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Articles

The Challenges of Cyberspace Regulation in View of the Global Power Dispute

Rodrigo Abreu de Barcellos Ribeiro[1]

Abstract: Information technologies, as well as cyberspace, have assumed a central role in contemporary society, becoming essential for the functioning of the economic, political and social sectors of states and even their Armed Forces. In view of this situation, the main military powers in the world already consider cyberspace as a new strategic domain, investing in robust capabilities for conducting cyber operations. The first two decades of the 21st century were marked by empirical examples of cyber espionage, sabotage, denial of service and other cyber operations conducted in peacetime by state actors against other states' critical infrastructures. Thus, debates about the need for an international regulation of the behavior of states in cyberspace were raised. The absence of an international regulatory institution for cyberspace contributes to the creation of a gray zone of what kind of cyber operations would be allowed in peacetime. Although it is already possible to notice international cooperative efforts in the field of regulating and combating cybercrimes, such as data theft and cyber terrorism, the same trend is not repeated in the scope of cyber operations conducted by states with political and economic objectives. In this sense, this research aims to address the impact of the current international power dispute on the process of creating an international institution capable of regulating cyberspace. The main argument is that the absence of an established hegemony and the subsequent clash of interests of the world's major military and cyber powers hampers the process of creating such an institution with global credibility. As for the methodological aspects, this work represents an inductive, exploratory and mostly qualitative research. Data will be collected from the analysis of official documents, bibliographic research and the use of databases. As for its justification, this research aims to contribute to greater regulation and governance of cyberspace through the understanding of the strategic interests that shape the decisions of the main state actors involved in the debate.

Key words: Cyberspace Regulation; Global Power; Dispute Settlement

1. Introduction

The beginning of the 21st century simultaneously observed two important events for the global balance of power. The first one is related to the rise of information and communication technologies, which ended up becoming fundamental for the functioning of critical structures of the states. The second change is related to the status quo of the international system, characterized by a hegemonic crisis.

Understood by the great powers as a new strategic domain, cyberspace has taken on a central role in the contemporary warfare strategy, as it has made it possible to inflict

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critical damage on an adversary without the use of kinetic means. The cyber domain is capable of influencing all other strategic domains simultaneously. In addition, it has characteristics such as the difficulty of attribution and the absence of an institutional framework capable of regulating it, despite some incipient initiatives. Without regulation on cyber operations, the recent years witnessed several examples of cyber espionage operations, denial of service and even sabotage of critical infrastructures, often conducted in peacetime.

At the same time, the international system has been showing the characteristics of what Giovanni Arrighi defines as "systemic chaos", that is, a conflict between two or more sets of norms and behaviors represented by different countries.[2] This apparently irremediable situation is caused by the crisis of American hegemony, evidenced over the last decade. In view of the 2008 financial crisis and the difficulty presented by the United States in achieving its primary objectives in its campaigns in the Middle East, China and Russia have started to directly challenge the pillars of American hegemony,[3] seeking to increase their international influence and modernize their Armed forces. The United States, in turn, is trying to maintain its hegemonic status, opting for a more aggressive foreign policy, based on the formation of new military alliances and intensifying its relations with its allies in the Asia-Pacific region.

This article seeks to understand the impact of the global power dispute on the process of creating an international institution capable of regulating cyberspace. The central argument raised is that the systemic chaos generated by the crisis of American hegemony hampers the process of creating such an institution with global credibility, due to the clash of interests between the world's major military and cyber powers. The main conclusion drawn is that the systemic chaos prevents the formation of a consensus that hinders not only the formation of an institution capable of regulate cyberspace, but also the very applicability of such regulation.

This research is inductive, exploratory and mostly qualitative, using data collected by the analysis of official documents, bibliographic research and databases, divided into three sections. In the first section, the aim is to outline an overview of the main characteristics of cyberspace and the problems associated with the regulation of this domain. In the second section, the status quo of the international system is discussed as a systemic chaos and the strategic interests that shape the behavior of the main military powers of the globe. Finally, in the third section, the main challenges for the regulation of cyberspace are raised in light of the discussion about the global power dispute.

2. Cyber Domain Regulation

In the 21st century, Information and Communication Technologies (hereinafter referred to as ICTs) gradually assumed a central role in contemporary societies, becoming, in some cases, essential for the functioning of a State. For 2022, a global investment of the United States $ 4.5 trillion is estimated in the ICTs sector - which includes data storage systems, software, devices and technology and communications

[2] See Giovanni Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times*, Verso, p. 31 (2010).
[3] See Robert Cox, *Gramsci, Hegemony and International Relations: An Essay in Method*, 12(2) Millennium 162, 162-175 (1983).

services - representing an increase of 5.1% compared to 2021.[4] The large investments in the sector translate into a rapid increase in the capillarity of ICTs within states, making their critical infrastructures increasingly dependent on the use of information and communication technologies for their functioning.

The critical infrastructures of a State are all those "responsible for providing certain commodities or services that are essential for the economic prosperity and social vitality of a Society".[5] These infrastructures are generally divided into categories according to their main function, as is the case of the taxonomy presented by Sergio Castro. The author separates the critical infrastructure of a State into eight categories, namely: "Government, Electricity grid; Oil and gas production and distribution; Logistic networks; Telecommunications; Financial sector; Manufacturing sector; [and] Services".[6]

When dealing with the impact of ICTs on critical infrastructure, it is first necessary to establish two principles. First, if a system or a device is connected to a network, it may be exposed to a cyber-attack that exploits a vulnerability that is either unknown or has yet to be patched. Second, the level of connectivity is directly proportional to the level of vulnerability.[7] Taking these factors into account, increasing investments in ICTs, in addition to improving the effectiveness of the systems used by the critical infrastructures of the states, increases their susceptibility to cyberattacks carried out by private and state actors with economic, military or political objectives. Therefore, it becomes possible to cause critical damage to a State from cyberspace, without the use of kinetic weapons.

Critical damage can be inflicted on a state through cyberspace when the confidentiality, integrity or availability of a system, a device, or even a file is attacked. Thus, confidentiality, integrity and availability are classified as fundamental principles of information security.[8] The concept of cyber operations arises from this discussion, being defined as the use of cyber capabilities aiming to achieve objectives in or from cyberspace.[9] If this operation attacks the cybersecurity principles mentioned above, it can be defined as a cyberattack. On the other hand, if the operation aims to protect availability, reliability or availability, it is a cyber defense operation.

From this perspective, it is essential to emphasize that the great military powers of the world - such as China, the United States and Russia - have a high degree of ICTs' capillarity. Thus, due to its fundamental role in contemporary warfare, cyberspace is already understood by these countries as a new strategic domain. The cyber domain, also

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[4] See Meghan Rimol, *Gartner Forecasts Worldwide IT Spending to Grow 5.1% in 2022*, https://www.gartner.com/en/newsroom/press-releases/2022-01-18-gartner-forecasts-worldwide-it-spending-to-grow-five-point-1-percent-in-2022 (accessed on November 1, 2022).

[5] See Nan Li & Fei Wang et al., *Interdependent Effects of Critical Infrastructure Systems under Different Types of Disruptions*, 8(1) International Journal of Disaster Risk Reduction 1, 1 (2022).

[6] See Sergio Castro, *Towards the Development of a Rationalist Cyber Conflict Theory*, 6(1) The Cyber Defense Review 35, 40 (2021).

[7] See Vitória Giordano & João Paulo Bosso, *A Estruturação da Defesa e Segurança Cibernética a partir do Mapeamento Documental dos Estados Unidos da America*, Danielle Jacon Ayres Pinto, Graciela de Conti Pagliari, Jéssica Maria Grassi (eds), A Geopolítica das Estratégias em Defesa Cibernética, Alpheratz, p. 17 (2021).

[8] See Peter Singer & Allan Friedman, *Cybersecurity and Cyberwar: What Everyone Needs to Know*, Oxford University Press, p. 35 (2014).

[9] See United States of America, *Joint Publication 3-12: Cyberspace Operations*, p. v (2013).

called the Fifth Domain, has no geographic limitations and can simultaneously affect all other strategic domains.[10]

The concept of cyberspace is volatile, being defined in different ways by states, international organizations and scholars. However, it is possible to raise three essential characteristics of cyberspace that end up shaping the behavior of states in this domain: the difficulty of attribution, the vague definition of threats and the lack of international regulation.

