some of its legislation and cybersecurity measures are very informative. In the post-pandemic era, countries are facing new cybersecurity challenges, and Germany is no exception. In 2021, the Information Technology (hereinafter referred to as IT) Security Act 2.0 came into force, further regulating and protecting Germany's IT systems considering new realities and technologies. Based on the Reports on the State of IT Security in Germany from 2019 to 2021 published by the Federal Office for Information Security (in German: Bundesamt für Sicherheit in der Informationstechnik, hereinafter referred to as BSI), I have extracted some particular measures that may be of reference for China.

At the societal level, with the IT Security Act 2.0, the BSI has been mandated to introduce a voluntary IT security label to be affixed to IT products or their packaging in order to strengthen consumer protection in the digital age. If a product meets the security standard specified by the BSI, the manufacturer can apply for the label from the BSI. If the plausibility check is carried out successfully and the label is granted, the manufacturer can label its product with it, and from then on, it is subject to supervision by the BSI. That is to say, only after the issuance of the label can the BSI carry out random checks to see whether the manufacturer is keeping its promise. The label can be withdrawn if there are violations of the standards. So, the cost of a label is significantly lower than that of a certification.

This is a sample of the IT security label. According to the new IT Security Act, the label consists of (1) an assurance by the manufacturer that the product meets certain IT security requirements for a specified period and (2) information from the BSI about security-relevant IT properties of the product. The main purpose of this measure is to regulate cybersecurity technology and better protect consumers. In Mainland China, society still lacks awareness of IT security protection. Such a label system can help an ordinary person who doesn't have enough IT knowledge to estimate the safety status of a product. It's a good way to improve the public's awareness of IT security protection. It can also inspire manufacturers to further improve the information security of their products to enhance their competitiveness. Moreover, the costs are reduced compared to applying for certification. Therefore, I consider it necessary to introduce an IT security

label system in the future in Mainland China through legislation, similar to Germany. Corresponding to our multilevel protection, there can also be multilevel standards in this system.

At the corporate level, the IT Security Act 2.0 regulates more obligations for operators. Firstly, the new edition adds the municipal waste management sector to Critical Information Infrastructures (hereinafter referred to as CIIs). Furthermore, "infrastructures in the special public interest" must fulfill similar requirements as CII operators. Certain obligations will also be imposed on the manufacturers of critical components, which are IT products used in CIIs. When planning to use a critical component for the first time, the CII operator must notify the Federal Ministry of the Interior before its use. In general, the new act is more rigorous in its protection of CIIs and eliminates security gaps in more subtle ways, taking the security of the entire supply chain into account. As a late starter in cybersecurity, China's efforts are currently focused on the regulation of CIIs. In the future, depending on the actual situation, more detailed rules could be considered.

During the COVID-19 pandemic, particular attention is being paid to the medical sector, which has faced increasing cyberattacks. Starting this year, all hospitals in Germany are obliged to take appropriate organizational and technical precautions for IT security. This means that even small hospitals have the obligation to provide proof that their technology is adapted to the standards. In parallel, the federal government will support the improvement of IT security in these hospitals with approximately four billion euros. China also has clear multilevel protection requirements for the medical sector, where most of the core business systems of first-class tertiary hospitals and internet hospital information systems should be classified at least as Level 3. However, according to the latest China Hospital Informatization Survey, the implementation of multilevel protection in these hospitals is not as good as expected, not to mention the smaller hospitals. So, the first important thing is to strengthen supervision over their fulfillment of the Multi-Level Protection Scheme (MLPS) Regulation and, if necessary, provide more financial support.

Small and medium-sized enterprises (hereinafter referred to as SMEs) also face cybersecurity problems in the post-pandemic era. For survival, they had to turn to e-commerce, but due to hasty conversions and limited financial and human resources, they have difficulty responding to cyberattacks. Although there is currently no legislation in place in Germany, the BSI is very focused on SMEs this year, according to its 2021 report. The German government has also taken some measures to support them, for instance, by building a freely available platform named TISiM (Transferstelle IT-Sicherheit im Mittelstand, which means literally "Transfer Office IT Security in SMEs"), providing advice on IT security to SMEs based on their vulnerabilities and

needs through a survey. I think it's very useful to provide such a central coordinated and tailored service as it can effectively reduce overhead for SMEs.

When it comes to cooperation between China and Germany, in 2014, HUAWEI had a friendly relationship with the state of North Rhine-Westphalia in Germany. It even received an investment award for its outstanding investments in this German state. However, five years later, in 2019, Germany faced a dilemma: on the one hand, the United States and more and more European countries banned HUAWEI due to the so-called "security concerns"; on the other hand, China is Germany's most important trading partner, and 5G mobile communication is vital to industry networking. Thus, in the years following, Germany did not explicitly reject HUAWEI nor impose restrictions on specific countries and products in its IT Security Act 2.0. However, recent media reports indicate that the German government is likely to take some action against Chinese products.

It is undeniable that there is mistrust between countries. There are huge systemic and cultural differences between China and Europe. In terms of cybersecurity, China and the European Union apply different approaches to global cyber governance. The Chinese position is based on the assumption that governments should govern the internet in order to defend against acts that endanger national security through the internet. In contrast, the European Union supports the creation of an open and free cyberspace. There are contradictions, and the reason why some European countries banned Huawei cannot be simply explained as pressure from Washington. What China should do is take the opportunity of the Sino-European Cyber Dialogue to deepen transparency and mutual understanding on cyber policies of both sides and build confidence in each other through some measures. We should hold an open and respectful attitude towards sensitive issues and strive to find a balance through communication on issues of mutual importance.

In the EU-China: A Strategic Outlook 2019, the European Union positioned China as a partner, competitor, and systemic rival. In 2021, the new German government continues to use this description in its Coalition Agreement, which means Germany still positions China first and foremost as a partner. Thus, we have reasons to maintain anticipation for the future healthy and stable development of the relationship between China and Germany, especially in terms of IT security.

Thank you!

Topic: International Relations in Digitalization: How Cyberspace Changes Geopolitical Game Between Big Powers

Speaker: Ph.D. Manqing Cheng (Politics and International Relations, University of Auckland)

I would like to firstly extend my thanks to Dalian Ocean University and FLIA. It is a great pleasure to witness the growth of FLIA and our fellow schools.

Now, turning to my topic, I am aware that we have many legal experts present at this meeting. Therefore, my speech today will focus on global politics and international affairs. By the way, I have just graduated from the University of Auckland.

By analyzing the geostrategic thinking of traditional geopolitical theorists, it is not difficult to see that, whether in the era of land power or sea power, the physical geographical environment serves as the basis for influencing the formation of political relations and structures. Geopolitics reveals the logic of political specialization. Traditional geopolitical thinking suggests that the world is divided into discrete spatial units, where each country can freely operate within its own territory. The space in which states can act is defined by their territorial borders, and the freedom to act within those borders represents their sovereignty. These territorial borders and assumptions about geography underpin the international and national systems. Clearly, traditional geopolitics are based on national interests and advocate for the expansion of territory through military means to gain geographical space. This approach reflects the existing state logic of a zero-sum game, where territory and space are strictly defined, and any territorial gains come at the expense of other countries.

However, with the deepening of globalization and the internet era, the trend of non-geographical space is increasingly evident. Globalization and the internet have broken the pattern of geopolitics being monopolized by the state and geographical space. Under the jurisdiction of national sovereignty, these factors have begun to transcend the limitations of territorial boundaries. This includes the global internet system, communications infrastructure, internet of things, cloud computing, big data, blockchain, and more. As states extend their influence into separate spaces, they are starting to regulate and filter the internet through technology and regulations. These actions, seen in a broader theoretical context, represent the assertion of territoriality.

In the near future, we will witness the significant impact of cyber power on history and the importance of cyberspace as a virtual organism within the international relations system. Therefore, not only do networks have transformative effects on traditional instruments of power, but cyber power itself can be utilized to achieve traditional geopolitical goals. However, the struggle for power in cyberspace has become another geopolitical competition. This presentation will examine the geopolitical competition between great powers, using China and the United States as examples. This competition is reflected primarily in the following aspects:

First, cyberspace's big data contains vast amounts of social, political, cultural, and even national defense information. The analysis of big data can uncover strategic and priority information to serve geopolitical goals. In 2012, the Obama Administration launched the big data research and development initiative, followed by the National Science and Technical Council (NSTC) issuing the Federal Big Data Research and Development Strategic Plan in 2016. It is evident that the management and manipulation of information and data have become crucial geopolitical practices. China also issued the Action Outline for Promoting the Development of Big Data in 2015. This plan is the first comprehensive and systematic document promoting the development of big data in China to date. The Communist Party of China (CPC) Central Committee's recommendations for the 13th Five-Year Plan for national economic and social development further emphasized the promotion of open sharing of data resources and the implementation of a national big data strategy. All of this indicates that the development and competition surrounding big data have become integral components of overall national strategies.

Second, cyber diplomacy creates a new platform for geopolitics. The United States demonstrates its network advantages in diplomacy, such as establishing a virtual embassy in Iran to carry out cultural, propaganda, and psychological offensives. Many terms can describe this trend, including digital diplomacy, internet diplomacy, Twitter diplomacy, and the competition between China and the United States in separate diplomacy reflects this. On the one hand, both China and the United States are striving to develop e-government to establish a virtual form of governance between the government and the people, as well as to strengthen the government's role in cyberspace. On the other hand, both China and the United States use the internet as a propaganda tool for political culture.

Third, regarding attitudes towards network governance, two main groups of wills emerge. One advocates a multi-stakeholder model with limited government involvement, expanding single sovereignty into global cyberspace, maximizing the freedom of cyber operations for national security, and even adopting cyber deterrence. The other group advocates a United Nations-led, sovereignty-driven, government-dominated, and state-guided multilateral model, which allows all countries to cooperate in cyberspace based on equality, along with government involvement in controlling the digital sphere. The United States and the United Kingdom fall into the first category, while China and Russia fall into the latter. Some emerging economies, such as Brazil, India, and Indonesia, are considered swing states. Although the Snowden incident weakened the first camp, the battle between the first camp led by the United States and the second camp represented by China and Russia has been an integral part of the global governance competition in cyberspace in recent years.

Fourth, cyber warfare is considered one of the most significant geopolitical trends in cyberspace. The militarization of the network represents the development of the internet

as a weapon for military purposes in a narrow sense. In fact, in the new geopolitical domain of cyberspace, various forms of cyber warfare, in a broad sense, are frequently staged, such as information war, public opinion war, cultural ideology war, network attack and defense war, and so on. Data from the United Nations Institute for Disarmament Research as early as 2013 shows that 46 countries established cyber combat forces by March 2014. The United States Department of Defense issued the Quadrennial Defense Review (QDR) in which it explicitly proposed investing in newly expanded cyber capabilities and building 133 cyber task forces, streamlining force structure. In August 2017, Donald Trump announced the operation of the Cyber Command under the Strategic Command, making it a joint operations command on par with the Strategic Command. The upgrade of the Cyber Command signals that it will no longer have to go through the respective services to direct units under its command, making cyber forces a separate branch of the military. This move officially makes cyberspace the 5th battlefield for the United States' military, alongside sea, land, air, and space. In April 2016, in his speech at a symposium on network security and informatization, President Xi pointed out that China needs to strengthen its network security, defense capabilities, and deterrence capabilities. Thus, the proposal of cyber deterrence capability has indeed fueled foreign speculation around China's enhanced cyber armaments.

Fifth, cyber issues are being incorporated into traditional geopolitical patterns. America is very focused on strengthening cooperation with its allies in cyberspace. In East Asia, the United States has incorporated cyber topics into the US-Japan Alliance and the US-Republic of Korea Alliance. In May 2013, the United States and Japan held their first security dialogue in Tokyo. The two sides decided to make cybersecurity the cornerstone of bilateral relations and elevate bilateral cybersecurity cooperation to a higher status. Following the US-India cyber dialogue, in August 2015, the two sides issued a joint announcement stating that the United States and India have identified opportunities for cooperation in cybersecurity capacity, building technology R&D, combating cybercrime, and internet governance. Additionally, in July 2016, members of the North Atlantic Treaty Organization (NATO) signed a document agreeing to protect cyberspace as an operational domain equivalent to air, sea, and land. Stimulated by the United States' geopolitical thinking in cyberspace, China was forced to start promoting its interests in cyberspace through other diplomatic platforms, including the Shanghai Cooperation Organization.

The distribution of power in cyberspace has not escaped the traditional geopolitical pattern, the global pattern of one superpower. Several great powers have emerged. In this scenario, the United States holds core control of global cyberspace. The United States has established a comprehensive cyberspace strategy implementation system in response to China's rapid rise in the global cyberspace. China actively promotes the R&D of information network technology and constantly improves the construction of network

infrastructure. The reason why the distribution of power in cyberspace has not deviated from the traditional geopolitical pattern is that high technology can strengthen geographical advantages and compensate for other disadvantages. The country that leads the information revolution can rapidly increase its economic strength and correspondingly enhance its military capabilities, widening the gap with other countries. Therefore, the development and utilization of the most advanced information network technology can maximize the security of a country's economic, political, and military information facilities, protect national defense secrets, spread the country's political ideology more widely, and strive for a leading role in global affairs. This development, coupled with its growing strategic status and increasingly disruptive impact on the existing international system, gives cyberspace not only a new era of strategic significance but also starts to affect international security, political stability, and economic stability in the physical world.

From the perspective of the relationship between major powers in cyberspace, the factors that determine a stable cyberspace mainly include the overall state security environment, the possibility of conflicts between countries in cyberspace, the existence of an institutional system consisting of the rule of law, common international norms of conduct, and a certain degree of consensus among major powers to maintain stability. These are the core topics of our second panel.

Currently, this competitive relationship between major powers has affected the stability of cyberspace itself. First of all, strategic competition in cyberspace has hindered cooperation among coordination bodies that originally played important roles in the field of global cybersecurity, making knowledge and information sharing difficult. The Computer Emergency Response Team in the Forum of Incident Response and Security Teams (FIRST) is one of the most important technical cooperation organizations in this field. However, cooperation among countries has significantly declined due to increasing political pressure and interference in technology security, particularly after the Snowden incident.

Secondly, cyber conflicts between major countries are exacerbating. Unilateralism and preemptive action are prevalent. The cyberspace security order is crippled by collective action. The dilemma of collective action in cyberspace mainly reflects the applicability of the existing international security architecture to cyberspace and the lack of consensus among major countries regarding the establishment of a new international security mechanism in significant global cybersecurity incidents, such as Stuxnet, Sony Pictures, and interference in the presidential election. The international security architecture has fundamentally failed and aggravated the adjustment of national cyber strategies toward self-help and offensive orientation. The United States Department of Defense has developed a policy of defense forward and persistent engagement that advocates extending defense to the sovereignty of other countries and countering their

adversaries through cyber operations. America has announced that it has carried out separate attacks on critical infrastructure in Iran, North Korea, and Russia in retaliation for actions by these countries that compromised US cybersecurity.

With the deployment of networks and AI in the military field, the nature of warfare will undergo a complete transformation. On the one hand, cyber technology will greatly improve the accuracy of weapon killing. On the other hand, it will make many civilian critical infrastructures vulnerable to attack, causing broader catastrophic consequences. Existing international law, including the Charter of the United Nations and International Humanitarian Law, diverges widely among major powers regarding its application in this era. The existing international security architecture, including arms control and disarmament mechanisms, fails to adequately address these new phenomena. Moreover, the existing international political system, in general, is increasingly struggling to adapt to the challenges posed by cyberspace. In particular, the role of the United Nations as a center of the international political system and its ability to lead in building order in cyberspace have been questioned and met with resistance from some Western governments and societies. The legitimacy of the United Nations in the traditional field of international politics derives not only from post-war institutional arrangements but also from the mandates of member states. Whether the legitimacy of the United Nations in the physical world extends to cyberspace remains questionable. The United Nations, being an intergovernmental organization composed of sovereign states, is not recognized by non-state actors as their representatives. This intensifies doubts about the representativeness of the United Nations among non-state actors who wield significant influence in cyberspace governance.

Third, the disruptive nature of the internet economy and the national security and privacy concerns associated with it have intensified the challenges confronting the international economic governance system and brought great uncertainty to the future of the global economy. First, the rules governing the digital economy are lacking. The contradiction between data localization and data flow is increasingly undermining the integrity of the international economic system. Second, the fragmentation of the supply chain caused by the great power game will further exacerbate the contestation in the digital geo-economy. If there is no consensus between developed countries and emerging markets on maintaining the integrity of the global supply chain system, innovation ecosystems of different geoeconomic blocks may emerge in cyberspace. Consequently, some disruptive innovations will shake the existing international economic governance mechanisms. For example, the application of blockchain technology has given rise to virtual currencies that have become the preferred tools for money laundering, extortion, fraud, and other crimes. Since we have experts in the next session coming from relevant backgrounds, let’s look forward to their more in-depth elaboration on this topic.

To sum up, international relations in the digital era are entering a new phase. International security and great power competition, including the IT represented by the Internet, are shaping sovereign states and international relations from the bottom up. The internet empowers society and reconstructs power dynamics. Social units' power changes the traditional power boundaries of countries. Cyber-attacks and political warfare, based on information manipulation and the application of disruptive technologies in the military, have complicated the international security situation. The game between major powers for dominance in science and technology, the digital realm, economic and trade rules, and cyberspace has intensified. Security norms are becoming more intense, endowing new meaning to the competition between major countries. Thank you for listening.

Topic: The Development Trend of Applying International Law in Cyberspace and the Chinese Response: An Investigation Based on the National Position Statements

Speaker: Ph.D. Candidate Kuangyi Luo (Institute of International Law, Wuhan University)

Hello, everyone. My presentation will be on the development trend of applying existing international law in cyberspace. As you can see, the title of my speech has been slightly changed, but the meaning remains the same as before. Given the continuous convergence of cyberspace and the physical world, as well as the occurrence of large-scale cyberattacks, it is urgent for states to define international law and international rules in cyberspace. This will help improve the predictability of cyberspace, reduce the risk of misperception among states, and curb state-related cyberattacks. In recent years, many states have extensively published their positions on the application of international law in cyberspace, primarily through strategy papers and position papers. The content of these papers is more specific, the system is more mature, and the positions are clearer.

Now I will take the United States as an example. In 2011, the White House introduced the topic of the application of international law in cyberspace to the international community through the International Strategy for Cyberspace. The following year, Harold Hongju Koh, Legal Adviser of the United States Department of State, delivered a speech on international law in cyberspace. In 2016, Brian J. Egan, the new Legal Adviser of the United States Department of State, delivered a speech on international law and stability in cyberspace. In 2020, Paul Ney, the Chief Legal Officer of the United States Department of Defense, made remarks on the application of international law in cyberspace. In 2021, the United States submitted a position paper to the GGE Report. Therefore, it can be observed that official state position papers are an extension and development of strategy papers and senior official speeches.

Regarding the status of national position statements, they are important as evidence of state practice. However, in the new frontier of cyberspace, scholarly writings, as represented by the Italian menu, are more abundant while state practice is scarce. Only in recent years have states focused on publishing their positions on related topics, quickly filling the gap in state practice for the lawmaking of the new frontier of cyberspace. This can be argued to have become a unique path of lawmaking in cyberspace.

When it comes to the legal nature of national position statements, we can discuss it from three perspectives: unilateral declaration, customary international law, and soft law. Firstly, a binding unilateral declaration is a statement made on behalf of a state that creates legal rights or obligations under international law. However, not all declarations or statements by states will give rise to legally binding rights or obligations. There are no settled rules on the legal effects of unilateral declarations. Therefore, various factors such

as the content, language used, the political level of the official making the statement, the intention of the state to be bound, and the response of other states are relevant to determine the legal effects.

Secondly, as mentioned earlier, the speech by the Legal Adviser of the United States Department of State in 2016 called upon states to identify how existing international law applies in cyberspace by publicly articulating their state practice and opinions on international law. Thus, official statements, whether verbal or in writing, have the potential to constitute state practice or evidence of opinion juries. However, from a dynamic view, the eventual formation of customary international law will depend on the various actions taken by states over a certain period of time.

Thirdly, it is more likely that national position statements agreed upon by states on multilateral platforms, such as the GGE Report or the Open-ended Working Group (OEWG), would be considered as soft law. These statements supplement existing international law because the GGE Report or OEWG are not legally binding or endorsed recommendations by all participants in National Precision Statements. Regardless of the form and legal nature of these national position statements, it is important to highlight that they reflect the game played by states in the process of forming and developing international rules in cyberspace.

Next, I would like to discuss the general trend of state position statements. By analyzing this trend, we can gain insights into formulating national discourse in the field of cyberspace. In terms of the overall situation, there are different voices between the two camps of China and the West, while unilateral statements and multilateral forums coexist. Many states actively refer to the Italian menu and other non-governmental research results. Furthermore, many states take into account both general international law and the special characteristics of cyberspace.

Moving on, the last part I want to address is China's current status and its future response. It is worth noting that China has not yet issued a position paper on topics such as the application of international law in cyberspace. However, China briefly mentioned related positions in its national cyberspace security strategy in 2016, submissions to the OEWG in 2019, positions on international rulemaking in cyberspace in 2021, and intentions regarding the application of the principle of sovereignty in cyberspace in 2022. I believe there are both legal and political reasons for China's limited engagement in this area, but I won't delve into that now.

Instead, I would like to pose a question regarding the implications of the current status quo for the future. In short, cyberspace is a domain of strategic importance where future international rules will profoundly influence all states. Only if all states effectively and meaningfully participate in rulemaking for cyberspace can there be an improved implementation and enforcement of this body of law. States like China and some other non-Western states need to make efforts to catch up in the ongoing race towards the rule

of law in cyberspace. However, many states simply lack the necessary capacity to articulate their positions, making capacity building in this regard essential.

Regarding China, the fact that it has not made extensive relevant position statements may be due to an unclear understanding of the application of existing international law in cyberspace. I believe China can contribute to improving academic research in this area. On the other hand, while approaching the process of identifying and committing to other state position statements with care, China should actively issue position statements on issues that are not yet definitively addressed. China can analyze these issues on a case-by-case basis, particularly for norms or potential norms that have consistently faced objections from China since their emergence. This approach ensures that China is not bound by potential new customary international law.

I will conclude here. Thank you for your attention, and please feel free to share your questions and suggestions.

Topic: Legal Approach to International Cooperation on Cloud Storage of Personal Information

Speaker: Ph.D. Candidate Yi Zhang (School of Law, University of International Business and Economics)

Hello, everyone. In order to cope with the storage dilemma of massive data, a large amount of personal data has gradually transitioned from hardware to cloud systems. Domestic companies such as Baidu and Alibaba, as well as foreign companies like Apple and Amazon, have all started to build their own cloud service products. International Data Corporation (hereinafter referred to as IDC) China predicts that by 2025, 49% of the world's stored data will reside in a public cloud environment.

As the name implies, cloud storage is a storage method based on cloud computing. This kind of distributed storage network often spreads all over the world, which also brings conflicts and challenges to the protection of personal information.

The first challenge is the Conflict of Jurisdiction in cyberspace. Taking the data jurisdictions of the United States and the European Union as examples, data legislation in the European Union has broad extraterritorial effects. Based on the General Data Protection Regulation (hereinafter referred to as GDPR), it further regulates the data processing behavior of business institutions inside the region. No matter where the actual data processing behavior takes place, as long as the data processor is located in the European Union, it needs to be subject to its jurisdiction. As for the United States, its "Cloud Act" enables American authorities to gain timely access to data stored overseas. As long as the service provider is an American company, it does not matter whether the data is stored inside or outside the United States. What matters most is whether the required data is within the "possession, custody, or control" of a US-based service provider, not its location. According to the legislations of the European Union and the United States, both can exercise data jurisdiction over personal information stored outside their domestic areas, which may cause conflicts in the international cyberspace.

The second challenge pertains to the exercise of network sovereignty in cyberspace. The debate over sovereignty in cyberspace is not purely theoretical. In recent years, the European Union has strengthened its cybersecurity governance, while the United States pursues a strategic tendency of super sovereignty. It is true that cyber capabilities can be used by a state to maintain or establish supreme control over physical territory. Networks and information technology can lead to more effective deployment and management of air, naval, and ground forces, and it can be used to detect kinetic attacks. Even so, when used for these purposes, cyberspace itself is still shared and not under sovereign control.

We should also pay attention to the distribution of rule-making power in cyberspace among different countries. Many countries have formulated their own rules to regulate personal information stored in cloud space. Taking the United States as an example, in

the field of investment, the United States has successively passed the Foreign Investment and National Security Act of 2007 and the Foreign Investment Risk Review Modernization Act of 2018 to review investments that "maintain and collect personal sensitive information of American citizens". It is evident that the United States is trying to strengthen its rule-making power on a global level by enhancing its discourse in cyberspace.

It is necessary to seek measures to overcome these obstacles and strengthen international cooperation in the protection of cloud storage of personal information. The first step is to promote the sharing of cloud storage in cyberspace while respecting national sovereignty.

First of all, an International Self-regulatory Organization on the security of personal information storage should be established to reach international consensus on general guidance concerning the collection and management of personal information, such as the access qualification of cloud service providers, operation standards for key information infrastructure, and emergency response mechanisms for personal information security.

Secondly, a security line for the rights in the protection of personal information should be constructed. The storage and use of personal information related to personal health, family, and other personal dignity must be carried out for legitimate purposes. Fundamental rights should be clearly included in the self-discipline, such as the right to know, decide, inquire, correct, copy, delete, etc.

Finally, the principle of benefit recognition before the use of personal information and the mechanism of punitive compensation in malicious commercial use should be established. In addition to compensating for the corresponding losses, the cloud service provider may be restricted or even banned from engaging in related cloud business for a certain period of time to strengthen the deterrence of malicious use of personal information.

It is important to further clarify the extraterritorial effects of domestic laws. China could introduce the data controller standard to break the inherent territorial jurisdiction, as well as follow the principle of international comity. The expression "data processor" in the Personal Information Protection Law of the People’s Republic of China is very similar to the expression "data controller" under the GDPR. Therefore, we can further define the meaning of the "data controller" standard in the laws or regulations in the Chinese Mainland by referring to the guidelines on the concepts of controller and processor in the GDPR version for public consultation raised by the European Data Protection Board. As for its form, the right of the data controller should be derived from formal laws and regulations. In terms of substance, the controller should have the right to determine the purpose and manner of data processing. Based on this, as long as the actual data controller is a Chinese company, even if the data is stored in a cloud server outside

China, that data controller should cooperate with the Chinese government to obtain the data.

It is also necessary to take an active part in international negotiations and enhance our discourse in cyberspace. There are some very influential soft law instruments on data privacy protection, such as the Organization for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, and the Asia-Pacific Economic Cooperation Cross Border Privacy Rules system. The implementation of these cross-border privacy rules relies on strict enforcement by a country's domestic regulatory agencies, which, to some extent, accelerates the pace of legislation to protect personal information. By promoting political mutual trust, China should actively join regional agreements and conclude more bilateral treaties to protect personal information stored overseas. The rights, obligations, and responsibilities of both parties should be clearly confirmed in the treaties. Regarding the exercise of extraterritorial enforcement jurisdiction, a joint investigation and enforcement mechanism, including information sharing and document delivery, should also be constructed.

The internet was never intended to be a homogeneous, borderless virtual space. It is and was designed to be a network of networks. We look forward to more international cooperation in cyberspace governance to better protect personal information on a global level.

That is the end of my presentation, and thank you for your attention.

After the conference, Dr. Anzelika Smirnova submitted a paper named "Cyber Democracy in the Age of Social Media Politicization: A Case Study on Telegram", which is from the topic she said in Panel 2. FLIA agreed to publish her paper without the recording on October 22, 2022, in this journal.

Q&A:

Wei Shen:

Thank you, Anzelika. It is a very interesting topic. I think cyber-democracy and cyber-security are exactly two paradigms. I think there is one question raised from the audience. What's the solution?

Anzelika Smirnova (Ph.D. Candidate, School of Journalism and Communication, Peking University) :

About the solution, like about the situation which is happening with the Telegram right now?

Wei Shen:

Let me see the question. What's the solution, then, if the private telegram type form cannot hold its original intention and vision for cyberdemocracy, can compliance measures be imposed?

Anzelika Smirnova:

This is a very tough question because during my introduction, we have seen that it faces challenges when it was not that popular and influential, so it could hold to it's like cyber democratic visions. But now we see that it still should find ways to cooperate because otherwise will be totally unavailable on the App Store or other platforms or on the Internet.

But as far as I have seen, they are separated into three so you can register online through the website. It is separated like there is a messaging app and another messaging app, so there is a kind of access to that and they're trying to bypass it.

Well, I don't think that this is using some kinds of different ways how to lead the access for people, but talking about in the general, right now I think that the first question they are facing is about the technological empowerment of the app on Google, because

they are, as it was told, having their roles and they should abide these rules, otherwise they will totally have any existence. And this is why I think that now they're searching kind of a shift out to find a way that they could still state on the international stage in the political arena, and this is also connected with what I would like to make research on. So, there are many issues that I need to dive a little bit deeper and better understand about, but right now I see that the first question is about the monopoly effect of Google.

Wei Shen:

Thank you, very interesting, so all the social media programs in Russia are actually sponsored by the government or somehow sense by the government, is that the ongoing effect yet?

Anzelika Smirnova:

There are statistics and what I mentioned is also from the book that I have been reading: many researchers were talking about that. I saw that there was written 95%, but I do not agree that 95% are under control. I guess that maybe 80% of that.

There is a full ownership of the Russian governments and the other one is that they are stakeholders, so they have stakes more than 51%, so they will have the right to speak and to make a decision. The other one is like Vkontakte, which was strategic ownership trying to integrate some of the rights to influence how the platform is developing.

Wei Shen:

Okay, thank you very much, it's very informative for us to learn more about Russia and the current ongoing situation, especially in cyberspace.

Topic: When Personal Data Protection Meets Bankruptcy Proceedings: A Balance to Be Realized

Speaker: Assistant Manager Lusheng Liu (Beijing Stock Exchange & National Equities Exchange and Quotations)

Hello, everyone. It is my great pleasure to be here. I received my master's degree from China University of Political Science and Law this summer. Today, I will narrow down the topic of cybersecurity to personal information protection.

I used the word "realize" because I believe it has two meanings. The first meaning is that I think everyone needs to realize the problem concerning personal information protection in bankruptcy proceedings. As we all know, in the past, the main goal of bankruptcy law was to maximize the expected wealth of creditors and create effective distribution groups. However, in recent years, especially when discussing personal information protection and bankruptcy proceedings, we have seen the emergence of a complex and interconnected set of stakeholders. This means that companies need to consider non-economic dimensions, with privacy protection being one of them. Personal information protection is certainly an important aspect of cybersecurity law. The second meaning of "realize," I believe, is that in the future, I hope we can achieve a balance of personal information protection in bankruptcy proceedings. So, here, I will present my views in four aspects. Let's first delve into the role of personal information and administrators in bankruptcy law. Secondly, I will discuss the storage of personal information, following the logic of transfer and disclosure of personal data.

First of all, let's allow personal data to speak. Personal data has two attributes. The first is the personal attribute, and the second is the profit attribute. When we talk about the personal attributes of personal information, it actually has two aspects. The first aspect is its ability to identify individuals because we can recognize a person from their personal information. This shows that personal information has a personal attribute. Many scholars have emphasized the importance of information for achieving cyber-democracy. Moreover, the information we receive today and our own personal information in the current data era can influence democratic debates and shape our views on democracy. Personal information can be correlated today through data profiling programs and many others. The second aspect of personal information is its property attribute. In the business world, many enterprises can use personal information to gain their own benefits.

There are three steps. The first step is that in order to be a property attribute, you need to firstly be under the management or control of the network. The second one is that you need to be transferable. The third one is that we need to be recognized as property under the Enterprise Bankruptcy Law of the People's Republic of China.

According to the Supreme People's Court of the People's Republic of China, it is quite easy to evaluate whether a person's information can be recognized as property under insolvency law. As long as it can be evaluated in currency, it can be recognized as property under the insolvency law. So, we can see that personal information is so easily recognized as currency, making it super easy to be transferred and stored in the bankruptcy proceedings.

The second part is that we need to observe the role of the insolvency practitioner because the insolvency practitioner can act as a data controller or a data processor during the whole proceedings. However, I think that the definition of data controller and data processor is only very important in the European Union, not in China. This is because the General Data Protection Regulation (hereinafter GDPR) first introduced us to the idea of a data controller and a data processor. But actually, the definition in the GDPR is quite ambiguous.

According to Article 4 of the GDPR, it clearly states that whether the practitioner becomes a controller depends on whether they determine the processing of the data. It is quite hard to differentiate between these two definitions. In England, we can see two cases: Southern Pacific Personal Loans Ltd v Walker and Green vs. Group Ltd. and others. In those two cases, the English court thinks that the insolvency practitioner is definitely not the data controller but rather the data processor because they can mostly be considered as an agent during the insolvency proceeding.

But wait a minute, is it that important to differentiate whether the practitioner is a controller or a processor? Even if you're not a controller, you still do it. This means that the practitioner does not need to undertake data protection or related responsibilities and duties at all, of course not. So, in China, we can see that Article 27 of the Enterprise Bankruptcy Law of the People's Republic of China tells us that there are no clear differences between these two definitions.

However, according to the Personal Information Protection Law of the People's Republic of China, it tells us that the person who can independently determine the purpose and method of processing personal information can be treated as a data controller. On the other hand, the Personal Information Security Specification tells us that the person who has the ability to determine the purposes and meanings of the processing of personal data can be treated as the controller. It seems that the ability to determine is crucial in China. But, you know, there are a few cases nowadays through which we can find out the Chinese opinion towards the data controller and the data processor.

But all in all, whether we can differentiate the two definitions or not, one thing is for sure: insolvency practitioners have double trust duties.

Many Chinese scholars have noticed the problem, and they also acknowledge that Article 27 of the Enterprise Bankruptcy Law of the People's Republic of China clearly states that insolvency practitioners have the obligation to undertake the debtor's and the

company's responsibilities. However, there is no clear status in China that explicitly states that they undertake this obligation towards data subjects. Some scholars suggest that we can interpret this obligation from the principle of good faith under Article 7 of the Civil Law of the People's Republic of China. We still need to consider the opinions of prominent scholars in China.

Now, let's delve into the logic of the entire process of personal information protection in bankruptcy proceedings. The first step concerns the storage of personal information.

When discussing the storage of personal information, we assume that the information is identifiable and separable. At this stage, the amount of data is so substantial that it would cost the company a significant amount of money to store personal information, especially during emergencies or bankruptcy proceedings. Therefore, it becomes crucial to determine whether the practitioner has the obligation to store personal information. While scholars in the past have argued that practitioners must undertake this obligation, two cases from the European Union indicate a different trend. In the Durant vs. Financial Services Authority case, the judge's argument states that the purpose of granting an individual access to information is to enable them to verify whether the data controllers' processing of it unlawfully infringes on their privacy. It is not intended to assist them in obtaining documents for litigation or complaints. The main aim of storing information is to enable the company and the subjects to verify whether their rights have been infringed, rather than helping with further litigation or complaints.

We can also observe a similar trend in the notable Southern Pacific Personal Loans case in the United Kingdom, which introduced the concept of disproportionate effort. Disproportionate effort means that the obligation to provide the data subject with a copy of their information and store it can be exempted if it is impossible or involves an unreasonable amount of effort.

However, even though we understand the concept of "disproportionate effort," its definition remains ambiguous. It is essential for scholars to determine how we can precisely explain such effort.

The second process involves the transfer of personal information. The transfer of personal information demonstrates the principle of self-management, meaning that data subjects have the final decision-making authority. They have the right to decide whether to transfer their own information for the sake of security. However, in recent years, another principle has emerged, known as the balancing of interests. This principle was introduced due to the urgent and time-sensitive nature of insolvency proceedings. In other words, there is not enough time to seek permission from every subject when the practitioner decides to transfer personal information.

There are three reasons to introduce the principle of balancing interests. Legitimate interest has been a focal point for many scholars in Europe in recent years. Under the

GDPR, it follows a process of elimination. So, how do we define the legitimate interests of the data subject? An interest is legitimate if it is not overridden by the fundamental rights and freedoms of the data subject. This principle is quite strict. In the European Union and Britain, the British Information Commissioner has introduced a three-step test consisting of the purpose test, necessity test, and balancing test. If we apply the three-step test to bankruptcy proceedings, we need to meet the following requirements.

Firstly, the transfer of personal information needs to be clearly defined to increase the discharge rate to creditors and achieve the goal of bankruptcy proceedings. Secondly, there should be sufficient arrangements for personal data in the acquisition agreement to provide adequate protection to the data subjects. Thirdly, when transferring assets to repay creditors, it should be done with basic business common sense. Fourthly, most data subjects are unlikely to object to the transfer if the acquisition agreement includes sufficient personal protection provisions. In other words, explicit consent from the data subject may not be necessary for the practitioner to transfer the personal information. We can also observe a similar tendency in another popular case, the Travel-Bird case from another jurisdiction.

The authorities finally decided to approve the deal in that case because the purpose of the data usage was restricted to the original contacts, which was considered the best approach. This was beneficial for both the European Union's data and the data subject.

However, in China, it remains uncertain whether practitioners can transfer personal information due to contradictions in different legislations. According to Article 29 of the Law on the Protection of Consumer Rights and Interests of the People's Republic of China, business operators cannot sell collected personal information to others. This represents an absolute prohibition in China. However, the Civil Code presents a different perspective, stating that personal information can be transmitted with the consent of the data subject. The reason behind the absolute prohibition in the Chinese consumer rights and interests law is that protecting consumer rights and interests would be unrealistic if the permission of every subject were required. Furthermore, the legislator emphasizes the strong inclination towards achieving social justice in the Law on the Protection of Consumer Rights and Interests of the People's Republic of China, hence the need to forbid all transfers of personal information. Lastly, there is the issue of personal information disclosure. Few cases are related to the Cybersecurity Law of the People's Republic of China. However, we can anticipate the future tendency based on the evolving cybersecurity framework.

Regarding the protection of personal information cases, I would like to present two examples. One is the Haig vs. Aitken case from the United Kingdom. In this case, Mr. Johansen Aitken, a member of the Conservative Party in the British Parliament, went personally bankrupt, and his diary attracted attention from creditors who wanted to sell it to the public. The court, of course, prohibited this behavior in order to protect Mr.

Aitken's privacy. However, in recent years, in the German psychotherapy case, the court eventually decided to disclose information about the patients of the psychiatry clinic to achieve the benefits of psychotherapy. In other words, they chose to disclose the patient's records in order to strike a balance between personal information and bankruptcy.

In conclusion, we can observe that in recent years, whether in China or the European Union, a focus on balancing personal information protection has emerged in bankruptcy proceedings. In the future, we hope to effectively manage this balance between the interests of data subjects and companies. That's all. Thank you.

Wei Shen:

Thank you, Mr. Liu, for the interesting topic. This is probably the only domestic topic in our panel.

Topic: Research on the Governance of the Cross-Border Cyber Fraud Crimes in the Post-Epidemic Era: A Perspective of China-Myanmar Community with a Shared Future

Speaker: Research Assistant Xinyu Yi (Southwest University of Political Science and Law)

The presentation consists of three parts. The first part is the current status of cross-border cyber fraud between China and Myanmar. The outbreak of the COVID-19 pandemic has had a significant impact on the international economy and politics. In 2022, the world entered the post-epidemic era, posing new challenges to the governance of cross-border cyber fraud.

In law enforcement practice, cyber fraud is the main cross-border cybercrime committed by Chinese individuals. These fraudsters target individuals in China after leaving the country. In recent years, Northern Myanmar has gradually become a preferred region for criminals. By March 2020, the number of domain names registered with keywords like "Coronavirus" had been increasing. Additionally, the epidemic has made combating this crime more difficult.

The second part discusses the dilemmas of governing cross-border cyber fraud in the post-epidemic era. Although China and Myanmar are actively engaged in law enforcement cooperation to combat cross-border telecom cyber fraud, two factors have led to limited results. First is Myanmar's special geographical location and social-political chaos. The second factor is the lack of a legal basis for border police cooperation.

Building up effective international cooperation mechanisms has proven challenging. There are two main concepts of cyberspace governance: multilateralism, which emphasizes the role of sovereign powers, and multi-stakeholderism, which emphasizes the interests of all stakeholders. Nowadays, the politicization of cyberspace governance has become a growing trend. The epidemic has caused more countries to prioritize self-preservation over development, making it even more difficult to establish international cooperation mechanisms in criminal matters.

China and Myanmar have not established efficient and complete information-sharing platforms, limiting information exchange and cooperation in cross-border telecom cyber fraud. In addition, the differences in law enforcement capabilities due to economic and political factors impede bilateral police cooperation. The epidemic has interrupted information sharing and caused Chinese police to suspend arrests abroad, thereby impacting cooperation between China and Myanmar.

Transnational cyber fraud interception and supervision have been difficult to execute as usual in the post-epidemic era. The epidemic has accelerated the shift of our lives to online scenarios, making fraud methods more cryptic and confusing. Public security

organs have encountered many difficulties in combating crimes abroad due to the impact of the epidemic. Many key personnel involved in fraud are still staying abroad without being controlled or persuaded to return. These challenges indicate that traditional methods have been challenged, and there is an urgent need to seek new approaches.