Attributing a cyberattack to its respective actors is a major challenge in cyberspace. When an actor, whether state or private, conducts a cyberattack against a certain target, they are able to mask the origin of the attack, making it incredibly difficult to say with certainty that the attack came from this actor.[11] Also, when launching cyberattacks, it is common for states to take advantage of a "bad reputation" of certain countries and mask them as coming from the territories of these actors. In a practical example, other states take advantage of the many cyber espionage operations attributed to China to camouflage their attacks as coming from Chinese territory, causing confusion in the attribution process.[12] In some cases, even when it is possible to trace the true origin of the attack, the obstacle becomes proving the link between the State and the group responsible for the attack, whether through direct command, funding or even providing sanctuary for the group's actions. Therefore, it is evident that there is no international institution capable of conducting an attribution process with international credibility. Thus, in the absence of a standardized and internationally recognized forensic process, states opt for decentralized investigations that end up garnering a low reputation and credibility.[13]

Defining and measuring threats is another challenge in cyberspace. The rapid advancement of technologies makes it difficult to raise awareness and measure the threats represented by a cyber-attack.[14] In addition, when a company (or a State) becomes aware of a vulnerability in its systems, an actor will no longer be able to use this same "exploit" to carry out a future attack, since it is presumed that this security flaw will be patched. For this reason, most cyberattacks recorded so far are based on unsophisticated tools, since states tend to save their so-called "zero-day exploits" - complex cyber weapons that exploit vulnerabilities that are not yet known by their targets - for an eventual large-scale conflict.[15]

Finally, cyberspace is also marked by a lack of international regulation of cyber operations conducted or sponsored by nation states. That is, just as there is no institution with international credibility to attribute cyberattacks to their original actors, there is also no institutional framework capable of regulating what types of cyber operations are permitted under international law. Therefore, a scenario is created "where details of the

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[10] The other strategic domains are land, air, sea and space. See Dighton Fiddner & Phil Williams, *Cyberspace: Malevolent Actors, Criminal Opportunities, and Strategic Competition*, Strategic Studies Institute - US Army War College, pp. 33-34 (2016).

[11] See supra note 8.

[12] See Magnus Hjortdal, *China's Use of Cyber Warfare: Espionage Meets Strategic Deterrence*, 4(2) Deterrence. Journal of Strategic Security 1, 12 (2011).

[13] See Milton Mueller & Karl Grindal, *Cyber Attribution: Can a New Institution Achieve Transnational Credibility?*, 4(1) The Cyber Defense Review 107, 107-122 (2019).

[14] See Catherine Lotrionte, *Reconsidering the Consequences for State-Sponsored Hostile Cyber Operations Under International Law*, 3(2) The Cyber Defense Review 73, 73 (2018).

[15] See Richard Clarke & Robert Knake, *Cyber War: The Next Threat to National Security and What to do About it*, Ecco, p. 236 (2010).

international legal principles and rules are poorly defined and subject to competing interpretation or contested application … [creating] potential to misread the intentions of other states that could unnecessarily lead to escalation".[16]

In addition, the absence of a clear regulation of the limits of operations that can be conducted peacetime and wartime leads states to explore "gray zones" between these two stages.[17] By definition, gray zone operations take advantage of loopholes and ambiguities in international law and principles.[18] This strategy is present in all five strategic domains, but the fundamental characteristics of cyberspace - mentioned above - enhance its use.[19]

When it comes to combating cybercrime, it is possible to notice a clear effort of international cooperation and the creation of norms and institutions. One of the main achievements of this long-standing commitment is the Budapest Convention on Cybercrime, from the European Council, signed in 2001.[20] Currently, 67 countries, from all continents, have ratified the treaty that provides important definitions on different cybercrimes and encourages the cooperation between the parties to combat transgressions. In addition to the Budapest Convention, there are also bilateral and multilateral efforts to combat and cooperate on issues related to cybercrime, such as the Shanghai Declaration, promoted by the Asia-Pacific Economic Cooperation (APEC for short) in 2002, and the Commonwealth Cybercrime Initiative, created in 2011. Even the United Nations, which already organizes the Internet Governance Forum since 2006, initiated meetings for the development of an international treaty on cybercrime, which should be finished in the coming years.[21] Therefore, even with some challenges, there is an international effort for cooperation and institutionalization regarding the fight against cybercrimes.

The same international effort to fight cybercrime through the creation of treaties and fostering international cooperation is not found in the context of cyber operations conducted, financed or supported by states. There is currently no Treaty or Convention regulating this practice. The most recent documents that come somewhat close to this goal are the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, published in 2017, and the United Nations Group of Governmental Experts (hereinafter referred to as UN GGE) report published in 2021.

Published in 2013, the first Tallinn Manual was organized by the North Atlantic Treaty Organization Cooperative Cyber Defense Center of Excellence in response to a series of cyberattacks launched against Estonia in 2007, which left the country's critical infrastructure on the brink of collapse.[22] The main criticism involving the publication of

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[16] See supra note 14.

[17] See Ye Zheng, *On the Essential Characteristics, Power Composition and Content Form of Strategic Game in Cyberspace*, http://theory.people.com.cn/n/2014/0818/c40531-25487795.html (accessed on November 1, 2022).

[18] See Michael Schmitt, *Grey Zones in the International Law of Cyberspace*, 42(2) Yale Journal of International Law Online 1, 1-21 (2017).

[19] See supra note 14, at 76.

[20] See The Budapest Convention (ETS No. 185) and its Protocols, https://www.coe.int/en/web/cybercrime/the-budapest-convention%3Fref%3Dhackernoon.com (accessed on November 2, 2022).

[21] See United Nations, *A UN Treaty on Cybercrime en route*, https://unric.org/en/a-un-treaty-on-cybercrime-en-route/ (accessed on November 1, 2022).

[22] The attacks, which lasted about a month, took place in the context of a diplomatic crisis between Russia and Estonia and were attributed to Russia. However, it was not possible to prove that the attacks were carried out by the Russian government, which attributed the attacks to Russian patriots. See Jason Fritz,

the manual was the low variety of the group of approximately twenty specialists responsible for the work - which was mainly composed by American, Canadian and Western European experts.

Taking this and other criticisms into account, North Atlantic Treaty Organization (hereinafter referred to as NATO) commissioned a second edition of the publication, the Tallinn Manual 2.0, which featured a more diverse team of experts, consultants and reviewers and offered a more in-depth approach when compared to its predecessor. The second version of the Manual outlines over 150 rules of conduct in cyberspace that deal with general characteristics of cyber law, its impact on other branches of international law - such as humanitarian law, maritime law and space law international cyber activities in peacetime and wartime and cybernetic conflict.[23] Comprising nearly 600 pages, the Tallinn Manual 2.0 constitutes a unique effort to build the debate on the applicability of international law to the cyber domain, however the publication was met with a series of criticisms from international scholars and policymakers.

When addressing criticisms on the Tallinn Manual 2.0, two main points need to be made. First, it must be considered that the book was funded, organized and prepared by NATO. Furthermore, the Manual is classified as an academic production, and not as a document, or a treaty, therefore not containing any regulatory character. In addition to that, Dan Efrony and Yuval Shany point out that the publication does not make it clear "whether it is reflective of existing international law, or merely the articulation of the views of an international group of experts on how international law should be applied to cyber operations (including, at times, both consensus and dissension views)".[24] Still according to the authors, critics questioned the low attention given by experts to issues related to international humanitarian law and even the application of international law as the most appropriate tool for the governance of cyberspace.[25]

Although there was an attempt to diversify the team of specialists involved in the production of the Tallinn Manual 2.0, it is imperative to highlight that experts from countries with robust cyber capabilities such as Russia, North Korea and Iran were not included in the discussions that originated the publication. Even without including representatives from these countries - who hold notably different sets of values from those cultivated by the West -, the experts responsible for the manual had difficulties in reaching a consensus on certain issues, which was marked as a reason for the number of pages of the work.[26]

Since 2004, the United Nations (hereinafter referred to as the UN) has been establishing a Group of Governmental Experts to deal with the behavior of states in cyberspace and its consequences for international security, producing six reports on the subject so far. The last report, released in 2021, was based on four formal meetings held between representatives of 25 countries, focusing on "existing and emerging threats,

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How China Will Use Cyber Warfare to Leapfrog in Military Competitiveness, 8(1) Culture Mandala 30, 57-61 (2008).

[23] See Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press (2017).

[24] See Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112(4) American Journal of International Law 583, 589-589 (2018).

[25] Ibid.

[26] See Michael Schmitt, *Tallinn Manual 2.0 & Gray Zones in International Law – CyCon 2017*, https://www.youtube.com/watch?v=w38HSUlnX6U (accessed on November 3, 2022).

norms, rules and principles of responsible State behaviour, international law, confidence-building and international cooperation and capacity-building, which together represent a cumulative and evolving framework for the responsible behavior of states in their use of ICTs".[27] By focusing on issues such as cooperation and transparency, the report highlights the importance of these practices to combat the unpredictability of threats that surround cyberspace and provide better conditions for states to develop their information security capabilities.

The main criticisms involving the 2021 Report point to the fact that the document doesn't propose any guidelines (beyond dialogue and consultations) on how states should improve their cooperation on information security issues. On the same note, the document does not propose any type of accountability mechanism for states that do not act transparently or continue to conduct, fund, or provide sanctuary for organizations that engage in cyber operations that could cause critical damages to another State. Finally, the document was also criticized for not meeting the expectations raised about its publication, by not introducing new variables to the debate or presenting different solutions to problems already known in the field of information security, implying a lack of real progress and a cyclical discussion.[28]

Despite the criticisms raised above, this paper argues that both the creation of new legislation to combat cybercrime, and the documents analyzed above, contribute, in their own way, to the creation of an institution that, in the future, may be able to regulate the cyberspace. First, the regulation of cybercrime helps to normalize a culture where principles of law are also applicable to the conduct of individuals in cyberspace, moving away from the idea of the internet as a "no man's land". The Tallinn Manuals, in turn, address how basic principles of international law apply to cyber operations. By dealing with key principles of international law (such as the principle of sovereignty, humanitarian law and international cooperation), based on widely adhered to International Conventions, the Manuals offer a guideline, although incipient, for a future regulation of cyberspace. Furthermore, the UN GGE 2021 Report, by also being built on the principles of international law, offers a more robust institutional support for these principles to also be considered in the context of the laws applicable to cyberspace. In this sense, despite the criticisms and challenges, the efforts mentioned above represent important contributions to the design of a future institution capable of exercising governance over cyberspace.

Thus, due to the advance of ICTs in the 21st century, the cyber domain appears as a new variable with a great impact on issues related to the security of states, presenting risks and challenges hitherto unheard of, such as the possibility of inflicting critical damage on an enemy without the use of kinetic means. Intrinsic characteristics of cyberspace, such as the difficulty in assigning and unpredictability of threats and the absence of an international regulation of cybernetic operations conducted, financed or supported by states, differentiate it from other strategic domains. The two Tallinn Manuals and the 2021 UN GGE Report comprise the main contributions to the formation

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[27] See United Nations, *Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, A/RES/73/266, p. 6 (2021).

[28] See Paul Meyer, *Incremental Progress or Circular Motion? – The UN Group of Governmental Experts (UN GGE) Report 2021*, https://ict4peace.org/activities/ict4peace-commentary-on-final-un-gge-2021-report/ (accessed on November 4, 2022).

of an institution capable of regulating cyber operations, but as noted, they are still very incipient. It is argued here that the difficulty in creating an institution with international credibility to regulate cyberspace, as well as the lack of consensus and the creation of accountability mechanisms, which mark the criticisms of the Tallinn Manual 2.0 and the UN GGE Report, are direct reflections of the status quo of the international system, which will be better addressed in the next section.

3. The Ongoing Global Power Dispute

Parallel to the scenario explored in the previous section, in which the rise of information and communication technologies in the 21st century creates new risks and challenges for the security of states, creating a new strategic domain, the international system is also facing a period of profound changes. During the 1990s, the United States of America enjoyed an unprecedented hegemony in human history, being able to impose its political, military and economic interests and creating a world order totally centered on its own strategic interests.[29] However, as of 2001, American hegemony began to show gradual signs of wear and tear, being questioned in recent years by other countries, notably China and Russia.

Within the studies on hegemony, the work of Antonio Gramsci appears as one of the most influential. Writing in the context of the relations between social groups within the State, the author defines that hegemony occurs when a group propagates its own values and norms to a population that ends up understanding those values as common good, adopting them without objection or revolt.[30] Writing about Gramsci's work, Robert Cox transports the concept of hegemony to the field of International Relations, arguing that in the international system, hegemony is exercised through the creation of norms and institutions.[31] Also, according to Cox, to characterize a hegemony, the dominant relationship must be expressed simultaneously in the economic, political and social fields. Questioning any of these pillars would constitute a hegemonic crisis.[32] In this sense, authors such as Giovanni Arrighi and Kishore Mahbubani argue that the American hegemony is experiencing a moment of crisis and decline.[33]

In this sense, Arrighi argues that the crisis of American hegemony causes the international system to assume a status of systemic chaos, that is, a "situation of total and apparently irremediable lack of organization … [caused when] a new set of rules and norms of behavior is imposed on an older set of rules and norms without displacing it".[34] This article is based on Arrighi's definition of systemic chaos to characterize the effects of the American hegemonic crisis over the international system.

From the 21st century onwards, at least two of the three pillars of American hegemony began to be questioned. Addressing the political pillar first, the failure to secure the United States strategic objectives of the United States in Afghanistan and Iraq, within the context of the War on Terror, raised doubts about the capabilities of the United

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[29] See Salvador Regilme Jr. & James Parisot, *American Hegemony and the Rise of Emerging Powers Cooperation or Conflict*, Routledge, p. 6 (2017).
[30] See Antonio Gramsci, *Prison Notebooks (volume 2)*, Columbia University Press, pp. 181-183 (1996).
[31] See supra note 3.
[32] Ibid.
[33] See Giovanni Arrighi, *Adam Smith in Beijing: Lineages of the 21st Century*, Verso, p. 178 (2007); Kishore Mahbubani, *Has the West Lost it? A Provocation*, Penguin UK, p. 8 (2018).
[34] See supra note 2.

States military power. In addition, such interventions came to be considered as imperialist policies by some actors in the international system.[35] As for the economic pillar, the 2008 financial crisis undermined the credibility of the American economy,[36] accelerating the process of shifting the world economic axis to Asia, pivoted by the economic rise of China.[37] As a result, from Gramsci's and Cox's point of view, the American hegemony is no longer sustainable. The questioning of these pillars marks a clash between three sets of rules and norms of behavior led respectively by the United States, Russia and China.

Due to its high economic growth in recent decades, China sought to increase its influence over the international system. Thus, Beijing initially strived to expand its role in institutions created and historically led by the United States, such as the World Trade Organization (hereinafter referred to as WTO), the United Nations, the International Monetary Fund (hereinafter referred to as IMF) and the World Bank.

China's entry into the WTO in 2001 as a developing country represented one of the most important events in the international economy in the 21st century.[38] From this event, the growth of the Chinese economy was driven by the privileges gained by the country as a developing country within the organization.[39] Currently, China is one of the most active actors in the organization, along with the United States and the European Union.[40] The same trend of expansion of the Chinese influence is also repeated at the IMF and the World Bank. China is the third largest contributor in both institutions, which translates, within their internal logic, to the third largest voting power, surpassed by the United States and Japan, respectively.[41] In the case of the IMF, there were internal negotiations for changes that would allow China to become the second largest contributor, however, in 2019, pressure from the United States culminated in the postponement of the process.[42]

As one of the permanent members of the United Nations Security Council (hereinafter referred to as UNSC), China has sought in recent years to increase its influence over other organizations within the UN system. The World Health Organization (hereinafter referred to as WHO) and the Department of Peace Operations (hereinafter referred to as DPKO) are among the main examples. Since 2014, China has increased its investment in the WHO by 50%, seeking to boost its influence over the organization.[43] In

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[35] See Rodrigo Abreu de Barcellos Ribeiro, *Caos Sistêmico: A Crise da Hegemonia Norte-Americana e a Ascensão da China*, Unpublished Bachelor's Thesis, Federal University of Rio de Janeiro, p. 87 (2021).

[36] See Oliver Stuenkel, *O mundo pós-Ocidental: Potências Emergentes e a Nova Ordem Global*, Zahar, p. 118 (2018).

[37] See Kishore Mahbubani, *Has the West Lost it? A Provocation*, Penguin UK, p. 8 (2018).

[38] Ibid.

[39] See Kishore Mahbubani, *Has China Won? The China Challenge to American Primacy*, Public Affairs, p. 36 (2020).

[40] See Center for Strategic and International Studies, *How influential is China in the WTO?*, https://chinapower.csis.org/china-world-trade-organization-wto/ (accessed on November 3, 2022).

[41] See World Bank, *IBRD Subscriptions and Voting Power of Member Countries*, https://finances.worldbank.org/Shareholder-Equity/IBRD-Subscriptions-and-Voting-Power-of-Member-Coun/rcx4-r7xj (accessed on November 3, 2022); International Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, https://www.imf.org/en/About/executive-board/members-quotas (accessed on November 3, 2022).

[42] See Al Jazeera, *China May Have to Wait to Become Second Most Powerful at IMF*, https://www.aljazeera.com/economy/2019/10/8/china-may-have-to-wait-to-become-second-most-powerful-at-imf (accessed on November 4, 2022).

[43] See Srinivas Mazumdaru, *What Influence Does China Have over the WHO?*, https://www.dw.com/en/what-influence-does-china-have-over-the-who/a-53161220 (accessed on November 4, 2022).

the case of the DPKO, in addition to substantially increasing its investment in the organization, becoming the department's second largest financial contributor, China is the only permanent member of the UNSC to contribute with troops, which are concentrated in strategically important areas for the country considering its economic objectives.[44]

While seeking room in the United States-led institutions, China is also building its own institutional framework. In this sense, the Shanghai Cooperation Organization (hereinafter referred to as SCO), the Asian Infrastructure and Investment Bank (hereinafter referred to as AIIB) and the Belt and Road Initiative appear as the main examples of this movement.