The third part focuses on governance measures for cross-border cyber fraud between China and Myanmar in the post-epidemic era. In 2020, China and Myanmar issued a joint statement on building a community with a shared future. The political consensus and concrete achievements of China's visit to Myanmar mainly revolved around anti-epidemic measures, the economy, and infrastructure construction. In terms of criminal justice cooperation, China and Myanmar coordinate within the framework of multilateral mechanisms such as China-ASEAN and Lancang-Mekong cooperation. Since most provisions under these mechanisms are, in principle, China should formulate specific measures based on the national conditions of China and Myanmar.

China is biased toward combating crime. Due to the universality, crypticity, and confusing nature of this crime, law enforcement agencies need to invest a significant amount of manpower and resources. The epidemic has forced these agencies to adopt passive measures, exposing the drawbacks of crime combating during public health emergencies.

In contrast, victim prevention has several advantages. Firstly, it disrupts the cooperation between fraudsters and victims, effectively preventing telecom cyber fraud. Secondly, it focuses on strengthening victims' prevention awareness and reduces the pressure on public security organs. Thirdly, it allows flexible responses to updated fraud methods and emergencies.

Up to now, China has signed treaties on extradition or mutual legal assistance in criminal matters with Vietnam, Malaysia, and other Southeast Asian countries. However, there are still gaps between China and Myanmar. Although the two countries have carried out bilateral law enforcement cooperation and achieved results, the absence of the aforementioned treaties not only causes jurisdictional conflicts but also reduces the efficiency of cooperation. China should actively negotiate with Myanmar to conclude these treaties, as they can provide a legal basis for combating telecom cyber fraud.

The border between China and Myanmar is difficult to control, and the epidemic has impeded arrests abroad, leading to criminals sneaking across the border to commit crimes and evade capture. Strengthening border control is crucial to combat cross-border telecom cyber fraud. Chinese public security organs should continue to strengthen cooperation with the National Immigration Administration, step up entry and exit management in key areas, and provide pre-warnings about key individuals to prevent fraudsters from recruiting members and committing crimes.

Cybercrimes have significantly changed in the post-epidemic era, and telecom cyber fraud has become the predominant crime. China and Myanmar should seize the

opportunity of building a community with a shared future and establish new mechanisms for cooperation and prevention of emergencies. Additionally, China and Myanmar are cooperating based on the ASEAN model, which gives more consideration to relationships and soft rules. This not only offers a way for countries without bilateral cooperation mechanisms to carry out law enforcement cooperation but also provides ideas for flexibly responding to the impact of emergencies.

Thank you!

Wei Shen:

I think the topic is quite interesting.

Topic: Intellectual Property Protection in Cyberspace

Speaker: Research Assistant Ruiyuan Guo (Southwest University of Political Science and Law)

Hello, everyone. It's an honor to have the opportunity to share my views. There are four main aspects to this topic, starting from cybersecurity and intellectual property. Then, I will introduce two key words for network intellectual property protection. Next, I will share my views on who should be responsible for intellectual property protection. Finally, I will focus on international cooperation in this field.

So first, let's take a look at the international environment for intellectual property development. The outbreak of the COVID-19 pandemic has pressed the pause button on many industries and disrupted the daily work and life rhythm of the people. At the same time, it has also pressed the fast-forward button for many industries, providing new business demand. The isolation situation created by the COVID-19 pandemic has provided unprecedented opportunities for the development of internet communication industries such as online education, video conferencing, and machine translation. From the perspective of the global international environment, the dual impact of the intensification of the intellectual property game between China and the United States and the COVID-19 pandemic has made the intellectual property system an important support for the development of scientific and technological innovation.

Now, let's discuss the relationship between intellectual property protection and cybersecurity. There are two articles in the Cybersecurity Law of the People's Republic of China that explicitly mention intellectual property. The first is Paragraph 2 of Article 12: "Any individual or organization using the Internet should abide by the Constitution and laws, abide by public order, respect social morality, and must not endanger network security, use the network to engage in activities ... disturbing economic and social order, and infringing upon others' reputation, privacy, intellectual property, and other legitimate rights and interests." The second is Article 16: "The State Council and the people's governments of provinces, autonomous regions, and municipalities directly under the Central Government should make overall plans, increase investment ... to protect the intellectual property of network technology, and support enterprises, research institutions, and universities to participate in national cybersecurity technology innovation projects." From these two articles, we can understand that maintaining the protection of intellectual property is an important part of maintaining cybersecurity. Simultaneously, a secure network environment can also provide technical support for the protection of intellectual property. In reality, they complement each other.

At the beginning of the development of the internet, due to technological constraints and information dissemination, the internet was mainly used as a tool for disseminating information and exchanging ideas. Therefore, intellectual property law, especially

copyright law, which also aims to protect creative literary and artistic works, was initially challenged by technological changes brought by the internet. Some developed countries with relatively advanced internet applications took advantage of their existing institutional and technological advantages to become leaders in formulating international standards for the protection of intellectual property. On the one hand, this enabled developing countries to passively pay attention to and improve the level of intellectual property protection. On the other hand, intellectual property has also become a barrier to technological progress in some developing countries.

How do cybersecurity and intellectual property interact in the era of the Internet?

Firstly, respecting and protecting intellectual property is a prerequisite for the emergence and progress of network technology and applications. If a network product or service provider wants to apply a technology, they must reach a licensing agreement with the right holder in advance. In addition, technological innovation can only be encouraged by guaranteeing the benefits of the right holder's own patents. In fact, information technology is a field in which various technical standards are highly concentrated and developing rapidly, such as cloud computing, 5G, and artificial intelligence, all of which generate a large number of new technical standards. While complying with these technical standards, specific network products or services actually apply and protect the intellectual property of related internet technology innovations.

Secondly, in cyberspace, the attacks on cybersecurity and intellectual property, as well as the technical measures to prevent these attacks, are similar. Generally speaking, the technical infringement or threat to network security mainly takes the following forms: viruses, worms, trojan horses, spyware, etc. With the development of internet technology and applications, new forms of attacks have emerged, such as deep and dark webs, web crawlers, database collisions, and unauthorized use of data. Infringements on internet intellectual property mainly manifest as illegal copying, dissemination, modification, counterfeiting, misappropriation, theft, and deep linking of rights-protected information without permission. The technical methods used by infringers overlap with or cross over the above attacks that endanger cybersecurity.

Finally, cybersecurity protection technology, in turn, has a positive significance for the security of intellectual property transactions in cyberspace and the judgment of intellectual property infringement.

In protecting intellectual property, we need to grasp two key words.

The first is motivation. No matter how technological progress is, as long as the basic prerequisite for future economic and cultural development is still to encourage intellectual creation, the intellectual property system must ensure that creators obtain economic benefits through the control of knowledge products. If the control of right holders over the use of knowledge products is not fully and effectively protected, it will not be conducive to the continuation of cultural and technological innovation. Therefore,

no matter how complex the infringement of online intellectual property rights is, it is intolerable and must be curbed.

The other key word is efficiency. Intellectual property protection is the regulation and control of intellectual property relations, which is inseparable from efficiency. The pursuit of efficiency is the foundation and an important goal of the intellectual property system. Different ways to protect intellectual property rights affect the realization of the efficiency of intellectual property protection. The efficiency of traditional intellectual property protection is mainly reflected in judicial efficiency and infringement management. In the Internet era, infringement in the Internet field is becoming increasingly hidden. Therefore, appropriate models must be selected for network intellectual property protection to achieve efficient protection of network intellectual property rights.

Now, who should be responsible for intellectual property protection? The intellectual property system ultimately promotes the development of the economy and culture by protecting the interests of right holders. Therefore, it is necessary to find a balance between the interests of the right holders and the interests of the public. Based on this principle, the best governance subjects should be diversified. The multi-stakeholder participation model, led by the government, industry autonomy, and enterprise self-discipline, is recommended.

First of all, the intellectual property governance of the Internet should pay attention to the consultation and interaction between the government, the market, and the public. When it comes to independent research and development of core technologies, most enterprises prioritize self-interest and rarely consider the perspective of the state. In this regard, competent authorities should guide and provide help by formulating policies, improving laws, and employing other means.

Secondly, although the supervision of Internet industry associations is not mandatory like that of public power departments, they have a better understanding of Internet operators. Through methods such as grade evaluation, credit evaluation, the blacklist system, and others, they can play a more preventive role rather than simply regulating after infringements occur.

Finally, the self-discipline of enterprises is also an important aspect of intellectual property governance in the Internet field. Government guidance, supervision by industry associations, and making Internet enterprises aware of their social responsibility, as well as the fact that malicious competition will ultimately affect their own interests, can help reduce the abuse of intellectual property rights. This, in turn, helps avoid wasting judicial resources or exercising intellectual property rights at the risk of compromising national security. To achieve this, we can motivate Internet associations and platform enterprises, with the participation of the government, to establish industry norms, industry

punishment and reward mechanisms, thereby forming a beneficial operating model in the field of Internet intellectual property rights.

Of course, the protection of intellectual property is also closely tied to international cooperation. To ensure the effectiveness of all protection measures, it is necessary to cooperate with other countries worldwide, reach relevant agreements, understand, respect, and collaborate with each other. This strengthens online intellectual property cooperation and yields mutually beneficial outcomes. Additionally, we can promote cooperation through measures such as training, publicity, and law enforcement, working together to purify the network environment, effectively reduce the occurrence of network infringement cases, and provide a clear legal framework for intellectual property in the Internet era. However, international cooperation should also abide by the principle of network sovereignty.

Whether in the field of cyber intellectual property or cyber security, there should be no universal legal norms that transcend national sovereignty. In the field of intellectual property, from the creation of intellectual achievements, their acquisition, trading, management, and protection, as well as the attainment of benefits, it is nearly impossible to rely solely on cyberspace. Right-holders are bound to be influenced by a country's existing knowledge resources, cultural consumer markets, rights management mechanisms, and judicial procedures.

Therefore, regardless of whether we advocate for an internet without borders, we should not implement a global unified intellectual property law. In the field of cyber security, respect for national sovereignty and law becomes even more crucial. Only by independently establishing domestic laws while respecting the national sovereignty of cyberspace can we define the boundaries for the exercise of subjective power in cyberspace, restrict and regulate cyber behavior, and maintain cyber security and national security.

That concludes my presentation. Thank you for your attention.

Topic: Chinese Cyber Security Legislation Based on Cyberspace Sovereignty

Speaker: Research Assistant Ye Zhu (Shandong University of Science and Technology)

The first part is a discussion on the attributes of cyberspace. Cyberspace sovereignty is the basis of national security in cyberspace. Reflecting on cyberspace sovereignty should be based on the attributes of cyberspace itself. Cyberspace is a new space embedded in the physical world of national and international law and order. It presents connections and interactions between things and across the boundaries of things. The first attribute is trans-personality, which is also why it is called the Internet. The second attribute is transnationality. Cyberspace is a space shared between different countries, such as cross-border interactions. The free flow of data in cyberspace is abundant. The third attribute is natural space. Cyberspace relies on cyber infrastructure in physical space but forms a distinct space of its own. The medium between them is data and algorithms.

Cyberspace is composed of three main layers. The bottom layer is the physical layer composed of cyber infrastructure, which holds a fundamental position. The middle layer is the logic layer, which consists of code and algorithms. The top layer is the content layer, including text, pictures, and other information and materials transmitted through the Internet, as well as various applications on the Internet. In the content layer, different users send and receive data between numerous terminals, thus creating a network space that encompasses individuals and countries.

The second part discusses the relationship between cyberspace and sovereign states, particularly focusing on the physical layer in current international law and practice. The physical layer of Internet governance applies to sovereignty. The concept of cyber-attack, as defined in current international law, largely relates to physical sovereignty. The Tallinn Manual points out the concept of cyberspace sovereignty and clarifies its extent. In principle, a state is free to adopt any necessary or appropriate measures concerning cyber infrastructure. First, the state exercises domestic legal and regulatory control over cyber infrastructure and activities. Second, this sovereignty over its territory grants the state the right, under international law, to protect cyber infrastructure.

Regarding the logical layer, it demonstrates strong connectivity, making it more suitable for the concept of interdependent sovereignty. Interdependent sovereignty emphasizes mutual recognition and interaction among states. First, it affects our country's sovereignty. For example, when a state is unable to effectively regulate cross-border mobility, it often establishes supranational organizations. Second, the implementation body is diverse. In the case of cross-border data flows, states have sovereignty over data generated or stored within their borders in terms of legal eligibility. However, in terms of actual control, data sovereignty is also partially shared by internet giants.

Third, in a state of interdependence, the sovereign itself shows great resilience. The power of nations largely determines the actual control of a country's sovereignty as a content layer. The content layer mainly involves information management and data regulation. Sovereignty tends to take measures to localize data, while countries advocate independent sovereignty, emphasizing international coordination and mutual assistance for data localization. In reality, countries often implement data localization measures to restrict cross-border data flow for reasons such as maintaining national security, although there are differences in the specific approach to data localization.

International cooperation and mutual assistance can reflect efforts to establish a common digital market and ensure the free flow of data, as seen in the example of the European Union. The European Union has successively promulgated the General Data Protection Regulation (GDPR), which unifies the cross-border rules system for personal data in more than 20 European Union member countries.

The United States has promoted the liberalization of cross-border data flow among its allies by signing international agreements and engaging with relevant international organizations. For example, they have signed Free Trade Agreements and the Trans-Pacific Partnership Agreement, and have adopted cross-border privacy rules. Through the Asia-Pacific Economic Cooperation, the United States has promoted its model to gain influence in the field of cross-border data.

The third part concerns three basic legal relationships in cybersecurity or legislation. The resources controlled by different actors are rapidly changing, leading to competition in all areas of cyberspace. There is no absolute authority that can control everything. Competition among legal entities forms three basic legal relationships in cybersecurity. First, there is competition between cyber superpowers and emerging countries. For the superpowers, this competition involves old and new contradictions, such as capital, science, technology, information, or military power. The second relationship is between cyber countries and cyber giants. At this stage, countries need to unite and rely on cyber giants to maintain national and cybersecurity. Cyber giants also require protection from their countries to address security needs. For example, the European Union has issued two drafts of the Digital Service Act and the Digital Markets Act to ensure the health and sustained development of the European digital economy. The Data Security Law of the People's Republic of China provides legal protection against unfair treatment of domestic cyber giants abroad. The third relationship is between internet giants and the public. GDPR reflects a prioritization of human rights for individuals.

The promulgation of the Export Control Law of the People's Republic of China, Anti-Foreign Sanctions Law of the People's Republic of China, and the Cybersecurity Law of the People's Republic of China reflect the characteristics of foreign-related legislation in the Chinese mainland and the types of relationships that need to be established as a whole.

The third type of relationship is necessary to achieve comprehensive legislation in public and private law. For example, civil courts have added provisions for the protection of citizens' right to privacy. Additionally, Chinese cybersecurity legislation has formed a certain system. The promulgation of the Cybersecurity Law is a landmark, providing the basic law for protecting Chinese cybersecurity.

After that, the State Council propagated the cybersecurity review measures and the Data Security Law of the People's Republic of China. This system contains provisions related to foreign affairs and reflects the embodiment of technical standardization and autonomy, such as Article 15 of the Cybersecurity Law of the People's Republic of China. China realizes industry autonomy by establishing the industry standard system for network security.

In conclusion, based on the attributes of cyberspace, we can observe the relationship between cyberspace and the sovereign state. China has also established its own stance through its response to three aspects of cybersecurity legislation in order to protect Chinese national security.

That's the end of my presentation. Thank you.

Q&A:

Wei Shen:

Hello, everyone. Any questions from the audience? Anyone want to raise questions to any speaker? The topics of the speakers in our panel are very interesting, all the speakers have managed to control the time well, so we are able to save some time, probably 20 minutes. If we have questions, we probably can have some communications and exchange our ideas with all the speakers. The next panel speakers can get ready for starting early a little bit. We actually have 11 speakers, but Dr. Tianzhu Han happened to have some family issues, so she is not able to join us today. She apologized before the meeting. We hope we can meet her again very soon. We also hope the COVID-19 pandemic will be over very soon, so we can meet off-online as soon as we can. If we don't have questions from the audience, we probably stop here. Dr. Shaoming Zhu?

Shaoming Zhu:

Thank you so much for your wonderful ability to chair the meeting and thank you so much for all of your presentation. I know it is quite a long panel for a conference and we have 5 speakers in the first Panel. But I guess cyber security issues are very attractive these days, and we are very moving to the virtual reality world and universe. Many things are really linked to cyber security, especially we actually see a lot of cross-border

questions or issues in our presentation. There are links we can find between cyber security and other law issues. Thank you so much, especially for Rodrigo. What time is it over there right now, is it 2 am or 3 am? (3:15).

Wei Shen:

It is really tough.You are absolutely very professional to stay with us.

Shaoming Zhu:

But I think the questions that the audience raised there for you and Professor Shen were also very inspiring. You really think about what kind of cyber security governance system we want to have. I think that's exactly the purpose for our discussion. I'm so glad to see we have people from really different perspectives, not only choose the law but also communication journalism. I personally believe international law is a communication mechanism between different legal cultures and between different transitions. That is why one of our most important programs is called inclusive international negotiation, where we surely include different reporters from different transitions to negotiation or to communicate. That's what we believe. That is to say, a healthy international order or international governance system can be established through all the participation from different levels and different transitions. So, thank you so much, actually I received some private messages here within our conference, saying these speakers are so impressive, you know, the way they speak, the way they present, and it especially even the short time we have, each of you only have fifteen or twenty minutes but you're able speak professionally and quickly. Thank you so much again for all of your presentation, just one we remind you that if you like to publish with us, you can send your full article by December 1st, and we are going to publish all the articles in the spring issue of the review next year. Thank you so much. I am also impressed that all of our participants are still online. Listening to the presentations for 5 hours is quite challenging. So, I'm very impressed with all of you, thank you very much. We actually started with about 120 or 130 people, we still have more than 50 people here, thank you so much. And we still have 10 minutes before our Panel 3. So, maybe we can take a break. And we are going to move on to our Panel 3. Tradition of this conference we always have a panel talking about educational issues across law schools from different places. So, this year we keep this tradition, we have speakers from different countries. Please stay online, maybe have a cup of tea or coffee and come back to join us in ten minutes, we will have five speakers joining us in Panel 3.

Thank you and see you shortly.

Panel Three: Critical Directions of Higher Education in the Next Decade of the Post-Pandemic Era

Topic: Was the Pandemic an IPhone Moment for Legal Education

Speaker: Professor Mark Poustie (School of Law, University College Cork)

Good afternoon to India, Bhutan, and Beijing as well. Thank you for inviting me to speak. Maybe the pandemic is a transformative moment for legal education that I want to explore whether that is indeed the case.

Let's start with what we're doing right now. We're participating in an international online conference with speakers from across the world. It's easily organized because we can participate without leaving our homes or offices. However, the downside, obviously, is that we're not meeting in person. We can't chat over coffee during a break or have a meal together after the conference. While there are benefits and downsides, one thing is certain: before the pandemic, we wouldn't have done anything like this. Nonetheless, you can argue that even in a post-pandemic world, these kinds of online conferences provide an opportunity for greater and more regular academic engagement. Taking reality into account, a hybrid event is also perfectly feasible. I recently attended the Europe-China Legal Studies Association Annual Conference in Copenhagen. I shared a panel in which all the speakers were online in China. There was an audience in the room with me, and it worked very well. And I think Shaoming, you shared the panel as well. Your speakers were also partly in person and partly online. That kind of hybrid flexibility is hugely valuable in terms of ensuring inclusivity. Even though it's great to have offline events again, it would be good if online and hybrid events were part of the mix of academic conferences in the future.

So, I tried to take a broad approach here to legal education, including things like conferences. And I'm thinking about how we run faculties or universities. Obviously, during the pandemic, all our meetings were switched online, and interestingly, many still remain online. One of the things I found very ironic and quite interesting is that I've been engaged in meetings about student engagement, which have all been conducted online. And if we're doing things online, are the students going to expect that some of their engagement with us would be online? The reality, obviously, is that online meetings can be more inclusive. They can be more efficient. But first, there has to be a meeting. There's the obvious downside that you can't chat at the fringe of a meeting before it starts or after it finishes, or sometimes even during the meeting. We found that attendance at larger meetings, whether within the school or at the university level, such as the academic council, which is the academic governing body for the university, greatly increased with

online meetings and was more inclusive. It would encompass colleagues with caring responsibilities and so on. That's obviously really positive. And there was also significantly more engagement in these meetings in terms of contributions. And that wasn't simply in the chat, but also people making oral contributions. So, hundreds would be present at the university's academic council, and also online at university town hall meetings where the president or the deputy president may be giving updates about the university. Some meetings do remain online, particularly larger meetings, and some switch to hybrid to try to ensure that the benefits of inclusivity remain. Although further investment is required in several roles, which is common in many institutions, to ensure that the hybrid approach can actually work better.

There are obviously some types of meetings where online meetings make more sense. For example, engagement with University College Cork (hereinafter referred to as UCC) and its overseas offices or agents, or meetings with new partner institutions or potential visitors. Instead of exchanging emails or trying to travel to meet them in person, it is much easier to have online meetings. We have been having these online meetings in my school, particularly for regular meetings regarding international recruitment with our overseas offices. Before the pandemic, we would have solely relied on email communication and visited them once or twice a year. However, now we can meet them monthly or even more frequently through online meetings, which undoubtedly has its benefits.

Furthermore, UCC planned an online summer school in collaboration with a law school. The planning process was much easier due to regular online meetings, compared to trying to handle everything through email. We also have regular meetings with our existing partner institutions, for example, in China, and we have successfully developed relationships with new partners through online meetings. Although there are downsides, such as the lack of informal conversations before and after the meetings, the positive aspect is that we can develop and maintain relationships without the need for extensive travel and the associated carbon emissions. This is quite revolutionary if you reflect on it. Nowadays, it is not uncommon for many of us to spend part of the morning in Asia, attend classes on campus in Ireland, and spend the afternoon in the Americas. I don't think this is going to change, and I believe it is a great complement to in-person meetings. In fact, in the case of China, online engagement is currently the only feasible option.

I will touch upon the theme of internationalization later in my presentation. However, I would like to make one final point about meetings. When you meet with another faculty member or a student, you can offer them either an online or offline meeting. There are more choices and potentially more convenience than before the pandemic. If your office hours happen to fall on a day when a student is normally working from home, that's fine. This flexibility is a positive change. When you reflect on it, it is quite revolutionary to turn that flexibility into the classroom setting.

As a reminder, in Ireland, law is primarily taught as an undergraduate degree, as it is in China. However, unlike in China, the principal degree for law in Ireland is the Bachelor of Civil Law, which might sound like an argument or a common state. There is also a postgraduate route to the Bachelor of Laws, which is roughly equivalent to a Juris Doctor. Additionally, we offer Ph.D. programs in the school as well. Before the pandemic, there was very little progress made towards online delivery in the field of law. Some law schools had started offering one or two online courses, but many thought it was too challenging. There was significant resistance, often from faculty colleagues who were hesitant about delivering courses online. The pandemic completely changed the situation at UCC; we transitioned to online teaching almost overnight. Although there were some initial technical difficulties, faculty members adapted remarkably smoothly. There has been a significant learning curve for faculty in utilizing platforms like Microsoft Teams, which we primarily used, as well as other platforms used in different schools. In the academic year 2021, all classes were delivered online, involving both live streaming and recordings. In 2021 and 2022, we adopted a hybrid model with limited classroom capacity. Some students attended classes in person, while others watched live streams online, and the classes were also recorded. It was a challenging but necessary adjustment.

There was a significant drop in attendance during the academic years 2021 and 2022, which was very disappointing. I believe there were several reasons responsible for this. One factor was caring responsibilities, as some students also had work obligations. Additionally, the hybrid experience was not ideal. Many of the classrooms in UCC, especially the smaller ones, lacked the necessary equipment for hybrid teaching. They didn't have fixed cameras, so unless you remained in a stationary position, it was difficult for the camera to capture you. This is in contrast to the larger lecture rooms where the installed cameras are much better and suitable for hybrid teaching. Therefore, if we plan to continue with hybrid teaching in the future, as I will discuss later in the presentation, investment is needed, particularly in the smaller classrooms.

Online teaching and hybrid teaching certainly had their benefits. Firstly, students with additional responsibilities could still participate. The functionality of platforms like Teams allowed students to ask questions. Interestingly, there were actually more questions in larger classes than what we would expect in a traditional large lecture. However, hybrid teaching was more challenging because the professor had to focus on both the students in the room and those online. It was a difficult task. Eventually, we prioritized the people in the room and tended to address the questions that were raised during or after the lecture. Another advantage of online or hybrid teaching is the ability to reach a wider market of students. This includes those who couldn't travel, even if they had the means to do so. For example, some international students may not have been able to travel. It also benefits professionals who wish to undertake further training and upskilling. Additionally, it accommodates individuals with significant caring

responsibilities, such as taking care of elderly grandparents or sick parents. Moreover, online delivery also facilitated remote work for staff. For instance, the chair of the panel showed me, as she is one of my colleagues at UCC, that she was able to work remotely from Beijing for nearly a year before joining us in Cork around a year ago. It was certainly challenging due to the time difference, but it was possible and successful.

This raises interesting possibilities for the future, but I don't want to overlook the drawbacks of remote teaching and learning. Faculty members may experience a sense of dislocation, and both faculty and students may feel isolated, especially in fully online delivery. There is a significant difference between teaching in a classroom with 200 students, where there is interaction and bonding among students before the class starts, and delivering content remotely, where you see officials but can't see many faces. These are very different experiences. However, as I mentioned, there are advantages to both approaches. Now, we have returned to in-person teaching with a few exceptions. We rely on external staff to deliver modules when they cannot be physically present on campus. We no longer live stream except for those few classes where external staff are involved, or in the case of one of our master's programs, which is a blended program. Recording lectures is left to the discretion of individual professors, but strong encouragement is given by me and program directors. Opinions on recording postgraduate classes, which involve more classroom discussion rather than lecturing, are more mixed. Additionally, we do not record small group tutorials at the undergraduate level to promote participation. As expected, students strongly demand the availability of recordings so they can catch up on missed classes or use them for revision purposes. There are also specific categories of students who should have access to recordings, such as disabled students who may be entitled to them, late registrants who need to catch up, and international students whose first language is not English and can benefit from reviewing the lectures for better understanding. Making recordings available to support international inclusivity.

Concluding, has this been a transformative moment for legal education, like the iPhone? Although I would like to think it has, I don't believe all the benefits have been fully realized or embraced. We have observed that certain conferences and events, particularly those involving China, have worked well in a light or hybrid format, although there are undeniable advantages to being physically present. For faculty meetings, many are still conducted online or in a hybrid manner for reasons of efficiency, convenience, and inclusivity. International meetings are also frequently held online, providing greater opportunities for international engagement. As an environmental lawyer, I would advocate for such practices. However, the classroom setting has mostly reverted back to in-person instruction.

Firstly, virtual options have been utilized in cases where a staff member cannot be physically present. Consequently, it is undoubtedly wonderful to have students back in the classroom. Nevertheless, we may be failing to capitalize on some of the benefits. For

instance, we could potentially reach a wider audience by utilizing chat functions to encourage more student participation and explore the international educational opportunities that have emerged. While we regularly engage in international meetings with colleagues, partner institutions, recruiters, or agents abroad, we might not be fully maximizing the potential of these international connections. Perhaps the significance of these opportunities is more apparent at higher levels of education, such as postgraduate studies focusing on comparative law or international law. Additionally, we are neglecting the possibilities within our domestic markets to attract students who could engage in hybrid programs.

Therefore, I believe it is worth considering the implementation of joint remote or hybrid programs that are open to the world. These programs could include periods of travel. For instance, colleagues from a European university could teach Chinese students online to prepare them for studying in the West. This approach could offer benefits in terms of student preparation for international relocation. Alternatively, we could develop an online master's course modeled after the EU Erasmus program, but on a global scale, involving students moving between different campuses. This program could encompass universities in Mexico, Bhutan, India, Australia, and Ireland. If we had better classroom equipment in our smaller groups, similar to what is required for delivering hybrid classes, the students participating in such a program could potentially engage with existing and future master's programs. This would add an entirely new dimension to internationalization and complement existing initiatives. Although it would require investment, particularly in law schools, to ensure the successful implementation of such an international hybrid model, these challenges are not insurmountable. Naturally, there are other issues to consider, such as fee structures between states. However, by focusing on the master's level, we could minimize jurisdictional problems concerning the type of law being taught, as students would be expected to study civil law systems, common law systems, and international law. While we are reaping and continuing to benefit from the shift online and towards hybrid models prompted by the pandemic, we seem to be slow in seizing other advantages, both in our domestic and international markets.

Thank you very much for your attention.

Shaoming Zhu:

Thank you very much, Mark, for your presentation. I think you did touch on quite a few very important issues. Actually, there are discussions about the advantages and disadvantages of moving education online or even to the hybrid way. But I think what you were talking about is really not a simple question as that, but a lot of other factors to consider such as the facilities and the industrial and basic structure, if they want to

support a hybrid or online education in a sufficient way. As you remember, one of the law schools in the United States had these very advanced cameras, because they're the law school's building of two campuses, namely, students are in different locations. With those cameras, if the students talk, the camera will be directed to you. It's almost like you're attending a very fantasy international conference. And that was before the pandemic as well. So, I think the student probably had a very wonderful experience with their online education or even higher education during the pandemic with those officials. But again, not every law school has that. Then we have to consider all these factors as well. We think about the advantage of having the different programs online, but I hope the audience finds it interesting to know the expenses in Ireland.

Topic: Legal Education through Collaboration

Speaker: Professor Dema Lham (Jigme Singye Wangchuck School of Law)

Good afternoon, everyone. Thank you, Shaoming, for inviting me to the symposium. I've been following the morning presentations, and I think it has been a great learning experience to hear from different professors, academics, and professionals from around the world. Thank you for including me in this symposium.

I am an associate team academic at Jigme Singye Wangchuck School of Law. I am also a faculty member and the director of the Human Dignity Committee. In my presentation today, I will be discussing legal education and collaboration. I will also touch upon the topic of human dignity and our efforts to incorporate legal education for our students. Additionally, I will briefly discuss the impact of COVID-19 on legal education here in Bhutan, with a focus on clinical legal education.

Jigme Singye Wangchuck School of Law is located in Bhutan and is the first and only law school in the kingdom. It was established in 2015 with the promulgation of the Royal Charter on February 21 by His Majesty. The core mandate of our law school, as outlined in the Royal Charter, is to provide legal education, facilitate research in legal and related fields, and promote cultural enrichment and traditional values. We strive to promote a fair and just society in Bhutan by strengthening the rule of law.

To provide some background information, our law school started in 2017 with 25 students, and we will have our first graduating batch this June. Currently, we have approximately hundreds of students, with 65% women and 25% men. At our law school, students learn a unique curriculum that combines the study of law with Buddhist values and a commitment to Gross National Happiness principles.

In our pursuit of the vision set for Jigme Singye Wangchuck School of Law, we have developed an innovative and contextually relevant curriculum that is responsive to the country's needs and global changes. Being a relatively new law school, we have the advantage of gathering ideas and information to create an innovative and unique curriculum. One of the cornerstones of our curriculum is the law clinics, which is a practice adopted by well-established law schools worldwide.

While a lawyer's training and education begin in law school, there is a recognition that law schools need to provide more skills training, experiential learning, and the development of practice-related competences. Therefore, our legal education in Bhutan focuses heavily on soft skills, such as collaboration, empathy, cultural awareness, client interaction, management, and customer service. We believe that these skills are increasingly important for legal professionals in today's diverse, global, and multidisciplinary marketplace. The law clinics at our school are designed to address this need for enhanced skills training and practical hands-on experience.

Currently, we have three clinics at our law school: the Human Dignity Clinic, the Appropriate Dispute Resolution Clinic, and the Environmental Law Clinic. We are also in the process of establishing a fourth clinic, the Environmental Law Clinic, which will be operational soon.

The Human Dignity Clinic is something I want to talk about today. It is dedicated to the vision that the promotion of respectful human dignity must lie at the heart of legal practice, particularly in a Gross National Happiness society. The clinic works to protect and promote the human dignity of the most vulnerable individuals in Bhutan, such as women, children, young people, and the elderly. Our primary focus is on persons living with disabilities. The Human Dignity Clinic enables students to understand and interact with others respectfully, as well as advocate on behalf of the most vulnerable populations. Through this clinic, students learn to use the law and their skills to improve the lives of their clients. They also gain an understanding of the professional ethics of client-centered lawyering and advocacy. It is important for them to be self-reflective about their role as agents of change in the Human Dignity Clinic.

Various interactive teaching methods, simulations, and real-world experiential practices are utilized worldwide. Under the supervision of faculty supervisors, students work collaboratively with clients in a constructive manner. In short, the aim of the Human Dignity Clinic is to produce students committed to the ideals of access to justice and the realization of social justice, with the support of the faculty supervisors.

Speaking from my experience with the Human Dignity Clinic and the students, we have worked on various projects in collaboration with civil society organizations, non-governmental organizations, and government institutions. Here I am with the first batch of students from last year, and the second batch of students currently participating in the human dignity clinic this year. Let me share a few examples of the projects we have undertaken in the last two years through the Human Dignity Clinic.

Despite having only a year and a half of work, we have managed to establish and accomplish a lot. We have collaborated with CSOs working towards the welfare, education, and environment of women in Bhutan. Additionally, we have worked and continue to work with London for a Season, focusing on the welfare of children in conflict with the law and those in difficult circumstances.

As you can see, I believe this is a situation that has occurred worldwide. Due to the COVID-19 pandemic, many people resorted to crime as they lost their jobs and became unemployed. This led to an increase in the crime rate and subsequently the incarceration rate. CSO National is responsible for looking after the welfare of children in difficult circumstances (CIATC), and CICO helps them develop diversion programs, especially for those at risk of incarceration or involved with the criminal justice system. Through the Human Dignity Clinic, we assist these CSOs in creating diversion programs for children in conflict with the law. This collaborative effort involves government institutions and

private agencies, along with community service mapping, as mentioned earlier by Shaoming.

Before I commence my presentation, it is essential to highlight that we have been working with the government of Bhutan on the legal aid project, particularly focusing on providing access to justice for individuals with disabilities. In just 1.5 years, I believe we have accomplished a significant amount.

However, unfortunately, with the COVID-19 pandemic, we also faced numerous difficulties and challenges. Being a new law school, it was not easy to overcome these issues. As I mentioned earlier, Bhutan is not an exception; we faced similar situations. As mentioned by Professor Mark and Doctor J Kumar in their presentation, the COVID-19 pandemic resulted in the closure of schools and colleges. Overnight, the traditional mode of education was disrupted, and lectures transitioned to an online format. The social and economic disparities across the country posed challenges for students from underprivileged backgrounds who had limited access to infrastructure. The transition to online learning has been beneficial for both Bhutanese students and visitors. Bhutan being a landlocked country, the accessibility issues are significant. For instance, there was a student who had to walk about 6 miles every morning to get an Internet connection in order to attend classes. Sometimes, after reaching the designated place, the Internet connection was so poor that the student had to climb another hill to find a better signal. These are some of the difficulties and challenges faced by the school of law.

As I mentioned earlier, we were a very new faculty and were not prepared to teach online. We were accustomed to face-to-face teaching in the classroom. We had to adapt to conducting lectures online and using the slower Google Classroom platform. We had to rely on it for every small thing. All our activities were conducted through Google Classroom, and we required training almost every day to familiarize ourselves with these online tools. Internet services in Bhutan are relatively expensive, which poses an additional financial burden on students. Therefore, at the law school, we negotiated with the Internet service providers to lower the rates, especially for students.

There were various difficulties that we had to face, and training had to be provided not only to the faculty but also to the students. As mentioned by Doctor Kumar in his presentation, some students were skipping classes by keeping their Zoom on without actively participating, which was later reported to us by their parents. I believe this was a universal challenge. However, as clinical faculty, it was even more challenging for us, particularly in the clinical legal education landscape where experiential learning and real-time interaction with practitioners are crucial. We had to apply innovative approaches to ensure that students could still have a fruitful learning experience. The COVID-19 pandemic has challenged the traditional model of clinical legal education in many aspects, directly affecting the clinicians' ability to provide students with the same learning experiences as their peers and seniors in previous semesters.

We dream of being forced to stay at home while remaining responsible for our students, and more specifically, our clients. These challenges, I think, have required us to think creatively and naturally about ways to sustain and enhance the student experience in clinical legal education during the pandemic. As a result, many of us had to abruptly adapt our clinical teaching and case supervision to adjust to the migrant restrictions brought on by the pandemic.

But having said all that, we must acknowledge the fact that other opportunities have emerged. I believe a more technology-centered approach is crucial to embrace teaching practices. When we first started, it was very difficult. However, once we got used to it, things started getting better. The real challenges were presented by the COVID-19 pandemic, which was very unexpected and required almost instantaneous change in the way tertiary institutions and schools had to manage. This was evident in the immediate adoption of online and remote teaching.

Due to the face-to-face nature and client interaction required in many clinics, one of the challenges within the clinical community is the close-knit, small-sized classes and frequent engagement between students, supervisors, and clients outside the classroom. The COVID-19 pandemic impacted many relationships within the clinical community. There was less personal interaction, which particularly affected clinical classes. Moreover, altered methods of financing also posed a challenge. Clinical faculty and students experienced changes in their relationships with each other, especially with the students, clients, and the community.

While our school is attempting to create a sense of community online, we acknowledge that the loss of the internal clinical community cannot be truly replaced or reimagined in any online or virtual environment. There is a temporary loss of personal interaction, so we had to resort to telephone calls and online meetings with clients and students. Consequently, opportunities for teamwork and collaboration with clients outside of the law school were reduced, resulting in fewer networking and personal contacts with legal professionals. These are some of the challenges we face. Additionally, the need for access to technology is something we have realized, but the frequent disruption of internet connection and the expensive internet charges pose significant challenges for us, at least at the School of Law.

However, after realizing all these challenges, we should not ignore the fact that the pandemic has also presented us with numerous opportunities. During the COVID-19 pandemic, we noticed how vulnerable populations were the most affected. Nevertheless, the world keeps moving on. The clinics that were lost, especially the Human Dignity Clinic, which focuses on vulnerable populations in society, can be viewed as an opportunity to collaborate with engineers and work for the welfare and well-being of these groups. This year, after long-term face-to-face classes resumed and normal life slowly started returning, we took advantage of this situation and engaged in a series of

projects for the betterment of disabled women, children in conflict, and more. We are continuing to work on these projects. It is important to note that these are vulnerable populations, especially women, children, and persons with disabilities, who have been significantly affected. This has given us an opportunity to work towards the welfare and well-being of these vulnerable populations and society as a whole. It has also given us an opportunity to be better prepared in case such circumstances arise again.

With improving technology skills, modern lawyers will find virtual practice necessary. Legal skills and experiential training should incorporate this reality. We should work towards developing a diverse set of teaching and skills on different platforms for both faculty and students. This is something we need to be more aware of and actively pursue.

For the students, I think the transformation of your education means it will become more affordable. Out-corporate education options will provide greater flexibility for some of the disadvantaged students to work part-time and gain valuable experience at the same time. It gives them an opportunity to cultivate abilities and learn from the best. I also believe that better education should be more customized. A greater emphasis on competitive ability and networking beyond the traditional law school or physical boundaries are the aspects I see in the transformation of legal education.

To conclude, while we hope the world will not face another pandemic or disaster, experience tells us that we cannot know what the future holds, right? As a transition, as a professor of law, and as a role model for my students, I believe we have an ethical responsibility to ensure that the clinics I run operate efficiently with adequate consideration for emerging states from now on. However, this will not work without an acknowledgment from the law school administration of the unique role of illness and the critical importance of this responsibility. We need to examine the sufficiency of planning resources and establish the best practices for incorporating technology and meeting emerging demands. Consider the extent of rural United Mandarin, which was unprecedented. Nevertheless, the need to agree on pedagogy and educational tools should not be unforeseeable, especially in the clinical context and in all other skill-based educational settings.

The experience of the COVID-19 pandemic taught us a great deal about our resilience and adaptability. Our collective perseverance led us through the challenging times of this pandemic, and I hope we will continue to do the same when we face whatever challenges the future holds. Thank you very much.

Shaoming Zhu:

Thank you so much. I am so touched by your inspiring presentation. I totally agree

with you. We, as modern lawyers or legal professionals, are very well prepared for winning an arbitration or litigation. But it's also very important for us to remember that we, as law professors, actually have a mission to promote human dignity, to protect the vulnerable groups and to be of service for others in our society. I also find the value of your law school is very inspiring, which includes justice, service and wisdom. I really hope that more law schools and the students join in the work you guys are doing. I really consider it a very good example.

Topic: Study on the Teaching Reform of International Law Course –Based on the analysis of the practice of Shantou University

Speaker: Assistant Professor Xuyang Guo (Law School, Shantou University)

Today, I want to share with you my topic concerning teaching reforms of international law. I think we are truly influenced by the global pandemic, especially in legal education, and there are so many difficulties in teaching and various areas of our daily lives. My topic actually, to some degree, concerns more about legal education in the post-pandemic era, and it is also based on the long-term practice of Shantou University. I do hope I can provide some ideas for you to overcome these difficulties and better prepare for the post-pandemic era.

My sharing will be divided into three parts. The first part is the policy background explaining why I initiated this topic. Secondly, I will introduce Shantou University's practice on International Legal Talents Education. The third part is the main part, which focuses on the currently taught international law, especially public international law. I will share with you some of my ideas for the teaching reform on public international law for undergraduate students.

Regarding the policy background, as Dr. Kumar mentioned, the changing face of globalization, China has recently proposed an official policy called the promotion of the international rule of law and domestic rule of law. In this context, our legal experts have proposed ideas for International Legal Talents Education. We have divided all students studying international law into two major categories. The first category is concerned with public international law and may include lawyers serving international organizations and relevant domestic agencies. The second category is focused on transnational legal talents who will serve transnational companies and provide legal services for international trade and investment businesses.

Based on these categories, we have implemented a special international legal education model at Shantou University. We refer to this model as the Trinity Coordination Model, which aims to promote legal education. This model is driven by international law moot court competitions that enhance the teaching and study of international law. We have a strong tradition in this field and have participated in numerous moot court competitions such as Jessup and international arbitration moot court, achieving excellent results. Therefore, based on this practice, we are motivated to further promote the teaching and study of international law. This model combines international law theory and practice. In addition to providing quality international law teaching and study, we also offer training for students participating in international law moot court competitions.

So now we will move on to the core part of my presentation concerning the teaching reform of international law for undergraduate students. Before getting started, I would like to share some background information about this international course. Considering the four perspectives for the practice of international law—policymakers, international scholars, diplomats, and international lawyers—this model focuses on the application and dispute settlement of international law. Therefore, our course is designed based on the perspective of international lawyers. I have divided the content of international law into three parts: the basic principles of international law, general international law, and specific international law. Among these, the most important one is specific international law, which concentrates on public international law.

In this process, we introduce the Outcome-Based Education Model (referred to as the OBE Model), which means outcome-based education. We divide the teaching process into three parts. Firstly, we arrange reading materials for students, with a particular focus on international legal documents, firsthand materials of international law, and judicial cases from the International Court of Justice (ICJ). Students need to carefully read these materials before class and will be asked some basic questions about them.

As part of the OBE Model, I have also divided it into three parts. The first part is bilingual teaching of the rules of international law, which is a unique feature in the framework of Chinese education for international law. Since our mother tongue is Chinese, traditionally we learn and teach international law using textbooks in Chinese. However, we recognize the importance of English in legal learning, so we also emphasize the English language skills necessary, including terminology, vocabulary, and articles. This forms the foundation of teaching.

Secondly, I want to highlight the practice of international law. I refer to it as practice because one of the main sources of international law is customary international law, which primarily consists of state practice and opinions. Therefore, we need to evaluate and teach students how states practice international law, particularly focusing on how China applies it and how different countries approach this practice. This comparative perspective helps students understand state practice.

The final part is case reports and comments. This is a crucial aspect of the OBE process. Students need to form case report groups and select an ICJ case to report on. The main task for the teacher is to provide students with sufficient and effective feedback from the teacher's perspective. After class, we also gather students' feedback and evaluate the advantages and disadvantages of this process.

There are some technical innovations in this entire process. I believe this reform is intended to help students better grasp firsthand international law materials and practice, as well as better prepare them for international moot court competitions.

Finally, I want to share with you some of my reflections. After listening to all of your sharing, it is evident that we are still in the midst of a global pandemic and the

so-called great changes of globalization. From a Chinese teacher's perspective, it is crucial for us to recognize the common ground between international law and international legal education. Based on this recognition, perhaps in the future, during the post-pandemic era, we can reform a new, invisible college of international lawyers or international legal education. I believe this idea holds great significance for China and Chinese scholars because the COVID-19 pandemic has caused numerous negative impacts, including a reduction in face-to-face communication with other countries around the world. This decrease in communication directly affects international teaching, making it a crucial aspect of international law education.

Topic: Prospects for Online Teaching Methods of Intellectual Property Law in the Post-epidemic Era

Speaker: Assistant Professor Kaixuan Yang (School of Marine Law and Humanities, Dalian Ocean University)

Today, I'm glad to discuss with you some views on the critical directions of higher education in the next decade for the post-pandemic era. I will explain my views in four aspects.

Firstly, more effective multimedia tools, such as 3D animation, AR, VR, powerful artificial intelligence, and Metaverse technology. On one hand, the development of science and technology has led to an increasing number of ways for people to express their views and communicate with others, ranging from letters to emails, from BBS to instant messaging software, from Internet phones to online video calls, and even AR, VR, and the Metaverse. All of these provide significant assistance in education and teaching while also posing challenges to teachers' abilities. On the other hand, with the arrival of the COVID-19 pandemic and the need to limit physical interactions, online communication and online teaching have become essential methods for people to learn and work. This poses a challenge to traditional in-person education but also provides opportunities for the development of online education. In the context of scientific and technological progress and epidemic prevention and control, the teaching of Intellectual Property law has experienced a revitalization. The Intellectual Property Law course encompasses various forms of literary and artistic works, goods, trademarks, patent technologies, and other objects of rights. Traditional in-person teaching methods struggle to achieve the teaching effect of visualizing and providing 3D presentations and explanations of complex course content.

Now, let's move on to the first part. More effective multimedia tools have been utilized to improve the teaching effect. Traditional in-person teaching pays excellent attention to multimedia tools, which compensate for the shortcomings of simple personal teaching, such as slide projectors and other equipment. However, with large classrooms and a high number of students, existing multimedia tools often fall short of being fully effective. In contrast, multimedia can play a significant role in an online environment. Taking the judgments of substantial similarity in copyright law as an example, the similarity comparison results of different types of works, such as written works, artworks, audiovisual works, and others, presented by multimedia tools in online environments are more apparent. This allows students to intuitively understand the total concept test of artworks.

Secondly, let's explore 3D Animation, AR, and VR. While multimedia technology is not a perfect teaching tool, it is technically 3D. However, the 3D elements that exist in teaching require the assistance of new technologies for presentation. Among the objects

of intellectual property, there are many 3D artworks, 3D trademarks, and 3D patterns in designed products, such as the Coca-Cola bottle's 3D trademark and the Kohler toilet's 3D trademark. The scope of legal protection needs to be examined and compared with the object itself to draw conclusions. At this point, 3D technology can be utilized to present the object of IP to students in a 3D format. Furthermore, AR and VR technology can allow students to immerse themselves in the scene and gain theoretical knowledge and practical experience when analyzing large-scale IP objects, such as electronic equipment and buildings.

Thirdly, powerful artificial intelligence. On one hand, artificial intelligence (AI) is an emerging and essential research topic in Intellectual Property (IP) law. It has also played an important role in epidemic prevention and control. Therefore, AI should be the undisputed focus of IP teaching in the post-pandemic era. On the other hand, there are many applications of AI in trademarks search, patent research, creation of works, patent development in technology, and the use of IP online. Hence, the use of AI technology for IP teaching is highly reasonable.

Fourthly, the latest technology: Metaverse. Thanks to the aforementioned multimedia, 3D, augmented reality (AR), virtual reality (VR), and AI technologies, a virtual world that maps or surpasses the real world can interact with the physical world. The Metaverse is, therefore, a digital living space with a new social system. This emerging technology has attracted worldwide attention, and Intellectual Property Law cannot ignore its significance. Moreover, the Metaverse presents a new paradigm for human work, learning, and lifestyle in the future, making it a natural choice for teaching Intellectual Property law. Importantly, the Metaverse, with its diverse technical features such as multimedia, 3D, AR, VR, and AI, is likely to become the most critical teaching method for IP law in the future.

In any case, the origin and development of Intellectual Property law draw inspiration from science and technology, especially in the online era, where online technology is indispensable. Similarly, the progress of science and technology is inseparable from the support of Intellectual Property law. Therefore, I have contemplated this topic and put forward my personal views based on previous study and work experience.

First of all, existing multimedia tools should be utilized as much as possible to increase the effectiveness of online teaching of Intellectual Property law. This will help in presenting teaching content to students through improved teaching slides. Secondly, we should strive to incorporate 3D, AR, and VR technologies more frequently in teaching and combine them with existing multimedia tools to enhance the interactivity of Intellectual Property law instruction. Thirdly, when circumstances permit, AI technology could be employed to conduct data analysis for Intellectual Property law teaching. This analysis can help customize the most suitable teaching content and methods for students. Last but not least, we should boldly envision the future. As technology continues to

evolve and improve, a majority of our teaching activities can eventually be conducted in the Metaverse, and Intellectual Property law is no exception.

To sum up, the online teaching of Intellectual Property law in the post-epidemic era should achieve compatible absorption of the advantages of real traditional teaching and online teaching to further improve online teaching methods for Intellectual Property law. China is one of the countries with the largest numbers of Intellectual Property rights in the world and has the largest numbers of registered trademarks and authorized patterns globally. Additionally, China is the world's largest developing country and needs to utilize Intellectual Property rights to promote national development in science, technology, education, culture, and the economy. President Xi Jinping once said that innovation was the primary driving force for development, and protecting Intellectual Property rights was tantamount to protecting innovation. Therefore, as an Intellectual Property law professor in China, I believe that I have the obligation and responsibility to continue improving the effectiveness of Intellectual Property law teaching and contributing to the development of Intellectual Property in China.

That concludes my presentation, and you're welcome to offer your different views on this topic.

Topic: Relevance and Significance of the COVID-19 Period Experiment to the Post-Pandemic Education

Speaker: Professor Jitendra Kumar (Nirma University)

My presentation will firstly focus on the experience of educational institutions during the COVID-19 pandemic. Then, I will discuss the challenges faced by education in this globalized world, as well as the impact on business and economies in general. These challenges are crucial for the upcoming generation, as they will need to find answers to many associated questions. I will raise some thoughts and questions for consideration, although I cannot guarantee having all the answers today. Nevertheless, I hope that younger individuals, in particular, will discover these questions and seek solutions for the future.

I will begin by examining the impact of the COVID-19 pandemic, which compelled us to self-isolate and forced educational institutions to shift to remote teaching. This situation provided an opportunity to thoroughly evaluate the advantages and disadvantages of online education. Therefore, I will explore the key takeaways from this experience for the post-pandemic world.

Regarding COVID-19, I will refrain from delving into extensive details, as the audience likely possesses ample knowledge on the subject and has already experienced its effects. The pandemic struck humanity like a tsunami, profoundly affecting various sectors of society, including industries, economies, and education.

As mentioned earlier, we were compelled to self-isolate, and governments worldwide had no choice but to implement self-isolation measures for students and mandate educational institutions to adopt remote learning. Like other critical sectors, the education sector was severely impacted. Students, schools, and colleges bore the brunt of this situation. A study indicates that over 800 million learners worldwide have been affected, with one in five learners unable to attend school and one in four unable to participate in higher education classes. Furthermore, 102 countries implemented nationwide school closures, while 11 implemented localized closures. This shift towards online education, known as online learning or e-learning, has become the new normal, a term coined during the pandemic. The concept of education has been transformed, with online learning at its core today.

Digital learning has emerged as an essential resource for students and educational institutions worldwide. Online learning is now widely accepted, not only for academic subjects but also for extracurricular activities. Its advantages and disadvantages have been extensively discussed. Online education offers better time management for students, as they no longer need to spend time commuting to educational institutions and can utilize this time for their studies. On the other hand, students also have the freedom to skip classes, as they can log in and switch off their cameras while being anywhere else. In my

experience, there was higher lecture attendance; however, it is difficult to determine the actual number of students present in the class, as many logged in without active participation.

Moreover, discipline is generally better because everything was, in most cases, being reported. In my institution, all lectures are being recorded so that they could be available for students to look back later on, or if any student is not able to attend the class in time, then he could refer to the recording. So, since the lectures have been recorded and they were under camera, discipline seemed to be better.

Now we shift to the disadvantages that online education causes. Communication deterioration is the most important one. Of course, email and phone work as available modes of communication, but they could never be as effective as classroom interaction. This lack of social interaction led, in many cases, to depression, which was also generally reported among the people during this pandemic. Anxiety and stress are issues faced by students, and I have received many emails from students expressing deep anxiety about their ability to cope with lectures and to be able to appear in the examinations. Examinations become a very difficult task to organize both for the institution as well as for the students.

Now, let's take a look at the impacts the COVID-19 pandemic made on the education sector. After the historic disruption of the COVID-19 pandemic, most education systems are back open worldwide. But education is still in recovery, assessing the damage done and lessons learned, and there is also an effort to compile the lessons learned from this experience. The COVID-19 pandemic has affected more than 1.5 billion students and youths, with the most vulnerable learners who were hit the hardest, as there were many students who couldn't afford a computer and were deprived of their online classes. Some gains already made towards the goals of the 2030 education agenda before the pandemic were lost due to its outbreak.

Now, what do we have in the post-pandemic scenario? We have now developed digital learning tools, and people are used to them. We have developed and enhanced training support. As Mark pointed out, some of the educational activities can retain a hybrid learning mode. It has its own advantages; digital tools can be developed to minimize communication barriers. Now, our current challenges are that we are living in a more inclusive world, and there is this post-pandemic world seeing both economic and strategic realignment of international relations. Every state is engaged to meet the task of self-preservation, and this is happening in most countries because of the experience during the pandemic. The face of globalization is changing. There is regionalization, bilateralization, and multilateralization. It is not that it was not there earlier, but I mean realignment of all these measures taking place, which leads to legal issues and legal consequences. As far as globalization is concerned, challenges have risen because the nature of global competition has changed and is continuing to change. Even in the eras

preceding the COVID-19 pandemic, the decades-long time of continental globalization consensus was in question.

One tends to think that the COVID-19 pandemic has accelerated the rate at which the globalization consensus is being defied. Now, the rate of defiance seems to have increased. To better understand the implications of this defiance, what is needed is research on pupil organizations and international competition to see whether this defiance weakens the cohesion needed to sustain globalization in peace. Pupils and organizations create cohesive forces that can link and constrain the differences encountered when people and organizations move across international borders.

Meanwhile, the nature of international competitions, particularly as connected to the level of active involvement by state actors, can lead to frictions that reduce cohesion across societies. There is little doubt that the COVID-19 pandemic has placed new stresses on the foundations of international relationships, especially with the intensification of tensions in various parts of the world and ongoing trade disputes. With greater stress, more aggressive rhetoric on the international stage, and variable moves towards business and government cooperation in major economies, the pressures created by the COVID-19 pandemic have the potential to substantially and dangerously deepen existing differences. The historical precedent of the Great Depression leading to nationalistic and isolationist pressures culminating in World War II is well-known. So, what is happening in different parts of the world? Take Ukraine or other similar situations, for example; it is a rather frightening scene. The question is: where does the responsibility for this dangerous trend lie? Perhaps it is time for people across nations to start questioning and holding their political leaders accountable for the prevailing state of affairs. They should take responsibility for their foreign policies. Particularly in developing countries, people are preoccupied with their own problems and more concerned about their livelihoods, with freedom and international peace coming secondary. This represents a significant issue we are currently facing—a crisis of faith.

Deviant political agendas need to be rejected, and it is the responsibility of future generations to ensure this, as they will be at the helm of affairs and will shape the direction of globalization. However, even though the differences between states are magnifying and deepening due to their intentions, individuals and organizations can act as cohesive forces that limit the extent to which globalization forces are slowed or repaired. People play a dominant role because politicians will continue to pursue narrow and individualistic goals.

As far as the academic community is concerned, scholars, for their part, can contribute to research by using traditional means of designing studies informed by literature or by employing methodologies that provide unique and profound conceptual insights into organizations and their processes. Therefore, academia should focus on understanding how individuals are affected by the pandemic in terms of their inclinations

towards globalization. They should investigate how organizations are reacting and explore how their structures and strategies influence these reactions. We hope that future generations rise up to this challenge. As I mentioned earlier, there are certain issues I do not have definite answers to, but the academic community must be committed to finding answers. More answers lie within the next generations.

Thank you for listening.

Cyber Democracy in the Age of Social Media Politicization: A Case Study on Telegram

Smirnova Anzelika[2]

Abstract: During the early stage of the rise of new communication technologies, many regarded cyberspace as a development in the democratization of communications; yet after a number of years, cases such as the suspension of Donald Trump's social media account, labeling of state-affiliated media, and governmental regulations of political speech on social media platforms through censorship show a clear connection between information technology infrastructures and national interests which have transformed social media into another form of influence among the major powers. However, in February 2022, as leading social media giants YouTube, Twitter, and Facebook prohibited the broadcast of Russian state media Russia Today (hereinafter referred to as RT) and Sputnik News and disabled access to other Russian state-linked media accounts on their platforms in response to the escalation of tensions between Russia and Ukraine, a rising international social media platform called Telegram, which didn't follow the mainstream censorship, attracted the attention of the international community. Telegram's behavior, different as it is from the dominant social media platforms, has brought the "romanticized" concept of cyber democracy back, and this paper will focus on an analysis of the development of this non-state social media platform, its growing role in the political context, its presence and effects in terms of the information landscape in different countries, and the reactions of local governments as well as tech giants to the political activities which have arisen because of the platform.

It has been found that ownership patterns, technological empowerment, and gaps in Internet governance are the key elements which have allowed Telegram to behave differently, yet growing popularity has brought Telegram position and the public views in terms of cyber democracy into confrontation with the vision of cyber democracy held by mainstream social media platforms, which indicates the need for a deeper understanding of the core idea of the promotion of social media's "democracy" in the age of globalization as a driver for broader influence over public opinion. Investigating a different approach and different interpretation of social media's democratic behavior also showcases that the evolution of the "cyber democracy" concept is inevitably tied to questions of politics and powers, and it can be seen that cyber security is gradually being treated as a form of cyber democracy. In these terms, this research demonstrates how Telegram's differences have ultimately been met with limitations and eventually it was unable to fully adhere to its vision of cyber democracy, changing its narrative focus away from cyber democracy towards the opposition of the tech monopoly of the Western tech companies, Google and Apple, which again shows that "cyber democracy" concept proposed is not a pure form of democracy but rather a concept driven by political

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interests. In conclusion, the author discusses the future role of Telegram as an informal sphere of influence in international political processes.

Keywords: Telegram; social media platform; cyber democracy; cyber security; political communication; politics

1. Introduction

In February 2022, leading social media giants YouTube, Twitter, and Facebook prohibited the broadcast of Russian state media RT, Sputnik News, and other Russian state-linked media accounts on their platforms, and changes in the platform's hate speech policy were made in response to the escalation of tensions between Russia and Ukraine.[3] Responding to the bans imposed by Western social media platforms,[4] Russian authorities restricted the use of Instagram and Facebook in the country. To some extent, limitations on the access to certain sources of information made by Russia and the West have further affirmed notions about the politicization of social media platforms and the global information flow in the present age,[5] though as governmental struggles regarding the control of information have become increasingly visible, content censorship has been noticed even in liberal democracies,[6] and the changing nature of the situation between Russia and Ukraine eventually "compelled" local and global social media platforms to take sides. A rising social media platform called Telegram, which in 2021 and 2022 was among the most downloaded apps worldwide,[7] has attracted the attention of the international community because it didn't follow any censorship measures related to the Russia-Ukraine conflict.[8]

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[3] See Elizabeth Culliford, *Facebook owner Meta will block access to Russia's RT, Sputnik in EU*, https://www.reuters.com/business/media-telecom/facebook-owner-meta-will-block-access-russias-rt-sputnik-eu-2022-02-28/ (accessed on November 29, 2022); Munsif Vengattil & Elizabeth Culliford, *Facebook allows war posts urging violence against Russian invaders*, https://www.reuters.com/world/europe/exclusive-facebook-instagram-temporarily-allow-calls-violence-against-russians-2022-03-10/ (accessed on January 29, 2023); Clothilde Gourjard, *Twitter to take down RT, Sputnik after EU sanctions*, https://www.politico.eu/article/twitter-to-take-down-rt-sputnik-after-eu-sanctions/ (accessed on November 29, 2022).

[4] See TASS, *Moscow court bans Instagram and Facebook for extremist activities*, https://tass.com/economy/1425179 (accessed on November 29, 2022).

[5] See Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90(1) Foreign Affairs 28, 38-41 (2011); Trevor Garrison Smith, *Politicizing Digital Space: Theory, The Internet, and Renewing Democracy*, University of Westminster Press. para. 2 (2017); Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 40(1) New Mexico Law Review 121, 156 (2014).

[6] See Adrian Shalbaz, *Freedom on the Net 2018: The Rise of Digital Authoritarianism*, https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism (accessed on January 27, 2023).

[7] See Sensor Tower, *Top Apps Worldwide for January 2021 by Downloads*, https://sensortower.com/blog/top-apps-worldwide-january-2021-by-downloads (accessed on January 27, 2023); Sensor Tower, *Top Apps by Worldwide Downloads*, https://sensortower.com/blog/app-revenue-and-downloads-q3-2022 (accessed on January 27, 2023).

[8] See Durov's Channel, *Mnozhestvo polzovateley obratilosj k nam s prosboy ne rassmatrivatj otklucheniye Telegram-kanalov na period konflikta, tak kak mi dlja nih edinstvenniy istochnik informacii*, https://t.me/durov_russia/41 (accessed on January 28, 2023).

State power over the nature of "cyber democracy" and the crisis of "the freedom of expression" is a highly debated topic within the academic community. Many studies which have focused on researching the growing role of social media platforms and its functioning in the political framework showcase the transformation of a new global communication from an expected form of democracy into a political mechanism of control and manipulation (political actor).[9] For example, the suspension of former U.S. President Donald Trump's Twitter account in 2021[10] due to the riots which broke out at the United States Capitol after he expressed dissatisfaction about the results of the United States election on the social media platform led to a proliferation of studies on the topic of political deplatforming,[11] demonstrating how deplatforming, censorship, and content filtering related to political discussions are applied for political purposes while being presented as a platform's content moderation policy. The research of Jack Nassetta and Kimberly Gross focused on the less discussed topic of the effects of state-affiliated media outlet labels on the mainstream social media platforms and discussed the use of warning labels as a method for preventing the dissemination of disinformation or misinformation;[12] but on the other hand, Twitter itself has emphasized that labeling is applied for accounts "heavily engaged in geopolitics and diplomacy",[13] highlighting that the connection of media to the state should not only be seen from the angle of the prevention of the spread of misleading information, but should also be considered as an approach which helps to shift viewers' perceptions of a certain source of information to account for the ideological line and geopolitical demands since the mainstream social media platform's behavior is influenced by indirect governmental interference.[14]

There are many other examples such as policy changes regarding the social media platform WhatsApp's sharing of user data with Facebook,[15] which has raised concerns about the political exploitation of private users' data and the algorithmic "guidance" of

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[9] See Neill Fitzpatrick, *Media Manipulation 2.0: The Impact of Social Media on News, Competitio n, and Accuracy*, 4(1) Athens Journal of Mass Media and Communications 45, 52 (2018); Richard Rogers & Sabine Niederer, *The Politics of Social Media Manipulation*, Amsterdam University Pre ss, pp.23-26 (2020).

[10] See Twitter, *Permanent suspension of @realDonaldTrump*, https://blog.twitter.com/en_us/topics/co mpany/2020/suspension (accessed on November 27, 2022).

[11] See Mathieu Deflem & Derek M.D. Silva, *Media and Law: Between Free Speech and Censorshi p* (*Sociology of Crime, Law and Deviance, Vol. 26*), Emerald Publishing Limited, Bingley, pp.81-97 (2021); Meysam Alizadeh et al., *Content Moderation As a Political Issue: The Twitter Discourse Around Trump's Ban*. 2 Journal of Quantitative Description: Digital Media 1, 21 (2022); Kirill Bry anov et al., *The Other Side of Deplatforming: Right-Wing Telegram in the Wake of Trump's Twitt er Ouster,* Communications in Computers and Information Science 417, 417-428 (2022); Richard R ogers, *Deplatforming: Following extreme Internet celebrities to Telegram and alternative social med ia*, 35(3) European Journal of Communication 213, 213-229 (2020).

[12] See Jack Nasetta & Kimberly Gross, *State media warning labels can counteract the effects of f oreign misinformation*, 1 Special Issue on US Elections and Disinformation 1, 6-7 (2020).

[13] See Twitter Help Center, *About government and state-affiliated media account labels on Twitter*, https://help.twitter.com/en/rules-and-policies/state-affiliated (accessed on January 10, 2023).

[14] See supra note 9.

[15] See Alex Hern, *WhatsApp's new terms of service: what you need to know*, https://www.theguard ian.com/technology/2021/may/14/whatsapp-new-terms-of-service-what-you-need-to-know (accessed on November 27, 2022).

society and targeted messaging during the presidential elections.[16] All the results from the studies mentioned above indicate that the current governance of the mainstream media platform has turned the environment of the social media ecosystem into an instrument of politically driven social control. Due to this, Telegram's disinterested, politically neutral behavior attracted greater scholarly attention. The platform's operating and image, shaped by narratives such as "the only party Telegram can be responsible to is our users, and only our users can dictate us their wishes and demands",[17] resemble the beliefs of the first generation of Internet users such as John Perry Barlow,[18] who regarded the emerging computer network as a process of communication democratization,[19] though now early cyberdemocratic ideals are critiqued for failing to think through state support in the development of a new communication system and about the possibility of authoritarian control over cyberspace—this has actually become a development paradigm of the mainstream social media today.[20] As notions of cyber democracy seem increasingly naïve and utopian, Telegram is viewed as a phenomenon.

The main goal of this paper is to shed light on Telegram's orientation towards cyber democracy and the impact of politics on the platform's functioning. Through the analysis of Telegram's practices, the study aims to identify differences in the vision of cyber democracy between the mainstream social media (YouTube, Twitter and Facebook) and Telegram, reflecting on the focus and driving force of these models of approaches as well as the consequences, challenges, and Telegram's role in the future development of social medial platforms in a political context.

2. Literature Review

The relationship that exists between cross-border social medias, politics, and democracy is a topic increasingly observed by academics as many researchers have become aware of the growing deficit of democracy in cyberspace; furthermore, the rise of Telegram has also attracted such attention. However, the Telegram social media platform has been discussed more in a political context and less from the perspective of why the platform's behavior is different in the context of democracy shaping social media.

One of the earliest studies focused on Telegram's different democratic approach was

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[16] See Panagiotis T. Metaxas & Eni Mustafaraj, *Social Media and the Elections*, 338(6106) Scienc e 472, 472-473 (2012); Sanne Kruikemeier & Susan Vermeer et al., *(Tar)getting you: The use of online political targeted messages on Facebook*, https://journals.sagepub.com/doi/full/10.1177/2053951 7221089626 (accessed on January 27, 2023); Philip N. Howard, Samuel Woolley & Ryan Calo, *Al gorithms, bots, and political communication in the United States 2016 election: The challenge of a utomated political communication for election law and administration*, 15(2) Journal of Information Technology & Politics 81, 81-93 (2018).

[17] See Durov's Channel, *There's a weird rumor being spread in Iran about Telegram moving serv ers there*, https://t.me/PavelDurovs/4 (accessed on November 28, 2022).

[18] See Thomas Streeter, *The Net Effect: Romanticism, Capitalism and the Internet*, New York Univ ersity Press, pp.71-106 (2011).

[19] See John Perry Barlow, *A Declaration of the Independence of Cyberspace,* https://projects.eff.org/ ~barlow/Declaration-Final.html (accessed on January 27, 2023).

[20] See Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom*, Public Affairs, 20 12; Weijia Wang, *Mediated Politics in the Age of Globalization*, People's Publishing House, pp.98-136 (2020).

related to an examination of consequences of platform users' empowerment, focusing on activities that arose due to Telegram to challenge the status quo of a political regime in Belarus, Russia, Iran etc..[21] Emphasizing democratic discourse and public participation in government through social media, these studies indicated that Telegram's non-state/private ownership and technological advancement in the field of encrypted messaging explain the platform's different governance in comparison to mainstream social media. Another line of scholarship, including studies by Plakhta, Ermoshina and Museani, Lyakhovenko, Salikov, etc.[22] has paid attention to Telegram's relations with the Russian government. The scholars were drawn to the fact that the platform was put into operation in Russia first and Russia was the first country where negotiations with the local government related to Telegram's democratic approach in an authoritarian country. Based on Telegram's different approaches to cyber democracy, another group of researchers has emphasized the increase of far-right activities on the platform.[23] Only a few studies have provided insights into Telegram's democracy and pointed out that the platform outlined issues of digital censorship and content moderation in a way that contradicts democratic values. Researchers like Victor Kazanin, author of "Telegram-Channels and Twitch-Broadcast As the Prospective Technologies in Government Transparency", are holding to the notion that Telegram can contribute to the development of political transparency,[24] while others look rather critically at Telegram's user privacy protection and freer political communication, stressing security concerns at a national level.

These studies have helped to make it clear that the rather big body of research does not recognize Telegram as a model of democracy and in many cases actions of mainstream social media platforms are taken to be standards of cyber democracy. In the author's point of view, in-depth research comparing Telegram's with the mainstream social media's democracy models and discussing what issues these differences can highlight in a broader sense, such as how the power of communications, the politicization of cyberspace, and the monopoly over cross-border social media operations affect the platform's democratic processes constitute a missing piece in studies on Telegram's performances. Therefore, to understand the importance of Telegram's rise, which is a variable that challenges the existing form of cyber democracy on leading cross-border social media platforms and urges us to rethink social media's democracy, it is necessary

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[21] See Sudhir Kumar Parida, *Telegram Revolution – An Analysis of Political Instability of Belarus in 2020*, (10) Voprosi Zhurnalistiki 60, 60-87 (2021); Akbari Azadeh & Rashid Gabdulhakov, *Platform Surveillance and Resistance in Iran and Russia: The Case of Telegram*, 17(1/2) Surveillance & Society 223, 223-231 (2019); Mariëlle Wijermars & Tetyana Lokot, *Is Telegram a "harbinger of freedom"? The performance, practices, and perception of platforms as political actors in authoritarian states*, 38(1-2) Post-Soviet Affairs 125, 125-145 (2022).

[22] Achievements of scholars mentioned in this part will be discussed in the main body of this article.

[23] See Aleksandra Urman & Stefan Katz, *What they do in the shadows: examining the far-right networks on Telegram*, 25(7) Information, Communication & Society 904, 905-918 (2020); Heidi Schulze et al., *Far-right conspiracy groups on fringe platforms: a longitudinal analysis of radicalization dynamics on Telegram*, 28(4) Convergence: The International Journal of Research into New Media Technologies 1103, 1103-1126 (2022).

[24] See Victor Kazanin, *Telegram-Channels and Twitch-Broadcast As the Prospective Technologies in Government Transparency*, 3(4) Contemporary Problems on Social Work 61, 61-69 (2017).

to understand the nature of cyber democracy and to understand the nature of social media in terms of a platform which gathers the vast majority of people across the globe into one system (a form of government or a form of politics) controlled by the owners of the platform, which makes it possible to challenge other actors, and also to understand what the driving forces are behind the shape that it takes.

A major difference between traditional democratic values that Telegram is attempting to promote in cyberspace and the current form of cyber democracy on the leading cross-border social media platforms, is actually the matter of the transformation of the concept of that was observable even in the early stage of the Internet era. In Thomas Meyer's "Media Democracy: How the Media Colonizes Politics", it can be clearly seen that already in the age of mass media, the transformation of the character and quality of democracy was being noticed. Meyer's viewpoint stresses the influence of media on politics, the fact that its rapid development can bring about effects, and its broad expansion into the public sphere around the world has allowed the political circle to recognize the agenda it sets and functions of its development, which later started to play a prominent role in political communication and actions. This led to a change from previous standards of democracy to a "media-led democracy", where influential and mainstream media gradually started to be integrated into politics and be "coded" by the political system.[25] In "Myth of Digital Democracy", Matthew Hindman highlighted that the new media environment made it easy for ordinary citizens to express their opinions, yet despite the ability to be connected globally and share information, being "heard" is where difficulties are experienced.[26] In "Lie Machines: How to Save Democracy from Troll Armies, Deceitful Robots, Junk News Operations, and Political Operatives", Philip Howard argued that the use of new communication technologies aims to misdirect people's attention for certain purposes, which shows that the result of the democratization of the digital information space has been its "weaponization" or, in other words, "manipulation".[27]

Martin Hilbert's theoretical research in "Digital Processes and Democratic theory: Dynamics, risk and opportunities when democratic institutions meet digital information and communication technologies" on the reasons for this outcome emphasizes that even though there is an essential framework of a concept of democracy, the digitalization of the democratic process brings about different effects and scenarios for its functionality and possibilities (e.g., the shaping of public opinion) and that the form of new digital democracy depends on which axis of a democracy model a certain cyberspace (social media) would switch to.[28] According to Lincoln Dahlberg's research on the level of "liberty" and "equality" on social media platforms, it can be seen that state-corporate

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[25] See Thomas Meyer & Lew Hinchman, *Media Democracy: How the Media Colonize Politics,* Blackwell Publishing Ltd, (2002).

[26] See Matthew Hindman, *Myth of Digital Democracy*, Princeton University Press, p.142 (2008).

[27] See Philip Howard, *Lie Machines: How to Save Democracy from Troll Armies, Deceitful Robots, Junk News Operations, and Political Operatives*, Yale University Press, p.1 (2020).

[28] See Martin Hilbert, *Digital Processes and Democratic theory: Dynamics, Risk and Opportunities When Democratic Institutions Meet Digital Information and Communication Technologies*, https://www.martinhilbert.net/DigitalDemocracy-eBook.pdf (accessed on March 25, 2023).

control heavily influences the libertarian rhetoric of platforms.[29] In the first chapter of "Mediated Communities: Civic Voices, Empowerment and Media Literacy in the Digital Era",[30] Moses Shumov introduces a highly important function of social media: the ability to reshape community or the ability to shape "new truth", as Neill Fitzpatrick calls it.[31] Logically, if the function is recognized by a group of interests who can benefit from it in a certain way, then this is how the trajectory of social media's democratic development will meet changes. Observations related to this issue were explored by Christian Fuchs and Lincoln Dahlberg, who concluded that as a new communication technology, the social media platform can set the rules for the democracy model, where the control and shaping of digital democracy is essentially assured by technologies since digital democracy is a technologically-driven proces[32] and technological advancement and ownership patterns are two important aspects which allow political contexts to be immersed in digital democracy and for legal frameworks such as the "terms of use agreement" for the platform's users to be adopted.[33] Facebook's content moderation proceeded by way of a centralized system where standards of moderation that comply with nation-state censorship laws can be taken as an example. In this sense, the recent development of social media platforms and its vision of democracy reflects the ongoing transformations democracy has undergone in the media environment since the beginning of the age of mass media and reflects how the intervention of politics influences a platform's operations by adopting characteristics of political logic that results in a new form of digital democracy that differs from the traditional understanding of the term.

The risks Hilbert was concerned about in his research typify the situation that the Telegram social media platform is experiencing at the moment. As Hilbert said, cyberspace allows various associations (e.g., social media platforms) to coexist and a democratic approach should enable their peaceful coexistence, yet "it is very possible that the strongest associations could dominate the entire system" and the "constant discrimination of minority" might take place.[34] First, a social media platform is a space where a large group of people worldwide is gathered into one single system. In these terms, it can't be fully understood as a formation of a truly democratic information society with cultural pluralism or a place for increasing public participation in governance, since one unit of cyberspace (social media platform) is similar to another form of centralized governance over the global community. In the present age, leading social

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[29] See Lincoln Dahlberg, *Cyber-libertarianism 2.0: A Discourse Theory / Critical political economy examination*, 6(3) Cultural politics 331, pp.331-350 (2010).

[30] See Moses Shumov, *Mediated Communities: Civic Voices, Empowerment and Media Literacy in the Digital Era*, Peter Lang Inc., International Academic Publishers, p.4 (2014).

[31] See supra note 8.

[32] Improvements in the field of Information and Communication Technologies (ICT) enabled free global communication.

[33] See Christian Fuchs, *Information and Communication Technologies and Society: A Contribution to the Critique of the Political Economy of the Internet*, 24(1) European Journal of Communication 69, 69–87 (2009); Lincoln Dahlberg, *Cyber-Publics and the Corporate Control of Online Communication*, 11(3) Javnost—The Public 77, 77–92 (2004); Lincoln Dahlberg, *The Corporate Colonization of Online Attention and the Marginalization of Critical Communication?*, 29(2) Journal of Communication Inquiry 1, 1–21 (2005).

[34] See supra note 27.

media platforms Facebook, Twitter, YouTube, and Instagram have established a monopoly over cyber cross-border communication and at this point, Telegram's different background and a restoration of traditional democratic values in cyberspace make the platform a part of "minority group" in the cross-border social media system that Hilbert mentions, with the result being that Telegram is rarely recognized as a democracy model. Even though academic studies such as Kelly Rantilla's "Social Media and Monopoly" stress recent concerns about lack of transparency, "shadow banning", government regulation, and a significant influence of the platform over the content on the mainstream social media platforms,[35] the perspective that Telegram is viewed and discussed from shows that in the majority of cases, the practices of mainstream social media are, in relation to its democratic performance, taken as a standard (democracy norms). This "exclusion" of Telegram from the cyber-libertarian context is where the author sees a need for research on Telegram's background and performance through the prism of the transformation of the democracy concept. On this basis, this study seeks to illustrate how Telegram's model of cyber democracy is different and rethink how political discourse frames cyber democracy on social media platforms.

3. Telegram's Model of Cyber Democracy

3.1 Brief History

Telegram was created in 2013 by two tech entrepreneurs - Russian brothers Pavel Durov (hereinafter referred to as Durov) and Nikolai Durov, who first founded Vkontakte (hereinafter referred to as VK), the first and the most popular social media networking site in Russia[36] and across the Commonwealth of Independent States,[37] which played a significant role in Telegram's development. At that time, the popularity of VK made it possible for the platform to become one of the main platforms used by protesters and opposition actors for mass mobilization not only in Russia, but also in the post-Soviet countries (e.g.,the "Snow Revolution" in Russia in 2011, the Euromaidan protests in Ukraine in 2013).[38] The founders were seeking to have free political discussions on platform, but Russia had a centralized media system;[39] the platform's refusal to cooperate with Russian authorities to suspend the accounts of those who organized the demonstrations and provide the data information for these users,[40] emphasizing the platform's liberal views such as "We do not support the authorities or the opposition, and we do not support either party. My personal views are liberal and will not be affected by

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[35] See Kelly Rantilla, *Social media and monopoly*, 46(1) Ohio Northern University Law Review 161, 165-166 (2023).

[36] See Mail.Ru Group, Socialjniye seti v Rossii: issledovaniye Mail.Ru, p.3 (2014).

[37] See Pavel Durov, *Novy rekord poseshajemosti Vkontake — 50,9 millionov chelovek za sutki. Vko ntake — ne tolko samaja populjarnaja, no I samaja bistrorastuschaja socialjnaja setj v SNG*, https://vk.com/wall1?offset=140&own=1&w=wall1_45570 (accessed on January 28, 2023).

[38] See Durov Pavel, *13 dekabrja 2013 goda FSB potrebovala ot nas vidat lichniye danniye organizatorov grupp Evromaidana*, https://vk.com/wall1_45621 (accessed on January 29, 2023)

[39] See Fei Wu, *Media Diplomacy: Analysis and Reference of American and Russian Media Diplomacy Thought*, pp.50-52 (2020).

[40] See Federaljnaya Sluzhba Bezopasnosti Rossiyskoj Federacii, 13.12.13g. No.6/6236-B, pp.1-2 (2013).

the current situation" has pushed the relationship between the VK platform and Russian regime into a situation of binary opposition.[41]

The negotiation between the Russian government and Durov about their different views on the platform's governance was the key element in Durov's decision to make Telegram a politically neutral platform with the use of encrypted messaging to protect users' privacy and freedom of speech. However, the idea of achieving independence from the Russian media system and operating without having to obey local regulations and requirements encountered obstacles. In 2010, Alisher Usmanov's media group USM Holdings, one of the five major media groups loyal to the Russian political system,[42] along with Igor Sechin, a former Deputy Prime Minister of Russian Federation and Executive Secretary of the Presidential Commission for Strategic Development of the Fuel and Energy Sector and Environmental Security as well as the head of the Russian state oil giant Rosneft, began nationalizing VK via United Capital Partners (hereinafter referred to as UCP), a Russian investment fund, through strategic ownership.[43] In 2013, UCP, as a shareholder of VK, sued Durov for using VK's funds and resources to develop Telegram, which launched in 2013, and demanded that Telegram, registered as a social media platform overseas, should be recognized as the property of VK and that the ownership should not be attributed to Durov alone.[44] Facing pressure from Russian authorities and the new shareholders of VK, Durov sold his 12% stake in VK in exchange for full ownership and control over Telegram.[45]

At a certain point, VK's integration into the Russian state-controlled media system and Telegram's process of political independence show the power of influence on the social media platform, an increasing interest in a cross-border communication platform in politics, and the ways in which a complex indirect network between stakeholders and the government can influence corporate political behavior and the concept of "cyber democracy". Meanwhile, the ins and outs of Telegram's background provide one of the explanations for Telegram's particular stance.

3.2 Ideology, Performance and Outcomes

3.2.1 Ideology and main characteristics

Telegram and its alternative functioning in regards to cyber democracy started to be noticed and studied by scholars widely in 2018, when the platform started to gain popularity worldwide, becoming an attractive destination for voices who were banned or

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[41] See Rosbalt, *Durov otvetil FSB na zapros o blokirovke oppozicionnih grupp*, https://www.rosbalt.ru/main/2011/12/08/922324.html (accessed on January 28, 2023).