Founded in 1996, the SCO has eight members including China, Russia, India and Pakistan. The main objective of the SCO is to foster economic, cultural and security cooperation. It should be noted that the organization does not constitute a military alliance, since its collective security treaty aims only to increase cooperation between members in combating separatism, extremism and transnational threats, such as terrorism and drug trafficking.[45]

The AIIB is one of the greatest examples of the shift in the global economic axis to Asia in the 21st century.[46] The creation of the bank represented a direct challenge to the World Bank and the Asian Development Bank, which is historically chaired by Japan, seeking to meet a demand for financing infrastructure projects in Asian countries. Since its founding in 2014, the success attributed to the AIIB have helped increasing the credibility of the Chinese economy, which undermined the efforts undertaken by the United States to prevent its closest allies from joining the bank.[47]

Finally, the Belt and Road Initiative, announced in 2013 by President Jinping Xi, represents the largest infrastructure project in human history, aimed at integrating China with its main economic partners through the construction of highways, railways, ports and airports. The project seeks to expand China's influence over Central Asia by strengthening institutional and economic ties between countries in the region and Beijing.[48]

Seeking to protect its strategic interests, in recent years China has been substantially modernizing its Armed Forces. The People's Liberation Army (hereinafter referred to as PLA) emerged from an archaic force, with low organizational capacity and readiness, in 2000, and began to surpass, as of 2020, Armed Forces of the United States in some aspects - such as a total number of ships, anti-aircraft defense systems, and a ballistic and cruise missile program.[49]

Modernization of the PLA gained prominence especially after the rise of Jinping Xi to the presidency in 2013. Under Xi's administration, the modernization began to include not only the development of new weapons and material capabilities of the PLA, but also

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[44] See Maria Parracho & Rodrigo Abreu de Barcellos Ribeiro, *O Papel Chinês nas Operações de Paz da ONU*, 171(1) Boletim Geocorrente 14, 14 (2022).
[45] See Eleanor Albert, *The Shanghai Cooperation Organization*, https://www.cfr.org/backgrounder/shanghai-cooperation-organization (accessed on November 6, 2022).
[46] See supra note 35.
[47] See supra note 36.
[48] Ibid.
[49] See United States Office of the Secretary of Defense, *Military and Security Developments Involving the People's Republic of China 2020: Annual Report to Congress*, pp. i-ii (2020).

changes in its institutional structure. Therefore, in 2015, the Chinese Armed Forces created two new branches: the PLA Rocket Force, which is responsible for controlling China's conventional and nuclear missiles, and the People's Liberation Army Strategic Support Force (hereinafter referred to as PLASSF), which is responsible for space warfare, electronic warfare and cyber warfare. The PLASSF would, consequently, play the role of spearhead of the People's Liberation Army with regard to the new battlefields of the 21st century,[50] materializing the Chinese commitment to developing its cyber capabilities, understanding them as important asymmetric weapons in the dispute for global power. Since the 1990s, China's cyber warfare program has been developed and modernized so that Beijing can utilize cyber operations to achieve its long-term global goals,[51] making China one of the world's leading cyber powers.

Hence, the PLA modernization process undertaken by China in recent years allows Beijing to project its influence over areas important to its strategic objectives, such as the Taiwan Strait and the South China Sea. At the same time, the country protects its sea lines of communication (SLOCs for short) and ensures the maintenance of its economic growth, so vital to guarantee China's hegemonic interests.

Russia's geopolitical actions have also represented an important challenge to American hegemony. Opposing NATO's expansion towards Eastern Europe and noting the difficulty presented by the United States in achieving its objectives in the Middle East in the context of civil wars in Libya and Syria, Russia saw an opportunity to project power again in its historical areas of influence: Eastern Europe and Central Asia. In this sense, in 2014, facing anti-Russian influence protests in Ukraine and the possibility of the country's entry into the European Union, Russia annexed the Crimean Peninsula to its territory based on a referendum. Moscow's action was answered with economic and political sanctions from the West and triggered separatist conflicts in the Donbass region.[52] It is plausible to argue that, in this context, economic sanctions had little effect, not dissuading Russia from continuing to project power over the region. Thus, in February 2022, once again challenging NATO's presence on its borders and seeking a more favorable position to guarantee its strategic interests in Eastern Europe, Russia militarily invaded Ukraine, escalating a conflict that had been taking shape since the annexation of Crimea.[53] Russia has also conducted a comprehensive modernization of its Armed Forces over the last few decades.[54] One of the main pillars of modernization was the development of the strategy defined by the West as hybrid warfare, which aims to exploit gray areas of international law.[55] Based on this strategic change and the understanding that cyber operations would be an important asymmetric capability for the challenging of the United States hegemony, Russia began to invest in the development of cyber capabilities, leading the country to be considered one of the main cyber actors in

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[50] See Elsa Kania & John Costello, *The Strategic Support Force and the Future of Chinese Information Operations*, 3(1) The Cyber Defense Review 105, 105-112 (2018).
[51] Ibid.
[52] See Michael O. Slobodchikoff, *Challenging US Hegemony: The Ukrainian Crisis and Russian Regional Order*, 44(1) The Soviet and Post-Soviet Review 76, 76-95 (2017).
[53] See Borys Kormych & Tetyana Malyarenko, *From Gray Zone to Conventional Warfare: The Russia-Ukraine Conflict in the Black Sea*, Small Wars & Insurgencies 1, 1-36 (2022).
[54] See Steven Rosefielde, *Russia in the 21st Century*: *The Prodigal Superpower*, Cambridge University Press, p. 9 (2004).
[55] See Bettina Renz, *Russia and "Hybrid Warfare"*, 22(3) Contemporary Politics 283, 283-300 (2016).

the world and being constantly accused by the West of conducting cyber-attacks to guarantee its political and economic interests on the international scenario.[56]

Relations between Russia and China in recent years have suggested the formation of a strategic partnership between the two countries. In recent years, the countries have been signing new agreements and bilateral declarations that point to an economic, political and military rapprochement between them. The most recent of these documents is the "Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development (2022)"[57] which sets out the views of countries on the international system and the role of partnership in securing mutual goals. In the military field, in addition to cooperation in the field of the SCO, in recent years, Beijing and Moscow have organized a series of joint military exercises.

However, the trend is that the partnership between China and Russia will not translate into a formal military alliance. The Belt and Road initiative has a major focus on Central Asia, projecting China as a regional leader in a region historically under Russian influence. At the same time, China publicly opposed Russia's invasion of Ukraine this year, calling for a peaceful solution for the conflict. Hence, Russia and China, despite maintaining close relations aiming the erosion of the United States hegemony, base their actions on different sets of norms and behaviors, which may indicate a potential crisis in the relations between the two powers in the future.

Observing the movements of China and Russia on the geopolitical chessboard, the United States, seeking to contain the erosion of its hegemony, undertook efforts to recover the credibility of its military and economic powers and curb Russian expansionism and the Chinese rise. Since the Donald Trump administration, the United States has taken on a more assertive discourse on this issue, initiating a Chinese product import taxation policy, triggering a trade war between the two largest economies in the world since March of 2018.[58] Despite an apparent normalization of the United States-China relations, still in 2022, the United States imposes technological curbing policies against China, seeking to prevent China's access to high-tech chips, for example.[59]

In the political-military field, one of the main objectives of the United States related to maintaining its hegemonic status was to strengthen its relations in the Indo-Pacific region, seeking to counterbalance the rising Chinese influence over the region. It is with this objective in mind that the Quadrilateral Security Dialogue (hereinafter referred to as QUAD) and the AUKUS Alliance come into play. The QUAD was re-established in 2017 and comprises a security dialogue initiative between the United States, Australia, Japan and India - countries that have somewhat turbulent relations with China. In recent years, the QUAD has organized joint military exercises and international summits, however expectations of a more formal partnership have not yet been met, raising doubts whether

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[56] See supra note 22.

[57] See China & Russia, *Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development*, http://en.kremlin.ru/supplement/5770 (accessed on November 4, 2022).

[58] See K. Zeng & R. Wells et al., *Bilateral Tensions, the Trade War, and US-China Trade Relations*, 24(4) Business and Politics 399, 399-429 (2022).

[59] See Jeff Pao, *New US Chip Ban Takes Tech War to Dire Next Level*, https://asiatimes.com/2022/10/new-us-chip-ban-takes-tech-war-to-dire-next-level/ (accessed on November 8, 2022).

internal differences between the members would allow the QUAD to become a more present and operational initiative.[60]

The trilateral security agreement between Australia, the United Kingdom and the United States (hereinafter referred to as the AUKUS) was established in 2021 with the aim of increasing security and development cooperation between the three countries. AUKUS gained global attention after the announcement that one of the first actions of the alliance would be the delivery of a fleet of nuclear-powered submarines (hereinafter referred to as SSN) to Australia.[61] Australia's acquisition of an SSN will have important implications for the Pacific Ocean's balance of power, particularly given the breakdown of relations between China and Australia in recent years. A nuclear submarine would be a major threat to China's projection of naval power, placing Australia at the forefront of guaranteeing hegemonic interests of the United States. In this sense, the establishment of the AUKUS can be understood as a way for the United States to compensate for its relative loss of power in the Pacific, increasing the military capabilities of its greatest ally in the region.