[42] See China Radio International, *Rossiyskij mediarinok: integraciya i razvitiye: Opit MIA "Rossiya segodnya" i telekanala RT*, World Affairs Press, pp.73-83 (2016).

[43] See Mail.Ru Group, *Excercise of Option*, https://web.archive.org/web/20111006195703/http://corp.mail.ru/en/IR/news/1125 (accessed on January 28, 2023);Roman Rozhkov, Maria Kolomichenko, *Mai l.ru poglotila "Vkontake"*, https://www.kommersant.ru/doc/2568426 (accessed on January 29, 2022).

[44] See TASS, *Fond UCP: Pavel Durov bezhit on sudebnih iskov, a ne ot politiki,* https://tass.ru/press-relizy/1152512 (accessed on November 26, 2022).

[45] See RIA Novosti, *Pavel Durov prodal svoju dolju v socseti "Vkontake"*, https://ria.ru/20140124/991224515.html (accessed on November 26, 2022).

when the right to free speech on other dominant social media platforms was limited.

Scholars Nathalie Maréchal,[46] Ksenia Ermoshina, and Francesca Museani[47] have found that the main characteristics of the platform that prompted numerous users to move to the platform are related to Telegram's cyber-libertarian approach. First, the platform supports user data privacy (Telegram regularly does not comply with local regulations and refuses to provide user data to third parties or ban users for political communication).[48] Second, the platform adopts end-to-end encrypted messaging and an operation model without algorithms (ensures prevention of state interference) and generally does not censor political content on the platform.

Studies on Telegram's development in Russia by Alexey Salikov,[49] Roman Zimarin,[50] and Oleg Lyakhovenko[51] outline the growing importance of Telegram in political communication for its option to create a one-to-many public channel (telegram channel), which was launched in 2016 and the development of a new structure of information for consuming and sharing that reached a high target audience. Dmytro Plakhta[52] noted that people are ready to trust and follow anonymous telegram-channels regarded as political "insiders", even if there is no proof that the information is true.

The general features of Telegram mentioned above can give a clearer picture of the platform's politics based on the freedom of speech principles; accordingly, as regulations and limitations to free speech in the mainstream social media in terms of political communication recently became stricter, Telegram gradually turned out to be the main source of political information and the place for presenting different viewpoints for many people, establishments, and political interest groups across the globe. Nathalie Maréchal,[53] Ksenia Ermoshina, and Francesca Museani[54] also mention that Telegram's public rhetoric about cyber democracy, the platform's politics shaped by the creator and owner of the platform, and continuous negotiations with the governments of different countries for the protection of user rights played a pivotal role in the shaping of the platform's image as well as its credibility and growing popularity.

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[46] See Nathalie Maréchal, *From Russia with crypto: A political history of Telegram*, 8th USENIX Workshop on Free and Open Communications on the Internet (FOCI 18), 2018.

[47] See Ksenia Ermoshina & Francesca Musiani, *The Telegram Ban: How Censorship* "Made In Russia" *Faces a Global Internet*, https://journals.uic.edu/ojs/index.php/fm/article/view/11704 (accessed on January 28, 2023).

[48] Telegram applies certain regulations if content is related to extremism, terrorism, or other serious crimes and promotion of violence. See Farzineh Badiei, *The Tale of Telegram Governance: When the Rule of Thumb Fails*, Justice Collaboratory, Yale Law School, Research Report, pp.23-24 (2020).

[49] See Alexey Salikov, *Telegram as a Means of Political Communication and its use by Russia's Ruling Elite*, 3(95) Politologija 83, 83, 95-103(2019); Alexey Salikov, *Social Media in Russian Politics*, 99(3) Politologija 64, 84-87 (2020).

[50] See Zimarin Roman Aleksandrovich, *Alternative communication channels as a new trend in obtaining political information (using political Telegram channels as an example)*, Socialno-gumanitarnije znanija 350, 350-357 (2020).

[51] See Oleg Lyakhovenko, *Telegram Channels in the System of Expert and Political Communication in Modern Russia*, 4(1) Galactica Media: Journal of Media Studies 114, 114-144 (2022).

[52] Dmytro Plakhta, *Telegram as a tool for political influence and manipulation*, (19) TV and Radio Journalism 88, 90-92 (2020).

[53] See supra note 23.

[54] See supra note 24.

3.2.2 Practices and outcomes

Before the Russia-Ukraine conflict, the international community recognized Telegram's practices after the Russian Federal Service for Supervision of Communications, Information Technology and Mass Media (hereinafter referred to as Roskomndazor) announced a ban on Telegram in Russia in 2018 as a result of Telegram's refusal to abide by the Yarovaya law,[55] which came into force in 2016 and required telecommunication service providers in Russia to store users' content (voice calls, data, text images etc.) for 6 months, to store metadata (location, data, sender, and recipient) for 3 years, and to provide all necessary information to authorities on request without court order. Telegram has temporarily bypassed the ban by routing its traffic through Google and Amazon cloud servers,[56] yet Russian authorities continued to implement the ban by blocking tens of millions of IP addresses.[57] The conflict between the platform and Russian authorities triggered a large-scale "digital resistance" movement, which Durov has defined as "a decentralized movement standing for digital freedoms and progress globally"[58] and which has formed a community of supporters all over the country, helping to set up numerous proxy servers for Telegram users to bypass the block.[59] According to the reports, the ban didn't have much of an impact on Telegram's operations in Russia;[60] on the contrary, it functioned more as publicity. Numerous reports by the leading Western press and media on the ongoing situation between Russia and Telegram helped the platform to shape its reputation as a "champion of privacy",[61] indicating another reason for Telegram's popularity related to its non-local status;[62] as in

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[55] See Federaljnij zakon ot 06.07.2016 g. № 374-ФЗ. O vnesenii izmenenij v Federaljnii zakon "O protivodejstvii terrorizmu" i otdelniye zakonodatelniye akti Rossijskoj Federacii v chasti ustanovleniya dopolniteljnih mer protivodejstviya terrorizmu i obespecheniya bezopasnosti paras. 13-15 (2016).

[56] See The Moscow Times, *Amazon, Google Still Uncooperative in Telegram Ban, Says Russian Regulator*, https://www.themoscowtimes.com/2018/04/26/amazon-google-still-uncooperative-in-telegram-ban-says-russian-regulator-a61268 (accessed on November 26, 2022).

[57] See Sputnik Belarus, *V Rossii posle Telegram blokiruyut polzovatelej IP-adresov Amazon I Google*, https://sputnik.by/20180417/v-rossii-posle-telegram-blokiruyut-polzovatelej-ip-adresov-amazon-i-google-1034878619.html (accessed on November 26, 2022).

[58] See Durov's Channel, *For the last 24 hours Telegram has been under a ban by internet providers in Russia*, https://t.me/PavelDurovs/30 (accessed on January 14, 2023).

[59] See Durov's Channel, *In April 2018, Russia's telecom regulator Roskomnadzor blocked Telegram on the country's territory*, https://t.me/durov/117 (accessed on November 26, 2022).

[60] See RTVI, *Roskomnadzor: Telegram degradiroval na 30%*, https://rtvi.com/news/roskomnadzor-telegram-degradiroval-na-30/ (accessed on November 26, 2022).

[61] In 2018, the ongoings between Russia and Telegram was a subject of a great interest in The New York Times, Reuters, The Guardian, Forbes etc.

[62] Although Telegram was created and started to operate in Russia first, the platform is not Russia-based. Durov stated that platform is not funded by the government and does not represent the interests of any country, providing a free space for communication. It is not known whether there are hidden ties between Telegram and different groups of interest, yet the image and narratives shape the vision of a platform as a politically independent platform focused on users' privacy and freedom of expression. See Pavel Durov, *Not sure why some media would refer @telegram as "Russia-based"*, https://twitter.com/durov/status/953449090930618368 (accessed on January 28, 2023); Durov's Channel, *The power that local governments have over IT corporations is based on money*, https://t.me/durov/76 (accessed on January 28, 2023).

the case of the United States, local platforms allow backdoor access to Western intelligence agencies,[63] and this is why Telegram's status and user-oriented approach to cyber democracy are some of the platform's major attractions. Besides Russia, Iran is another country with a large number of Telegram users where the platform was also involved in political engagement and negotiations with the local government, leading to a ban on the platform in the country.[64] An increasing level of interest in a one-of-a-kind platform and continuous reports assisted Telegram in gaining popularity and statistics show that after 2018 Telegram started to have an evident influx of users worldwide.[65]

The author observed that there is a noticeable periodic "migration" of users, which is closely related to a certain time period and the background of users themselves. For instance, on January 6, 2021, the 45th President of the United States Donald Trump's expressions of dissatisfaction regarding the results of the United States election caused riots at the United States Capitol, and as a result, Trump and more than 70,000 Twitter accounts related to the United States right-wing conspiracy-theory group "QAnon" were permanently banned.[66] Statistics show that after Trump's Twitter account was banned,[67] Telegram attracted more than 20 million users from the United States, making it one of the most downloaded platforms in the United States that week. The ban of a political leader and the mass migration of Trump supporters attracted attention of political voices who were experiencing limitations and has led to another notable example which is the announcement of Brazil's former President Jair Bolsonaro that Telegram is going to be his main channel for information sharing,[68] as previously Bolsonaro experienced temporary suspension of his accounts on Facebook and Twitter, being accused for

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[63] See Palko Karasz, *What is Telegram, and Why Are Iran and Russia Trying to Ban It?*, https://www.nytimes.com/2018/05/02/world/europe/telegram-iran-russia.html (accessed on January 28, 2023).

[64] See Kargar Simin & Keith McManamen, *Censorship and Collateral Damage: Analyzing the Tele -gram Ban in Iran*, https://thenetmonitor.org/bulletins/censorship-and-collateral-damage-analyzing-the-telegram-ban-in-iran (accessed on January 28, 2023); Abolghasem Bayat et al., *The adoption of socia -l messaging apps in Iran: Discourses and challenges*, *39*(1) *Information Development* 72, 72–85 (2023).

[65] See Statista, *Number of monthly active Telegram users worldwide from March 2014 to April 2022*, https://www.statista.com/statistics/234038/telegram-messenger-mau-users/ (accessed on January 28, 2023).

[66] See BBC, *Twitter 'permanently suspends' Trump's account*, https://www.bbc.com/news/world-us-canada-55597840 (accessed on November 26, 2022); Twitter safety, *An update following the riots in Washington, DC*, https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--. (accessed on November 27, 2022). Since Elon Musk took over Twitter in 2022, many of these bans were reinstated. Platform's rebuilding and a shift in content moderation, different from the other mainstream social media and Telegram, is another new case bringing different vision of platform's governance in the context of digital democracy. Similarly to Durov , Musk is atypical "player" bringing his own vision, background and purposes into the formation of Twitter's ecosystem what directly influences the "texture" of social media platform's democracy. Se-e CNN Business, *Elon Musk now owns Twitter. Here's what he could change*, https://edition.cnn.com/2022/10/28/tech/elon-musk-twitter-changes/index.html (accessed on April 8, 2023); The New York Times, *Musk Lifted Bans for Thousands on Twitter. Here's What They're Tweeting*, https://www.nytimes.com/2022/12/22/technology/musk-twitter-bans.html (accessed on April 8, 2023).

[67] See Sensor Tower, *Telegram Daily Category Rankings*, https://app.sensortower.com/overview/org.telegram.messenger?country=us (accessed on November 28, 2022).

[68] See Jairbolsonaro, -* *Inscreva-se em meu canal oficial no telegram**, https://twitter.com/jairbolsonaro/status/1349092202333544454 (accessed on November 26, 2022).

spreading false information, and certain content was deleted by platforms where the information was shared. In two years, his Telegram channel appeared on the top ten global popularity list of Telegram's political channels, with his channel being ranked as the second-largest with more than 2.8 million followers.[69] Because of this, many studies on Telegram concluded that Telegram is a "niche" for a large number of right-wing groups, supporting populist communication and spreading misleading information.[70] Nevertheless, in the author's view, this demonstrates that Telegram is not a platform run by certain ideological aims but rather includes different political circles and viewpoints. As an example, in 2021, when the influential state-run Russian media outlet RT Germany, which is not affiliated with a right-wing group, was banned by YouTube, it turned to Telegram, attracting 10,600 followers within one day after announcing the news about being available on Telegram.[71] In this way, Telegram's presence without specific censorship on political communication reflects the inequality in free speech and information flow while establishing a contrast between the forms of operations and interpretation of cyber democracy by the mainstream social media platforms and Telegram.

3.2.3 Understanding telegram's cyber democracy

To a certain point, our previous understanding of the democratization of information in the age of social media was essentially based on the performance of global platforms such as YouTube, Facebook, and Twitter, since they play a dominant role in the market. Therefore, there has been a particularly one-sided view through a lens of dominant platforms. Although all the platforms presented themselves in the way that Facebook Mark Zuckerberg founder did when he stated that "Facebook stands for helping to connect people and giving them voice to shape their own future",[72] criticism on social media undermining democracy has increased in the past few years.[73] As soon as Telegram gathered a political circle that stood in stark opposition to the mainstream social media and the difference between them in terms of their approach to cyber democracy became more noticeable, it became clear that the way platforms think of

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[69] See TGStat, *Rating of Telegram channels*, https://tgstat.com/ratings/channels/politics?sort=members (accessed on January 28, 2023).

[70] See Aleksandra Urman & Stefan Katz, *What they do in the shadows: examining the far-right ne tworks on Telegram*, 25(7) Information, Communication & Society 904, 905-918 (2020); Kirill Bry anov et al., *The Other Side of Deplatforming: Right-Wing Telegram in the Wake of Trump's Twitt er Ouster,* Communications in Computers and Information Science 417, 417-428 (2022); Aliaksandr Herasimenka et al., *Misinformation and professional news on largely unmoderated platforms: the case of telegram*, https://www.tandfonline.com/doi/full/10.1080/19331681.2022.2076272?scroll=top&ne edAccess=true&role=tab (accessed on January 28, 2023).

[71] See EUvsDisinfo, *Sputnik and RT Expand Media Presence to Telegram*, https://euvsdisinfo.eu/spu tnik-and-rt-expand-social-media-presence-to-telegram/ (accessed on November 25, 2022).

[72] See Mark Zuckerberg, *I want to respond to Marc Andreessen's comments about India yesterday*, https://www.facebook.com/zuck/posts/10102645335962321 (accessed on January 15, 2023).

[73] See Siva Vaidhyanathan, *Anti-Social Media: How Facebook Disconnects Us and Undermines Democracy*, 35(4) European Journal of Communication 426, 426-427 (2020); Hans Asenbaum, *Rethinking Digital Democracy: From the Disembodied Discursive Self to New Materialist Corporealities*, 31(3) *Communication Theory* 360, 360–379 (2021).

democracy and what their democratic ideals and practices are driven by was an issue.

Some scholars view mainstream social media as being "in the service of power" or in terms of "monitory democracy" due to the fact that a complex indirect network among social media,[74] stakeholders, and government influences political behavior of social media. Up to this point, Telegram's ownership pattern is what has made the platform's governance different. As previously mentioned, it is Durov, the founder and owner of Telegram, who controls Telegram's operations and decision-making. This structure allows the platform to avoid being influenced and pursue its original orientation towards cyber democracy. Therefore, Telegram's approach is obviously driven by different preferences, and this gives us a different vision of "cyber democracy". In addition, the dissimilarity also arises from the fact that Telegram is a non-Western platform,[75] while other dominant social media belong to the Internet giants of the West.

It is known that in the mid-1990s, the promotion of democracy was deeply integrated into U.S. foreign policy and a link between globalization, the promotion of democracy, and a rise of online communication was mapped out ages ago[76]. Considering this background and the latest removal of content on the dominant platforms, it is conceivable that the West's active promotion of "Internet freedom" during the early stage of globalization reflects that the definition of "Internet freedom" and the discourse about cyber democracy (liberal internationalism) has been the strategic dissemination of a belief within the framework of geopolitics in order to persuade minds and hearts across the globe to establish dominance in the shaping of public opinion. Making comparisons with Western social media apparently driven by a given agenda, scholars consider Telegram's "cyber democracy" as a business model that uses a sense of contrast to gain popularity and advantage[77] or else partially as a process for establishing a sphere of influence counter to the views of dominant social media.[78] In any event, Telegram's politically neutral rhetoric and performances increased its "political actorness".[79] In addition to the cases mentioned, Telegram has also been involved in waging protests, such as large-scale

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[74] See John Keane, *Democracy* in the *Age* of *Google*, *Facebook and WikiLeaks*, The Council of Europe *Democracy Debate Series,* pp.5-6 (2011); Tanner Mirrlees, *GAFAM and Hate Content Moderation: Deplatforming and Deleting the Alt-right*, *in Media and Law: Between Free Speech and Censorship*, Emerald Publishing Limited, pp.81–97 (2021).

[75] In addition to the platform's non-state characteristics, the infiltration of capital from the United Arab Emirates and Russian Federation into Telegram through the investment also showcase the fact that Telegram is representative of a non-Western social media platform. See Dealroom, *Telegram*, https://app.dealroom.co/companies/telegram (accessed on March 26, 2023).

[76] See William I. Robinson, *Globalization, the World System, and "Democracy Promotion" in U. S. Foreign Policy*, 25(5) *Theory and Society* 615, 619 (1996); Daniel R. McCarthy, *Open Networks and the Open Door: American Foreign Policy and the Narration of the Internet*, 7(1) Foreign Policy Analysis 89, 89-111 (2011); *U.S. Initiatives to Promote Global Internet Freedom: Issues, Policy, and Technology*, Congressional Research Service Report for Congress, pp.13-16 (2011).

[77] See supra note 23.

[78] See supra note 9, 24, 40, 41; Darren Loucaides, *How Telegram Became the Anti-Facebook*, https://www.wired.com/story/how-telegram-became-anti-facebook/ (accessed on January 28, 2023).

[79] See Mariëlle Wijermars & Tetyana Lokot, *Is Telegram a "harbinger of freedom"? The performance, practices, and perception of platforms as political actors in authoritarian states*, 38(1-2) Post-Soviet Affairs 125, 125-145 (2022).

anti-government demonstrations in Iran in 2018,[80] the anti-government protests in Belarus in 2020,[81] German[82] and Irish protests against local COVID-19 policy,[83] etc. At this point, the question arises as to whether Telegram can maintain its vision of liberal cyberspace when its influence and growing role in a political context has started to challenge the existing cyber world order and started to generate political instability in many countries around the world.

4. Facing The Limits of Cyber Democracy — Telegram's Challenges and Solutions

The flow of information and data across national borders has given rise to national security issues, which means that countries will strengthen the rules of law to improve state governance over cyberspace, especially when the development of this new communication structure has given people open and free communication possibilities, activating social power in terms of "public opinion" to the point that platforms have gradually been regarded as "the Fifth Estate".[84] Nevertheless, the concept of "informational sovereignty" began to emerge only in 1979[85] and is as such a relatively fresh concept; therefore, a series of practical experiences is needed to create a "complete system" of cyber security law. In the case of Telegram, on one hand, platform-based political activities have pushed the need in many countries to improve national cyber security so as to fill the gaps that created favorable conditions for the cross-border social media platform's approach. On the other hand, measures taken regarding Telegram show how politics influence the functioning of social media, which is considered as a space for free communication.

4.1 Meeting Limitations - Whole-of-government Approach and Tech Giant's Join

Azadeh Akbari and Rashid Gabdulhakov observed that in some countries Telegram's operations were limited by the tightening of local Internet regulations or the application of a ban. For example, in Iran nearly 79% of the country's population used Telegram before protests were waged with the use of this platform. To take control of the situation, Iran's Supreme Council of Cyberspace announced in 2016 that the communication systems used in Iran should transfer servers serving local users to Iran

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[80] See Hadi Sohrabi, *New Media, Contentious Politics, and Political Public Sphere in Iran*, 35(1) Critical Arts 35, 39-40 (2021).

[81] See Sudhir Kumar Parida, *Telegram Revolution - An Analysis of Political Instability of Belarus in 2020*, (10) Russian Journal of Media Studies 60, 60-88 (2021);

[82] See Wesley Dockery, *Germany cracks down on far-right Telegram users*, https://www.dw.com/en/germany-cracks-down-on-far-right-telegram-users/a-60715438 (accessed on November 25, 2022).

[83] See Cliona Curley, Eugenia Siapera & Joe Carthy, 8(4) *Covid-19 Protesters and the Far Right on Telegram: Co-Conspirators or Accidental Bedfellows?*, Social Media + Society 1, 1-15 (2022).

[84] See William Dutton, *The Fifth Estate: A New Governance Challenge*, The Oxford Handbook of Governance, Oxford University Press, pp.584-598 (2012); Lucie Greene, *Silicon States: The Power and Politics of Big Tech and What It Means for Our Future*, Counterpoint, paras. 1-3 (2018).

[85] See Kaarle Nordenstreng & Herbert I. Schiller, *National Sovereignty and International Communication*, Ablex Publishing Corporation, p.1 (1979).

within one year. Telegram was blocked in 2018 due to its non-cooperation, but it used proxy servers to bypass bans in Iran, Russia, and other countries which had banned the platform. To improve the efficiency of restrictions, Iran's Supreme Council of Information and Communication Technology issued a decree to block "VPN" services.[86] Nonetheless, as Ahmed Al-Rawi points out, social media enabled the decentralized dissemination of information so that when Telegram channels are filtered and blocked, "news loopholing" is a format for the spread of targeted information. His study shows that the same information from specific channels is shared repeatedly on different channels which are followed by a targeted audience, allowing the message or certain channels to reach the intended audience after all.[87]

In addition to the proxy servers and "news loopholing" that make it possible for Telegram to continue being available, the German case showed another gap in the cyber security laws and regulations. Helena Gunkel pointed out that Durov did not register Telegram as a social media platform but rather defined Telegram as a messaging app. The reason for this is linked to the fact that Telegram's one-to-many dissemination of information (telegram channel) function was developed later, which gave Telegram an additional option to bypass regulations related to social media platforms. As a consequence, Germany's Network Enforcement Act (Netzwerkdurchsuchungsgesetz, NetzDG), which came into force in 2018 to regulate speech on social media platforms, had no impact on Telegram in Germany.[88] In *Challenges and Exploration of the German Social Media Administration Law,* Shi Anbin and Zhang Zhuo concluded that Germany's Network Enforcement Act had also led to the question of how the governance of social media platforms and the German Constitution should coexist. This is a reflection of the fact that, within the context of social media platform governance, legal systems supporting freedom of speech in the countries of the European Union are prone to conflict with each other, since restricting the output of some content on the platform can be regarded as interfering with users' freedom of communication.[89] In this regard, the political independence of Telegram and its alternative model of "cyber democracy" highlighted these issues in the governance of cross-border platforms. Still, there have recently been some significant changes in terms of Telegram's compliance with the requirements and regulations of different countries and regions.

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[86] See Akbari Azadeh & Rashid Gabdulhakov, *Platform Surveillance and Resistance in Iran and Russia: The Case of Telegram*, 17(1/2) Surveillance & Society 223, 223-231 (2019).

[87] See Ahmed Al-Rawi, *News loopholing: Telegram news as portable alternative media*, https://link.springer.com/article/10.1007/s42001-021-00155-3 (accessed on January 29, 2023).

[88] See Helena Gunkel, *Telegram v opale: pochemu v FRG hotjat ogranichit ego rabotu*, https://www.dw.com/ru/telegram-v-opale-pochemu-v-frg-hotjat-ogranichit-ego-rabotu/a-60133716 (accessed on November 25, 2022).

[89] See Anbin Shi & Zhuo Zhang, *The Challenge and Exploration of Social Media Management Law in Germany*, 25(13) Youth Journalist 84, 84-86 (2018).

Table 1. Examples of Telegram's cooperation with different countries and regions

Date	Country	News
February 10, 2022	Germany	After the second meeting of the Telegram representatives and the German government, Telegram agreed to suspend 64 Telegram channels that opposed Covid-related restrictions and accounts involved in waging protests.
March 04, 2022	Countries of the European Union (EU)	Telegram suspended the channels of Russia Today and Sputnik News (Russia) on their platform in the EU countries after Telegram announced that it would not ban different Russian and Ukrainian Telegram channels during the Russian-Ukrainian conflict.
March, 2022	Brazil	After the Supreme Court of Brazil issued an order to ban Telegram, Telegram agreed to cooperate and provide its contact information to keep in touch with relevant Brazilian authorities, and also agreed to monitor the information of the 100 most popular channels in Brazil.

The table is made by the author. Information sources: German newspaper *Süddeutsche Zeitung*, Russian News Agency TASS, and France24 News.

Telegram has been facing the pressure of bans for years, but the latest compromises have a close connection with the platform's high reliance on tech giants Apple and Google. In 2021, Apple and Google issued new policies to strengthen the legislation level for those operating apps available on the App Store and Google Play Store, requiring the Telegram-like apps to comply with the laws and regulations of the countries in which they operate or else the app might be taken offline.[90] The example of the Parler social media platform, which describes itself as a free-speech and non-biased platform, being taken offline by Apple and Google due to its high popularity among far-right communities of the United States,[91] is a clear indication that to remain available on iOS and Android systems, app operators have to adopt the rules set by tech giants.

Within this framework, it is worth noting that the set of the new rules gives the impression that a relationship network is forming between the world's largest tech

[90] See Pavel Durov, *Why Telegram had to follow Apple and Google when they suspended a voting app*, https://telegra.ph/Why-Telegram-had-to-follow-Apple-and-Google-when-they-suspended-a-voting-app-09-25 (accessed on November 26, 2022).

[91] See Jack Nicas & Davey Alba, D, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters*, https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html (accessed on November 26, 2022).

companies and the governments of different countries. This is similar to Steven M. Luke's three-dimensional view of power,[92] which involves gathering different actors with the same goal and reaching the objective by controlling resources and setting "the rules of the game". Technological dominance of the West related to global communication is a significant factor that provides advantages to both themselves and their allies in setting "standards" for cyberspace governance and cross-border platform governance. Online communication is a technologically-driven process, and thus the changes in Google and Apple's policies regarding the rules and regulations of different countries can be understood as a further strengthening of dominance, a collective accumulation of power that can rationalize and stabilize the existing political system and order, as well as continuing to exert its influence, institutionalizing a certain ideology and cultivating legitimacy barriers for the non-like-minded actors. Under these circumstances, it is easy to see that although Telegram is a private platform, its growing credibility among users across the globe and political influence naturally will meet difficulties in terms of holding on to its vision of cyber democracy as it challenges the existing pattern of cyberspace governance, and once it can't be limited directly, other ways like the linkage between actors with common interests will be applied to consolidate its position.

4.2 Telegram's Re-orientation

There have been changes in Telegram's public rhetoric in response to external pressure. The main emphasis in Telegram's rhetoric on a free speech policy and user rights privacy switched to an explanation about the geopolitical reasons for Telegram's free speech censorship and criticism of Apple and Google's control and monopoly over the global information flow.[93] Ksenia Ermoshina and Francesca Museani noted that a shift in the Telegram founder Pavel Durov's narratives might be associated with the changes in the platform's relations with Russia when Roskomnadzor reached consensus and Telegram was no longer blocked in Russia under the agreement that Telegram would cooperate with Russian authorities and provide personal data of users if a person was suspected of terrorism and extremism.[94] On July 9, 2020, three weeks after Telegram was officially unblocked, Telegram Vice President Ilya Perekopsky was invited to a panel discussion on the future of the IT industry that was attended by the Russian Prime Minister, Mikhail Mishustin. The Prime Minister's presence can be considered as Telegram's switch to a government-friendly platform. At that meeting, the content shared by the representatives of Telegram, as well as Durov's remarks that day, focused as they were on criticizing Apple's market monopoly and the inequality of allocation of power in cyberspace,[95] can be seen as marking the starting point of a shift in Telegram's narratives

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[92] See Steven Lukes, *Power: A radical view* (2nd ed.), Palgrave Macmillian, pp.108-151 (2004).

[93] See supra note 67.

[94] See Federalnaya sluzhba po nadzoru v sfere svazi, informacionnih tehnologij i massovih kommunikacij, *O messendzhere Telegram*, https://rkn.gov.ru/news/rsoc/news73050.htm?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com (accessed on January 29, 2023).

[95] See Pavel Durov, *7 Myths Apple Is Using to Justify Their 30% Tax on Apps*, https://telegra.ph/7-Myths-Apple-Is-Using-to-Justify-Their-30-Tax-on-Apps-07-28 (accessed on January 29, 2022); Pravit elstvo Rossii, *Panelnaya diskussiya s uchastiyem predstavitelej IT-industrii*, http://government.ru/news/39995/ (accessed on November 26, 2022).

and its position, while previously content related to the Western social media was focused more on comparing user privacy issues.

A new chapter in the development of the relationship between the two sides can be understood as "each takes what he needs". From the perspective of Russia's national security and strategic communication, the "return" of Telegram played an important role during the Russian-Ukrainian conflict. At the end of February 2022, in response to the Western ban on state-run Russian media content and the targeted hate speech policy, Russia added Meta Platforms, Inc. and their social media Facebook and Instagram to the list of "terrorist and extremist" organizations and banned their use in Russia.[96] Restrictions triggered the "migration" of 40 million Russian users to the Telegram platform. By the end of March 2022, the average daily visit of Telegram's Russian users had increased to 63%.[97] According to the statistics provided by Mediascope, contrary to Telegram, the number of Russian users' daily visits to Instagram, which was banned, has fallen from 39 million to an average 11 million per day, and visits to Facebook dropped from 6.7 million to 1.9 million.[98] Under these circumstances, it is clear that abandoning the demands to restrict Telegram not only allowed Russia to change the Russian citizens' priority choice for their source of information and change it to a non-Western platform, but it also enabled Russia's news and world view narratives have a direct dialogue with local audiences, free from content monitoring and filtering by the West. Based on a report made by Telegram, since the mutual ban on information dissemination between the West and Russia, by April 2022, the number of Telegram users reached 700 million in two months.[99] This data shows that the two-sided bans also triggered a platform migration outside Russia, which also can be regarded as a strategic achievement.

For Telegram, close ties with Russia might reduce Telegram's dependence on the West in terms of the selection of a cloud service provider, as cloud computing has also been embedded in politics,[100] and, as Durov noted, Russia can be taken as a pilot to study suitable ways for using Telegram in other countries with relatively strict network regulations.[101] On the other hand, both Telegram and the Russian government share the

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[96] See Federalnaya sluzhba po nadzoru v sfere svjazi, informacionnih tehnologij I massovih kommunikacij, *Prinjati meri po zaschite rossijskih SMI*, https://rkn.gov.ru/news/rsoc/news74108.htm (accessed on November 26, 2022).

[97] See Marina Tunaeva (Bochkareva), *Telegram oboshel Whatsapp po objemu trafika v Rossii*, https://www.vedomosti.ru/technology/articles/2022/03/20/914320-telegram-oboshel-whatsapp (accessed on November 26, 2022).

[98] See Vasilij Cherniy, *Posle blokirovok zarubezhnih socsetej Telegram viros boleye, chem v poltor a raza*, https://br-analytics.ru/blog/rus-social-media-sept-2022/ (accessed on January 29, 2023); Sergey Mingazov, *Analitiki ocenili rost ohvata Telegram na fone blokirovki zapreschennih socsetej*, https://www.forbes.ru/tekhnologii/468653-analitiki-ocenili-rost-ohvata-telegram-na-fone-blokirovki-zapresennyh-socsetej (accessed on November 26, 2022).

[99] See Telegram, *700 million users and Telegram Premium*, https://telegram.org/blog/700-million-and-premium (accessed on November 27, 2022).

[100] See Tim Jordan, *Information Politics: Liberation and Exploitation in the Digital Society*, Pluto Press, pp.83-98 (2015); Nana Amankwah Peprah & Kamal Kant Hiran et al., *Politics in the Cloud: A Review of Cloud Technology Applications in the Domain of Politics*, (1053) Advances in Intelligent Systems and Computing book series 993, 993-1003 (2020).

[101] See Durov's Channel, *Russia's telecom regulator Roskomnadzor blocked Telegram on the country's territory*, https://t.me/s/durov/121 (accessed on November 27, 2022).

same thoughts on opposing technological hegemony and monopoly of the West and on the imbalance of the global information flow. Therefore, in terms of the power competition between Russia and the United States, the cooperation between the two also seems to have made the atmosphere of competition for international public opinion on the social media platform more visible. Certainly, Telegram is a cross-border platform and changes in the relations between Russia and Telegram present only one case which apparently shows how the challenges of a newly-formed post-liberal cyberspace made Telegram turn to search for a balance between its vision and practices of "cyber democracy", on one hand, and "cyber democracy" in the modern world, on the other. Since political activities are usually the core factors which influence the functioning of social media platforms and bring changes and challenges on the surface, it requires a further prolonged study to fully understand Telegram's development in a post-liberal cyberspace and what the goals of its approach to cyber democracy are.

5. Conclusion

The case of Telegram, a private social media platform gaining a foothold in global communication, shows that, in practice, a notion of liberal spatial perspectives in cyberspace remains utopian, for the reason that superiority in the control of the global information flow and new communication technologies plays a pivotal role in the modern world politics. Even though Telegram's ownership structure allowed its decision-making to not be influenced by the ideologies of a certain group of actors, it couldn't bring about a significant change in the "imbalance" of the current global information flow or changes to the nature of the democracy of social media platforms. The dependence on the Western cyber ecosystem and improvement of Internet laws have limited Telegram to some extent, though compared to other leading social media platforms, it still maintains a higher degree of free political communication. With a trustworthy reputation, Telegram can still affect political outcomes and remains an influential transnational actor.

From the perspective of the politicization of social media, Telegram's presence has made the impact that politics has on the nature of "cyber democracy" and social media more evident. As Durov noted, "the world is getting more pro-censorship in general, with even democratic countries changing their definitions of free speech";[102] thus, political influence on the mainstream social media and Telegram shows that "cyber democracy" and emerging "cyber security", which appear to be two concepts with the opposite meaning, are gradually transforming into one, where the concept of "cyber democracy" is shaped and developed on the basis of cyber security and national interests.

[102] See Pavel Durov, *Why Telegram had to follow Apple and Google when they suspended a voting app*, https://telegra.ph/Why-Telegram-had-to-follow-Apple-and-Google-when-they-suspended-a-voting-app-09-25 (accessed on January 17, 2022).

Revisiting the "One China" Principle: A Critique of the Glaser Report on "Beijing's Distortion of UN Resolution 2758"

Jianqiang Guan & Xinyi Sun [1]

Abstract: On March 24, 2022, Jessica Drun and Bonnie Glaser published a report, "The Distortion of UN Resolution 2758 and Limits on Taiwan's Access to the United Nations", arguing that the People's Republic of China (hereinafter referred to as PRC) reinterpreted UN Resolution 2758 as equivalent to the "One China" Principle. This article criticizes core arguments of the report from two dimensions: (1) by demonstrating UN Resolution 2758 is beneficial to the PRC in regard to upholding the principle, as evidenced by the drafting process and the wording used; and (2) justifying the rationality of the principle. An analysis concludes that the validity of the "One China" Principle does not derive from UN Resolution 2758 per se, but from objective historical facts and principles of international law. China simply does not need to "distort" UN Resolution 2758: the "One China" Principle was instead its very theoretical foundation.

Keywords: "One-China" Principle; The Glaser Report; UN Resolution 2758

1. Introduction

On March 24, 2022, Jessica Drun, a non-resident fellow with the Atlantic Council's Global China Hub, and Bonnie Glaser, the director of the Asia Program at the German Marshall Fund of the United States, jointly published a report named "The Distortion of UN Resolution 2758 to Limit Taiwan's Access to the United Nations" (hereinafter referred to as the Glaser Report).

The key point of the Glaser Report states "UN Resolution 2758 does not include the words 'Republic of China' or 'Taiwan'—it merely alludes to the former vacating its United Nations seat. Accordingly, it does not present an institutional position on the status of Taiwan, even though the People's Republic of China (hereinafter referred to as the PRC) claims it does—it solely states that the PRC will, from that day forth, represent 'China' at the United Nations."[2] As such, the Glaser Report asserts that Beijing distorts UN Resolution 2758 by falsely accusing the PRC of conflating UN Resolution 2758 with its "One China" Principle with the attempt to make a "revisionist shift from the original intent of the document".[3]

UN Resolution 2758, adopted by the UN General Assembly on October 25, 1971, restored all lawful rights to the PRC and "recogniz[ed] that the representatives of the

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[1] The first author: Jianqiang Guan, Professor of International Law of East China University of Political Science and Law, China; the second author: Xinyi Sun, Ph.D. Candidate of East China University of Political Science and Law, China.

[2] See Bonnie S. Glaser and Jessica Drun, *The Distortion of UN Resolution 2758 and Limits on Taiwan's Access to the United Nations*, p.8, http://www.gmfus.org/news/distortion-un-resolution-2758-and-limits-taiwans-access-united-nations (accessed on March 2, 2023).

[3] Id., at 5.

People's Republic of China are the only lawful representatives of China to the United Nations". Meanwhile, it also "expel[led] forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it".[4] By emphasizing that the PRC as the "the only lawful representatives of China" and expelling "the representatives of Chiang Kai-shek", UN Resolution 2758 refused to recognize that Taiwan as a State.

In the following section, the drafting process and the literal reading of UN Resolution 2758 will be further analyzed to reveal that the "One China" Principle has long been supported by the United Nations. This article will then examine the history of Taiwan and relevant international agreements after World War II—based on the principles underlying international law—in an effort to reveal the truth of these fallacies in the Glaser Report.

2. UN Resolution 2758 Is an Affirmation of the "One China" Principle

The Glaser Report challenges the United Nations for not presenting an institutional position on the legal status of Taiwan and falsely asserts that the PRC commits "relentless efforts to distort the original text of UN Resolution 2758 in ways that construe it as equivalent to its 'One China' Principle".[5]

To be clear, Article 2.7 of the UN Charter states that the United Nations is not authorized to intervene in matters within a state's domestic jurisdiction. Hence, in accordance with the principle of non-interference, the UN General Assembly is not authorized to take an institutional position on Taiwan's status but can only vote on the qualifications for representation. Additionally, the historical background and adoption process of UN Resolution 2758 shed light on the fact that the "One China" Principle is regarded as the theoretical basis throughout the adoption process. The significance of UN Resolution 2758 also rests on a recognition that the Republic of China (hereinafter referred to as the ROC) government has lost its standing to represent the sovereignty of China.

On October 24, 1945, when the United Nations was formally established, China was one of five Member States to become a founding and permanent member of the Security Council along with the United States, France, the United Kingdom, the Russian Federation, and China. Along with other Chinese delegates, the Communist Party of China representative Biwu Done (董必武) signed the UN Charter at its opening ceremony.[6]

On October 1, 1949, following the establishment of the PRC, Chairman Zedong Mao (毛泽东) publicly proclaimed the PRC as the sole legitimate government to represent the whole of China. Subsequently, on November 15 of the same year, Premier

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[4] See Restoration of the lawful rights of the People's Republic of China in the United Nations, UN. General Assembly (26thsess.: 1971), A/RES/2758(XXVI), https://www.un.org/chinese/ga/ares2758.html (accessed on March 2, 2023).

[5] See supra note 2, at 7.

[6] See China Institute of International Affairs, *Carnegie Endowment for International Peace: China and United Nations: Report of a Study Group Set Up*, Manhattan Publishing Company, p.39 (1959).

and Minister of Foreign Affairs Enlai Zhou (周恩来) made a call to Trygve Lie, Secretary-General of the United Nations, and Carlos Po Romulo, President of the Fourth Session of the UN General Assembly, on behalf of the PRC government. They requested the PRC replace the ROC seat in the United Nations, rendering the legitimacy of the ROC government in the UN Security Council denied.[7] However, these legitimacy requests were not fulfilled through the 1950s: starting in the early 1960s, an increasing number of Asian, African and Latin American countries began yearly petitions to the UN General Assembly demanding the restoration of China's lawful seat in the United Nations.[8]

On July 15, 1971, the "Restoration of the lawful rights of the People's Republic of China in the United Nations" was placed on the provisional agenda of the 26th Session of the UN General Assembly.[9] Over the course of this session, 23 countries submitted a draft resolution to the General Assembly, requesting to restore all of the rights of the PRC and expel forthwith the representatives of Chiang Kai-shek.[10] In contrast, a group of 22 countries led by the United States submitted another draft Resolution saying that "any proposal to change the representation of China would be an important question under the UN Charter".[11] According to Article 18.3 of the UN Charter, an approval of a two-thirds majority vote is required for decisions on such "important questions". However, among nine of these questions defined in Article 18, only three are related to Member States; the "admission of new members to the United Nations", "suspension of the rights and privileges of membership", and "removal of members".[12] Of the questions, none are related to the representation of Member States. Considering that Draft Resolution A/L. 630 is concerned exclusively with "restoration", it did not imply a question of admission or removal of members. The vacating of the seat of Chiang Kai-shek clique was a legal, logical consequence of restoration of the lawful rights of the PRC. For this reason, Draft Resolution A/L. 632 regarding "important question[s]" submitted by the United States failed for adoption by a vote of 59 opposed, 55 in favor, and 15 abstentions. On the contrary, Draft Resolution A/L. 630—which proposed to restore all lawful rights of the PRC and to expel the representatives of Chiang Kai-shek from the place which they unlawfully occupy in the United Nations—was adopted by a vote of 76 to 35, with 17 abstentions.[13] In addition, the "Dual Representation Proposal" (A/L. 633), in which the United States attempted to create two Chinas, was aborted without further discussion amidst serious protests from the PRC government.[14] From the perspective of the United

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[7] See Zhaohui Jin, *ZHOU En-lai & China Resuming Its Lawful Seat in UN*, 58(5) Wuhan University Journal (Humanity Sciences) 599, 599-600 (2006).

[8] See Qinhua Yang, *The Authority of UN Resolution 2758 Cannot be Challenged*, 28(70) China Today, 2021.

[9] See 26 U.N. GAOR Annex, Agenda Item 93at 1-7, A/8392 (July 15, 1971).

[10] See U.N. Doc. A/L. 630 (September 25, 1971) and Add. 1 (September 19, 1971) and Add. 2 (October 19, 1971).

[11] See U.N. Doc. A/L. 632 (September 29, 1971) and Add. 1 (October 7, 1971) and Add. 2 (October 12, 1971).

[12] See Article 18, the Charter of the United Nations.

[13] See Office of Public Information United Nations, Yearbook of the United Nations, 1971, Volume 25, p.132.

[14] See Xiaohong Yuan, American Policy towards China and the Restoration of China's Representation in the United Nations, 175(3) Seeking 215, 215 (2007).

Nations, the expulsion of Chiang Kai-shek's representative was tantamount to the expulsion of the ROC representative. This showed that UN Resolution 2758 determined the ROC government was no longer qualified to represent the sovereignty of China.

Furthermore, in the General Assembly Official Records of the plenary meeting, President Adam Malik made the following statement: "[W]e have always consistently opposed any unlawful action in respect of the Chinese island of Taiwan, any deprivation of the People's Republic of China of its legitimate rights in the United Nations, the concept of 'two Chinas' and any notion of a 'dual representation of China'. This is our position of principle, and we shall uphold it at this session of the General Assembly".[15] This is additional solid proof that UN Resolution 2758 was made in recognition of the "One China" Principle.

3. The Historical and Legal Basis of the "One China" Principle

The Glaser Report asserted, "[c]rucially, UN Resolution 2758 does not present an institutional position on the status of Taiwan… the PRC spreads the fallacy that, through the resolution, UN Member States came to a determination that Taiwan is a part of the PRC."[16] To address this argument, it is necessary to examine both (1) the historical fact that Taiwan is an inherent territory of China, and (2) the legal basis for the assertion that "Taiwan is a part of the People's Republic of China". Such an analysis is intended to demonstrate that the validity of the "One China" Principle is not solely dependent on UN Resolution 2758 but is also substantiated by objective historical facts and has gained widespread international support.

3.1 Taiwan Has Been an Inherent Territory of China Since Ancient Times

3.1.1 Taiwan came under China's spheres of influence in the early 17th century

The Chinese system of periodization shall be referenced to establish an appropriate definition of "ancient times". According to the prevailing scholarly view in Chinese Mainland, the country's ancient history can be divided into three stages: primitive society, slave society, and feudal society. The First Opium War represented a turning point in Chinese history, with the country shifting from an independent feudal society to a semi-colonial and semi-feudal society.[17] Within this system of periodization, "ancient time" refers to the time period before 1840, or the First Opium War.[18] Hence, it is not necessary to go very far back in history to prove Taiwan has been China's inherent territory since ancient times—sufficient evidence can be established by demonstrating

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[15] See General Assembly official records, 26th session: 1942nd plenary meeting, p.11, https://digitallibrary.un.org/record/720389 (accessed on March 2, 2023).

[16] See supra note 5, at 5.

[17] See Hu Cheng, *Globalization and National Sovereignty: Comparative Analysis*, Tsinghua University Press, pp.103-104 (2003).

[18] See generally Tingfu Jiang, *Modern History of China 1840-1937,* Jiangsu People's Publishing House, p.1 (2019); See also Chinese Historical Chronology, http://www.gov.cn/test/2005-07/27/content_17445.htm (accessed on March 2, 2023).

China's effective occupation over Taiwan prior to the modern historical period (i.e., before 1840).[19]

Long before Dutch and Spanish settlers occupied Taiwan, Taiwan and Penghu were within China's spheres of influence—those lands "exclusively reserved for future occupation" by a State that "has effectively occupied adjoining territories"—and consequently subject to its government jurisdiction.[20] In 1561, in Volume 8 of Miscellaneous Writings from Kaiyang Zheng specifically marked Taiwan under the name as "Xiao Liuqiu" in the Coastal Defense Map (*万里海防图*).[21]

In the winter of 1602, Japanese pirates reoccupied Taiwan's west coast for more than three months, plundering the area and making life difficult for its merchants and fishermen. When the provincial governor ordered the Ming General Yourong Shen (沈有容) to conquer the Japanese pirates in Taiwan, Yourong led a punitive expedition against Japanese pirates and recaptured Tayouan in 1603 (Anping, Tainan), destroying six of their vessels and rescuing more than 300 fishermen, the third battle in which the Ming forces defended Taiwan. From that point forward, peace was maintained in that area for decades.[22] In 1617, Japanese pirates returned to Taiwan and the Ming forces pursued them until Jhuchan, an old harbor of today's Hsinchu, the fourth battle of the Ming forces to defend Taiwan. After the multiple battles led by the Ming forces, conflicts with Japanese pirates in Taiwan finally ended in 1636.[23]

The aforementioned historical facts indicate that the Ming government had regular enforcement activities in Taiwan and Penghu, which can be regarded as the use of administration power over the islands. It is hence self-evident that Taiwan fell within China's spheres of influence early on.

3.1.2 Chenggong Zheng recaptured Taiwan on behalf of the Ming Dynasty

In 1624, the southwest part of Taiwan was occupied by the Dutch East India Company. By 1642, the Dutch defeated and expelled the Spanish forces in the northern part of Taiwan, thereby unifying both the northern and southern parts of Taiwan (though excluding the central part).

Some scholars argue that the act of the Dutch East India Company was authorized by the Dutch government, making it an act of "occupation".[24] Under international law, "occupation" refers to an act by which a State "intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another [s]tate".[25] For an act by a State to amount to occupation, it must align with the principle of effective

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[19] See Jianqiang Guan, *Unsolved Issues from the Sino-Japanese War and International Law*, Law Press, p.436 (2016).

[20] See Lassa Oppenheim, *International Law, A Treatise, Volume 1 (of 2)Peace*, Green and Company, p.298 (1992).

[21] See Hailin Zheng, *The Diaoyu Dao Islands: A Historical and Legal Study from a Chinese Perspective*, Publishing House of China, p.48 (2007).

[22] See Jialin Qi, *History of Taiwan*, Hainan Publishing House, p.8 (2011).

[23] See Chengyi Yuan and Zhikun Qian, eds. *Taiwan before 1949*, Zhejiang University Press, p.39 (2006).

[24] See Tonio Andrade*, The Rise and Fall of Dutch Taiwan, 1624-1662: Cooperative Colonization and the Statist Model of European Expansion,* 17 Journal of World History 429, 435-442 (2006).

[25] See supra note 20, at 292-293.

occupation,[26] which mandates a sovereign State to exercise effective possession and administration on terra nullius. Sovereignty and State power should exist continuously and smoothly for a reasonable period, even in the case of disputes.[27] However, Dutch jurisdiction over the northern and southern parts of Taiwan only lasted for 38 years. Prior to 1648, the Dutch were under the rule of the Habsburgs, the Holy Roman Empire, and then Spain.

In 1568, Dutch independence fighters fought against the Spanish in the Eighty Years' War. In 1581, United Provinces of the Netherlands declare independence, but the war lasted until the Spanish Monarchy signed the Peace of Münster in 1648, recognizing the Dutch Republic.[28] Accordingly, before then, the Dutch government was a non-state belligerent group in the sense of international law, and was not qualified to authorize the Dutch East India Company to exercise public power. This is exactly the reason why the Tokugawa shogunate did not recognize Dutch governance in Taiwan, despite the Dutch declaring its occupation. From the shogunate's perspective, no political entity honored by international law existed on the island.[29]

In brief, the Dutch occupation of Taiwan failed to satisfy the requirements of effective occupation in light of international law for the following reasons: (1) at the time, the Dutch had not yet been qualified for possession and administration, as it would not be a State until 1648; (2) the possession was short-lived, as Dutch control over parts of Taiwan only lasted 38 years; (3) the Dutch power of administration obviously fell short of exclusion and effectiveness; and (4) the Dutch government was unable to maintain the stability in governance during conflict. In other words, Taiwan was still terra nullius at that time, despite the fact that it was de facto occupied by the Dutch for years.

In 1662, Chenggong Zheng (郑成功) led his troops to expel the Dutch from Taiwan. Such an act cannot constitute a conquest in international law, which is defined as the military occupation of an enemy's territory in wartime (i.e., the acquisition of another State's territory by force and annexation).[30] Chenggong, who was appointed as the Duke of Yanping (延平君王) by the last emperor of the Southern Ming (Yongli Emperor, 永历帝),[31] never established an independent state separate from the Ming government—considering that he did not proclaim himself emperor after recovering Taiwan and Penghu. Instead, he pledged allegiance to the Ming Dynasty by using the slogan [Chinese meaning of 反清复明] to overthrow the Qing and restore the Ming." Accordingly, the expulsion of the Dutch and recovery of Taiwan can be considered an act of the Ming government. With an effective occupation over Taiwan, the Southern Ming Dynasty—a failing government—reestablished its power in Taiwan. In 1683, the Qing Dynasty annihilated the last military base of the Southern Ming Dynasty in Taiwan and

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[26] See Tieya Wang ed., *International Law*, Law Press, p.236 (1995).
[27] See supra note 25, at 293-294.
[28] See Zhenghua Dong, The United Provinces of the Netherlands and the Rise of the Netherlands in the 17th Century, (4) Science and Modernization 53, 53(2007).
[29] See Adam Clulow, *The Company and the Shogun: The Dutch Encounter with Tokugawa Japan*, Columbia University Press, pp.226-228 (2014).
[30] See supra note 25, at 303-304.
[31] See Ming-minPengand Chiau-tong Ng, *Taiwan's Status in International Law,* Yushan Press, p.8 (1995).

Taiwan remained under Qing rule until 1895. The overthrow of the Ming Dynasty by the Qing Dynasty was an internal matter of government succession, as it was the overthrow of Han rule by ethnic minorities within China. After that, the Qing government exercised effective control over Taiwan for a prolonged period.

The term "inherent territory" is frequently used in claims regarding territorial disputes within Korean, Chinese, and Japanese texts.[32] According to international law, inherent territory is not land acquired by conquest, cession, prescription, sale, or exchange, but is: (1) land on which inhabitants have lived for many generations before the formation of a State, or (2) land a State has acquired of through terra nullius.[33] In the latter sense, such territory can be considered the inherent territory of the acquiring State. Taiwan has been under effective control of successive Chinese governments for 234 years, including the period when Chenggong Zheng controlled Taiwan on behalf of the Southern Ming Dynasty. Although the cession of Taiwan to Japan by the Treaty of Shimonoseki was tragic to the Chinese, it also represented Japan's recognition of the Qing government's sovereignty over Taiwan. As such, China has satisfied the legal requirements of occupation and exercised effective control over Taiwan through terra nullius. Even though Japan later occupied Taiwan for 50 years, the claim made by the Chinese government that Taiwan has been an inherent territory of China since ancient times remains indisputable.

3.2 How to Interpret "Taiwan Is Part of the People's Republic of China"

Towards the end of October 1992, the mainland-based Association for Relations Across the Taiwan Straits (hereinafter referred to as the ARATS) and Taiwan's Straits Exchange Foundation (hereinafter referred to as the SEF) conducted talks in Chinese Hong Kong. A month later on November 3, the SEF issued a press release and simultaneously sent a fax to the ARATS outlining its stance on the "One China" Principle. The statement declared that "having obtained the approval of the competent authorities, we accept that each side can have its own verbal interpretation regarding the 'One China' Principle". The ARATS responded via fax, stating that it fully respected and accepted the SEF's proposal. As Taiwan's former regional leader, Ma Ying-jeou cited the SEF's press release and the ARATS' fax as concrete evidence of the existence of the "1992 Consensus".[34] This consensus was reached after working talks finally reached an agreement, whereby each side expressed a joint understanding that adhered to the "One China" Principle, though the matter of interpreting "One China" unaddressed.

The "One China" Principle implies both Chinese Mainland and Taiwan belong to the same sovereign State, referred to as China, with the ROC and the PRC being its distinct dynasties. Considering the fact that the PRC is now the lawful government representing

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[32] See Ethan Yorgason, *International Political Implications of Language: The Linguistic Puzzle of "Inherent Territory"*, 16(3) The Korean Journal of International Studies 435, 435 (2018).

[33] See Jianqiang Guan, *Territorial and Sovereign Disputes over the Diaoyu Islands under the Scrutiny of International Law*, 30(12) Social Sciences in China 128, 128 (2012).

[34] See Daling Zhang, *Revealing the Truth of Debate Over the 1992 Consensus*, 15(9) Relations Across Taiwan Straits 16, 16 (2011).

China, Taiwan is considered part of the PRC. Historically, Taiwan belonged to China and was ceded to Japan as a result of the defeat in the First Sino-Japanese War. However, the Cairo Declaration imposed specific obligations on Japan to restore the Manchuria, Formosa, and the Pescadores to "the Republic of China"—obligations that were reaffirmed by the subsequent Potsdam Proclamation and the Japanese Instrument of Surrender. Accordingly, the statement "Taiwan is a part of China" is not particularly controversial, but the expression "Taiwan is a part of the People's Republic of China" was challenged by the Glaser Report. The following section will provide an analysis from various perspectives, including the etymology of China and government succession, to establish the legitimacy of the claim as "Taiwan is a part of the People's Republic of China".

3.2.1 "China" is an abbreviation of the State that includes the two sides across the Taiwan straits

Some scholars supporting "Taiwan independence" dispute the etymology of the word "China", originally derived from the pronunciation of the name of the "Qin Empire (秦)".[35] In Mandarin, "China (中国)" is pronounced as "Zhongguo", which means "Central State" or "Middle Kingdom". In ancient times, people inhabiting the Yellow River Basin believed that they lived in the center of the earth. Historically speaking, "China" is not the name of a particular country,[36] but rather the dynasties of Chinese history have all claimed to be "China".

With the introduction of international law, "China" has become a commonly accepted name within the global community. In the Treaty of Nanking signed in 1842, "China" was cited in several cases, such as in the agreement that "[m]erchandise may be conveyed by Chinese Merchants, to any Province or City in the interior of the Empire of 'China' and in any part of the Chinese Empire".[37] In the 1689 Treaty of Nerchinsk, the term "the Great Emperor of China" was used to refer to the Qing Dynasty, which included the Mongolian region and northeastern China.[38] Following the 1911 Revolution (also known as the Xinhai Revolution), the Manchu-led Qing government went into demise. The ROC was later declared in Nanjing on January 1, 1912, inheriting the territory of China from the former Qing Dynasty. After World War II, the ROC became a founding member of the United Nations and a permanent member of the UN Security Council. The ROC government also accepted the return of Taiwan, Penghu, and the islands in the South China Sea. Since its establishment, the ROC has been referred to as "China" or "Zhonghua (中华)".[39] Despite the ROC government being exiled to Taiwan after the Chinese Civil War, it continued to consider itself the representative of "China"

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[35] See supra note 31, at 37.

[36] Id.

[37] See the Treaty of Nanking (1842) Article 8, Article 10.

[38] See Chi Leung Ng, *A View of China in Sixteenth Century Portugal*, Journal of Macau Studies, pp.24-42 (1996); The Treaty of Nerchinsk (1689).

[39] See "Calling China the Republic of China"; Nanxian Zhang, *The Revolution in Hubei*, Shanghai Publishing House (1946); Department of Modern Chinese History of Wuhan University, *Selected Historical Materials of the Xinhai Revolution in Hubei*, Hubei People's Publishing House, p.149 (1981).

and referred to itself as "Free China". The territory under its actual jurisdiction is accordingly referred to as the Tainan area, the Taiwan area, and the free area.

Similar to the practice of the ROC government in overthrowing the Manchu-led Qing government and inheriting its territory in its entirety, the Communist Party of China defeated the ROC Kuomintang (hereinafter referred to as the KMT) in Chinese civil war and exiled it to the island of Taiwan, resulting in a temporary halt to the conflict. Subsequent to its founding, the PRC become the legal successor of the ROC government and was entitled to inherit and assume its rights and obligations from the former ROC's rule under international law. Therefore, the PRC, as the legal representative of China's sovereign territory and its people, also utilized the term "China" as its abbreviation.

3.2.2 The Government of the People's Republic of China is the sole lawful representative of China's sovereignty

For the purpose of denying the PRC's standing as the lawful representative of "China", the Glaser Report distorts the issue of government succession arising from the overthrow of the ROC government, resulting in a disruption of the State from the Chinese people, into the issue of State succession following the cessation of a State.

At this point, it is necessary to clarify a difference between State and government succession. State succession takes place when there are territorial changes, like in the event of independence, merger, secession, or its dissolution.[40] Government succession occurs when an old government is replaced by a new government, while the territory and the sovereignty of the State remain unchanged. In the event that the old government is replaced by a new one, the sovereign rights of the former are transferred to the new.[41]

However, some scholars have argued that in the practice of international law, government succession generally occurs under the condition that the old government is completely overthrown. As such, the fact that the old ROC government was not completely eliminated during the Chinese Civil War may have led to an "incomplete succession of governments"; the old and new governments opted to coexist without the complete collapse of the former.[42] Nonetheless, Rousseau's idea of sovereignty in *the Social Contract* stated "[s]overeignty is indivisible...a will is either general, or it is not; it is the will of the body of the people, or of a part only. In the first case, this will, once declared, is an act of sovereignty and has legal authority. In the second, it is only a particular act of will, or an administrative decision; at most it is a decree".[43] From the perspective of international law, this statement can be interpreted to mean that a sovereign State can only be represented by one government—not both old and new ones. Chinese Mainland and Taiwan belong to the same sovereign territory of China; a notion rooted in historical facts as well as a consensus between the old and new governments. According to the principle of democratic constitutionalism, the legitimacy of a republican State's government is an internal matter and can only be determined by its people—its

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[40] See supra note 27, at 128.
[41] See Jianmin Cao, *International Public Law*, Law Press China, pp.93-95 (1998).
[42] See Chiyuki Mizukami, *International Law*, Fuma Shobō, p.46 (2002).
[43] See Jean-Jacques Rousseau, *The Social Contract, A New Translation by Christopher Betts*, Oxford University Press, p.64 (1994).

community of inhabitants. The legitimacy of the ROC government that once represented China was previously derived from the support of the Chinese people. However, after being defeated in the Chinese Civil War, it was overthrown and lost support. Consequently, it ceased to be the legal government and lost sovereign right over the territory. The PRC government, established in 1949, replaced the ROC government as the successor to hold sovereignty over China. Although the old government under Chiang Kai-shek was not completely eliminated and retreated to the island of Taiwan—part of China's territory—it cannot legally represent China based on the principle of popular sovereignty. Even though it obtained the support of the entire population of Taiwan island at that time, popular sovereignty stipulates that being considered as a legal government requires the support of at least the majority of the voting population with more than half of the citizens being entitled to vote. Taiwan has been integrated into China's territory through the persistent efforts of successive governments, which the Chinese people have made significant for generations. Thus, only the Chinese people as a whole are entitled to inherit the Taiwan's sovereignty. The authority to determine the legal status of Taiwan does not solely belong to the residents of Taiwan. Rather, all Chinese citizens, including those residing in Mainland China and Taiwan, should participate in the voting process. Consequently, the exiled ROC government lacks the legitimacy to act as China's government without the support of the mainland Chinese population and is therefore incapable of making decisions regarding the legal status of any of China's territory.

In accordance with Rousseau's idea of sovereignty, only one government is entitled to exercise power and carry out duties on behalf of a State. Currently, the new Chinese government remains in a State of Chinese Civil War with the old one, despite a military ceasefire. In the course of Chinese Civil War, it is possible for multiple governments to exist simultaneously, causing an anomalous circumstance that exists only during a period of transition. Whereas the ROC government under Chiang Kai-shek was not eliminated by the PRC government and retreated to Taiwan, both the ROC (the old government) and the PRC (the new government) have put forward claims to being the sole legitimate representative of China in the international community. Therefore, the UN General Assembly adopted UN Resolution 2758 with the objective of resolving the question of who has the right to represent China.

According to UN Resolution 2758, the PRC government is the only legitimate representative of China in the United Nations.[44] This recognition grants the PRC government the exclusive right to exercise political, military, diplomatic, and territorial sovereignty. After being overthrown by the PRC, the ROC retreated to the island of Taiwan and exercised territorial and personal jurisdiction over its inhabitants through actual control. However, with the establishment of the PRC, the exiled ROC completely lost its effective and actual control over Mainland China. This implies that without due authorization from the PRC government, the ROC government had no authority to claim sovereign rights pertaining to political, military, and diplomatic affairs on behalf of China. As such, "Taiwan is a part of the People's Republic of China" can be considered as an

[44] See Restoration of the lawful rights of the People's Republic of China in the United Nations, UN General Assembly (1971), A/RES/2758 (XXVI), https://digitallibrary.un.org/record/192054 (accessed on March 2, 2023).

interpretation of "Taiwan is a part of China". This statement is grounded in the doctrine of popular sovereignty, wherein the legal status of Taiwan as a part of China depends on the choice of the 1.4 billion Chinese people, including those in Taiwan. The legitimacy of the PRC as the new government representing China at the United Nations—the representative of all Chinese people—means that the PRC has the right to determine the legal status of any territory within China's sovereign lands. The PRC introduced in its 1978 Constitution the notion that "Taiwan is part of China", refining it in its 1982 Constitution to "Taiwan is part of the sacred territory of the People's Republic of China", and confirming the title of Taiwan's territory under the "One China" Principle.

The Glaser Report, however, distorts the issue of government succession—assuming the overthrow of the ROC government by the Chinese people was an issue of State succession. This report disregards historical fact and adopts a flawed theoretical foundation, as it views the Taiwan people as an exclusive entity with the authority to determine its legal status, while disregarding the rights of the mainland Chinese people. In light of this, it is evident that the arguments in the Glaser Report are characterized by a double standard and are devoid of an objective and rational perspective that is essential to academic research.

3.2.3 Taiwan cannot be regarded as sovereign State under international law

In terms of the qualifications in international law, a State must possess the following basic elements: a permanent population, a defined territory (though boundary delimitations are not necessary), a government with the entitlement of sovereignty, and the capacity to enter into relations with other states.[45] Taiwan does not meet the above-mentioned qualifications and thus cannot be considered a State. A new State can be created in the following circumstances based on the practice of international law: (1) merger of existing States into a new State; (2) secession or separation of part of a State; (3) dismemberment of an existing State; (4) decolonization.[46] The principle of popular sovereignty and the practices of international law shall be used to refer to the separation of part of a State. Typically, the pursuit of independence through the separation of a part of a State is frequently the outcome of political maneuvering. There exist two ways of achieving independence: (1) by peaceful means, with the permission of the ruling authority of the home country; (2) by non-peaceful means, that is by publicly declaring independence and enduring the ensuing civil war.[47] However, it is impossible to obtain the consent of the ruling authority of the home State regarding the claim of Taiwan's independence. In this context, unless "Taiwan independence" forces have the courage to declare independence and are able to survive until the mother State ceases to reclaim its territory through force, it will not be legally qualified to establish an independent State. Additionally, it is also worth emphasizing that the secession of "Taiwan independence" forces constitute a deviation from the collective will of the entire Chinese populace.

In the case of Taiwan, the exiled government did not attempt to declare

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[45] See Ian Brownlie, *Principles of Public International Law*, William Clowes & Sons Limited, p.74 (1979).
[46] See James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, p.409 (2019).
[47] See Salvatore Senese, *External and Internal Self-Determination*, Social Justice, p.19 (1989).

independence. The Constitution of the ROC enacted under Chiang Kai-shek in 1946 did not demonstrate any intention of pursuing independence; at the time of enactment, the PRC was not yet established, and the ROC government was the legitimate representative. As a result, the 1946 Constitution encompassed Mainland China and various islands (including Taiwan, Penghu, Kinmen and Matsu) within its territorial scope.[48] It even contains provisions on the rights and duties of people in Mongolia, Tibet, and the frontier regions.[49] Article 4 of the ROC Constitution stipulated that "[t]he territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly". To date, neither the KMT nor the Democratic Progressive Party (DPP) authorities have made any change to the territorial scope of the ROC Constitution and continue to use it as the legal basis of their governance, indicating that the Taiwan authorities maintain their claim to sovereignty over the entire territory of China. However, with the PRC's replacement of the ROC as the sole legitimate representative of China in the international community, the ROC no longer has the authority to exercise de facto sovereignty. Based on the fact that there has been no amendment to the ROC Constitution to support secession, nor any public declaration of independence, Taiwan authorities have made no attempt to pursue either secession or independence through the principle of self-determination. Although the DPP authorities under Chen Shui-bian's administration advocated that "the future of Taiwan should be decided upon Taiwanese self-determination", this was merely an ideological propaganda without any legal effect.

Furthermore, it should be noted that Taiwan does not constitute a political entity that can be subject to recognition by other States. Recognition is a crucial factor in the process of a new State gaining global presence and becoming a subject of international law. Without recognition, a new State cannot claim any right towards other States.[50] Recognition in international law occurs in two scenarios: (1) in which there is a change in territorial sovereignty resulting in the creation of a new state, and (2) in which there is a change in the government of the existing State, yet the territory remains unchanged. The former leads to recognition of a State, while the latter results in recognition of a government.[51] The overthrow of the ROC government under Chiang Kai-shek by the Chinese people was the outcome of a social revolution, which constitutes a change in the government of the State (the ROC as the predecessor and the PRC as the successor), rather than partial State separation. Nonetheless, Taiwan is not a political entity subject to recognition as a government. After the ROC government retreated to Taiwan, it only had jurisdiction over a small area of 36,000 square kilometers-0.375 percent of China's total territory. According to 1950 data from the Ministry of the Civil Affairs, the population of China (including Taiwan) was 483,869,678, with only approximate 8 million people under the jurisdiction of the Taiwan authorities, accounting for just 1.6 percent of the entire Chinese population. Since then, the ratio between Mainland China and Taiwan has

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[48] See Constitution of the Republic of China (Taiwan) (1947) (rev. 2005), The Additional Articles of the Constitution of the Republic of China, Article 10. "The same protection and assistance shall be given to the people of the Penghu, Kinmen, and Matsu areas."

[49] See Id. Article 26, Article 64, Article 91, Article 120, Article 163, Article 168, Article 169.

[50] See supra note 40, at 117.

[51] See supra note 45, at 90-91.

remained relatively consistent. To gain recognition as a new government, two prerequisites must be satisfied: (1) the government must exercise effective control over its sovereign territory, which means that it must have long-standing, de facto control over the majority of its territory and population; and (2) such effective control must be obtained in compliance with international law.[52] Under both the geographic area and population criteria, the Taiwan authorities do not satisfy the requirements for effective control under the theory of State recognition in international law.[53]

In light of the foregoing analysis, the statement "Taiwan is part of the People's Republic of China" is justified on the basis of the principle of popular sovereignty. The rule of recognition exists on a consensus reached by both governments old and new on the "One China" Principle. Meanwhile, the statement also reflects the position of the PRC government, which holds sovereignty over all of China's territory, and will not permit the separation of Taiwan. As the Glaser Report advocates that Taiwan is a sovereign State under international law, it misapprehends and violates relevant principles in international law.

3.3 The "One China" Principle Is Universally Accepted by the International Community

The Glaser Report fabricated that China used UN Resolution 2758 and bilateral normalization agreements with other Member States to falsely claim that its "One China" Principle is a universally accepted norm.[54] Such a perception is unsupported. It is an objective fact that the "One China" Principle has been generally accepted by the international community, with the term "generally" denoting the majority of countries rather than all. Furthermore, according to historical facts as well as the principles of sovereignty and non-intervention, the "One China" Principle deserves due respect from a logical and legal point of view. The UN General Assembly's adoption of UN Resolution 2758 exists through an overwhelming majority, which expelled the representatives of Chiang Kai-shek, effectively denying the ROC government the right to represent the sovereign State of China. Beyond this, there is no more logical explanation. In addition, the "Dual Representation Proposal" (A/L. 633) submitted by 19 countries (including the United States, Japan, New Zealand and others) was not brought to a vote, indicating that most of Member States of the United Nations are well aware of the truth of Taiwan's legal status.

The PRC government, upon establishment, has consistently declined to maintain diplomatic ties with any country that recognizes the ROC. This approach has developed a set of well-known principles that underlie diplomatic relations with the PRC. They assert that the establishment of formal diplomatic relationships with the PRC is based on three general concepts: (1) there is but one China in the world; (2) the PRC government is the sole legitimate government representing China; (3) Taiwan is a part of China's territory.

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[52] See Hersch Lauterpacht, *Recognition of Governments: I*, 45 Columbia Law Review 815, 825-826 (1945).

[53] See Jianqiang Guan, *Fairness, Justice, and Dignity: The Legal Basis for Chinese War Victims' Claims Against Japan*, Shanghai People's Publishing House, p.214 (2006).

[54] See supra note 16.

As of March 2023, 181 countries have established formal diplomatic relations with the PRC on the basis of such understanding,[55] with most of them expressing their adherence to the "One China" Principle in the Joint Communiqués on the Establishment of Diplomatic Relations. The recognition of a government or a State under international law is no legal duty but rather an optional and political act.[56] The PRC government never forced any of the 181 countries to establish diplomatic relations with itself as China's new government, but only required States to be willing to establish formal diplomatic relations with the PRC—and avoiding so-called "diplomatic relations" with the ROC. Likewise, the ROC government will not establish relations with any State that holds diplomatic relations with the PRC. Currently, only 13 United Nations member states and the Holy See maintain official diplomatic relations with the ROC.[57]

Prior to the outbreak of the Korean War, the United States publicly recognized the "One China" Principle. In a press conference held on January 5, 1950, President Truman declared that "Japan must restore territories it had stolen from China, such as Formosa (Taiwan) to the Republic of China, according to the Cairo Declaration. The United States was a signatory to the Potsdam Proclamation of July 26, 1945, which declared that the terms of the Cairo Declaration should be carried out. The provisions of this declaration were accepted by Japan at the time of its surrender. In keeping with these declarations, Formosa (Taiwan) was surrendered to Generalissimo Chiang Kai-shek, and for the past four years the United States and other Allied Powers have accepted the exercise of Chinese authority over the island." He further stated, "[t]raditional United States policy towards China…called for international respect for the territorial integrity of China…The United States has no predatory designs on Formosa (Taiwan), or any other Chinese territory…The United States government will not pursue a course which will lead to involvement in the civil conflict in China."[58] President Truman's statement implied that, at the very least, the United States recognized the historical reality that Taiwan has been restored to China, thereby indicating that the United States recognized "Taiwan as the territory of China".

The position of United States is further stated in the 1972 *Shanghai Communiqué* as follows: "[t]he United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position."[59] This statement confirms the fact that there is only one China, that Taiwan belongs to China, and China's sovereignty over

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[55] See Summary of Dates of Establishment of Diplomatic Relations with the People's Republic of China, Official website of the PRC Ministry of Foreign Affairs, https://www.fmprc.gov.cn/web/ziliao_674904/2193_674977/200812/t20081221_9284708.shtml (accessed on March 2, 2023).

[56] See supra note 51, at 94.

[57] As of March 2, 2023, the ROC's diplomatic relations include four countries in the Asia-Pacific region: Palau, Marshall Islands, Nonu, and Tuvalu; eight countries in Latin America and the Caribbean: Honduras, Guatemala, Belize, Haiti, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, and Paraguay; Swaziland in Africa; and the Vatican in Europe.

[58] See Statement by the President on U.S. Policy with Respect to Formosa, The President's News Conference of January 5, 1950, Public Papers of the Presidents of the United States: Harry S. Truman, Government Printing Office, pp.11-12 (1950).

[59] See Joint Communiqué of the United States of America and the People's Republic of China (Shanghai Communiqué) (February 27, 1972).

Taiwan. Against this backdrop, the United States made a similar statement in the 1979 Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, which reads, "[t]he United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan." It further states that "the Government of the United States of America acknowledges the Chinese position that there is, but one China and Taiwan is part of China."[60]

The statements in the 1972 Shanghai Communiqué as well as 1979 Joint Communique on the Establishment of Diplomatic Relations, regardless using the wording as "acknowledge" or "recognize", represent a de jure recognition of the "One China" Principle by the United States and thus irrevocable. In short, the statement of the "One China" Principle is a universally accepted norm is supported by historical facts and other countries' practices, making it an undeniable statement.

4. Critique of "Theory of the Undetermined Sovereignty of Taiwan" and Its Derivative Theories

In addition to disputing the affirmation of the "One China" Principle at the United Nations level, the Glaser Report contends that UN Resolution 2758 actually reflects the One China policy—acknowledging the position that Taiwan is part of China but does not accept PRC claims to sovereignty.[61] This policy, in turn, is based on the "Theory of the Undetermined Sovereignty of Taiwan", a long-held stance by the United States. The following section of this critique will thoroughly examine and challenge the "Theory of the Undetermined Sovereignty of Taiwan" and its derivative theories. It will demonstrate that this policy lacks a fundamental legal basis and emphasize that UN Resolution 2758, which was adopted by the majority of United Nations Member States, will not legalize a policy that is grounded in an erroneous interpretation of international law.

4.1 Background of the Theory of the Undetermined Sovereignty of Taiwan

After the outbreak of the Korean War, the United States made a dramatic shift in its position on the Taiwan question. Departing from its previous 'no challenge' approach, President Truman made the statement on June 27, 1950: "[t]he determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations."[62] On September 5, 1951, the members of the Allied Powers in World War II, led by the United Kingdom and the United States, held a peace conference with Japan in San Francisco. However, Chinese

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[60] See Joint Communiqué on the Establishment of Diplomatic Relations between the People's Republic of China and the United States of America (December 16, 1978).

[61] See supra note 54, at 7.

[62] See Harry S. Truman, *Statement by the President on the Situation in Korea, National Archives*, https://www.trumanlibrary.gov/library/public-papers/173/statement-president-situation-korea (accessed on March 2, 2023).

representatives were excluded from the peace conference with Japan. By the signing of the Treaty of San Francisco, the provision related to the restoration of Chinese territory that was confirmed in the Japanese Instrument of Surrender was intentionally abandoned by the western countries led by United States. Instead, Article 2(2) of the Treaty of San Francisco reads: "Japan renounces all right, title and claim to Formosa and the Pescadores."[63] Thereafter, on April 28, 1952, the ROC government, on behalf of China, signed the Treaty of Peace between the Republic of China and Japan (Treaty of Taipei). The Treaty of Taipei was the reaffirmation of Article 2(2) of the Treaty of San Francisco with respect to China's territorial issue. Thus, the emergence of the "Theory of the Undetermined Sovereignty of Taiwan" can be traced back to that period.

Since the sovereignty of Taiwan was not explicitly stated in the context of the Treaty of San Francisco and the Treaty of Taipei, some Taiwanese scholars have argued that Taiwan was theoretically still terra nullius at that time—belonging to the people of Taiwan, instead of China.[64] According to the KMT think tank, as Japan renounced its sovereignty of Taiwan in the Treaty of San Francisco and did not specify the State to which Taiwan's sovereignty would be transferred (returned), it made Taiwan terra nullius again. The ROC government under KMT authorities accepted the return of Taiwan after the war, whereby it gained de facto sovereignty over the occupation of Taiwan.[65]

Not content with the "Theory of the Undetermined Sovereignty of Taiwan", advocates of "Taiwan independence" turned to attack the legal validity of *the Cairo Declaration* and *the Potsdam Proclamation* to fully eliminate theoretical obstacles to "Taiwan independence". Peng Ming-min, a scholar who advocates "Taiwan independence", asserted in his book *Taiwan's Status in International Law (臺灣在國際法上的地位)* that the Cairo Declaration, the Potsdam Proclamation, and the Declaration by United Nations are not treaties. He alleged that the contents in the declarations, even with highly important elements, do not create any right or obligation for other States.[66] However, proponents of these theories, including Peng Ming-min, apparently fail to understand the nature of a treaty and its binding force upon the Contracting States.

4.2 The Undeniable Binding Force of the Cairo Declaration and the Potsdam Proclamation

The Cairo Declaration is the common name for the press communiqué issued on December 1 1943, following a meeting between President Franklin Roosevelt of the United States, Chairman Chiang Kai-shek of the National Council of the ROC, and Prime Minister Winston Churchill of the United Kingdom. It was signed in Cairo, Egypt, from November 23 to November 27, 1943, during World War II. Although the press

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[63] Pescadores, also called Penghu Islands by Chinese people.

[64] See Cheng-jung Lin, *The San Francisco Peace Treaty and the lack of conclusions on Taiwan's international status*, Taiwan Historical Association, http://www.twhistory.org.tw/20010910.htm (accessed on March 2, 2023).

[65] See Hung-dah Chiu, *The Legal Status of the One China Principle in Taiwan*, 11(4) Modern China Studies 1, 1 (2000).

[66] See Ming-min Peng and Chiau-tong Ng, *Taiwan's Status in International Law*, Yushan Press, p.128 (1995).

communiqué drawn up at the Cairo Conference was left unsigned, on the day after the Cairo Conference (November 30, 1943), Roosevelt and Churchill went to Tehran to meet with Stalin.[67] During this meeting, Stalin stated that he "thoroughly" approved "the communiqué and all its contents". He further affirmed that "it was right that Korea should be independent, and that Manchuria, Formosa and Pescadores Islands (Penghu) should be returned to China". On the following day, the ROC, the United States and United Kingdom issued an official press communiqué, which is commonly referred to as the Cairo Declaration.[68]

As defined by renowned international jurist Lassa Oppenheim, treaties are "conventions or contracts between two or more States concerning various matters of interest".[69] Article 2(1)(a) of the Vienna Convention on the Law of Treaties (hereinafter referred to as the VCLT) states a treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[70] Hence, the validity of a treaty depends on the voluntary acceptance of its terms by the involved parties. According to Article 35 of the VCLT, an obligation arises for a third State from a provision of a treaty; if the parties to the treaty intend the provision to be the means of establishing the obligation, the third State must expressly accept that obligation in writing. Certainly, the initial Cairo Declaration did not constitute any legally binding force on Japan—Japan as a third State—but considering that the Potsdam Proclamation stipulated that the provisions in the Cairo Declaration had to be implemented, and along with the written commitment made by Japan in the Japanese Instrument of Surrender, Japan had expressly and unconditionally accepted the provisions in the Potsdam Proclamation. Through voluntary acceptance, Japan was no longer a third State, but a party to the Cairo Declaration and the Potsdam Proclamation. As such, the obligation under the two treaties were accordingly imposed on Japan.

The Cairo Declaration imposed specific obligations on Japan as restoring the Manchuria, Formosa, and the Pescadores to "the Republic of China". This obligation can be interpreted in two approaches. First, the Cairo Declaration was released on December 1, 1943. At that time, the ROC was still the lawful representative of China's sovereignty—making "the Republic of China", at the time, equivalent to China. Second, by stating that "all the territories Japan has stolen from the Chinese", the text's definition of the Japanese occupation of Chinese territory renders the Treaty of Shimonoseki invalid. As a result, it challenges that the Treaty of Shimonoseki had any legal binding force from the outset. Accordingly, the sovereignty of the stolen territories remained the status quo before the signing of the Treaty of Shimonoseki, which belongs to the Qing government—collapsed by then—or its successive government. Based on similar

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[67] Foreign Relations of the United States Diplomatic Papers, The Conferences at Cairo and Tehran, p.448 (1943).

[68] See Linghui Li, *The Three Great Allies Meetings in World War II, the Venue of Which was All Set by the Soviet Union*, People's Daily, May 11, 2005.

[69] See Lassa Oppenheim and Hersch Lauterpacht, *Oppenheim's International Law. Two Volumes. V.2*, Translated by Wang Tieya and Chen Tiqiang, The Commercial Press, p.540 (1981).

[70] See Article 2(1)(a) of Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLT) (1986).

reasoning, the Potsdam Proclamation also has a legally binding effect on Japan, and detailed context will not be repeated here due to space limitations. According to the contents of the Cairo Declaration and the Potsdam Proclamation, the provisions created obligations for Japan that are the ones that are created as obligations for a third State. However, subject to express acceptance made by Japan through the Japanese Instrument of Surrender, these obligations hereby become binding under international law. Therefore, from historical facts and doctrine of international law, the legal status of Taiwan as a territory of China is more than clear.

In summary, historical facts and doctrines of international law jointly demonstrated that the Cairo Declaration and the Potsdam Proclamation have undeniable binding forces on Japan. Japan was thus under the obligation to return Manchuria, Formosa, and the Pescadores to the Republic of China, the legitimate representative of China at that time.