As noted, in recent years the status of the United States as a hegemonic power has come to be openly questioned by important actors in the international system, such as China and Russia. Based on its economic growth, China seeks more influence in the international system, pursuing more prominence in main international institutions, modernizing its military power and projecting power over strategic areas for its security. Russia, identifying NATO's expansionism towards Eastern Europe as a risk to its own security, annexed the Crimean Peninsula in 2014 and started a conflict with Ukraine in 2022. The United States, in turn, tries to keep its hegemon status, seeking to contain China's economic growth, repress Russia's expansionism and create new military alliances. Thus, the status quo is represented by a clash between three sets of rules and norms of behavior supported by three different great powers, constituting a systemic chaos. Having raised the main characteristics of cyberspace and the current status of the dispute for global power, the next section will explore how all of these factors influence the process of creating an institution capable of regulating cyberspace.

4. Main Challenges for International Law

The process of creating rules in international law has historically faced a series of challenges, especially in discussions related to the conduct of warring parties. Contemporarily, when it comes to the incorporation of newly developed weapons into conflicts, there is a difficulty in adapting them to international law, which often leads to the use of these weapons before there is a legal structure capable of regulating it.[62]

As discussed in the first section, the intrinsic characteristics of cyberspace make the process of attributing cyberattacks difficult. Due to the possibility of masking the origin of attacks, the attribution mechanisms currently available do not have the international credibility necessary to hold states accountable for cyber operations conducted in their

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[60] See Thayná Ribeiro, *QUAD Summit: Challenges to Regional Security in the Indo-Pacific*, 136(1) Boletim Geocorrente 14, 14 (2021).

[61] See Manqing Cheng, *AUKUS: The Changing Dynamic and Its Regional Implications*, 2(1) European Journal of Development Studies 1, 1-7 (2022).

[62] See George Lucas, *Law, Ethics and Emerging Military Technologies: Confronting disruptive innovation*, Routledge, p. 1 (2022).

territories. However, taking into account that a large volume of cyberattacks is carried out by private actors, the attribution dilemma encompasses other factors, that is, the difficulty to define in which situations accountability should be attributed to a State for operations conducted in its territory. It is debated whether this attribution should be made when the State controls the operation, when it funds the group, or when the State offers sanctuary to the group, among other situations.[63]

The attribution dilemma could be resolved by creating an institution with international credibility to establish a standardized forensic process that could determine the origin of cyberattacks based on well-defined principles regarding the degree of involvement that would indicate accountability of a State.[64] Since it deals directly with the interests of the great powers, the creation of this institution would require an international environment conducive to cooperation. However, the scenario of systemic chaos discussed above creates obstacles for the creation of an institution with this behavior,[65] since in recent years there has been a tendency to attack the credibility of international institutions.

One of the pieces of evidence that the systemic chaos hampers international cooperation efforts is the above-mentioned trade war, which started with decision of the United States to tax Chinese products. Also in the economic field, the departure of the United Kingdom from the European Union (BREXIT), initiated in 2016 and completed in 2020, represented a great challenge for the economic bloc, since the United Kingdom represented, in 2015, the second largest economy in the European Union, accounting for about 17% of the Gross Domestic Product of the entire bloc.[66] Both actions happened in the context of a wave of protectionism and isolationism that marked the Western powers in recent years.

Similarly, in 2019, the United States withdrew from the Intermediate-Range Nuclear Forces (INF for short) Treaty that it had established with Russia since 1987. At the time, the signing of the treaty determined the destruction of the entire arsenal of land-based ballistic missiles, cruise missiles, and missile launchers with ranges of 500–5,500km and prohibited the construction of new missiles with these configurations. The United States officially claimed that its withdrawal was linked to a series of violations of the agreement by Russia. However, the American decision also indicates a response to the modernization of China's nuclear capabilities, whilst Beijing already positioned itself against its eventual inclusion in the Treaty.[67] The United States and Russia also withdrew from other arms control treaties, notably Open Skies, which allows participating countries to conduct reconnaissance flights over each other territories to observe advances in military capabilities.[68] These behaviors have a negative impact on

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[63] See supra note 26.
[64] See supra note 13.
[65] See supra note 2.
[66] See International Monetary Fund, *World Economic Outlook Database 2015*, https://www.imf.org/en/Publications/WEO/weo-database/2015/October (accessed on November 15, 2022).
[67] See *United States Initiates Withdrawal from Intermediate-Range Nuclear Forces Treaty*, 113(3) American Journal of International Law 631, 631-634 (2019).
[68] See United Nations, *Treaty on Open Skies*, https://treaties.unoda.org/t/open_skies (accessed on November 15, 2022).

international cooperation, intensifying "the nuclear security dilemma, which accelerates the arms race, resulting in the end of stability-enhancing arms control".[69]

Deriving from the systemic chaos created by the clash between the sets of norms and behaviors headed by the United States, China and Russia, the difficulty of consensus appears as an important obstacle to the creation of an internationally recognized regulation for cyber operations. As discussed earlier, the search for consensus was one of the main challenges faced by the group of experts who wrote Tallinn Manual 2.0.

In 2021, the International Institute of Strategic Studies (hereinafter referred to as IISS) published a report entitled "Cyber Capabilities and National Power: A Net Assessment" that raised the cyber capabilities of fifteen of the main actors in the international system, namely: Australia, Canada, China, France, India, Indonesia, Iran, Israel, Japan, Malaysia, North Korea, Russia, the United Kingdom, the United States and Vietnam. According to the report, although these countries have very different levels of cyber capabilities, they all understand cyberspace as a new and important arena for guaranteeing their interests and have been increasing their investments in cyber defense,[70] meaning these actors will most likely assume prominent positions on cyber capabilities in the future.

Hence, a cyberspace regulation institution that does not take into account the values of the countries mentioned in the report, would have little applicability, since it would most likely not be followed by such countries — especially those that do not cultivate values similar to those of the West. In the specific case of the United States, China and Russia, their geopolitical dispute shapes their views of cyberspace,[71] which would most likely hinder the progress of the debates regarding cyberspace regulation. The presence of Iran and Israel on the list shows that regional conflicts could spill over to the process of establishing a cyberspace international regulation. At the same time, if the fifteen countries were to agree on the rules proposed, that would probably mean that the text of the legislation would potentially be broad and open to ambiguities, undermining the very effectiveness of international law as a tool for regulating the conduct of states in cyberspace.

Finally, the role of the deliberate use of gray zone operations by states must also be considered. As discussed earlier, gray zone operations are found in all five strategic domains, but the characteristics of cyberspace enhance their use, as there is a low probability of having to deal with accountability mechanisms.[72]

The Russian Federation is consistently associated with the use of gray zone operations, mainly because of its hybrid warfare doctrine, which combines conventional military tactics and non-military elements (such as psychological operations, cyberattacks, and sabotage) in ways that cause physical and psychological harm to an opponent.[73]

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[69] See Nancy Teeple, *Offensive Weapons and the Future of Nuclear Arms Control*, 14(1) Canadian Journal of European and Russian Studies 79, 79-102 (2020).

[70] See International Institute of Strategic Studies, *Cyber Capabilities and National Power: A Net Assessment*, https://www.iiss.org/blogs/research-paper/2021/06/cyber-capabilities-national-power (accessed on November 15, 2022).

[71] See Matthew Bey, *Great Powers in Cyberspace: The Strategic Drivers Behind US, Chinese and Russian Competition*, 3(3) The Cyber Defense Review 31, 31 (2018).

[72] See supra note 14.

[73] See Bettina Renz, *Russia and "Hybrid Warfare"*, 22(3) Contemporary Politics 283, 283-300 (2016).

Since the crisis that led to the annexation of Crimea by Russia, Moscow has been systematically accused of conducting of gray zone operations in Ukrainian territory, in order to achieve its political objectives without starting a conventional conflict. This strategy was changed in 2022, when Russia decided to militarily invade Ukrainian territory.[74] In response to the Russian invasion of Ukraine, NATO officially announced that cyberattacks on a member country of the organization would trigger Article 5[75] of its treaty.[76]

Other countries mentioned in the IISS report also regularly conduct gray zone operations to project power and secure their strategic interests. According to leaked documents from the National Security Agency (NSA for short) of the United States, in 2013 the United States conducted espionage operations against the presidents of Brazil and Mexico.[77] Russia also accused the United States of planting malwares in its energy grid, which would be activated in the event of a war.[78] China, for its part, has been consistently accused of conducting cyber espionage operations against commercial, military and governmental targets in order to further boost its economic growth and the modernization of the PLA.[79]

When conducting gray zone operations, states seek to establish advantages over their main competitors by circumventing some principles of international law. In this sense, the ambiguity generated by the use of gray zone operations ends up being understood as something positive by the states, since it provides a greater number of options for achieving their strategic, economic and political objectives. Michael Schmitt argues that the way to increase the efficiency of international law and curb the deliberate use of these operations by states is to reinforce the understanding that if a state benefits from the use of gray zone operations, so does their main international competitors.[80]

5. Conclusion

The rise of ICTs and the formation of a systemic chaos scenario over the international system could be understood as two main events in the 21st century, directly impacting the relations between the great powers, placing cyberspace in a prominent position for contemporary conflict and evidencing the absence of regulation for cyber

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[74] See supra note 52.