4.3 The PRC Government Is Not Bound by the Treaty of San Francisco or the Treaty of Taipei

4.3.1 The Treaty of San Francisco is not binding on the PRC Government

Against the backdrop of the Cold War following the outbreak of the Korean War. in September 1951 neither the ROC nor the PRC were invited to the San Francisco Peace Conference—a manipulation by the United States which was considered unjustified. On January 1, 1942, a group of 26 countries that declared war against Germany, Japan, and Italy signed the Declaration by United Nations in Washington, D.C. This declaration affirmed that each government would pledge itself to employ all their resources in the war against the Axis powers and would not seek to negotiate a separate peace.[71] On one hand, the binding effect of the Declaration by United Nations on each of the Allied countries is undeniable. When the United States acted to conclude a separate peace treaty with Japan without the consent of some of the previous contracting parties, it was in violation of the treaty obligations under the Declaration by United Nations.[72] In such a scenario, the Chinese government should have had every right to hold the United States accountable. On the other hand, according to the well-recognized principle of "a treaty created no obligations without the third party's consent"—which can be traced back to the Roman law principle *pacta tertiis nec nocent nec prosunt*—a treaty can only be enforcing on the contracting parties and cannot bind on a third State unless it has gained its written consent.[73] In terms of both its contracting procedures and substantive content, the Treaty of San Francisco is incompatible with the treaty law. By signing it, the United States- and British-led Allied Powers were in violation of their commitment in the Declaration by United Nations. Meanwhile, Japan also breached its commitment in the Japanese Instrument of Surrender and illegally disposed of the territory of a third State

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[71] See Declaration by United Nations, signed by 47 national governments between 1942 and 1945.

[72] On September 8, 1951, representatives of 48 nations signed the Treaty of San Francisco at the War Memorial Opera House in San Francisco, California, United States, to re-establish peaceful relations with Japan.

[73] supra note 50, at 564.

(China). Those wrongful acts lack a legal basis, and therefore cannot have binding effects on China.

However, some scholars supporting "Taiwan independence" have argued that the Treaty of San Francisco should be given precedence over the Japanese Instrument of Surrender; citing differences in the texts of two successive declarations on the same issue, such as the fact that the Treaty of San Francisco was signed later. This viewpoint is a blatant deviation from the spirit of the VCLT regarding the application of successive treaties on the same matter. Article 30(3) of the VCLT provides that when all the parties to the earlier treaty are also parties to the later treaty, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. Despite the fact that the Treaty of San Francisco was signed later than the Japanese Instrument of Surrender, its parties did not correspond to those of the former one. Therefore, the Treaty of San Francisco has no priority as the conditions specified in Article 30(3) of the VCLT cannot be satisfied. Moreover, as for the Treaty of San Francisco per se, even though it was adopted by Japan as the principles for post-war arrangements with other countries, China is not bound by it since the treaty was intended to impose obligations on a third State. China has never given its written consent to be bound; none of its obligations can be legally imposed.

4.3.2 The treaty of Taipei is illegal and invalid

Due to the international challenges the Taiwan authorities faced at that time; they were forced to comply with the orders of the United States. Hence, on April 8, 1952, Taiwanese authorities and the Japanese government signed the Treaty of Peace between the ROC and Japan (hereinafter referred to as the Treaty of Taipei).[74] In terms of the issue of restoring the territories of Taiwan and Penghu, the Treaty of Taipei copied the template of the Treaty of San Francisco. However, it is worth noting that by 1952, the ROC government had already been overthrown and had retreated to Taiwan. Accordingly, when the Treaty of Taipei was signed and sought to dispose of the interests of the Chinese people, the ROC had already lost its sovereignty over China's territory and was no longer qualified to sign such a treaty. Even the Japanese government had noticed the ROC's lack of effective control over Chinese Mainland when the Treaty of Taipei was signed. For this reason, a supplementary statement was made in the Annex Protocol to the Treaty of Taipei: item 1(a) of the Annex Protocol states, "[w]herever a period is stipulated in the San Francisco Treaty during which Japan assumes an obligation or undertaking, such period shall, in respect of any part of the territories of the Republic of China, commence immediately when the present Treaty becomes applicable to such part of the territories." Considering the fact that the ROC government under Chiang Kai-shek has no effective control over the entire China's territory, the binding effect of the Treaty of Taipei on Mainland China was further dealt with by the exchange of notes on the same date. The exchange of notes (No. 1) reads, "…the terms of the present Treaty shall, in

[74] See Article 3, Treaty of Peace between the Republic of China and Japan (Treaty of Taipei) (April 28, 1952).

respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be, under the control of its Government".[75]

Generally speaking, a treaty is binding upon each party in respect of its entire territory unless otherwise stated.[76] However, a peace treaty aimed at formally ending a state of war between parties becomes effective for the entire territory. Considering the fact that the Sino-Japanese War was a war between two countries, this peace treaty could only speak on the basis of the entire territory of the two countries. In cases where the effect of the peace treaty is only binding on a part of the territory and inhabitants of a country, such a "peace treaty" cannot be regarded as legally ending the war throughout the entire territory of the contracting parties.

After the conclusion of the Treaty of Taipei, uncertainty remained over whether ending the state of war would apply to the entire territory of China. As a party to the treaty, the Japanese government's position on this issue was also unclear. During the morning session of the Japanese National Diet on December 14, 1970, Prime Minister Eisaku Satōmade the statement suggesting that the Treaty of Taipei did not necessarily put an end to the state of war between Japan and China which he later retracted in the afternoon.[77] This indicates that the Japanese government itself was uncertain about the legal effect of the Treaty of Taipei. According to the exchange of notes associated with the treaty, the territorial scope of the treaty remained unspecified. Therefore, the Treaty of Taipei is an invalid one inconsistent with the fundamental nature of a peace treaty.

In December 1950, upon the conclusion of the Treaty of Taipei, Premier Enlai Zhou made a statement declaring that "the PRC government is the sole legal government of China and is entitled with the right to make peace with Japan. The ROC government under the KMT has no authority to represent China." The conclusion of the Treaty of Taipei incited strong opposition from the Chinese people and on May 5, 1952, one week after the signing of the Treaty of Taipei, Premier Enlai Zhou made a solemn statement on behalf of the PRC government firmly rejecting the Treaty of San Francisco and the Treaty of Taipei.[78]

It can be concluded that the conclusion of the Treaty of Taipei was an illegal attempt by the ROC government to dispose of the interest of the entire China beyond its authority. Consequently, the provisions of the Treaty of Taipei were invalid from inception.

4.3.3 The Japan–China Joint Communiqué Acknowledged the Invalidity of the Treaty of Taipei

On September 25, 1972, Japanese Prime Minister Kakuei Tanaka led a delegation to China. The PRC and Japanese governments later issued the Japan-China Joint Communiqué on September 29.[79]

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[75] See The Ministry of Foreign Affairs of the Republic of China (Ed.), *Chinese and Foreign Treaty Compilation*, Taiwan Commercial Press, pp.248-255 (1958).

[76] See Article 29, Vienna Convention on the Law of Treaties (May 23, 1969).

[77] See Japan Federation of Bar Associations, *Japan's World War II Reparations*, Akashishoten, p.172 (1994).

[78] Id, at 173.

[79] See Joint Communique of the Government of Japan and the Government of the People's Republic of China (September 29, 1972).

In April 2001, Japan implemented the Information Disclosure Law, which allowed diplomatic documents to be made public, including the Japanese Ministry of Foreign Affairs documents reflecting the outline of the meetings between Prime Minister Tanaka, Minister for Foreign Affairs Ohhira, and Premier Enlai Zhou in 1972, as well as the transcript of the confidential meeting between Chairman of the Kōmeitō Party Yoshikatsu Takeir and Premier Zhou Enlai.[80]

The official version of the Japan-China Joint Communiqué expressed the Three Principles for the Restoration of Relations in the following manner: The first principle declares the PRC government as the sole legal government of China, and this principle is reflected in Article 2 of the Japan-China Joint Communiqué, thereby resolving any potential disputes between China and Japan. The second principle asserts that Taiwan, which has been restored to China by Japan, is an inalienable part of the territory of the PRC, thereby making the Taiwan question an internal affair of China. This principle is stated in Article 3 in the Japan-China Joint Communiqué, which reads: "The Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan fully understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation". Although the Japanese government merely states that it "fully understands and respects" the "One China" Principle, Article 8 of the Potsdam Proclamation has clearly stated that "the terms of the Cairo Declaration shall be carried out ..." According to one of the conditions of the Cairo Declaration, (the purpose of the three Allies is) ..... that all the territories Japan has stolen from the Chinese, such as the Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. The third principle contends that *the Treaty of Taipei was illegal, n*ull and void, and must be abrogated. Even though there was no specific clause in *the* Japan-China Joint Communiqué that elaborates on this principle, the preamble of the Communiqué and Article 3 "[t]he Government of Japan…firmly maintains its stand under Article 8 of the Postsdam Proclamation" already clearly indicated that the PRC government and Japanese governments had reached a consensus in the Communiqué that the Treaty of Taipei was null and void. Furthermore, the ROC government already had the de facto recovery of Taiwan and Penghu as early as October 25, 1945.[81] In the Japan-China Joint Communiqué, the Japanese government recognized in a legal document that Japan had returned Taiwan and Penghu to China. At this point, the principle that Taiwan is the territory of China, or that the two sides across the Taiwan Straits belong to the same China, are not only binding on Japan but is also affirms Taiwan's legal status to the other countries in the international community.

5. Conclusion

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[80] See Akira Ishii and Jianrong Zhu, *Records and Proofs: Normalization of Japan-China Diplomatic Relations - Negotiations for the Conclusion of the Treaty of Peace and Friendship*, Iwanami Shoten, p.42 (2003).

[81] On October 25, 1945, General Rikichi Andō, governor-general of Taiwan and commander-in-chief of all Japanese forces on the island, signed an instrument of surrender and handed it over to Governor-General of Taiwan Chen Yi, representing the Republic of China Armed Forces to complete the official turnover.

With the failure of the "Dual Representation Proposal" (A/L. 633), UN Resolution 2758 was adopted in 1971 which confirmed the PRC as the sole legitimate representative of China in the United Nations. The adoption history and context of UN Resolution 2758 indicate the General Assembly was in favor of the "One China" Principle.[82] Accordingly, in contrast with the statement made in the Glaser Report, China does not need to redefine or distort UN Resolution 2758 to conflate it with the "One China" Principle. Meanwhile, the United Nations is an international organization with the participation of sovereign States and is thus incapable of taking an institutional position on whether Taiwan is a sovereign State. Consequently, any challenge to UN Resolution 2758's position on the "One China" Principle would be meaningless.

Furthermore, the Glaser Report's accusation that the PRC "implants" the "One China" Principle across all levels of the United Nations and its related organizations is illogical and unreasonable. As previously discussed, historical facts reveal Taiwan has been an inherent territory of China since ancient times. Enforceable treaties as well as fundamental rules of international law also validate China's right to recover Taiwan after World War II. With the establishment of the PRC on October 1, 1949, the PRC government became the successive government to the former ROC government and the only legitimate government of China, thus acquiring sovereignty and territorial rights over Taiwan. Therefore, the "One China" Principle per se is adequately supported by historical facts and principles of international law, it is in turn facilitated the adoption of UN Resolution 2758. Despite this, as stated in the Glaser Report, ROC passport holders continue to face restrictions accessing the United Nations buildings and activities. For the purpose of facilitating individual visits or the admission of Taiwan residents to the United Nations organizations and their affiliated organs, the PRC government could issue official certificates of PRC residents to Taiwan residents who acknowledge and adhere to the "One China" Principle, promoting peaceful development of cross-Strait relations.

Historical facts must be respected, and the principles of international law must be upheld. China has traditionally advocated the Five Principles of Peaceful Coexistence and has placed a strong emphasis on the adherence to the UN Charter and international law principles. Moreover, China has continually called on the international community to work together towards the goal of developing a Community of Common Destiny. Any research or discussion regarding the Taiwan question should be conducted on this foundation. Unfortunately, the Glaser Report has failed to do so.

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[82] Ibid.

A Review of China's First Case of NFT Digital Artworks Infringement

Yiming Zhou[83]

Abstract: In recent years, the rapid development of the non-fungible token (NFT) market, which is a combination of digital artworks and blockchain technology, has presented significant challenges to the Copyright Law of the People's Republic of China. To promote the NFT market, it is crucial to clarify the legal nature of NFT transactions and to apply the Copyright Law accurately. NFT transactions are not considered an act of distribution under the Copyright Law, but should be subject to the control of the information network dissemination right. The transactions of NFT digital works are different from the traditional online sales of copies of works. The former ensures the specific and unique nature of the object of transaction, meaning the interests of the copyright owner are satisfied after the first sale. Therefore, the first sale doctrine should be applied to NFT digital artworks transactions. Finally, considering several factors, such as the comprehensive transaction model, technical characteristics, platform control capability, profit model, type of works, and popularity, NFT trading platforms should bear a higher duty of care than general network service providers.

Keywords: NFT; Dissemination via information networks; First sale doctrine; Platform liability; Duty of care

In recent years, the non-fungible token (hereinafter referred to as NFT) has emerged as a rising star in the trading market due to its innovative transaction model. The COVID-19 pandemic has provided a fertile environment for the growth of the NFT market. It is projected that China's NFT market will experience a growth rate of 150 percent and reach a market value of over three billion yuan in the next five years.[84] The development of NFT trading overseas is even more robust. OpenSea,[85] a single platform, achieved a transaction volume of USD14 billion in 2021.[86] The world's first NFT project, CryptoPunks,[87] currently sells CryptoPunks at a minimum unit price of USD100,628.[88]

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[84] See Leadleo, *2021 China NFT Platform research Report*, https://pdf.dfcfw.com/pdf/H3_AP202202081545653782_1.pdf?1644314982000.pdf (accessed on March 4, 2023).

[85] OpenSea is an American non-fungible token (NFT) marketplace headquartered in New York City. It offers an online marketplace allowing NFTs to be sold directly at a fixed price or through an a uction. See Wikipedia, *OpenSea*, https://en.wikipedia.org/wiki/OpenSea (accessed on March 4, 2023).

[86] See supra note 2.

[87] CryptoPunks is an NFT collection on the Ethereum blockchain. CryptoPunks are commonly credited with starting the NFT craze of 2021. See Wikipedia, *CryptoPunks*, https://en.wikipedia.org/wiki/CryptoPunks (accessed on March 4, 2023).

[88] See CryptoPunks, *Overall Stats*, https://www.larvalabs.com/cryptopunks (accessed on March 4, 2023).

While the NFT market is still in its infancy, its popularity and profitability are extremely impressive.

The NFT market lacks clear legal rules, which has led to legal problems in judicial practice and triggered intense academic debate.[89] For example, in *Shenzhen Qice Diechu Cultural Creativity Co. Ltd v. Hangzhou Bigverse Technology Co. Ltd.* (often referred to as the Fat Tiger case),[90] the first NFT infringement case in China, the legal nature of NFT transactions, the applicability of the first sale doctrine,[91] and platform liability are the main points of controversy. Reasonably determining the above issues can delineate the rights and obligations boundaries of all parties in NFT transactions, thereby facilitating the NFT transactions and ensuring the healthy and stable development of the NFT market.[92] Whether the first sale doctrine can be applied to the digital world has been debated for decades.[93] The obstacles to applying the first sale doctrine in the digital world are gradually becoming insignificant with the advancement of technology.[94] The revolutionary trading model of NFT may break the final barrier of the first sale doctrine's application to the network.

This article aims to analyze the main controversial issues in the Fat Tiger case with a comparative study to clarify the rights and obligations of both parties in the transaction

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[89] The NFT market is a market trading NFTs, which are a highly speculative purchase. The basis of the NFT market is proof of unique ownership.

[90] See the Civil Judgement (Case No. 0192 Min Chu No. 1008.) issued by the Hangzhou Internet Court in 2022. [杭州市互联网法院(2022)浙 0192 民初 1008 号]; also see the Civil judgement (Case No.01 Min Zhong No.5272) issued by Zhejiang Provincial Higher People's Court in 2022. [浙江省高级人民法院(2022)浙 01 民终 5272 号]. This case first went through the Hangzhou Internet Court and then through the Zhejiang Provincial High People's Court, which ultimately upheld the original judgment. As the fact finding in this case is mainly based on the original judgment, with the subsequent judgment extensively citing it, this case revolves around the first judgment.

[91] The first sale doctrine allows a customer who owns a copyrighted work to lend, sell, or give away the item to someone else.

[92] Parties refer to purchasers, sellers and NFT marketplace (platforms) in NFT transactions.

[93] See U.S. COPYRIGHT OFFICE, *DMCA SECTION 104 REPORT 97 (2001)*, http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1 .pdf. (accessed on March 4, 2023) " ... did not find the analogy of digital transmissions to transfers of material objects to be a compelling one." ; Also see *Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003*, H.R. 1066, 108th Cong. (2003). "SEC. 4. DIGITAL FIRST SALE. Section 109 of title 17, United States Code, is amended by adding at the end the following: ... (f) The privileges prescribed by subsections (a) and (c) apply in a case in which the owner of a particular copy or phonorecord of a work in a digital or other nonanalog format, or any person authorized by such owner, sells or otherwise disposes of the work by means of a transmission to a single recipient, if the owner does not retain the copy or phonorecord in a retrievable form and the work is so sold or otherwise disposed of in its original format." ; Case C-128/11, 2012 E.C.R. 1-0000. (UsedSoft GmbH v. Oracle International Corp.) ; Publishers Weekly, *German Court Nixes Selling Used E-books*, https://www.publishersweekly.com/pw/by-topic/digital/retailing/article/56916-german-court-nixes-selling-used-e-books.html (accessed on March 4, 2023) "German District Court of Bielefeld ruled that digital books can't be resold by purchasers." ; NUV/GAU v. Tom Kabinet [2018]ECLI:NL:RBDHA:2018:3455. ; Capitol Records, LLC v. ReDigi Inc., No.12 Civ 95 (RJS) (S.D.N.Y Mar.30, 2013).

[94] Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58(4) UCLA Law Review 889, p.925 (2011).

and the platform. This article will develop as follows:

1. Section 1 introduces the facts of the case, the focus of controversy, and the court ruling.

2. Section 2 analyzes the concepts and legal nature of NFTs and their transaction and concludes that all three stages involved in NFT transactions should fall within the scope of information network dissemination rights.

3. Section 3 argues that the law should set exceptions to the first sale doctrine for NFT transactions in response to the innovation brought by this new trading model to the online works market.

4. Section 4 shifts the perspective to the platform side. By analyzing multiple factors of network service providers, it is asserted that in the case of user infringement, NFT trading platforms, as a new type of network service provider, should bear secondary infringement[95] liability that matches their duty of care.

1. Overview of the Case and Key Points of the Judgment

Cartoonist Qianli Ma created a series of works entitled *I'm Not a Fat Tiger* and published related works through Weibo and other publications. In 2020, Qianli Ma granted the copyright of the series of works to the Qice Company, the plaintiff in this case, under an exclusive license. Thereafter, Qice discovered that a user had minted[96] an NFT called the "Fat Tiger Vaccination"[97] on the NFTCN digital artwork transaction platform owned by Bigverse Company, the defendant. The plaintiff then sued the defendant in court.[98]

The plaintiff asserted that the defendant had failed to fulfill the duty of care and *ex ante* monitoring obligation[99] for the NFT works displayed on its platform and charged a certain transaction fee.[100] As a result, the defendant had violated the plaintiff's right of information network dissemination[101] and, as such, should stop the infringement and compensate the plaintiff for the losses.[102] The defendant, however, believed that the work

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[95] Secondary infringement, which is also known as indirect or contributory infringement, is the liability a party assumes when it does not actually take part in copyright infringing activities but contributes to infringement by other parties.

[96] CORP. FIN. INST., *Minting Crypto*, https://corporatefinanceinstitute.com/resources/knowledge/data-analysis/minting-crypto/ (Accessed on May 4, 2023). "The process of creation of a token often is called 'minting' the token."

[97] One of the "I'm Not a Fat Tiger" series works.

[98] See the Civil Judgement (Case No. 0192 Min Chu No. 1008.) issued by the Hangzhou Internet Court in 2022, 3. [杭州市互联网法院（2022）浙 0192 民初 1008 号].

[99] NFT trading platforms that operate might be held liable for their users' infringing uploads if they fail to perform their duty of care.

[100] See supra note 16, at 11–12.

[101] The right of dissemination via information networks in Article 10(12) of the Copyright Law borrows the WCT's definition of the right of communication to the public, that is, the right to provide works that may be obtained by the public at the time and place selected by the public by wired or wireless means. This article use the Chinese legal term.

[102] See supra note 16, at 1-2.

had been uploaded by the platform user on their own, and as a third-party platform, the defendant only had an obligation to review after the incident, and, thus, the defendant had fulfilled the obligation of "notice and deletion." Therefore, the defendant should not bear any relevant infringement liability.[103]

The Hangzhou Internet Court identified the following controversial issues: whether the "Fat Tiger Vaccination" claimed by Qice constituted a work of art (originality of the disputed work),[104] whether Qice was a qualified plaintiff in this case (copyright license), the legal nature of the minting and trading process of NFT and NFT digital works, the applicability of the first sale doctrine, and the duty of care of the defendant platform.[105]

1.1 Originality of an Artwork in the Copyright Law

To address the first controversial point, the court referred to Article 3 of the Copyright Law[106] and the Regulation for the Implementation of the Copyright Law (the 2013 Revision).[107] The court ruled that in addition to possessing the basic attributes of the originality and replicability of general works, art works also need to have certain aesthetic significance. As long as the creator expresses their unique views on aesthetics in a visual manner on material carriers, meeting the minimum requirements of originality, the result can constitute a work of art that is protected by the Copyright Law. Qianli Ma portrays the body proportions, facial features, colors, and lines of the fat tiger, shaping the image of a fat, sturdy, loyal, and honest Northeast tiger. Specifically, the fat tiger has a large head and round body, lacks a neck, has significantly bulging cheeks and significantly shortened limbs and tail length compared to a normal tiger. It is also endowed with many anthropomorphic facial features. The fat tiger portrays a cute "fat tiger" image. From this, it can be seen that the work involved in the case of the "Fat Tiger Vaccination" presents the author's unique individual expression, reflecting a certain degree of artistic beauty, and falls within the meaning of the Copyright Law as an artwork.[108]

1.2 Qualifications of the Plaintiff

In response to the second controversial point, Article 11 of the Copyright Law[109]

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[103] Id, at 4.

[104] To be qualified for the copyright protection in China, one of the prerequisites is the originality.

[105] Id, at 16.

[106] Article 3 of the Copyright Law. "'Works' mentioned in this Law shall refer to ingenious intellectual achievements in the fields of literature, art and science that can be presented in a certain form: ... (4) works of fine art and architecture ...."

[107] Article 4(8) of Regulation for the Implementation of the Copyright Law of the People's Republic of China (2013 Revision). "'works of fine arts' means two- or three-dimensional works of the plastic arts created in lines, colours or other media which impart aesthetic effect, such as paintings, works of calligraphy and sculptures."

[108] See supra note 16, at 16-17.

[109] Article 11 of the Copyright Law. "Except otherwise provided in this Law, the copyright in a work shall

and Article 7 of the Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright were invoked by the court,[110] which concluded that the existing evidence in this case was sufficient to prove that the work "Fat Tiger Vaccination" had been publicly published and that the copyright owner was Qianli Ma. After signing the copyright authorization license contract with Qianli Ma, Qice became the exclusive licensee of the work in question and enjoyed the right to sue in accordance with the law.[111]

1.3 Legal Nature of NFT Digital Works Minting and Trading

The legal nature of NFT digital artworks and NFT transactions is related to the rights under the Copyright Law that control NFT transactions, and the intervention of different rights affects the legality of subsequent NFT transactions.[112] Therefore, this section is not only the focus of the court reasoning, but also the core of this article. The court divided NFT transactions into three stages: minting, sales (display), and transactions, and found that:

1. The works were uploaded in the minting process, which causes the digital works stored in the minting terminal device to be copied to the network server. The first stage of NFT transaction relates to the reproduction right.[113]

2. In the sales (display) stage, the trading platform displays the NFT digital artwork for sale, which allows the public to obtain the work at a selected time and location. The second stage falls under the control of the right of dissemination via information networks.[114]

3. In the transaction process, NFT is transferred as a digital commodity.[115] Due to the core feature of the distribution right being the transfer of ownership of the original or copies of the work (which is limited to the transfer or gift of ownership of the original or copies of the work on a tangible carrier in the Copyright Law), the sale of NFT digital artworks in the NFT marketplace without the permission of the rights holder cannot yet fall under the control of the distribution right.

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belong to its author."

[110] Article 7 of Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright. "The documents provided by the parties involved, including copyright manuscripts, original documents, legitimate publications, copyright registration certificates, and certificates issued by certification agencies, can be used as proof. A natural person, legal person, or unincorporated organization who signs a name on a work or product shall be deemed as the owner of the copyright or rights related to the copyright, unless there is evidence to the contrary."

[111] See supra note 16, at 17-18.

[112] Article 10 of the Copyright Law. This article mainly discusses 3 rights of 13 rights stipulated in the Copyright Law, respectively reproduction right, right of information networks dissemination and distribution right.

[113] See supra note 16, at 18.

[114] Ibid.

[115] Id, at 18-19. "Digital commodity is a simulation of real things that exist in virtual space in the form of data codes and have property properties. It has the characteristics of virtuality, dependence, and special exercise methods, but it also has a certain degree of independence, specificity, and dominance."

Due to the fact that NFT digital artworks are provided in a public digital environment through the minting process, and their trading targets are not specific to the public, each transaction is automatically executed through smart contracts,[116] allowing the public to obtain NFT digital artworks at a selected time and location. Therefore, NFT digital artwork transaction conforms to the characteristics of information network dissemination. The court further pointed out that since NFT transactions are not controlled by distribution rights, the first sale doctrine cannot be applied.[117]

1.4 Duty of Care of the Platform

The court holds that the defendant platform not only needs to fulfill the duty of care as a general network service provider, but also to establish an effective intellectual property review mechanism to conduct a preliminary review of the copyright of NFT artworks traded on the platform.[118] The determination of platform responsibility and the analysis of court judgments will be elaborated on in section 4 below.

1.5 Civil Liability

According to Article 52 and Article 53 of the Copyright Law,[119] the court believes that every transaction of the accused NFT artworks is tamper-proof and recorded on the blockchain, ensuring the traceability, security, transparency, and authenticity of the identities of the buyer and seller of the works. The entire process is traceable, and each transaction cost can be recorded on the blockchain. As a result, the infringement profits in NFT digital artworks transactions can usually be identified. In this case, the selling price of the "Fat Tiger Vaccination" work is 899 yuan, and it has only been traded once. Therefore, the infringement gains in this case should be within the range of 899 yuan in the selling amount. However, considering that both parties failed to provide evidence to prove the profit amount of the transaction, it is still impossible to determine the actual infringement profit of the infringer, and Qice also failed to provide evidence to prove the actual losses caused by the infringement. Consequently, the court adopted a statutory compensation method,[120] which combined the transaction amount of the infringing work,

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[116] Smart contracts are automatically executable programs composed of underlying code. As a tool for carrying the terms agreed upon between the parties involved in a transaction, smart contracts "contain the expression of the parties' intention or an offer to contract."

[117] See supra note 16, at 18-21.

[118] Id, at 21-23.

[119] Article 52 of the Copyright Law. "He who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology or paying compensation for damages, depending on the circumstances ...."; Article 53 of the Copyright Law. "Whoever conducts any of the following torts shall, as the case may be, assume the civil liabilities as prescribed in Article 52 of this Law ...."

[120] Statutory compensation is a calculation method stipulated in Article 54 of the Copyright Law. "...Where the right holder's actual losses or the infringer's illegal gains and royalties are difficult to be calculated, the people's court shall, on the basis of the seriousness of the tort, adjudicate on a compensation not less than

the fees charged by the defendant platform, the evidence collection fees, lawyer fees, and other reasonable expenses incurred by Qice to stop the infringement, finally determining that the amount in damages was 4,000 yuan.[121]

As the first NFT infringement case in China, the Fat Tiger case, has, to a certain extent, dispelled the fog lingering in the NFT trading market. This case confirms that the copyright owner has the right to exercise exclusive rights under this new trading model, which effectively protects the copyright. At the same time, it also ensures the transaction security of NFTs by carefully identifying the infringement facts. Moreover, the court responded reasonably to the new situation of the development of the platform's control[122] over content through technology, ensuring copyright and transaction security from another perspective.

However, the purchasers at the other end of the transactions did not receive a property benefit equivalent to what they paid in this case (according to the court's view, the purchasers must obtain permission from the copyright owner to resell NFTs), and the first sale doctrine was once again prevented from being applied in cyberspace.

2. Applicability of the Information Network Dissemination Right in NFT Transactions

2.1 Clarification of NFT and NFT Transaction

2.1.1 What is NFT?

In brief, NFTs are encrypted digital certificates based on blockchain technology that cannot be copied or modified.[123] They are represented as a set of metadata stamped with timestamps on the blockchain, which point uniquely and specifically to digital content stored in the network, usually through a specific URL link or hash set.[124] While NFTs operate based on the blockchain, the digital artwork NFTs point to is generally not written into the blockchain due to the high storage costs.[125] Therefore, the "Fat Tiger Vaccination" series of artworks is the specific digital content of NFT.[126] Similarly, on

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500 yuan nor more than 5 million yuan ...."

[121] See supra note 16, at 25-27.

[122] The "control" here mainly refers to the platform's high control ability over the digital works minted, which will be discussed in detail in the fourth part of this article.

[123] See Arvind Narayanan Et al., *Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction(2016)*. Also see in Collins Dictionary: NFT, a unique digital certificate, registered in a blockchain, that is used to record ownership of an asset such as an artwork or a collectible.

[124] Jake Frankenfield, *What Is a Hash? Hash Functions and Cryptocurrency Mining*, https://www.investopedia.com/terms/h/hash.asp. (accessed on March 4, 2023) "Hash functions are algorithms that transform or 'map' a given set of data into a bit string of fixed size, also known as the 'hash'."

[125] Off-chain NFT is the most common way in the NFT market. See Guadamuz A, 16(12) *The Treachery of Images: Non-Fungible Tokens and Copyright* 1367, 1369 (2021).

[126] This article refers to NFTs as certificates that manifest externally as metadata, and NFT digital artwork

OpenSea, the largest NFT trading platform outside of China, NFT holders can obtain their contract address, token ID, and the public chain they are on (usually Ethereum),[127] and then obtain a storage link (often an IPFS storage link)[128] through the contract address's Etherscan browser using the Token ID.[129] The result returned by the link address is the specific digital artwork that the NFT points to.[130] In short, the NFT itself does not have any data that can be directly transformed into an image but serves only as a certificate recording the initial issuer of the specific digital content, the issue date, and circulation information.[131]

2.1.2 What are NFT transactions?

Briefly, NFT transactions primarily involve the transfer of metadata. The unique data of each NFT allows for the verification and tracking of ownership rights, as well as the transfer of token ownership rights to new owners.[132] The market consensus mechanism recognizes this control ability, which imbues NFTs with value.[133] In essence, NFT transactions facilitate the automatic transfer of digital property ownership through smart contracts, while also recording ownership transfers on the blockchain.[134]

American entrepreneur, Marc Andreessen, noted that NFTs offer a secure and guaranteed way for one internet user to transfer unique digital property to another user. This new model of digital artwork trading involves the transfer of NFT metadata, which guarantees the legitimacy and safety of the transaction.[135] While NFT transactions do not involve the transfer of original or copied artwork, their uniqueness, immutability, and specificity grant the purchaser control over the digital artwork that the NFT points to. Thus, the purchaser gains property rights to both the NFT and the digital artwork, and the court in the Fat Tiger case also recognized the transfer of ownership of digital properties through NFT transactions in the digital network space.[136]

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refers to the specific content of the artwork pointed to by the equity certificate.

[127] ERC-721, http://erc721.org/ (accessed on March 4, 2023). "ERC-721 is a free, open standard that describes how to build non-fungible or unique tokens on the Ethereum blockchain."

[128] The InterPlanetary File System (IPFS) is a protocol, hypermedia and file sharing peer-to-peer n etwork for storing and sharing data in a distributed file system. See Wikipedia, *InterPlanetary File System*, https://en.wikipedia.org/wiki/InterPlanetary_File_System (accessed on March 4, 2023).

[129] See supra note 43, at 1370.

[130] See BlockBeats, *Where does the NFT avatar you spent tens of thousands of dollars on actually exist?*, https://zhuanlan.zhihu.com/p/398961397 (accessed on March 4, 2023).

[131] See supra note 16, at 9.

[132] Gibson J, *The Thousand-and-Second Tale of NFTs, as Foretold by Edgar Allan Poe*, 11(3) Queen Mary Journal of Intellectual Property 249, 255 (2021).

[133] Scarcity tends to increase the perceived value of almost any acquirable good.

[134] See Harrison Jordan, *No, NFTs Aren't Copyrights*, https://techcrunch.com/2021/06/16/no-nfts-arent-copyrights/ (accessed on March 4, 2023)

[135] See Marc Andreessen, *Why Bitcoin Matters*, N.Y. TIMES (Jan. 21, 2014), https://dealbook.nytimes.com/2014/01/21/why-bitcoin-matters (accessed on March 4, 2023).

[136] See supra note 16, at 10-11.

2.1.3 Legal attributes of NFT and NFT digital artworks

As noted, NFTs are merely a set of metadata stored in blockchain and serve as proof of ownership for the NFT digital artwork to which they point. Consequently, NFTs gain their value when combined with NFT digital artwork and are endowed with a property attribute.

Under the NFT transaction model, the property rights involved (ownership of digital artworks) are different from real rights, creditor's rights, or intellectual property rights. First, according to Article 115 of the Civil Code of the People's Republic of China (hereinafter referred to as the Civil Code), items include immovables and movables, and if rights are the objects of any real rights in accordance with any laws, such laws shall apply. Since NFT transactions do not involve the transfer of physical property ownership, the law does not specifically provide for NFT digital artworks as the object of real rights. Consequently, NFT digital artworks do not fall under the scope of real rights.

Second, according to Article 118 of the Civil Code, a creditor's right is a right held by a creditor to demand that a specific debtor perform or refrain from certain actions arising from contracts, torts, management of the business of another under no obligation, unjust enrichment, and other provisions of laws. Professor Qian Wang believes that the transaction of an NFT digital artwork creates a creditor's right for the purchaser against the minter.[137] Under the Civil Code, the characteristic of a creditor's right is its nature of being a demand, which means that, taking haircut cards as an example, the creditor has the right to demand the debtor to perform a certain act. Haircut cards serve as debt certificates between barbers and customers, and the object of the creditor's rights is the performance of barbers (providing haircut services). Correspondingly, once the NFT purchaser gains control of the NFT, they would automatically gain access to the NFT digital artwork without the permission of others. In other words, in the model of an NFT transaction, the parties to the smart contract whose object is the NFT do not undergo any delivery process through performance. In China, due to the choice of the platform,[138] although NFT purchasers may request the platform to provide the digital artworks pointed to by the NFT, the object of the creditor's rights is limited to the behavior of performance. Specifically, NFT digital artworks do not fall within the meaning of performance, meaning NFT digital artworks also do not fall within the scope of the control of creditor's rights. Furthermore, even if an NFT is considered a debt certificate, the NFT digital artworks it points to should also be the subject matter of creditor's rights. Hence, NFT digital artworks are not the object of creditor's rights, which means that NFT digital artworks do not fall within the control of such rights.

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[137] See Qian Wang, *On the Legal Characterization of NFT Digital Artwork Transactions*, 16(1) Dongfang Law Review 18, 29 (2023).

[138] The previous text mentioned that NFT trading platforms, due to storage cost considerations, may choose to store digital works off-chain, such as on the platform's network servers.

Finally, it should be noted that uploading an NFT digital artwork only creates a copy of the work and does not automatically transfer the copyright during the transaction. Thus, NFT digital artworks are not the subject of intellectual property rights. However, it is important to note that the parties involved can dispose of the property rights of the works, such as self-use, commercial license, and transfer, through agreement.

According to Article 127 of the Civil Code, laws that provide protection for data and virtual property shall be applied. NFT digital artworks are believed to be stored in a network environment and to possess legal characteristics such as tradability, legality, limitedness of time and space, reproducibility, value, and exclusivity.[139] Thus, they should be considered virtual property. While the law does not explicitly specify the legal nature of virtual property, it is widely recognized that it has property interests and that the rights holders can enjoy the digital artworks without restriction at a chosen time and place. Virtual property rights are specifically stipulated in the Civil Code, while there is a consensus on the property attribute of NFTs around the world.[140] If the relevant regulations and policies permit, the holders can also resell their virtual property.

In summary, NFT digital artworks should be entitled to copyright protection since they satisfy the constitutive requirements of works as defined in the Copyright Law.[141] As for network virtual property rights, NFT holders have the right to possess, benefit from, and dispose of virtual property. Consequently, during an NFT digital artwork transaction, the external manifestation of the transaction is the transfer of NFT ownership, while the internal manifestation is the transfer of carriers of intellectual properties. Due to the comparability between this new transaction model and the sale of tangible carriers in the real world, the debate regarding whether this new transaction model is eligible for the first sale doctrine has become a focal point of controversy in the academic community.

2.2 Rights Involved in Minting and Display Process

The trading of NFT digital artworks can be broken down into three main stages: minting, display, and transaction. Each stage involves different types of copyright, which can be classified as follows.

During the display stage, the uploader is required to upload a copy of the digital artwork stored on their device to the network server of the NFT trading platform.[142] Once

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[139] See Jie Shi & Shuangquan Wu, *On the Legal Nature of Virtual Property on the Internet*, 21(4) Political Science and Law Review 33, 34-36 (2005).

[140] For example, English High Court and Singapore's High Court both considered NFTs as propert y. See Lavinia Deborah Osbourne v Persons Unknown, Ozone [2022] EWHC 1021 (Comm). Also see Tyler Bridegan & Spencer Brooks et al, *Property Rights in NFTs Are in the Spotlight,* https://www.jdsupra.com/legalnews/property-rights-in-nfts-are-in-the-4248058/#:~:text=Purchasing%20an%20NFT%20grants%20ownership,they%20relinquish%20to%20third%20parties (accessed on March 4, 2023).

[141] Legal Issue 1 of Fat Tiger case put forward by the court.

[142] This is centralized storage off-chain, which is commonly adopted by most NFT trading platforms in China. Overseas platforms often use decentralized IPFS storage and other methods.

uploaded, the platform will review the NFT digital artwork and make it available for sale. However, it is important to note that if the uploader is not the copyright owner of the digital artwork, they will be infringing the owner's copyright.

First, the process of minting an NFT constitutes an infringement of the owner's reproduction right. According to Article 10 of the the Copyright Law, the right of reproduction includes the right to produce one or more copies of the work in various forms, such as through printing, xeroxing, sound recording, video recording, duplicating, re-shooting, or digital means. The reproduction right controlled by the the Copyright Law should satisfy two requirements: the work should be reproduced on tangible material carriers; and the work should be "fixed" on the tangible material carrier relatively securely and persistently, forming a tangible copy of the work.[143] As stated earlier, during the minting process, the uploader has already synchronized the digital artwork to the network server of the NFT trading platform. The digital artwork is not only stored in digitalized form on a tangible material carrier but also, due to the trading nature and platform's profit model, will be durably saved during the period of time the NFT trading platform exists.

Second, the display process constitutes a violation of the right of dissemination via information networks as stipulated by Article 10 of the Copyright Law. The right of dissemination via information networks, which includes interactive dissemination via networks, refers to the provision of works to the public, enabling them to obtain the work at their chosen time and place. Once the digital artwork is uploaded to the NFT trading platform's server, the platform publicly exhibits it for sale to any user browsing the platform, allowing the public to obtain it at their selected time and place.

The relationship between the reproduction right and the right of dissemination via information networks is a topic of concern.[144] This article agrees with the court's reasoning that NFT digital artwork reproduction and upload for display are regulated by the reproduction right and the right of dissemination via information networks, respectively, under the Copyright Law. The purpose of reproduction is to make works available to the public through dissemination via information networks, which is a necessary step in network dissemination. Therefore, the damage caused by reproduction is inherent in the damage caused by dissemination via networks, and there is no need to separately assess the reproduction behavior.[145]

2.3 Applicability of the Information Network Dissemination Right in the

[143] See Haochen Sun, *Reconstructing Reproduction Right Protection in China*, 53(1-2) Journal of the Copyright Society of the U.S.A. 223, 258-259 (2005-2006).

[144] Some argue that the accused act constitutes both the reproduction right and the right of dissemination via information networks, and the right holder can of course claim that the defendant infringes on both rights.

[145] See supra note 16, at 19.

Transaction Stage

2.3.1 No transfer of the tangible carrier ownership or the copyright of the artwork

First, NFT trading does not entail the transfer of ownership of the tangible carrier of the artwork, but rather involves the transfer of control over the digital artwork. When an uploader sells an NFT, the information on the smart contract is updated to indicate that the purchaser has acquired ownership of the NFT.[146] Throughout the transaction process, the NFT remains unique and specific, and the ownership of the particular digital artwork is transferred. As noted earlier, the minting process of the digital artwork involves the creation of a copy of the artwork, which is always stored on the network server of the NFT trading platform. The purchaser can only gain access to the digital artwork through the platform or exercise relevant rights within the agreed scope.