[75] Article 5 of the North Atlantic Treaty states that: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area". See NATO, The North Atlantic Treaty, p. 1 (1949).

[76] See James Pearson & Jonathan Landay, *Cyberattack on NATO Could Trigger Collective Defence Clause–official*, https://www.reuters.com/world/europe/cyberattack-nato-could-trigger-collective-defence-clause-official-2022-02-28/ (accessed on November 15, 2022).

[77] See Heather Saul, *US Pushed to Explain Allegations of NSA Spying on Brazilian President Dilma Rousseff*, https://www.independent.co.uk/news/world/americas/us-pushed-to-explain-allegations-of-nsa-spying-on-brazilian-president-dilma-rousseff-8795711.html (accessed on November 15, 2022).

[78] See Andy Greenberg, *How Not To Prevent a Cyberwar With Russia*, https://www.wired.com/story/russia-cyberwar-escalation-power-grid/ (accessed on November 19, 2022).

[79] See supra note 12.

[80] See supra note 26.

operations. Therefore, based on the elements addressed throughout this research, it was possible to draw some conclusions about the relationship between the status quo of the international system and the creation of a cyberspace regulation process.

First of all, the main characteristics of cyberspace make it difficult to develop a regulation of cyber operations conducted or supported by states. The attribution difficulty and the rapid advancement of information and communication technologies hinder the creation of accountability mechanisms with international credibility in the light of international law. At the same time, the unpredictability of threats, generated by the predominant use of unsophisticated tools in cyberattacks, inhibits greater international cooperation on the issue, since the definition of the cyber capabilities of each State is not clear.

Second, despite the centrality of the cyber domain in contemporary conflict, there is no proposed regulation submitted so far. The Tallinn Manual 2.0 and the 2021 UN GGE Report are the examples that come closest to a formal proposal but are still very incipient and fail to address important aspects for an eventual formalization of the rules they propose, generating a series of criticisms from states, international organizations and scholars. The most concrete efforts are associated with combating transnational cybercrime, a trend that is not repeated in the context of operations conducted, financed or supported by states.

Third, systemic chaos undermines the search for consensus, as it brings different values and norms into collision. Without the establishment of a consensus, an institution that regulates cyberspace would face a series of challenges in order to the reach the international credibility necessary to effectively exercise governance over the fifth domain. The search for consensus also proves challenging when analyzing the profile of the main countries mentioned in the report by the IISS, which have been increasing their cyber capabilities and disputing power influence at the regional and global level.

Finally, the research suggests that states, to some extent, benefit from the use of gray zone operations, mainly associated with the cyber domain. An analysis of the behavior of the main military powers in recent years demonstrates moments in which gray zone operations were used by states to guarantee their main strategic objectives displayed in their official documents, taking advantage of loopholes in international regulations and avoiding committing to a conventional conflict. Therefore, greater regulation over cyber operations would imply a major limitation of a state's options for action.

Which Destiny for Greenland?

Norbert Rouland[1]

Abstract: Long based on fishing and hunting, the economy of Greenland is changing. In 2008 the Declaration of Ilulissat, signed by Russia, mentions the global warning. It allows for easier extraction of rare earths, and the Greenlandic subsoil contains significant deposits of uranium. This warming has bad impacts on traditional forms of the economy, but it makes easier maritime traffic, not only in the Northwest Passage, but also along the Russian Arctic coastline. Recently Donald Trump offered to buy Greenland. But China is very present, and Russia is interested in obvious reasons. Vladimir Putin has a strong arctic policy and claims based on the existence of the Lomonosov Ridge. Greenland is a Danish territory which since 2008 enjoys enhanced autonomy which can lead to independence. But economic transformations can have negative social effects by disrupting traditional Inuit lifestyles, including the presence of many foreign workers, even though aboriginal rights are recognized in international law, especially since the United Nations Declaration about these rights of 2007.

Key words: Greenland; Development; Protection; Destiny

1. Global Warming in the Arctic

In the following lines, I will speak mainly of Greenland, but also of Russia, which has an Arctic coastline of several thousand kilometers and many indigenous peoples.

1.1 The Facts

On September 25, 2019, the Intergovernmental Panel on Climate Change (IPCC for short) in Monaco published its damning report. The pace of global warming has more than doubled since 1993. In the Arctic, pack ice has lost 40% in 40 years and at this rate there will be no more ice in summer in 30 years. The sea ice in the central Arctic is only a quarter of the thickness it had in 1975 (1.25m against 3.5m), and up to 99% of the permafrost could melt by 2100. Global warming is already mentioned in the Ilulissat Declaration drafted by the five riparian countries: Canada, Denmark, the United States, Norway and Russia. They are commonly called G5.

The first paragraph discusses the promise of access to natural resources due to global warming. It also contains the outstanding claims of Russia. Russia is an arctic country: the northern passage is 5700 km long; the Arctic accounts for 20% of Gross Domestic Product (hereinafter referred to as GDP) and 22% of Russian exports. While recognizing that it relies on international law, Russia planted a titanium flag in 2007 under the North Geographic Pole at a depth of 4200 meters. But representatives of indigenous groups were not invited, nor were those from the United State and the European Union. These groups emphasized that this G5 could harm existing regional institutions such as the Arctic Council. Until a relatively recent period, the end of the previous century, the economy Greenland was based on traditional fishing and fishing

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activities and hunting transfers from Copenhagen. This imbalance could now be reversed because of the changed ecological and economic data, because global warming is particularly sensitive in arctic area. Economically, it can have some positive consequences. In addition, Greenland is proving to be a land rich in various natural resources, mainly mining.

1.1.1 Global Warming in Greenland

In Greenland, global warming is obvious which could be seen in June 2017. I returned to places where I had already been with Jean Malaurie 40 years ago and where the sea began to freeze in September. I was told that even during the winter it does not freeze at all. Between 1992 and 2011 the Greenlandic massif lost each year 152 gigatonnes of ice. It has been established that above 60° of latitude the average temperature in the Arctic rises twice as fast as elsewhere.

The total summer ice floe is expected to disappear around 2100. As the sea ice decreases, the solar radiation increases, since reflects 80% of this radiation while the ocean returns only 10%. All of these entails a number of consequences. The melt permafrost causes a decrease in the strength of the foundations. Plankton decreases, changing the fish food chain. It migrates to the north, which makes fishing more difficult. In Greenland, the use of dog sledges is becoming increasingly rare.

During my first trips to Greenland, dogs lived next to men. Today, in agglomerations of a certain size, like Ilulissat, they are parked on land waves located outside the city. One can think at the famous sentence of Knud Rasmussen, the great explorer of Greenland, from the beginning of the previous century, “Give me the winter, give me the dogs, and keep all the rest.” What could he say today? However, some consequences are positive from a point of view purely technical economic. Industrialization becomes easier, drilling is easier. Warming also makes navigation easier.

In the past, the Northwest Passage, north of Alaska and Canada, near Greenland, could only be realized by explorers. Today, if you have about €20000, you can travel by cruise ship. In September 2008, for the first time in history, the road to Northwest and the Road to North (Russia) were ice-free for a number of years. The navigability of these passages decreases between 20 and 40 percent between Europe and Asia. However, navigation is difficult, and the slowdown speed (which drops from 40 to 26 km/h) decreases this advantage. On the other hand, night lasts several months in these countries and icebergs are numerous. The advantage is therefore relative. More real hopes are based on discoveries of mineral and oil wealth of Greenland.

1.1.2 Global Warming in Russia

With annual average temperatures rising in Russia twice as fast as in the rest of the world, the country will face serious challenges, including natural disasters and economic losses.

A recently released government report on the state of the environment states: “The rate of temperature growth in Russia is faster than average over the period 1976-2017; the average annual temperature in the world has increased by 0.18 °C in a decade, while in Russia the same index was 0.45 °C.” In other words, global warming is real everywhere, but it is happening faster in Russia. Why? “This is a characteristic of the northern countries of Russia and Canada,” said Vladimir Chukprov, head of Greenpeace Russia’s energy program, in an interview. “All countries in the North feel the consequences of

global warming faster than those in equatorial or tropical regions, because their layers of permafrost are melting slowly." He added. The winters in Russia and Canada were much harder half a century ago, when average temperatures dropped to -40°C to -50°C each year, Chukprov said. Although there are still cold areas, the general picture has changed: the temperature in winter rarely falls below -30°C.The Department of Natural Resources lists the potential consequences of climate change, and the list goes on. "Buildings, roads and other infrastructure will deteriorate faster due to temperature and humidity deformations... More intense rains make river floods and mud tides more likely, resulting in flooding and destruction of coastal infrastructure." The south and east of Russia are particularly vulnerable to such threats, said the report.