Second, in the absence of a prior agreement between parties, the trading of NFT digital artworks does not result in the transfer of the original artwork's copyright. The court's judgment correctly pointed out that the purchaser only acquires a property interest and not a transfer or license of intellectual property rights.[147] Nevertheless, NFT trading provides a high degree of autonomy, and smart contracts can not only record the work's information but also set usage permissions and methods through prior agreements, record copyright rights, and automatically execute subsequent transactions. Chinese platforms often determine the nature and content of traded artworks during the upload stage, where users are typically asked to select the rights to the work.[148] If the user chooses digital artworks, the NFTCN platform service agreement states, "After the transaction is completed, the intellectual property rights of the digital artworks still belong to the owner of the intellectual property rights of the work." Many NFT platforms outside of China have prior agreements, including the content of licensed use. For instance, the Bored Ape Yacht Club (hereinafter referred to as BAYC) clearly states on its official website that it grants NFT holders worldwide free self-use and commercial licenses, including the rights to use, copy, and display, but does not include a transfer of the copyright.[149]

2.3.2 Obstacles to the application of distribution right

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[146] Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47(2) AIPLA Quarterly Journal 219, 265 (2019).

[147] See supra note 16, at 19.

[148] NFTCN categorizes them into four types: digital artwork, digital licensed artwork, digital derivatives, and derivatives. See NFTCN Platform Service Agreement available on the platform.

[149] See BAYC, *TERMS & CONDITIONS*, https://boredapeyachtclub.com/#/terms (accessed on December 21, 2022). "i. You Own the NFT. Each Bored Ape is an NFT on the Ethereum blockchain. When you purchase an NFT, you own the underlying Bored Ape, the Art, completely ... ii. Personal Use. Subject to your continued compliance with these Terms, Yuga Labs LLC grants you a worldwide, royalty-free license to use, copy, and display the purchased Art ... iii. Commercial Use. Subject to your continued compliance with these Terms, Yuga Labs LLC grants you an unlimited, worldwide license to use, copy, and display the purchased Art for the purpose of creating derivative works based upon the Art ('Commercial Use') ...."

The distribution right's core feature is the transfer of ownership of the original or a copy of a work. This means that the transaction-involved distribution right does not create new copies but only transfers the ownership of a specific physical carrier. Due to the unique nature of NFT transactions, while the storage location of the corresponding digital artwork has not changed, the certificate (NFT) pointing to the digital artwork has, resulting in a change in the control rights of the digital artwork. Consequently, some believe that the one-to-one correspondence relationship between NFT transactions and digital copies should be regulated as the transfer of ownership of a copy of the work.[150] In fact, NFT technology allows for specific transaction objects, and each NFT transaction corresponds to a specific copy of the work that was already specified during the minting process. The number of copies is not increased by the NFT transaction, and the entire transaction process is transparent and traceable. Thus, the essence of an NFT digital artwork transaction is an act of distribution.[151] Furthermore, the core feature of the distribution right is the transfer of ownership of the original or a copy of a work, regardless of whether the work carrier is tangible or intangible.[152] In addition, some scholars believe that NFTs are merely metadata representing tangible and intangible items, but not the items themselves, meaning the resale of an NFT does not constitute an act of distribution or dissemination via information networks.[153]

However, the court in the Fat Tiger case believes that the sale of NFT digital artworks should also fall under the scope of the right of dissemination via information networks. The main reason for not considering it as a distribution right is that NFT transactions do not involve the transfer of the original or copies of a work.[154] Due to the automatic execution of smart contracts for NFT digital artworks, the public can obtain the corresponding digital artwork at a selected time and location after the transaction, and the entire transaction process meets the characteristics of dissemination via information

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[150] See supra note 40, 374; also see Qian Tao, *Legal Implications of Non-Fungible Token Transactions of digital artworks*, 86(2) East Law Journal 70, 74-77 (2022).

[151] See Chao Rong & Xiya Gu, *Qualification of Infringement in the "I am not Fat Tiger" NFT Infringement Case of Hangzhou Internet Court*, https://mp.weixin.qq.com/s/wL2CmVcYgBJZLU_MIhC6GQ (accessed on March 4, 2023).

[152] See Case C-128/11, 2012 E.C.R. 1-0000. (UsedSoft GmbH v. Oracle International Corp.), at para. 42. "The ECJ held that a sale is 'an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.'" Also see Huaiwen He, *The right of distribution in the online environment*, 59(5) Zhejiang University Journal (Humanities and Social Sciences) 150, 153-154 (2013).

[153] Baiyang Xiao, *Copyright Law and non-fungible tokens: experience from China*, 30(4) International Journal of Law and Information Technology 444, 468 (2022).

[154] This differs from the opinion of the U.S. courts mainly because the interpretation of "tangible carriers" by the U.S. courts goes far beyond the meaning of U.S. Copyright Law. Therefore, on the one hand, the U.S. courts have included the transaction of electronic documents in the scope of distribution right, but on the other hand, they have determined that it does not apply to the first sale doctrine. Although there are differences in the definition of the laws between the two countries, it does not affect the actual legal outcome.

networks. Therefore, the court concluded that the sale of NFT digital artworks should be subject to the right of dissemination via information networks.[155]

The court's assessment of the nature of NFT transactions is reasonable. In essence, the NFT transaction model is a transfer of certificates (NFTs) that point to specific digital artworks. The NFT itself is merely a string of data and does not contain any original content of the digital artwork it represents. Hence, the transfer of NFT ownership is not equivalent to the transfer of the ownership of the original or copies of a work. Instead, it is a transfer of control rights over the specific digital artwork, which can be accessed and used within the scope agreed upon.

The determination of the nature of NFT transactions is comparable to the qualification of software serial number keys in the Copyright Law from several years ago. The "software plus serial number key" commercial model works as follows. After users download the genuine software from the official website for free, they need to purchase and enter the software serial number to run the software successfully. The software serial number key, a string of code that does not contain the original content of the software, is given special value as a necessary element for software operation. Some judges believed that selling pirated software serial number keys alone was equivalent to putting pirated books in a locked safe and then selling the key to the purchaser, which is still a distribution act of selling pirated works; however, this is not entirely true.[156]

Selling and delivering a U disk with infringing works through online sales constitutes the transfer of ownership of a tangible carrier and should fall within the regulatory scope of distribution rights. Meanwhile, selling an e-book with a complimentary blank U disk only involves the uploading and downloading of e-books and is subject to the right of dissemination via information networks. Therefore, while illegal serial number key sales have led to the same adverse consequences as directly selling pirated software, the same result does not mean that the nature of the behavior is the same. The serial number key is a technical measure that does not contain the intellectual property of the software, lacking the core element of infringement of distribution rights (the transfer of ownership of tangible carriers of works).

Similarly, although NFT transactions have changed the certificate pointing to digital artworks and resulted in the effect of changing the actual controller of digital artworks, they still lack the core element of distribution rights, and therefore cannot fall under the control of these rights.

Following an NFT transaction, the buyer receives a certificate for a specific digital artwork, which allows them to access it at a selected time and place. This meets the requirement for the behavior of "making the work available to the public so that the

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[155] See supra note 16, at 20.

[156] See Qian Wang, *On the Qualification of the Sale of software serial numbers key and Cracking Programs*, 37(5) Law Science 119, 122-126 (2019).

public can obtain it at their selected time and place" through information networks. Some argue that NFT transactions may not be intended for the general public, such as in the case of unique sales with no copies or with sales restricted to specific users. This article disagrees with this notion. Using the example of limited edition e-books sold online, the number of buyers may be limited, but the platform's registered users are not specific, and the purchasers can obtain the work at a selected time and place. Therefore, whether or not there is a limit does not affect the determination of the right of information network transmission.

The mainstream international view recognizes that the transfer of ownership of tangible carriers is an essential element for the right of distribution. Despite the development of digital network technology, this element has not been abandoned. The WIPO Copyright Treaty (hereinafter referred to as WCT) expressly stipulates that authors of literary and artistic works shall enjoy the exclusive right of authorizing availability of the original and copies of their works to the public through sale or other transfer of ownership. Similarly, Article 4(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter referred to as Copyright Directive) stipulates that member states shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise.

U.S. Copyright Law adopts a unique legislative model that only specifies five rights without the right of dissemination via internet networks, including the right of reproduction, distribution, projection, performance, and adaptation. Nevertheless, these five rights are functionally sufficient for addressing the problems brought by new technological developments. The U.S. Copyright Office believes that the five rights granted to copyright owners are sufficient for regulating the "right of making available to the public." For the act of providing downloads (experiencing the step of transmission before viewing), the right of distribution can cover it. For the act of displaying or browsing works (simultaneously transmitting and viewing), the rights of projection and performance can cover it. The right of dissemination via information networks established in the Copyright Law is essentially absorbed by the right of distribution, projection, and performance in U.S. Copyright Law.

In NFT transactions, users directly obtain the works through certificates without any specific download steps. Thus, it should fall within the scope of U.S. Copyright Law's right of projection and correspond to the Copyright Law's right of dissemination via information networks. Therefore, it is reasonable to include NFT transactions that use the network as a means of transmission under the right of dissemination via information networks.

3. Applicability of the First Sale Doctrine

3.1 The First Sale Doctrine

The first sale doctrine was created to resolve conflicts between the distribution right and real property rights. Without it, the purchase and resale of a book would lead to a conflict between the copyright owner's economic interests and the purchaser's absolute right of ownership over the book. Therefore, the first sale doctrine is a reasonable balancing of interests under the Copyright Law, which allows the lawful owner of the original or reproduced work to resell or give it away without the permission of the copyright owner. In the U.S., 17 U.S.C. § 109 states that it is legal to resell or dispose of physical copies of copyrighted works.[157] Article 4(2) of the Copyright Directive also indirectly provides for the first sale doctrine.[158] In Japan, Article 26(b)(2) of the Copyright Act states that "the right of distribution shall not apply to the original or copies of a work if the ownership of such original or copies has been transferred by the owner of the right of distribution or his/her licensee." While there is no explicit legal or judicial interpretation of the first sale doctrine in China, it is widely reflected in judicial practice.[159]

There is an ongoing debate within the academic community regarding the applicability of the first sale doctrine to NFT transactions. One perspective asserts that the traditional first sale doctrine must be upheld. For example, in the Fat Tiger case, the court deemed that secondary NFT transactions should be categorized as a form of dissemination via information networks. This implies that, even if the platform rules do not impose restrictions on resale, NFT purchasers still require authorization from copyright owners to resell digital artworks on the platform.[160] The value of the first sale doctrine lies in delineating the boundary between distribution rights and rights of dissemination via information networks. As the transmission or resale of digital artworks involves information flow and not the transfer of tangible carriers, it does not fall within the scope of distribution rights, making the first sale doctrine inapplicable to NFT

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[157] See 17 US Code § 109. "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord ...."

[158] See Copyright Directive 2001/29/EC. "The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent."

[159] See the civil judgment documents such as (2023) Liao 02 Min Zhong 1323, (2022) Yue 06 Min Zhong 8242, (2021) Yu Zhi Min Zhong 5, (2020) Jin 01 Min Zhong 5484, etc. [(2023)辽 02 民终 1323 号]、[（2022）粤 06 民终 8242 号]、[(2021)豫知民终 5 号]、[(2020)津 01 民终 5484 号].

[160] See supra note 16, at 20.

transactions.[161] The U.S. Copyright Office also stated in its report that the first sale doctrine could not be invoked as a defense even if the transmitter deletes the transmitted work copy from their computer, leaving only one copy available between the transmitter and the receiver.[162] Meanwhile, an alternative view is that the distribution of digital artworks and tangible works are both methods of providing works to the public by transferring ownership. Therefore, if works are transferred to the public by ownership transference, they should be considered distribution acts, and the first sale doctrine should be applied to NFT transactions.[163]

3.2 New Developments of the First Sale Doctrine

Adhering to the traditional meaning of the first sale doctrine poses new challenges in the digital age and may not adequately balance the conflicting interests of copyright owners and property rights owners. In the NFT transaction model, each purchase by the purchaser does not require additional authorization from the copyright owners. If the first sale doctrine or other related rules are not reinterpreted, this new business model cannot be accommodated by the old rules. In fact, even before the emergence of the NFT transaction model, there were cases in China and abroad reflecting this issue.

For example, in *Capitol Records v. ReDigi* in the U.S., the defendant, ReDigi, expected, through agreements and platform rules, that the music file would be deleted from the seller's computer once it was sold, ensuring that only one copy of the music file existed. While the defendant repeatedly emphasized the uniqueness of the file and considered the transaction as a migration of the same file, the U.S. Federal Second Circuit Court of Appeals held that the first sale doctrine only applies to the sale of specific copies of certain works. The resale of music works, although ensuring a fixed number of copies, results in the creation of new copies, which means that the buyer did not obtain a specific copy of the work. Hence, the court held that the transaction did not meet the "specificity" requirement of the object of sale and rejected the application of the first sale doctrine.[164]

In fact, the NFT trading model has effectively resolved this problem. Due to the specificity and uniqueness of NFTs, NFT transactions only result in a change in control of the NFT, which points to the digital artwork's address, without creating new copies of the work. The specific copy of the artwork always remains on the originally uploaded server, thus satisfying the specificity requirement. This analysis can also be seen as a

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[161] See Eurie Hayes Smith IV, *Digital First Sale: Friend or Foe?*, 22 CARDOZO ARTS & ENT. L.J. 853, 854 (2005). "Expression stored in digital code can readily be fixed, manipulated, duplicated, distributed, and transferred at almost no expense."

[162] See US Copyright Office, *DMCA Section 104 Report (2001): A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act*, pp. 78-80.

[163] See supra note 68, at 77-79.

[164] See Capitol Records, LLC v. ReDigi Inc., No.12 Civ 95 (RJS) (S.D.N.Y Mar.30, 2013). "Moreover, the statute protects only distribution by 'the owner of a particular copy or phonorecord ... of that copy or phonorecord'."

response to the U.S. Copyright Office's assertion that "this copying implicates the copyright owner's reproduction right as well as the distribution right (in the sense of U.S. Copyright Law)."[165] Consequently, the first sale doctrine cannot be prevented from applying to NFT transactions based on the traditional understanding of dissemination via information networks. While this new type of transaction lacks the physical element of the first sale doctrine, it has the basis for its application due to the inherent conflict between network virtual property rights and copyrights in NFT digital artworks.

In the case of *NUV v. Tom Kabinet*, the latter operated an online platform where "secondhand" e-books were exchanged between the platform and its users. Tom Kabinet attached a digital watermark to every e-book to ensure that no new copies were produced after the transaction. The company adopted a "per-copy-per-user" model, whereby the specific e-book copy saved by the seller was deleted after the purchaser obtained the copy. The court found that the purchaser had paid a reasonable economic value equivalent to the value of the work copy and had obtained the right to control and use the copy.

Based on the analogy between online and physical transactions, the first sale doctrine was found to be applicable in this case.[166] The "forward-and-delete" model ensures that the number of digital artworks on the network server remains unchanged and achieves a legal effect of "copy transfer" rather than "new copy generation."[167] The decision shows that as long as the number of sales objects is strictly controlled, the seller can recover interests from the sale and at the same time respect the purchaser's right to dispose of the specific copy. This achieves a balance between the distribution right and network virtual property right.

In *Beijing Century Super Star Information Technology Development Co. Ltd. v. Beijing University Press Co. Ltd.*, concerning the infringement of the right of dissemination via information networks, the Beijing Intellectual Property Court noted that there are still challenges to applying the first sale doctrine in the digital space. Even if it is introduced, at least two requirements must be met. First, the transfer of the original or a copy must be ensured, and second, the transferee must delete the stored file after transferring the original or copy of the digital artwork to others, thereby ensuring that the number of files remains unique.[168] If this is not the case, the uncontrolled number of

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[165] See Copyright Directive 2001/29/EC. "The ultimate product of one of these digital transmissions is a new copy in the possession of a new person. Unlike the traditional circumstances of a first sale transfer, the recipient obtains a new copy, not the same one with which the sender began. Indeed, absent human or technological intervention, the sender retains the source copy. This copying implicates the copyright owner's reproduction right as well as the distribution right."

[166] See ECLI:NL:GHAMS:2015:66. (NUV v. Tom Kabinet)

[167] See Meng Chu, *On the Application of the Exhaustion Doctrine of Distribution Right in the Network Field*, 19(2) Private Law Review 232, 242-244 (2019).

[168] See the Civil Judgement (Case No. 73 Min Zhong No. 3672) issued by the Beijing Intellectual Property Court in 2019. [北京知识产权法院(2019)京 73 民终 3672 号].

copies will seriously harm the interests of copyright holders.[169] It is evident that when considering the exceptional application of the first sale doctrine in the digital space, the court emphasizes the need to control the number of sales objects during the transaction and considers strict control of the number of sales objects as a necessary element for the doctrine's application.

3.3 Exceptions to the First Sale Doctrine

The first sale doctrine was initially created to address the transfer of tangible carriers of works, and its application to the online space is still under debate due to the limits of the distribution right. However, the respective questions of whether the distribution right and the first sale doctrine should apply to the online space are distinct from one another. As a novel model, NFT transactions do not involve the transfer of tangible carriers and lack the core element of the distribution right. Nevertheless, the NFT transaction model can achieve the same effect as the transfer of ownership of a specific and tangible carrier of a work without resorting to the forward-and-delete model. If an exceptional application of the first sale doctrine is not established for NFT transactions, it could lead to conflicts between the network virtual property rights owned by NFT purchasers and the copyrights of the NFT digital artworks, reproducing the dilemma before the establishment of the first sale doctrine in traditional transactions.

Opponents of NFTs argue that the dissemination of information in the online space can lead to uncontrollable infringement problems as works can easily be copied and disseminated.[170] However, NFTs can have a certain scarcity value based on the consensus of platform users, and for the purpose of ensuring the stability of their NFT value and the scarcity of quantity, purchasers and sellers do not spread the digital artworks they have purchased. This unique advantage of the NFT transaction model can prevent the spread of digital artworks from the source, thus avoiding infringement issues.

Currently, the core argument against the first sale doctrine not applying to the online space continues to focus on the damage to the primary copyright market and the loss of flexibility in the copyright trading market.[171] However, the characteristics of NFT transactions, such as being specific, unique, and tamper-evident, as well as their unique collectible value, have already resolved these problems. Parties to the transaction and the platform can limit the number of resales through smart contracts to respond to wear and tear in actual sales, and due to the limited number of NFTs, the involvement of the first sale doctrine allows resales to correctly reflect market value and activate trading markets.

Some scholars believe that applying the Civil Code to NFT transactions can achieve

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[169] See supra note 16, at 20-21.

[170] See Weijun Zhang & Lin Zhang, *On the Copyright Regulation of Non-Fungible Token Transactions of digital artworks—Taking the First Case of NFT Infringement Dispute as an Example*, 535(14) China Publishing 19, 21 (2022).

[171] See supra note 85, at 247-248.

the goal of allowing subsequent transfer,[172] but this article argues that this can obstruct the protection of NFT digital artworks under the Copyright Law. While creditors have corresponding rights inherently (the seller's obligation is to record the purchaser's identity in the smart contract), if the subject matter of the creditor's right includes the object protected by the Copyright Law, the conflict between the creditor's right and the copyright is yet to be resolved. If the protection of the Copyright Law is not applied to NFT digital artworks, it can undermine the creative enthusiasm of NFT content creators, reduce the activity of the NFT market, and hinder the development of emerging industries.

To prevent copyright owners from having absolute control over the NFT market and disrupting the balance between network virtual property rights and copyright, as well as breaking the balance of interests between purchasers and copyright owners in the traditional system of distribution rights, it is necessary to establish an exceptional application of the first sale doctrine without changing the essence of the distribution right.

By applying the first doctrine, it is not only possible to curb the trend of rights abuse but also to provide a channel for the free circulation of copies, allowing people to obtain genuine copies at relatively acceptable prices through secondhand transactions rather than through resorting to piracy under the pressure of the prohibition of resale by copyright holders. Therefore, the establishment of the exception can, to a certain extent, stimulate payment consciousness, safeguard the interests of copyright owners in reverse, and achieve a win–win situation for both parties.

It is important to maintain a balance between the rights of copyright owners and the interests of purchasers. Establishing exception is one way to achieve this balance, as it allows for the free circulation of copies while protecting the rights of copyright owners. In so doing, the NFT market can continue to thrive, and the development of emerging industries can be supported.

4. Higher Duty of Care

According to Article 1 of the Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in Handling Criminal Cases Involving Crimes of Illegally Using an Information Network or Providing Aid for Criminal Activities in Relation to Information Network, there are three types of network service providers:

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[172] See supra note 55, at 30. "When reselling the NFT digital artwork, as long as the 'reseller' presents the debt certificate to potential purchasers through the transaction system through technical means, it is sufficient to prove that they enjoy the above-mentioned creditor's right and have the right to transfer. After the 'resale' is completed, the new purchaser will be credited as the new owner of the certificate in the Smart Contract, which will replace last purchaser's claim on the 'minter'." Also see Ansgar Kaiser, *Exhaustion, Distribution and Communication to the Public – The CJEU's Decision C-263/18 – Tom Kabinet on E-Books and Beyond*, 69(5) GRUR International 489, 495 (2020).

1. Network access, domain name resolution, and other information network access; computing, storage, and transmission services.

2. Information issuance, search engine, instant messaging, online payment, online reservation, online shopping, cyber games, network broadcasting, website construction, security protection, advertising and promotion, application stores, and other information network services.

3. E-government, communication, energy, transportation, water conservancy, finance, education, medical care, and other public services provided through information networks. Network service providers do not directly provide information to network users or organize, screen, or review information. Therefore, they can be deemed to be internet intermediaries. They only provide transmission channels or display platforms. As a result, network service providers often find it difficult to know about infringement in real time. If network service providers were liable every time someone posted infringement content on the internet, the resulting threat of liability and effort at rights clearance would hinder the development of the internet.

It is necessary to clarify the burden that network service providers should bear when the platforms they set up provide substantial assistance for infringement behavior. First, network service providers cannot constitute direct infringement of copyright because they are not content providers. Furthermore, it is unreasonable to force them to find out about all infringement information existing on the platforms due to the vast amount of information. Second, based on the technology neutrality principle established in *Sony Corp. of America v. Universal City Studios, Inc.* in 1984,[173] network service providers can be held liable for secondary infringement[174] when they know or should know the conditions; otherwise, they can be exempted from liability to the copyright holders on the grounds of "substantial non-infringing uses."[175] In the U.S., the judge-created doctrines of secondary liability and safe harbors have been embodied in the Digital Millennium Copyright Act (hereinafter referred to as the DMCA).[176] In China, the Regulation on the Protection of the Right of Communication to the Public on Information Networks (hereinafter referred to as the RPRC) also stipulates the rules of safe harbor, which were embodied as the "notice-and-takedown regime" and "red flag standard."[177]

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[173] See Sony Corp. of America v. Universal City Studios, Inc., 464 US 417 (1984).

[174] See Randal C. Picker, *Copyright and Technology: Deja Vu All over Again*, 1(1) 2013 Wisconsin Law Review Online 41, 43 (2013).

[175] See Jesse M. Feder, *Is Betamax Obsolete: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37(4) Creighton Law Review 859, 892-896 (2004).

[176] See Pub. L. No. 105-304. 112 Stat. 2860, 2877-86 (codified at 17 USC. § 512 (2006)).

[177] "Red Flags" theory: The network service providers should remove potentially infringing material beyond the notice-and-takedown procedure.

With the continuous iteration and update of internet technology, the rules established at the beginning of the internet's development face new problems. Nowadays, network service providers are gradually participating in the production, sharing, and dissemination of information. In addition, with the continuous improvement of algorithms and artificial intelligence information screening mechanisms, the possibility of their knowing about users' infringement uses on the network is constantly increasing, and their ability to prevent related network infringement behaviors is also continuously improving. Therefore, it is necessary to respond to the problems brought about by new technologies under the established rules, especially for network service providers represented by NFT trading platforms that run new business models, which cannot be simply classified into existing categories. The duty of care they should bear actually depends on the court's discretion in individual cases.[178]

There are differing opinions in academic and judicial practice on whether the duty standards of NFT trading platforms should be increased. Some believe that a higher duty of care should be set for network service providers in response to the updates in internet technology, while others argue that for new types of internet behaviors brought about by new internet technologies, the judiciary should uphold a modest judicial concept and should not easily make positive or negative evaluations. Instead, they should promptly clarify the rights and obligations of all parties through case-by-case judgments, reasonably define platform liability, clarify liability boundaries, and regulate the market order of this new business model.[179]

This article agrees with the latter view. According to Article 1197 of the Civil Code, network service providers shall be jointly and severally liable for the network user if they know or should know that the user is infringing upon the civil rights or interests of another person through their network services and fail to take necessary measures, which is also referred to as "knowing infringement." Specifically, the special protection rules (safe harbor regime) provided by the RPRC to specific categories of network service providers based on factors such as operating mode still follow the basic rule of good faith, as noted previously.

Secondary infringement can be divided into facilitating infringement and inducing infringement.[180] The determination of facilitating infringement involves three factors:

1. The fact that users use online platforms to commit infringement.
2. The online platform has provided substantive assistance for infringement.
3. The online platform is aware or should be aware of the infringement facts. For

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[178] See supra note 16, at 22.

[179] See Jiangqiao Wang, *Copyright Protection and Platform Liability in NFT Trading mode*, 40(5) Financial and Economic Law Review 70, 76-77 (2022).

[180] See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 929-930 (2005).

NFT trading platforms, since they do not fall into any of the four platforms specified by the RPRC, their obligations should be determined based on basic rules, such as facilitating infringement and factors like their specific operating mode.

Specifically, based on Article 9 of Provisions by the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Communication to the Public on Information Networks (hereinafter referred to as AL), the duty boundary of the NFT trading platform should be determined based on factors such as the transaction model, technical features, subjective control ability of the platform, profit model, type, and popularity of the works. In general, NFT trading platforms have stronger surveillance capabilities compared to general internet service providers and should therefore bear higher surveillance duty standards than such providers.

First, regarding the transaction model of NFT platforms, the traded object is the NFT itself. When the ownership of the NFT changes, the control of the specific NFT digital artwork it points to also changes, but the copyright of the NFT digital artwork remains with the copyright owner. Therefore, the minter of the NFT digital artwork must not only be the owner of the artwork copy but also the copyright owner or authorized person of the digital artwork. If this is not the case, the NFT digital artwork will infringe on another's copyright. This transaction model determines that the trading platform must fully understand the legal nature of the traded object and expect users to upload infringing works. According to Article 42 of the E-Commerce Law of the People's Republic of China, platform providers such as Taobao and JD do not have the duty to examine the goods sold but only have a duty termed "know or should know." In contrast, the NFT trading platform faces the first sale of a digital artwork, which is inevitably initiated by the copyright owner or authorized person and is closely related to the copyright. Therefore, reasonable measures should be taken to review the source of the digital artwork to prevent copyright infringement.

Second, regarding the technical characteristics of the transaction, NFT transactions use blockchain and smart contracts. On the one hand, this technology resolves the trust and security concerns between the transaction parties, while on the other, it also makes NFT transactions automatic and executable. This means that if the NFT digital artwork pointed to by the NFT constitutes an infringement, it will often irreversibly harm the interests of purchasers before and after the transaction chain. Moreover, the lack of trust of all parties in the security of NFT transactions will further undermine the trust ecology under the NFT business model, which will seriously hinder the orderly development of the entire NFT industry. The NFT trading platform should fully recognize the trust system on which the platform relies and take corresponding measures to review uploaded digital artworks to avoid infringement and other adverse consequences for the right

holders.

Furthermore, the NFT platform has control over the digital artworks that are minted as NFTs and displayed on the platform. Before listing any artwork, the platform conducts a review of the digital artwork, which is necessary and set by the platform itself.[181] Only the artworks that pass the review can be listed, and all copies of the artworks displayed on the platform are uploaded and stored in network servers designated by the platform.[182]

In general, NFT transactions involve limited editions, and each traded object typically refers to only one digital artwork. Therefore, there is no situation where a massive amount of data cannot be reviewed, which differs from network service providers such as Google, Bing, or Baidu. The NFT platform has a rankings entry that displays four categories of rankings: "hotness," "rise," "popularity," and "real-time." These rankings include both the digital artwork authors and the artworks.

The platform also has a "featured topics" section on the same page, including categories such as "masters," "popular creators," and "physical albums." This indicates that the platform has a subjective judgment on the content of the displayed digital artworks and intends to promote them to users.

During the review process of the artworks by the platform, the platform reviewers set a recommendation level (which gradually increases from 0 to 20) for the corresponding works based on the information obtained from the National Work Registration Information Publicity System.[183] This recommendation level affects the recommended results received by the users. In summary, the trading platform has strong control and subjective judgment over the process and objects of NFT transactions. Thus, it is necessary for the platform to conduct a review of the artworks uploaded to the platform.

Finally, regarding the platform's profit model, the NFT platform charges a certain percentage of commission for each successful transaction of a work, which constitutes a direct benefit obtained from the NFT digital artworks. According to Article 11(1) of AL, if a network service provider directly obtains economic benefits from works, performances, or recordings provided by network users, the court should recognize that it has a higher duty of care for any act infringing on the right of dissemination via information networks by the network user. Therefore, the court concluded that the NFT trading platform should bear a higher duty of care based on the commission it receives from the users.

However, the court's determination that the platform's commission constitutes

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[181] See supra note 16, at 23. "When users upload digital artworks on NFTCN, the upper left corner of the web page interface displays 'Under review'."

[182] The approach adopted by NFTCN in this case is centralized platform management.

[183] This is a Chinese work information registration platform that reflects the copyright information of works, and relevant personnel can check here to ensure that they do not infringe on the copyright of others.

"direct economic benefits" is debatable. The commission includes a gas fee,[184] which is a necessary expense for minting, on-chain, and trading. Its amount is usually a fixed price unrelated to the content of the work or the transaction price, and it does not directly arise from the digital artwork itself. The Beijing Higher People's Court explicitly stated in Article 9.19 of its Guidelines for the Trial of Copyright Infringement Cases that where a network service provider collects standard service fees from their users for information storage space service based on time, traffic, or otherwise, they shall not be deemed to have "directly obtained economic benefit from service objects as a result of the provision of works, performance, or sound or visual recordings" under Article 22 Paragraph 4 of the RPRC. The report of U.S. Congress to the DMCA also pointed out that receiving a one-time set-up fee and flat periodic payments for a service from a person engaging in infringing activities would not constitute receiving a "financial benefit directly attributable to the infringing activity."[185] Therefore, further clarification is needed regarding the determination of direct financial benefits to avoid ambiguity, while it does not affect the conclusion that the platform should bear a higher duty of care for users' behavior.

5. Conclusion

An NFT is a revolutionary combination of digital artworks and blockchain technology, which provides advantages for the protection of copyright. The use of blockchain technology facilitates the certification of copyright ownership and the process of evidence collection for infringement, thus enhancing the credibility of copyright protection. However, the application of new technologies such as blockchain also requires the balance of interests among all parties involved in NFT transactions, which relies on the Copyright Law.

In essence, NFT transactions involve the constitutive element of information network dissemination and do not involve the transfer of ownership of tangible carriers of works. Therefore, they should fall within the control of the right of dissemination via information networks. To maintain an appropriate balance between network virtual property rights and copyrights, the law should break through the limit of the first sale doctrine and create exceptions. This approach will not only guarantee the specificity of the transaction object but will also avoid propagation risks from the mechanism, thus protecting the interests of both copyright owners and subsequent purchasers.

Moreover, based on the transaction model, technical characteristics, the platform's subjective control ability, profit model, type of works, popularity, and other aspects, the

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[184] A service fee paid by users each time they transact on Ethereum, calculated on the basis of the amount of computation.

[185] See *S. Rept. 105-190 - THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, S.Rept.105-190, 105th Cong. (2021)*, https://www.congress.gov/congressional-report/105th-congress/senate-report/190/1 (accessed on March 4, 2023).

NFT trading platform should bear a higher duty of care compared to general network service providers. The platform should conduct a review of the digital artworks before minting them as NFTs and displaying them on the platform. All copies of the artworks displayed on the platform should be uploaded and stored on the network servers designated by the platform. The platform's profit model, which charges a certain percentage of commission for each successful transaction, should be clarified to avoid ambiguity regarding the determination of direct financial benefits.

In summary, the traditional copyright protection model needs to be re-examined and adjusted to respond to the emerging technologies and the rapidly changing digital environment. It is necessary to pay attention to the reconstruction of individual property rights and the interests of all parties involved in copyright to make timely responses and adjustments to new situations arising from new technologies.[186]

[186] See Chuntian Liu, *The Third Amendment to the Copyright Law is a Requirement of the Great Change in the National Conditions*, 26(5) Intellectual Property 7, 12 (2012).

International Symposium

On March 11, 2022, the Center of International Law Practice and the EU Law Center at Shanghai Jiao Tong University organized a online conference on the Impact and Prospects of the Financial Sanctions on Russia.

The participants were Alistair Milne, Joel Slawotsky, David Tang, Heng Wang and Wei Shen.

Financial Sanctions on Russia: Impacts and Prospects[187]

Wei Shen (Professor of Law, Shanghai Jiaotong University; Editor-in-Chief, The Foundation for Law and International Affairs Review):

Good evening, good morning, good afternoon, ladies and gentlemen! Wherever you are, thank you for joining us. Welcome to this seminar. Today's topic is "Financial Sanctions on Russia: Impact and Prospects". We have several speakers today: Alistair Milne from the UK; and Joel Slawotsky from Israel. We also are very lucky to have Professor Heng Wang from Australia; he is three hours ahead of us, so it is already midnight for him. We also have David Tang, a partner of Junhe Law Firm, China. My name is Wei Shen. I am a Professor of KoGuan School of Law in Shanghai Jiao Tong University, and the organizer of this conference.

The seminar will last about two hours with a Q & A section at the end. We ask participants to please be patient, as you will have a chance to raise questions. We invite you to write down your questions in the chat box, so there will be no interruptions to the conference.

Ladies and gentlemen, I think the entire world is watching Russia and Ukraine; the Russian Special Military Action against Ukraine. We have witnessed sanctions imposed by the United States and its alliances. It is probably historic that, for the first time, we are seeing so many sanctions imposed on a particular country.

I have background information, so everyone gets a general picture of what is going on. Russia is on a short list as the number-one most sanctioned country in the world, far more than Iran and Syria. Before February 23, 2022, Russia was already subject to a wide range of sanctions. After, sanctions on the state have sharply risen.

Historically, the most used sanctions by the United States against Russia were trade ones. After Russia launched its Special Military Action against Ukraine, the Biden administration decided to ban crude oil exports and natural gas from the state. These sanctions were imposed by the United States Department of Commerce's (DOC) special export restriction division, the Bureau of Industry and Security (BIS). The BIS has since imposed more export controls and even extended its Export Administration Regulations (EAR) to third-party products. A Specially-Designated Nationals (SDN) list also covers key Russian officials, including the Russian President Putin and key Russian entities, so no American individuals and entities can make any transactions with them—even those without connection to the United States.

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[187] This content was recorded and transcribed by Yijing Zhu and Junya Guo (both from East China University of Political Science and Law).

We've seen a combination of trade and financial sanctions. Americans are not allowed to transact, make any financial investments, or do any trade with entities on the List of Specified Persons (LSP). A couple days before the invasion, the EU and the United States were thinking of joining Canada to remove Russia from World Trade Organization (WTO). Canada already did a couple weeks prior, and no longer grants the most-favored nation (MFN) treatment to Russia. As a result, they've imposed a 35% tax on Russia-made products. The EU and the United States are now also considering no longer granting the MFN treatment to Russia under the WTO framework. the United States is even considering a motion to remove Russia completely from the WTO. So, the Biden administration, together with G7 member states, is calling for a cancellation of Russia's normal trading status forever. This has all been about trade sanctions.

I will talk about financial sanctions in a minute. But consider trade sanctions are limited this time largely because the United States is not Russia's largest trading partner. The EU now accounts for 35% of Russia's international trade, and the United States only occupies 5% of Russia's export. As a result, the United States pays more attention to its financial sanctions. Due to financial sanctions, for example, the Russian sovereign fund, Central Bank and Ministry of Finance are no longer able to borrow money from the global market. The EU will not lend to any Russian financial institution. One of the largest Russian banks, BTB, had its assets frozen by the United States. Seven Russian banks—including VEB, VTB, and their subsidiaries—have been removed from the Society for Worldwide Interbank Financial Telecommunication (SWIFT). Three Russian banks are included in the Sectoral Sanctions List (SSI). The largest Russian commercial bank, Sberbank, is included in the Correspondent Account and Payable-Through Account Sanctions (CAPTA) list. This prevents Russian banks from conducting physical transactions and setting up accounts in the United States.

These Russian entities are covered by SDN: along with financial, military, and media institutions are individuals such as President Putin and some ministers. It is a very long list, and we can see certain names on the LSP. No American can transact with these individuals: they cannot make any financial investment or trade with them, including with Russia's five biggest banks. We are seeing massive sanctions targeting Russia's banks, entities, Ministry of Finance, Central Bank, and sovereign wealth fund. This is a large-scale, US-led, joint sanctions imposed by the Western alliance.

There are a lot of questions to understand, including the functions of these sanctions: how they work and how they affect Russian military actions. We are waiting to see how effective these sanctions will be and whether they can deter, discourage, or stop further Russian military action in Ukraine.

In fact, we care about ourselves—referring to Chinese people and entities. We want to see what impacts could be caused by a wide range of sanctions to Chinese banks, individuals and the government. Yesterday, for example, the United States government said that any Chinese banks or institutions must follow sanction requirements; the consequences, if violated, might be bad. We are looking at what these consequences are, and if they do happen, what we should avoid.

We also want to know if other countries—such as the UK, the EU, and individuals in Israel—can take some countermeasures towards sanctions. Their citizens could take

some preventive measures, such as continuing to do business, or at least having some contact with Russian banks and companies.

We also need to understand the big picture and impact of sanctions on the global supply chain. We are still facing challenges from the COVID-19 pandemic, which has already hugely affected global supply chains. But now, with another "black swan event", we want to understand the impact of sanctions on the global financial system. For example, the payments system: the future of the SWIFT, because it is closely involved in financial sanctions. Russian commercial banks are completely kicked out of the SWIFT.

There is a question of whether the SWIFT will continue to be the major payment processing system after the Russia-Ukraine war. We have to wait and see what will happen from the sanctions against Russia. There are some alternative systems developing; Russia, the EU and China are trying to build their own payment systems. The Russian version of the SWIFT, called SFPS, is a Russia-centric payment system. However, it is pretty obvious that SFPS does not seem to be working particularly well insofar as its scale and importance. We also tried to see the EU version of the SWIFT, and whether it can really replace the SWIFT. As for this, we will wait and see. China also has its own version of the SWIFT called CIPS. There are many factors that are constantly changing, so we are very interested to see whether these problems can be solved in the end.

Last but not least, we will see whether the Bretton Woods system will continue functioning. While I do not have answers for any of these questions, I consider answering them to be the purpose of this event; to bring top experts into the conference and ask them what they think and their thoughts on the legal issues.

We now have five speakers online.

Let's welcome Professor Joel Slawotsky, based in Israel. He is a leading expert on financial and international economic law. He was an assistant to the New York Attorney General and is now teaching in Israel. His research focuses on corporate and global governance, international economic law, and national security. He has extensive publications covering all commercial law subjects like bankruptcy, finance, and company law. All these articles are published in top law journals.

Professor Joel Slawotsky has been involved in China-related legal topics and legal issues. His research covers China's commercial laws and financial markets. He is a well-established scholar, and a very experienced litigator in the field. He is an American lawyer, and so very familiar with the United States legal system on sanctions. Here you go; Joel Slawotsky, please.

Joel Slawotsky (Professor, IDC Herzliya, Israel):

Thank you very much, Professor Wei Shen, for the introduction and inviting me to the conference. It is an honor.

First, let me show some documents. I am going to talk about national security, upon which these sanctions are based. And I am also going to talk about some possible impacts. Then, we will have a discussion.

Before I begin, I want to say that context is very important; we need to understand it. In fact, when we talk about economic sanctions and about the United States government

and its allies' policies, we must remember there is a perception. I am not saying it is right or wrong, but there is a perception. In Western countries—I am not talking about China—the perception is to treat Russia's involvement in Ukraine as an invasion. We should remember that many Western countries, including the United States, are political democracies where the government must respond to public opinion. This is not a political comment, but you must remember: there is a general belief in many countries right now that what Russia is doing is an invasion. Again, I am not saying that I agree or disagree with that, I am just pointing out the fact that there is a perception that what Russia is doing is wrong. At the political level, there is pressure for governments to respond. Otherwise, it could be bad for the leaders in the next election.

Let's look at sanctions in this context and the question of sanctions in law. Where do sanctions come from? This is an Executive Order from April 2021 that criticizes Russia.[188] It prohibits the United States persons from engaging in transactions with specific Russian entities based on threats to the United States national security. This Executive Order is from the Biden, not the Trump, administration. I will soon show you a very important law, and what people tend to forget is that the United States Congress actually enacted this law in 1977, decades ago. This is an order from the United States Congress to the United States President. Some of you may know, some of you may not—that in the United States, once Congress makes a law, the President is responsible for enforcing it. So, Congress makes this law—I will show you that in a moment—called the International Emergency Economic Powers Act (IEEPA), and it allows the president to take action, like the Presidential Executive Order issued on April 15, 2021, against Russia.