One could think it's a good thing: one of the coldest countries on the planet is finally getting a little hotter. But this is not the case. Both officials and scientists agree that climate change will cause (and has already caused) many problems for Russia. Warming means more rainfall and thus the climate becomes wetter and unpredictable. The south and east of Russia are particularly vulnerable to such threats, the report says. This is not a problem we will be facing in the distant future, experts say. The worst scenario is already underway. "Between 1990 and 2010, the number of dangerous natural phenomena increased four-fold, or about 6-7% per year," former Minister of Natural Resources Sergei Donskoy told in Rossiyskaya Gazeta in 2016. According to Donskoy, Russia loses around 4-6% of its GDP annually due to environmental devastation. Chugov stressed that the slow melting of permafrost could worsen the situation. "We have gas pipelines that go thousands of kilometers, a nuclear power station [Bilibinskaya] in Chukotka all located in permafrost regions," Chuprov said. "Warming in these areas increases the risk of industrial accidents that can lead to environmental damage. As nature knows no boundaries, everything happening in Russia influences the world in general", Chukprov said.

As elsewhere, the debate is raging in Russia to know if climate change is caused by humans. Skeptics insist that humanity may not have as much impact on the planet as we think, and that climate change is probably due to natural causes. Some even go so far as to say that it is an invention pure and simple. Most scientists disagree, however, "At the moment, science knows only one factor affecting the global climate: greenhouse gases such as methane, nitrous oxide and, most importantly, carbon dioxide. In the last century, no other gas has been as fast as carbon dioxide in terms of atmospheric emissions," said Alexander Sergeev, science journalist and member of the Commission against Pseudoscience at the Academy of Sciences of Russia.

As we know, fossil fuel produces harmful emissions that accelerate global warming. Chouprov believes that there are two possible ways to deal with global warming: reducing air emissions by switching to renewable energy sources, or simply adapting to unavoidable changes. "At the moment, Russia and the world seem to be leaning towards the second option," Chukov said. Russia ranks 4th among countries in terms of carbon dioxide emissions, accounting for about 5% of the total amount of carbon dioxide. It is still far behind China and the United States, which emit about 30% and 15% respectively. But that is not good for the climate.

1.2 The Fate of Indigenous Peoples

We will examine them successively in Greenland and in Russia.

1.2.1 The Inuit of Greenland: Janus

The Inuit of Greenland are at the heart of a dilemma that resembles to Janus' two faces. On the one hand, global warming is affecting the traditional fishing economy. On the other hand, it would enable them to take advantage of the important wealth of their subsoil and thus be able to gain their financial autonomy with a view to a future accession to independence from Denmark. This requires some explanations on the legal status of Greenland.

1.2.1.1 The Legal Status of Greenland

The colonization of Greenland has different features of North American penetration in the Alaskan and Canadian Arctic. Although the first contacts between Inuit and Europeans took place throughout the Arctic mainly in the 18th century, the presence of the latter on the ground remained much less marked in Alaska and Canada than in Greenland, where the Danish settlement dates from 1721. From this date, Greenland maintains close relations with Europe.

Denmark's policy initially rested on the idea of keeping Greenland in a relative state of isolation in order to avoid too abrupt contact with the modern world. A government agency, Kongelige Grolandske Handel (KGH for short) implements a planned management of the sale of hunting and fishing products in order to guarantee regular income and a satisfactory level in Greenland by subtracting the selling prices of its products. This policy was generally positive, since it allowed Greenland both to enjoy the technical advantages of modern civilization without this contact leading to too rapid and traumatic transformations.

Everything changes in the aftermath of the Second World War. Until 1953 Greenland had the status of Crown Colony. The Danish government, fearing to emerge as a colonial power, decided to make Greenland an integral part of the kingdom. This status it retained until the granting of autonomy in 1979. The competitive market economy as well as the wage-earning made their appearance that the Danes flocked to Greenland, the populations were grouped into urban centers. On the legal level until 1951, we are dealing with a dualistic customary system. From 1951 legal pluralism is reduced. During the colonial period Danish law applied to the minority, Greenlandic law to the majority. This division was not based on an ethnic character. The criterion was not birth in Greenland or Denmark. All persons employed in the colonial administration, whether Danish or Greenlandic, where considered subjects of Danish law. The rest of the population was subject to customary law. No more than elsewhere, the latter is not confused with traditional law. It is partly composed of traditional rules, but also of written laws, as well as orders made by village councils.

After the Second World War, it is assumed that the law must be the same for all inhabitants of Greenland. Customary law is formally drafted by the Danish authorities. In 1948 and 1949 a group of three lawyers and sociologists of Danish law was sent for 15 months along the west coast of Greenland to prepare the codification of Danish law and traditional law. From there, a series of codings is written. From 1979, the Greenlanders put in place a greening policy, particularly in the area of linguistic and cultural heritage and environmental management. But a new not going to be crossed soon. In 1984 a Greenlandic-Danish Commission was created on the initiative of the Greenlanders. It is at the origin of a law on reinforced autonomy, approved by referendum on November 25,

2008 (with 75.5% of positive votes), ratified by the Danish Parliament on May 19, 2009. This new status enhances self-government, recognizes the right of the people of Greenland to self-determination, elevates Kalaallisut to the rank of official language, and extends Greenland authorities to 30 new areas, including the police, justice, family law, but also and above all the management of natural resources. A limiting clause is fixed. The annual grant awarded by Denmark is 456 million euros. It represents two-thirds of the Greenlandic budget. Greenland will receive all the gains from the management of raw materials, up to 10 million euros. The excess earnings in relation to this limit will have to be shared equally between both partners. It is understood that the share perceived by Copenhagen will be deducted the annual envelope allocated to the territory. The Danish grant will be suspended if the gains made by Greenland exceed 935 million euros.

We see that the exploitation of natural resources is a determining factor in the process towards a possible independence. Article 2 of the Act on Greenland Self-Government provides that "the autonomous authorities of Greenland may decide that the sectors of the powers provided for in the Annex will be transferred to the autonomous authorities".[2] Article 21 of the Act on Greenland Self-Government states that "the decision on independence shall be taken by Greenland". Negotiations will be held between the Government of Denmark and Greenland for the advent of this independence. The resulting agreement will have to be approved by a referendum in Greenland. From 2010, Greenland has become sovereign in management of its natural resources. The Declaration of Itilleq also gives Greenland an influence foreign policy common to this territory and Denmark about his own interests. The outside observer might be surprised at this generosity of Denmark, at a time when Greenland enjoys interesting prospects in the exploitation of these deposits of subsoil resources. (10% of world oil resources, the largest uranium deposit in the world). Several factors, however, explain this orientation. On the one hand, we must account of Denmark's feelings of guilt for the colonial past. On the other hand, the presence of Greenlandic deputies in the Danish Parliament has influenced on the formulation of this policy. Finally, many Danes think that Greenland is expensive for Denmark, and that increased autonomy will make it possible to save money by collecting a significant part of the future income from the exploitation wealth of the basement. In her wishes for 2014, the President of the Executive, Aleqa Hammond, affirmed: "Greenland is a unique country and Greenlanders are a people unique". However, there is not one but three indigenous cultures in Greenland having their own language. The official language has become the language spoken by the majority of the population, on most of the west coast and south of country: Kalaallisut. The traditional language of the East Coast is the Tunumiit, which Paul Emile Victor estimated in a relationship of difference with the previous similar to the one that exists between Italian and French. Finally, the Avanersuamiutut, traditionally spoken around Thule.

In this evolution, let us remember one important point: the possibility for Greenland authorities to manage their natural resources. Stig Moller, former Danish Foreign Minister (2000-2010), Chairman of the Foreign Affairs Committee of the Danish Parliament summed up part of the problem, "Greenland, having been a peripheral region of the world, will have thus central and growing importance for the global economy.

[2] See full text of the *Act on Greenland Self-Government* (No. 473 of June 12, 2009), https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/110442/137381/F-520745313/DNK110442%20Eng.pdf (accessed on October 6, 2023).

Greenland will consequently attract more and more investors [...] If, for the sake of climate, we must stop industrial development. It's not fair that this stops when Inuit have the opportunity to enjoy it. If industrialization is to stop, it should stop at they in those who have benefited profusely."

It is also necessary to specify a data of a political order, relative to a possible Greenland independence in the future. It would be advisable that before accessing political independence, Greenland has developed a strong policy of self-reliance economic. Otherwise, it may fall under the influence or less direct of the great powers present in the Arctic, and even of China, an actor more and more present in the zone. It should also have an elite that can handle the new independent state. Ilisimatusrfik, the University of Greenland, was founded in 1984. It currently has about 500 students in 9 institutes. There is no legal department. Students are mainly of origin Greenlandic and have the opportunity to study abroad, especially in Canada and in France. The curriculum goes from the first year to the Master. The University of Greenland also offers a doctoral studies program. It has a lecturer of French course, in relation with the French Institute of Copenhagen. It remains that the dilemma is there. What to do with modernity and some aspects of global warming? Polle Christiansen, Greenland's Minister for Education and Research, "In the midst of this great international politics, which is at the same time an energy policy and, in fact, also a policy of security, small or poor countries are faced with a choice between a development of their economy and prosperity and taking into account global climate change. Do these countries have to use their resources as they are still sought or should they let the development continue with the risk that their resources become worthless?"