And then there is a document from February 2022, an Executive Order, claiming that the Russian Federation was undermining the peace and sovereignty of Ukraine. You see, the description is very important; it talks about the invasion as a serious homeland security issue for the United States. It links what is happening in Ukraine and in Europe to the national security of the United States. In fact, this is also based on the 1977 IEEPA, which empowered the United States President to protect homeland security. So, when we see the United States President sign an Executive Order against Russia—or some other entity or organization—there is a legal basis to authorize the United States President to sign an executive order like this one. It is not a decision made on the fly. It is actually based on US law. So, when we talk about sanctions, we have to put that into context. The United States considers these military actions from Russia as a threat to American national security.

Now, as you all know, the US dollar is a hegemonic currency in the world. It gives the United States a huge advantage. As we can see, sanctions like the ones on Russia are based on the US dollar hegemony. We see a lot of banks that are also very dependent on the dollar and on SWIFT. So, in that sense, the United States has huge power and advantage, and exploits that advantageous tool. It has worked well over the years. Former Secretary of the Treasury Steven Mnuchin talked about why the United States uses sanctions, stating they are used because they are a good alternative to military action and

[188] Editor: The Executive Order from April 2021 was from 50 U.S. Code § 1701 - Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities.

basically an alternative to war. For Russia, though, this is a declaration of war in a sense; sanctions really do damage to the economic viability of a country.

This is the justification to the background of the Executive Order: the claim that what Russia is doing in Eastern Ukraine is a huge threat to the United States national security and foreign policy. For those of you—who I know some are—familiar with political and economic law backgrounds, it is clear there is a reconceptualization on understanding national security. We see that the relationship between China and the United States is actually one of two strategic rivals: the United States considers China its rival, is very wary of it. Various emerging technologies issued by central banks, such as artificial intelligence and digital currencies, can be used by a rival to degrade the other without firing a single shot.

The United States national security advisor once gave a speech, along with the United States Secretary of State Mike Pompeo's earlier one, conceptualizing national security in terms of economic and ideological dominance. We see the continuous efforts of the United States to ensure supremacy in technological, economic, and ideological spheres. As a result, the United States conceptualization of national security has expanded to all aspects of emerging technologies, political governance, the CCP, and human rights.

There are also some trade and financial sanctions related to Xinjiang Province, China. The United States believes human rights are being suppressed in Xinjiang Province as their position. So, we see that Xinjiang sanctions reflect the expansion in understanding national security. Take a look at this direct quote claiming that China's integration into global financial markets and development of its own financial market is a national security threat to the United States.[189] This is a shocking expansion of national security. In addition, the United States believes that a Chinese central bank's digital currency will also affect the future hegemony of the US dollar, therefore constituting as a national security threat.[190] This is understandable, since the digital currency would erode powers of the US dollar, a very powerful sanctions tool. Expanding the understanding of national security is almost limitless: potentially any device connected to the Internet and participating in financial markets, for example, could be considered a threat to the United States national security.

Just before, Professor Shen raised many questions. I am not sure whether I have the answers; expanding the contours of national security is a slippery slope. Where do you draw the line? With regard to Russia, we can see the problem. Does a law enforcement problem in one country, though, create a national security threat in another? I do not think there was a genocide in Ukraine—which was the reason Russia gave for its incursion. Can one country invade the territory of another because the invader claims genocide is occurring? For example, I consider China wrongly accused of engaging in genocide in Xinjiang Province. China is only enforcing its own laws, including anti-extremism ones. Some Western countries believe China committed genocide, using this as a reason to impose sanctions, but there is no genocide in Xinjiang Province—there is no evidence.

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[189] Editor: Report to Congress of the U.S.-China Economic and Security Review Commission, November 2021, p. 11.

[190] Editor: Report to Congress of the U.S.-China Economic and Security Review Commission, November 2021, p. 166.

The Western countries claim that they can use sanctions in response to genocide. The United States uses this claim to justify imposing trade sanctions and controls on Xinjiang exports.

This is a valid Chinese point of view, but what can we do to prevent the abuse of sanctions? Currently, if the United States does not like the way China enforces its laws, the United States can kick China out of SWIFT at will. Through Central Bank Digital Currencies (CBDC), China has realized a potential method of evading sanctions. CBDC allows the use of digital wallets with which there is no need to go through SWIFT or through a bank; offering a new way to bypass SWIFT. It is sensible, then, for China to make its digital currency campaign successful and as a way to erode the US dollar hegemony.

I believe sanctions against Russia will not be lifted in the near future, and targeted entities will be very interested in digital currencies. They will have an impact not only on the imposition of the US dollar sanctions but also on the exercise of the United States extraterritorial jurisdiction. For example, the United States has an overseas corruption law banning bribery to foreign officials; the Foreign Corrupt Practices Act (FCPA). The United States persons, individuals, and companies are subject to FCPA jurisdiction. Companies which trade in the United States capital markets are subject to the FCPA. Foreign entities that engage in conduct within the United States territory are subject to the FCPA. Take a look at the United States Department of Justice Guidance: if you engage in conduct outside the United States that involves the system of a US financial institution, you are subject to FCPA. No defendant has filed a defense against claims of extraterritorial jurisdiction in the FCPA context or appealed on the basis of jurisdiction. So, every time we see enforcement against a foreign entity like this one, they end up settling. In a CBDC environment, the United States will likely have extraterritorial jurisdiction eroded if the CBDC does not touch the United States financial system. Therefore, this will further encourage Chinese central bank to promote digital currency more, because of the situation of the extraterritorial jurisdiction of the United States.

For China's CBDC to be a success story will require additional reforms: opening capital account, floating RMB. I also want to mention the Ralls litigation where the Chinese investor filed suit against the decision that the transaction constituted a national security threat to the United States. Many people in China were impressed that the Appeals Court ruled against the United States government. This is another area of reform. China has to overcome the perception that the judiciary in China is subject to politics, whereas in the United States and other Western countries the courts are perceived as independent. I am not saying that the courts in China have to take orders from the government, but the West has this view and understanding for Chinese courts. With respect to market reforms, I do not believe these reforms are going to take many decades, they are not going to happen immediately, but they are going to happen, and they are going to enable China to push forward with digital currencies, which for China is important to be able to fight the sanctions imposed by the United States. If China were able to do so, I believe it would be in a much stronger position and would no longer be subject to dollar-led sanctions.

I've been talking for 25 minutes. Thank you for listening.

Wei Shen:

Thank you, Professor Joel Slawotsky, for sharing your thoughts. Please stop sharing your slides. There are a few noteworthy highlights. In particular, you talked about digital currency; whether the digital RMB could be an alternative solution as a countermeasure against sanctions.

As a matter of fact, Russia has been doing a number of things in past years to lower the risk of being sanctioned. For example, it lowered the percentage of its assets kept in the United States. So now, probably less than 50% of its overseas assets are in the United States. Over the past several years, the Russian government has already been working on disconnecting its system, assets and financial linkages to the United States market. Digital currency can be a fascinating idea but that depends on whether the digital currency will be used in a large scale and cross-border context. I consider this a very interesting point.

Some Chinese scholars have also mentioned this topic in their articles—many of them are not in the context of sanctions, but more related to the internationalization of RMB. Interestingly, any currency that wants to become a major international reserve currency has to face the dilemma that it can only become one if used on a large scale abroad. But, if you use the currency on a large scale outside the country, the central bank's monetary policy eventually becomes less effective; this is called the Triffin Dilemma.

It doesn't matter which currency is the major reserve currency, as they all use the US dollar, RMB or EU Euro. That will refer this to the Triffin Dilemma anyway. China will have to face such a dilemma in the end, which is a problem that all currencies need to overcome.

The RMB, as you know, is subject to tight foreign exchange controls. It is not that easy for people to take it out or bring it into China, another practical obstacle that RMB has to face if it wants to become a major reserve currency. It is a very fascinating discussion. Thank you very much, Professor Joel Slawotsky. We will probably have some interesting questions from the audience later.

Our next speaker is David Tang. He is a partner of Junhe Law Firm, a major law firm in China. He is based in Shanghai. He has twenty years of experience specializing in international trade and customs law, and he is a very well-established trade lawyer. In China, he has extensive experience in sanctions and countermeasures studies. He is a leading expert with practical experience in this field. We are very lucky to have David Tang with us today.

David Tang (Partner, Junhe Law Firm, China):

Thank you, Professor Wei Shen. Let me share my slides. I would like to spend a couple minutes talking about the United States sanctions on Russia. There are potential risks relating to Chinese countermeasures when companies in China or in other parts of the world are trying to comply with US law—the possibility that these countermeasures might kick in.

We all understand that the United States economic sanctions and export controls have an extraterritorial effect of long-arm jurisdiction rules, like secondary sanctions against Russia. Many Western countries cannot have a commercial relationship with Russian SDN as deals with them are forbidden, affecting Chinese and European companies. They must withdraw from Russia's projects or transactions. China and many European companies have been in divestments. We've seen this action in the markets in past weeks. All of them are due to the fear of secondary sanctions by the United States.

Part of the problem is that the United States has revised its export control laws and created rules targeting Russia. In terms of export control, what we see is a complete embargo, where more and more American products are being subject to a lot of strict regulations and then having some foreign product laws in specific areas as well. We see that the United States are much more aggressive in this regard than before, and many products are now subject to the long-arm jurisdiction of the United States export control laws and policies.

Many Chinese companies are also concerned about compliance with US laws. We know that the White House has made a statement in its press conference that they have seen China abide by the sanctions put in place. This is a very unusual statement—at least from what I have been read—in recent years. I guess it's very controversial coming from the United States government. I often think, from the United States government side, their expectation for Chinese companies or government is that they want us to be on their side working with them; not working with them is like working with Russia. The United States is also putting pressure on China. We see things changing very fast. As companies in China, we have to pay very close attention to every step of how the situation develops. We must be very careful to every moment of compliance; very careful treating these problems.

They need to be very careful to set up their own compliance program. At the same time, we see the Chinese government saying that sanctions are never an effective way to solve problems. As the government has said, China is opposed to any unilateral or long-arm sanctions. At the same time, China is also very concerned about the China's companies and individual rights, so the position of the Chinese government is very strong. The government conveys a message that it will take some counter policy. As a matter of fact, the Chinese government has tried to implement some countermeasures. The first one is the Anti-Foreign Sanctions Law (AFSL) passed in 2021, providing the government with comprehensive authorization to take action on dealing with discriminatory and restrictive measures by foreign countries. It also prohibits anyone abroad from taking discriminatory and restrictive actions against Chinese companies or individuals.

Under the AFSL, China mentions any unilateral sanctions against China are firmly opposed. We have seen, for example, so-called sanctions relating to; Xinjiang Province, Hong Kong, Taiwan, the South China Sea, human rights, and export controls; all of which are unilateral sanctions against China. But sanctions on Russia are mainly targeted at Russian companies, government agencies, and officials. Whether they are defined as discriminatory and restrictive measures abroad depends on how we interpret them.

Under this law, sanctions against Russia are not discriminatory measures. But, if we think about it a little more and imagine any Chinese company or individual continuing to

do business with Russia in violation of the United States secondary sanctions, at the end of the day there will be direct consequences for the Chinese company. We see that, then, whether the company is in the SDN list or not is related to our interpretation of whether the measure is discriminatory. In this case, it determines whether we can implement the AFSL.

Lots of Chinese companies and some foreign ones have now cut off relations with China because end-products made there may be supplied to Russia. In fact, it depends on the enforcement of the contracts in these areas, their transactions, and how they are treated. We can potentially also implement a kind of anti-sanction law. In fact, our government could potentially identify some individuals and put them on the list of countermeasures.

I just shared with you a personal view. This is unlikely to happen, of course, depending on two other countermeasures. One is the unreliable entities list launched in 2019 when Huawei was added by the United States DOC. Its sole purpose is to prevent certain types of long-arm jurisdiction, which in the case of sanctions means secondary ones. This may also extend to primary sanctions, such as export controls. There is no specific designation of which overseas laws will be blocked, which can create a lot of uncertainty. Secondary sanctions are already evident in the United States sanctions against Russia right now; if such a legal block is introduced, then Huawei is designated because it supplies to Iran, a direct violation. Because Huawei is accused of supplying products to Iran, it is subject to export controls. The administration could also impose primary sanctions—if it wants to do so.

Sanctions against Russia—because of secondary sanctions can be treated as a long-arm jurisdiction of the United States. Apparently, this is not reasonable. It means that sanctions do not have to be implemented in China, but will have significant influence on the Chinese local market. Chinese companies do not have to follow the laws of the United States, and American companies in China—they are also a Chinese legal person—do not have to follow US laws. This will have a very big consequence and can cause a very big fine. This is a block and would allow affected companies to sue.

If the United States sanctions against Russia are blocked in China, which I consider unlikely, it won't happen in the near future. The Chinese government can use a third tool Unreliable Entity List (UEL); when a foreigner has a conflict of interest and may use discriminatory practices against China. European companies are concerned about whether their Chinese business partners complying with sanctions can safely terminate contracts for violating them. But, if these European and American companies are classified as UEL, they can basically be kicked out of the Chinese market, which will also have a very big impact on them. Of course, I do not think this is a near danger for foreign companies in China.

What's happening now is that companies in China, both local and foreign, are doing a lot of training to re-educate themselves about the law and what it requires. In particular, the demands on the companies under different jurisdictions, including the United States and China, can be quite different. Many companies are re-evaluating compliance procedures and actively implementing various Chinese countermeasures, based on sanctions on export controls and in cases where Chinese and US laws are in conflict.

What we need to keep in mind is that we are supposed to have a good relationship with our customers. We hear from them that they are changing compliance—just not overcompliance—with Chinese, European, or American laws. We encourage companies to carefully weigh and consider where potential conflicts arise, and customer management teams to come in and form a special working group to deal with such a situation.

If any of your customers is the target of the United States sanctions or export controls, what steps you should take need to be up to date. We need to be very flexible in dealing with such a fluid situation.

I will also add that the Russian government has its own anti-foreign sanctions law and has introduced a lot of methods and measures to deal with the current situation—especially those targeting foreign companies. For example, confiscation of foreign investors' investment assets in Russia.

That is all I like to share for today and I look forward to more discussions with you. Thank you.

Wei Shen:

Thank you, David Tang, for sharing your thoughts. It's very interesting to compare the Chinese anti-sanction laws with Russian ones. It's interesting to put everything in a comparative context. The next speaker is Alistair Milne. He is joining us from England, probably six or seven hours behind us. Most speakers are actually lawyers with a legal background. Alistair is an economist, and a professor of financial economics. He has extensive experience advising the government department on financial issues and regulations. He is also advising financial and trade sections of the government and parliament. Some of his major works are well-acknowledged. We are very lucky to have this financial dimension shared by Alistair today, and to hear from an economist about financial sanctions and their possible impacts.

Alistair, let me share some questions the audience has posed. In the beginning, for example, we tried to understand the functionality of these financial sanctions and their effectiveness. In particular, we want to understand whether there is any way to walk away and avoid these sanctions, whether the third-party countries and their nationals can take any countermeasures, and whether the financial sanctions will have great impacts on global supply chains. We will also try to understand whether there is any alternative payment system which can replace the SWIFT, as it is heavily involved in financial sanctions. All major Russian banks have been kicked off from the SWIFT system. Russia has its own called SPFS, China has CIPS, and the EU has EBICS. These are still in very preliminary stages. These are the questions that we are trying to discuss. Certainly, it is open and there is no boundary. We welcome anything you like to share with us.

The floor is yours, Professor Alistair Milne, please.

Alistair Milne (Professor, Loughborough University, UK):

Thank you, I will try to share my screen first, because I am not very familiar with

the Tencent system, how can I share?

Wei Shen:

There is a sign at the bottom that looks like a computer screen.

Alistair Milne:

I joined via the Web, so maybe this feature is limited. Let me start. I have some titles, but I do not have detailed slides like what David Tang prepared.

I would like to start with a small personal story. I have been doing research for many years as an economist. I started at monetary economics in money and banking but moved to focus on financial technology payments. Several years ago, I actually was a visitor at the University of Moscow, which is the primer research university in Russia and familiar to anyone who has visited Moscow.

I was a visitor at the Department of Mechanics with the Faculty of Mechanics and Mathematics. This is where some of the most prominent mathematicians in history have come to research, and I had the chance to present my work to some leading technical economists. My host was the Ph.D. student, Kolmogorov. I do not know if there is anybody here who knows him because we have an audience of lawyers. But anybody who studies mathematics will perhaps be aware of Kolmogorov, who is probably the most famous Russian mathematician of the 20th century—responsible for a huge range of major contributions to the discipline. I was really talking to the top mathematician in Russia, and it happened to overlap with some of my own work. What I really bring back from that visit is a sense of solidarity with intellectuals. Even though we are in different countries and jurisdictions with big differences—political and cultural—I think it is tremendously important that scholars should maintain contact and exchange views in a passionate way.

Of course, I don't want to spend too much time on this story, but I want to say that there another old professor who is also a very famous mathematician. He told me a story through translation: in the 1930s—in the era of Stalin—Russia wanted to convict a mathematician because he was anti-government. Then the authorities put him in a prison in Siberia. Russia at that time also had a special legal system, and they had to find a person closely related to him to give evidence. They asked one person; wanting to hear from him that the mathematician was a criminal. In Russia, though, the bonds of family and friendship between university colleagues are much closer than in the United States. This is all what his grandson told me; he refused to give evidence against his colleagues, and he was unwilling to provide the evidence.

I know that many of today's audience is Chinese, but I tell this story to show that, as scholars around the world, no matter how different our opinions are, we can communicate in a very civilized and fruitful way. This is the story I want to tell.

I have mentioned I am an economist. I study economy and financial technology. These two are closely related to law, so I often discuss these topics with some lawyers. Here I want to mainly discuss two things and two themes. First, let's talk about SWIFT

sanctions. In recent days, everyone has been talking about this.

First, I want to talk about SWIFT, and aspects related to sanctions and economy. Generally speaking, SWIFT is a signal of sanctions or a symbolic sanction. What does it mean? I will explain in detail. Then, I will discuss something related to SWIFT, like the effectiveness of sanctions that we have just mentioned. It is not my special area, but I will also talk about it. Finally, we will take a look at my opinions on some problems.

Firstly, about SWIFT. The Financial Times has published a blog post of mine. In this blog, I pointed out one perspective—and I will share the link with you later. The history of the United States sanctions, especially ones against Iran, is very impressive. Historically, SWIFT did not play an important role in the United States sanctions against Iran. In fact, dating back to 1979 after the Iranian revolution, which was the first time that the relationship between Iran and the United States became tense. Mainly in 1987, during the Reagan administration, people paid more and more attention to Iran's support for terrorist activities and the Iran-Iraq war. At the time, sanctions were gradually imposed on Iran: first, economic sanctions to limit their ability to sell oil; and then, more in 2004 and 2005. I have a link here, where you can see the details.

At that time, payment was widely restricted. The United States government informed people that, if they made transaction payments with Iranian citizens, it would violate regulations—meaning American companies couldn't export to Iran. In other words, their goods could not go to Iran. Also, Iran's payment could not be received—therefore, the country's assets were frozen.

If you violate these sanctions, there will be serious punishment. Later, corresponding sanctions were imposed on other countries, such as Cuba and Venezuela. Such mechanisms were more mature. The United States Department of the Treasury (DOT) has a foreign assets control office, whose responsibility is to enforce sanctions. At the same time, we see that breaking the law often means large fines. The largest fine in the past five to six years was nine billion dollars on France's BNP Pariba—caused by sanction violations. This is an example related to sanctions against Iran, Venezuela, and other countries.

Far beyond kicking off the SWIFT system, there are also detailed provisions in this aspect, covering many economic and financial relations with Iran. There are also many legislative details. Of course, the most important is the restriction on payment systems after 2000. In fact, there are more than 100 pages of documents about the history of these sanctions in the Congressional Research Office. SWIFT only played an important role after 2012 to support sanctions more than the sanctions themselves. Take a look at the United States and the EU. In fact, the EU has never been as critical as the United States towards Iran and has always been cautious about sanctions. They mainly pay attention to, for example, the nuclear issue related to Iran, and hope to treat it in a more democratic way. They are more cautious and moderate in terms of sanctions. To a certain degree, they are subject to or forced by the United States to take SWIFT related measures.

Actually, SWIFT and its organization themselves are also uncomfortable. They certainly do not want to be involved, but you can see that if the EU does not involve SWIFT, they will not necessarily want to be involved. Finally, in 2012, we saw Iranian banks were kicked out of the SWIFT system, so SWIFT began to play a very important

role in sanctions.

SWIFT was re-admitted to Iran in 2015 because the United States signed a nuclear agreement with Iran. In the agreement—signed with the Obama administration of the United States, the EU, and other countries—Iran agreed to stop the development of nuclear weapons. As a supplement, SWIFT was restored. Therefore, with regard to payment sanctions, SWIFT actually came very late.

Even if SWIFT sanctions are implemented, not many transactions are conducted through it. Many banks in the world believe that if we deal with Iran, they only make little money with great compliance risks; they can suffer huge fines from the United States. The best way is to not have an affair with Iran. Banks, therefore, decided not to have any dealings with any Iranian financial institutions.

If banks in other jurisdictions have little association with the United States, they can continue doing business with Iran. Rich people in Iran can transfer money very freely because there are many ways to transfer funds. Iran is still obtaining foreign currency through oil. If people in Iran want to transfer money abroad, they can just ask the Iranian government to exchange their currency for a foreign one. There are many loopholes—only for those who have special relationship with the government, which enables those who fully support the Iranian government to enjoy these privileges.

This is completely contrary to the original intention of the West, who wants to promote democracy by imposing sanctions on Iran hoping that sanctions will stop the development of nuclear weapons. The EU has developed an alternative to SWIFT. In 2019, after Iran began to default, SWIFT sanctions were launched again—this time in the Trump government.

Here are two things to be said: the short-term impact and long-term impact. In the short term, SWIFT can be an effective tool. We live in the era of social media. President Zelenskyy of Ukraine does not know much about the SWIFT system. For him, he encouraged imposing greater sanctions on Russia. So, SWIFT is actually more like a symbol, symbolizing financial sanctions against Russia. From a pragmatic point of view, you may not know that the kicking the Russian bank out of the SWIFT system has not yet started. It will start tomorrow, March 12.

In the past 14 days, it has been very difficult for funds to enter and leave Russia, but it kicking Russia out of SWIFT will begin on March 12: if Chinese banks want to route payment to Russia through SWIFT, they will encounter difficulties. While Western banks, such as HSBC—a very important bank, have stopped all transactions with Russia since last week.

I am a payment expert, not a legal expert. My view is that we should distinguish the short-term impact from the long-term impact. In the short-term, SWIFT is a sign. But its impact is not so huge and significant if you take a close look at the details.

The last point is kicking Russian banks out of SWIFT, which once again shows the differences between the United States and the EU. The EU is very worried about its energy purchase, Russia's natural gas export, and it hopes that Russia can continue exporting natural gas to Europe. Sberbank is a very important payment channel. I know that the legal basis of the sanctions list comes from sanction laws against Iran which was introduced around 2000. This is all for the short term.

When I carefully read specific information about sanctions, I find that the EU and the United States know exactly what they want to do. This SWIFT sanction is very special. Why are there only seven Russian banks? They are still able to pay for energy and natural gas through the subsidiary of Gazprom, the main natural gas exporter. Gazprom exports oil throughout Europe. A total of eleven branches has accounts or other foreign currencies in Europe. They can still pay for natural gas to Russian entities through foreign exchange accounts.

Therefore, in the short-term, SWIFT sanctions are only symbolic. In the long-term, we should pay attention to the effectiveness of sanctions as a whole. Whenever I have Chinese students, I always like to discuss with them and know our cultural differences. I always like a simplified understanding. When I compare Chinese and European cultures, I find that there are many cautious attitudes in Chinese culture, including around language expression and many symbols. I am Irish: I have Irish roots because I grew up in Northern Ireland. And, because of my culture, I pay more attention to emotional expression. In our culture, we first express our feelings, and then about the impact and consequences.

When it comes to the sovereignty of imposing sanctions, there is no actual good cooperation. Those imposing the sanctions have not thought about their common goal. In the long run, what they hope to achieve from SWIFT sanctions will become a big problem. I think from this perspective, the effectiveness of SWIFT sanctions in the future is weak. These sanctions will prevent the emergence of more small sanctions, meaning small companies will not be able to conduct cross-border payment transactions. But large institutions can still find ways to flow their payments around the world.

China is quite familiar with the use of modern payment systems, including Alipay or WeChat pay. You pay by mobile phone, then others will receive money and transactions can completed within a few seconds. It works extremely well for small payments. To make a joke with Wei Shen: we agreed with the fee for this speech: just a joke, there is no 5-figure-fee at all! If anyone pays me, they can use Mobile Banking to pay through an automatic payment. The whole banking system is automatically connected all over the world. The importance of SWIFT is that it is an information transmission system. If Russia hacks the SWIFT system—which it wants to do—it will find the task very difficult. Actually, all of these are instructions on various bank systems, and banks can pass money between themselves. For example, money can go from an account in China to my account in the UK immediately. SWIFT is all about automation because the goal of SWIFT is to make a payment flow through in seconds. For example, if I am in Kazakhstan and I want to get millions of dollars to Russia, I just need to open a bank account in Kazakhstan. You should know; there are no sanctions between Russia and Kazakhstan to prevent me from sending money. It could be through telephone call, WhatsApp, WeChat messages, or something. If the Bank in Kazakhstan says that they want to get a 2% commission, one million could be twenty thousand in commission. Then—make sure you'd send one million to the receiver in Russia after taking twenty thousand dollars.

If our sanctions are really strict, this big transfer is impossible. Therefore, in the long run, I think the power of the Russian president will be further strengthened to exercise

greater power over individuals. It might be a cultural thing; in some cultures, people act first. It is not wrong, just a cultural feature. So, the big question is: in the long run, what are we trying to achieve with the sanctions going forward?

In fact, I have answered Professor Wei Shen's questions quite a lot. I can also share my reference with you guys; this is actually my field of research. There are many books on the effectiveness of sanctions, including how successfully they achieve their goals. There is some historical evidence that sanctions are not very effective. Look at Iran—it is a good example. When trying to promote a cultural or political change in Iran through sanctions, sanctions only reinforce the status quo. This makes its leadership say: "you see, there are hostile elements who are trying to defeat us, so we must be stronger, and we must not respond to what they would like us to do." So, I think Russia is facing the same situation today. The current sanctions against Russia will certainly further strengthen the power of President Putin in the near future.

In addition, on Russia's actions in Ukraine: I do not know about the media's opinion in China. Western media wrote that Russia has been preparing for this war for ten years. The most important development is that Russia has made itself a major grain exporter. In 2012, Putin set an objective to double Russia's grain output, including in corn and wheat, and they became the world's largest food exporter in 2020. If I remember correctly, China is the largest importer in the world, and Ukraine is the third-largest exporter of grain in the world.

I like Chinese food very much. I remember that the Chinese like to eat pork, and pork is delicious. Half the pigs in the world live in China, but many of them feed on corn from Ukraine and Russia. Therefore, I think in addition to the high price of energy, it is another big factor for the impact on global economy.

When it comes to grain, I want to emphasize that Russia is self-sufficient in food and energy, meaning that the Russian military can continue to sustain itself, I am also hesitant about whether it is invasion. Invasions can last for several months. Sometimes, they may have some technical issues: for example, Russian planes need to import some parts and components from the West. I think military action like this may last for at least a few to several months, despite the difficulties.

If Russia's military action against Ukraine lasts for two to three years, I think it is also possible for Western sanctions to last that long. Most sanctions in the West lack the consistency of what they are trying to achieve in many details. I may have talked too much, but in general—I want to say that what we want to achieve through these sanctions is unclear.

For sanctions, we may need more legislation than so-called executive orders. We should clarify what the West is trying to achieve in their sanctions. In this way, we can very clearly rule out some specific situations and have a longer-term vision. Suppose Chinese companies are doing business in Russia—I am not going to comment on the morality of that. But, from a commercial perspective, it is very clear that Chinese companies have commercial interests in the West. There are compliance requirements in this aspect. With legislation, I think that everything may be clearer: this is the effectiveness of sanctions.

Then, let's talk about the impact of sanctions. In fact, I think it should be a broader

discussion among all experts. I have just talked in detail about Russia as a sanction target. Neighboring countries may be, intentionally or unintentionally, involved in the impact. However, this goes beyond my own expertise. In fact, as an expert in payment, I think it is very possible to find a way around sanctions to make large payments. But it might be difficult for some smaller companies to make payments.

Take the CIPS system, which uses RMB payment, as an example: in the long term, it is difficult to prevent relatively small Chinese companies from using CIPS. If Russia exports oil to China, after two or three years, not smaller but larger companies would be more concerned about sanctions in the West. Smaller companies may be able to export a series of products to Russia. Under such circumstances, some people will find that the advantages outweigh the disadvantages of trading with Russia. Of course, CIPS, as such a mechanism of RMB, cannot develop to a great extent at once, and there are indeed some political risks.

The point here is that Western media often opposes democracy and autocracy to compare and tell. But what I want to say is that no political system is perfect. At the end of my speech, I would also like to talk about a personal feeling. My guess is that Chinese authorities may be very cautious about rapidly promoting trade with Russia because there will be risks with a country that has been subject to many sanctions, such as with SFPS. Take Kazakhstan as an example, larger payments could go to the bank of Kazakhstan or other members of SFPS and then could find its way to Russia. The future of SWIFT is still fairly clear: it will be as politically independent as possible.

But from my experience with SWIFT, it is only a messaging system. It has to obey political groups despite not being particularly willing. It wants to remain neutral.

Finally, I would like to talk about some other things. Chinese culture respects the elderly very much—and I am an elder now. My father is also a professor, long passed away, more than two decades ago. I know that his works have been translating into Chinese because he was an authority on human rights. His experience is very interesting: as an anti-Nazi veteran, he was also a victim of the war after he lost his eyesight. But he finally became a university professor and told countless stories. The point here is about the issue of human rights. We may not be satisfied with some things happening within Chinese borders. I want to point out to the attitude of some people—I do not want to say who they are—that human rights are closely related to culture, and sometimes there is no right or wrong.

Back to my story in Russia, there is a certain commonality among all of us as human beings. As scholars, our cultures may be different. But our ultimate and deepest values as humans can be shared across all civilizations. Although we have different cultures and are now facing war, we—as economists, political philosophers and lawyers—all have our own roles to play. Thank you very much for your invitation.

Wei Shen:

Thank you, Alistair Milne, for sharing your wonderful points. I just received a message through WeChat from a lawyer saying they are very interesting. As a matter of fact, whenever we talk about the exclusion from the SWIFT system, people are panicked

because that is basically a kickoff from the world payment system.

But what you said is very interesting. It seems that the SWIFT system is just a symbol. Payment transactions can still continue through various channels instead of SWIFT. I think what you said is correct. What I want to say is that the effectiveness of SWIFT as a sanction is not particularly good in the long run, because, in the end, powerful people would be able to get around it. But small people, like small businesses, will be affected in the long run because automatic payments depend so much on SWIFT. I have heard this kind of argument from financial people like lawyers, saying that, based on its attitude, SWIFT—between the United States or the rest of the world—sometimes does not want to be involved in these sanctions.

Alistair Milne:

I think your statement is very interesting. I am not perfectly persuaded because SWIFT is a non-profit organization with more than eleven-thousand-member banks. Its decision-making process is very slow; you have to get all these banks to agree, which takes time. If you want to promote anything, it must be in the interests of member banks.

I would also like to talk about a topic different from sanctions. At present, there is a very important global initiative, which China supports, called the Digital Standards Initiative for trade (DSI). In all global trade, people today do not make full use of digital technologies: a major barrier is standard. Therefore, SWIFT is very involved in an important initiative for setting standards for trade finance. The economic value of DSI initiatives will reach a full nine trillion dollars, accounting for 10% of global GDP. To make a comparison, China's GDP is fourteen trillion dollars. This is an initiative that SWIFT is very engaged in.

Whether our payment and trade can be smoother and at lower costs, such initiatives can benefit all of us economically. I also have been engaging with Chinese lawyers on trade and trade finance. Of course, this is another topic altogether.

Wei Shen:

Thank you very much. Let's move to the next speaker, Professor Heng Wang. He has a very long title: a professor at the International Law School of the University of New South Wales, Australia; and the Co-Director of China International Business and Economic Law Center. He has a wide range of publications on various topics. I am extremely appreciative of Professor Wang's attendance because, currently in Sydney, he is three hours ahead of us; it is around one or two o'clock in the middle of the night in Sydney. Let's welcome Professor Heng Wang.

Heng Wang (Professor at the International Law School of the University of New South Wales, Australia; Co-Director of China International Business and Economic Law Center):

Thank you, Professor Wei Shen, for the warm welcome. No problem, I feel very

good. I'm very glad to participate in this round-table discussion. I do not have any slides, but I will talk about the impacts of financial sanctions on Russia—especially on enterprises.

I agree with the views of other participants. At present, the scale of sanctions against Russia is unprecedented. Therefore, we are also concerned about the impact on the global economy and international order, which is very important for enterprises, namely for business decision-making. We also need to think about how to move forward in this challenging situation.

What the future financial system and its impact will have on enterprises is what I want to discuss today. Firstly, we saw the fragmentation of the global order and the rise of many different systems, including SWIFT. Russia is now promoting its own system, but how far it can go is still a big question. Of course, its development is also facing great pressure.

Secondly, in terms of a fragment system: people use national currencies—not only the US dollar—because sanctions will target other ones. We are particularly concerned about the impact on RMB, which will play a more important role. And certainly, another perspective we will see is the impact of Currency Swap Agreements (CSAs). The discussion on CSAs has increased since 2010: in addition to the money of public institutions, the major transactions of cryptocurrency should comply with sanctions. We are not sure whether every transaction and cryptocurrency platform will comply with sanctions. This is a question. It will relate to local reactions and national laws because, if this is the case in China, it may not be the same story in other countries. So, it is a completely fragmented situation.

In relation to the international system, the organization AID said they have terminated projects in Russia and Belarus. This will also have an impact on international multilateral finance organizations, thus affecting enterprises.

The second point is that different countries must make trade-offs. China, as an example, has to deal with its Russia relations and other countries in the world to ensure that it can join the global financial system—which can be very challenging for China.

The United States would like to stop the crisis in Russia and Ukraine through further sanctions. This is actually a dilemma for the United States: Professor Joel Slawotsky mentioned the Central Bank Digital Currency, and I think it is very difficult for CBDC to be used across borders. Many people want to use CBDC, but it is still different from traditional currency—the issue is about data flows. Whether the central bank is willing to share data on money flow is another open question. There is also the issue of network security, which can be said is a fatal blow to CBDC. It will affect people's confidence in the currency of CBDC. If CBDC is used across borders, it will have to meet high standard. So, it is full of challenges.

Third, I will talk about enterprises. With the fragmentation of the whole system and its various challenges, enterprises face higher costs in transactions. Just now, David Tang said that anti-sanction laws will be passed in different countries. We do not know whether there will be financial decoupling, because enterprises actually want to avoid risks. There are different enterprises; large and small. The SWIFT system is mainly about banks, so the impacts on each industry are different. I think financial sanctions will have expected

and unexpected effects. It will have short-term effects, as Professor Wei Shen mentioned. If you do not act in accordance with international law, these trade laws will not benefit you, including the role of energy, the US dollar, currency, and technology. People use technology in different CBDC environments. Moreover, it is not only about national laws, but also about trade agreements between countries. Therefore, the global value chain will see unprecedented challenges. We are more likely to see a negative impact, which is the destruction of an existing global pattern and will lead to higher costs for enterprises.

Finally, I would like to echo what Professor Alistair Milne mentioned: we should think about how to end the war, that is really what we need to do. Thank you.

Q&A

Wei Shen:

Thank you, Professor Heng Wang. It is very late for you there and it is also late in China. So, we will finish soon, but it is routine to pick up some questions in the end to show audience involvement and participation. So, would anyone in the audience like to raise a question? You can direct your question to someone, such as Alistair Milne and David Tang.

Question:

Hello, Professor Wei Shen. All speakers can answer my question. I am a second-year postgraduate studying international law in Shanghai Jiao Tong University. My question is about countermeasures that may be taken by Russia. No matter whether the war is an invasion or not, it will be taken. Like Professor Wei Shen mentioned, some countries, such as Canada, have canceled the MFN treatment to Russia in the trade dealings. I am wondering, if Russia wants to sue Canada—on what basis can Russia take action for the cancellation of its MFN treatment through the WTO or other platforms?

Wei Shen:

Thank you for your question. Basically, there is no clear rule in the WTO on which state can remove another member. The whole voting process would be complicated. As you know, WTO uses the consensus mechanism, so it is very difficult to remove a member. Secondly, it is difficult to compare Russia in the WTO, and then in the International Court of Justice (ICJ). The ICJ has jurisdiction over this case, but in the WTO—as I said, there is no procedural rules about removing a member.

Question:

Good evening, professors. I am a first-year master student from Nanjing Normal University. I have a question about secondary sanctions: I want to know whether they are justified under international law? And in this case, what countermeasures can we take?

Wei Shen:

Can secondary sanctions be justified under international law? Joel Slawotsky, could you answer this question?

Joel Slawotsky:

First of all, this is a good question. In fact, Professor Sienho Yee from China Foreign

Affairs University wrote about the illegality of unilateral sanctions and secondary sanctions, especially under the framework of international law. I have read this article twice and hope you will also take a look. I mentioned at the beginning, the first thing people in China need to understand is the view of many people around the world on the crisis in Ukraine.

I have noticed some content on Chinese social media. I understand what you mean; I think the perception of the rest of the world is that this is a shocking invasion. If you look at international law and its technical details, we should note the political pressure is felt by governments all over the world.

Speaking of the first question: regarding Canada and the revocation of the MFN treatment from Russia, you can see that the attitude is actually based on the international rules-based legal order. I think in China, such sanctions are more regarded as a manifestation of American hegemony. This is very interesting: the decision to remove the MFN treatment based on national security and the violation of the so-called rules-based global order. In terms of responding, I think we should realize that, outside China, in the pictures seen by people all over the world—such as those from Ukraine—make it actually difficult for Russia to explain itself. Ukraine brought a case to the ICJ stating that the Russian justification for military incursion was just a pretext and therefore broke international law. Ukraine argues that Russia launched the war on the false pretext, genocide. I hope you can read Professor Sienho Yee's article on unilateral sanctions.

At the same time, when we think about the legal aspects of secondary sanctions, we should realize that people all over the world see the pictures of Ukraine constantly, which indeed plays a very key role in the decision-making process to impose sanctions.

Wei Shen:

Thank you, Joel Slawotsky. Who would like to ask the last question?

Question:

Can I follow up a question about the professor's answer and make a comment? Professor Joel Slawotsky, you just talked about the so-called genocide in Xinjiang Province. Based on this point of view, some companies in the United States have been banned from purchasing any raw materials from Xinjiang Province. At the same time, there is also a ban on any so-called forced labor issue in Xinjiang Province. Besides the compliance that these companies should work on, what measures do you think the Chinese government or other Chinese companies could possibly take on facing such bans?

Joel Slawotsky:

I think China and Chinese enterprises should explore some measures of litigation. If I were a Chinese business owner, I would consider filing claims in the United States courts. I think in general, the United States courts are still fair, and respect due process.

So, China should explore some legal strategies. Of course, this is my personal opinion. Through these strategies, we can show that what we do has not negatively impacted national security. For example, the United States accuses China of genocide in Xinjiang Province. I think this is unfair: take sterilization as an example; Europeans prohibited African women from having more children in Africa. Why can they do this? Why do they not consider what they did in Africa as genocide while they think China is carrying out genocide? So, the law seems powerless in front of politics in many times, but you can try, especially in US courts.

If I were an advisor to the Chinese government and could make suggestions to it and other Chinese enterprises, I would urge it to carefully explore the possibility of litigating claims, which is to bring a suit against the United States decision to sanction through legal channels. Litigating the legal basis of these measures to the American judicial system is to challenge and question it.

I know that China's "war wolf diplomacy" is very popular, and I respect it very much. But I think there should be more effective ways to counter sanctions, which is to explore and adopt legal methods—such as litigation in the United States courts, and I would be very surprised if China could not present its evidence there. In fact, many people in the United States are very fair. No matter who you are, they will not deliberately oppose you. If your argument is strong enough, they will accept it.

The United States government may be more wary of China because they see it as a very powerful competitor. But the United States judicial system is still very fair and impartial. Thank you.

Wei Shen:

Thank you, Joel Slawotsky, for the answers. And also, thank you for your questions. Ladies and gentlemen, how time flies. I know you still have many questions about the impact of financial sanctions on Russia. Today is a good beginning for us to further learn about their impacts and prospects. I would like to take this opportunity to thank all speakers. We have overcome many difficulties—including different time zones—and are finally successful in participating in this online forum. I also thank the audience for your participation and questions. We had 150 participants online today.

Finally, I would like to thank the team behind us: our organizers, includingYuhan Qian who prepared PPTs for us; and some students who were responsible for the technology. Thank you, again, for your kind participation. We look forward to seeing you on other occasions. Thank you and goodbye!

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