1.2.1.2 The Exploitation of the Subsoil of Greenland

Industrial activities, on the one hand, would bring an inevitable pollution; on the other hand, by favoring the influx of foreign labor might cause sociological imbalances. Let us not forget that Greenland has the highest suicide rates in the world. This dilemma has been illustrated by the long hesitations which we are discussing below regarding the exploitation of uranium.

Inuit cultures depend on land and sea and the sustainability of the environment. The narrowing of the sea ice that made it possible to cross the territory in winter is a good example. For the moment, the Greenlandic economy is essentially based on the fishing industry which accounts for 85% of the country's exports. The shrimp fishery will be very affected. In September 2018, the United Nations Special Rapporteur on Hazardous Wastes released his report on the implications for human rights, environmental scene management and storage of hazardous substances during his mission to Denmark and Greenland. He underlines, "The total exclusion of the local population in the decisions made during the presence of the United State military in the country to fuel serious tensions and resulted in past violations recognized as the displacement of the population that originally inhabited the territory where the Thule Air Base was and was built. Even today, the lack of transparency of the United State military on the nature of all hazardous materials deployed in Greenland is a source of concern."

The Rapporteur also highlighted the injustice done to the Greenlandic and Arctic communities by the contamination of the biological natural resources on which they depend by pollutants of foreign origin. The report has highlighted that with increasing autonomy, concerns about hazardous waste management have emerged. He added that

Greenland needs the support of the international community to find solutions to major environmental problems. A recent study by the United State Geological Survey states that the Arctic would contain 20% of the world's oil reserves, huge amounts of large deposits of ores (uranium, diamond, gold, zinc, nickel, molybdenum). Some investments have been the subject of projects. The Greenland Government therefore decided to commit in July 2010 the drilling of oil and gas wells in the Davis Strait, located between Greenland and Nunavut. The American group Alcoa has considered the commissioning in 2014 of a large aluminum plant on the west coast, in Maniitsoq, which would employ 5,000 for its construction and lead to the creation of 700 jobs. All this would represent an initial investment of 3 billion euros. Under the pressure from multinationals, Greenland has passed a law allowing for the payment of foreign workers less than Greenlanders. Gold Alcoa would hire almost as many as Poles and Chinese. What impact can this have on a local community? In 2008, a Greenland Mining School was opened which employed 1,200 people. But the most important is the rare earths and uranium. What is it about? Damien Degeorges defines the rare earths: "Rare earths are a group of metals include fifteen lanthanides[...] rare earths, present for some in abundance in the crust, are often associated with radioactive elements, such as uranium or thorium, which makes their exploitation sensitive [...] the rare earths are already a geopolitical issue of the twenty-first century [...]they will experience a constantly increasing demand during the twenty-first century."

At present, China has the quasi-monopoly of rare earths, the others deposit mainly in India, Brazil and Malaysia. But it turns out that Greenland is also rich in this sort of minerals. In Peary's Land which is very difficult to access, we find lead and zinc; molybdenum at Mesters Vig, on the east coast; from gold and platinum to Kangerlussuaq; iron near Nuuk; uranium near Narssaq. Greenland would contain the third largest uranium reserves worldwide and could be among the top ten or five exporters to the 2030 horizon. According to the Geological Research Institute of Greenland, there is would have some 600,000 tuns of uranium in the subsoil of the island, while the annual world production is currently in the order of 40,000 tuns. An Australian junior company based in Perth, Greenland Mineral and Energy (hereinafter referred to as GME), is interested in the Kvanefjeld mining project (in southern Greenland, near Narssaq), which contains radioactive elements. Rumors have circulated in the Greenlandic press concerning a possible sale of this venture to Chinese investors. The case of uranium is a very good example of the advantages and disadvantages which could be the transformation of Greenland into a possible El Dorado of the 21st century.

For or against the exploitation of uranium? Rarely a subject will have as much shared the Greenlanders. Twenty years ago, Greenland itself forbidden by decree to extract uranium. In the years that follow, Nuuk de facto adopts an uncompromising position: no exploration permit is issued if it affects materials radioactive. The principle of "zero tolerance" will be formulated a posteriori by Kim Kielsen, Prime Minister and member of the Social Democratic Party, Siumut. In a speech in 2008, he referred to this moratorium, which would have been adopted by a natural resources committee in 1988. But the historian Henrik Knudsen was searching for it, "no trace was found which proves that there was formal decision". Lars Emil Johansen, President of the Greenlandic Parliament, confirms that "This is a political decision that was made at a time when we did not know how to deal with the problems and potential of uranium". Henrik Knudsen,

however, assures that the vast majority of Greenlanders are still convinced that zero tolerance has been adopted by Parliament.

Why would it have been necessary to put an end to it? Historians speak of an argument to convince the undecided, “By saying that tolerance zero date of the time when Greenland was still under Danish rule, one implies that it belongs to the time of the colonies and that it is necessary to pass to other thing.” Siumut, by the way, is one of the most ardent defenders of the suspension of the moratorium, even though Lars Emil Johansen recalls that “zero tolerance not been raised to open uranium mines, but to facilitate the rare earths extraction”. Since 2008 and the strengthening of its autonomy, the province has taken over the control of its basements, which now belong to it exclusively, which was not the case before. Greater autonomy means, among other things, that the millions flock each year from Copenhagen to Nuuk will dry up. And it is difficult to live only shrimp. Uranium is therefore of great interest.

At term, it is the economic independence, and possibly political, of the island that is at stake. But if prospectors, encouraged by soaring prices of and the melting of ice making it easier to access deposits previously out of reach, have flocked a few years ago, many have since left. Because the region of Arctic has a high level of risk and requires very large investments. A dozen companies remained on the basis of the promises offered by the least exploited regions in the world. Jorgen Wæver Johansen, Mayor of municipality of Kujalleq on which Kvanefjeld mountain is located, defended the project. The spoke of the economic spin-offs for his region, the population has decreased by 12% in eight years. “The mining industry has the potential to change the rules of the game”, he says. It is counting on the creation of 750 jobs and “Revenues that should increase and allow the municipality to offer better services for the inhabitants”. If it will be necessary to employ foreign manpower, he assures that “after eight or nine years, on similar projects, 80% of workers will be Greenlandic.” According to environmentalists, however, the impact on the environment could have a disastrous effect on the local economy. The GME company plans by example of storing a million tuns of waste, including some radioactive in a nearby lake, says Niels Henrik Hooge, of Friends of the Earth. “With its 20,000 sheep, southern Greenland is the larder of the island. Who will want consume meat that could be contaminated?” He asks himself. Mikkel Myrup, president of the environmental Non-Governmental Organizations Avataq, added “It’s that we do not have competent scientists to evaluate the impact studies and we need consultants.” Nuuk is not bound by the European conventions, since the island left the European Union in 1982. Others were also concerned about the image of Greenland abroad. Revenues from the tourism industry doubled last year: “We are known to be a very green region, with a particular nature.” Becoming a uranium exporting nation is not trivial. “This implies an essential change in the way we perceive ourselves.” The mayor of Kujalleq, Jørgen Wæver Johansen, said he did not understand the resistances, “When we talk about uranium, the emotions prevail, and we only seethe negative. You have to be pragmatic. With a rock that only contains 0.034% of radioactive material, it would be possible to crush it, load it in a truck and travel all over Europe, without the need for a warning sign, because according to European legislation, the content in uranium is so weak that it is not dangerous.”

Some pointed out that for Greenland the stakes are much higher great. The warming of the planet reveals the presence in its basement of other treasures that uranium.

However, it turns out that, if we continue to ban exploitation of the latter, large local reserves of iron ore, copper, gold and of rare earths will also be lost from an economic point of view. Moreover, the province, turned into a showcase of global warming, decided not to ratify the climate agreement negotiated in Paris. Nuuk refuses to pay steep amounts to cover CO_2 emissions produced by its mining industry. Finally, a turning point is October 24, 2013. The Government has, as a first step, signed an operating license for thirty years an iron ore deposit 150 km northeast of the capital Nuuk, which should produce 15 million tuns per year. In a second step, he obtained that Parliament repeal the ban which weighed since 1988 on the extraction of uranium. The text was adopted at 16 votes in favor, 12 against and one abstention. Ending the Prohibition on Uranium Exploitation, Greenland changes in size both at regional and global level. It becomes a kind of Eldorado.

1.2.2 The Natives of Arctic Russia

Russia has 19 indigenous peoples in the Arctic, belonging to three distinct ethno-linguistic families. The Nenetse are the most numerous: 41,000 in 2002, on 1 million square kilometers, in Western Siberia.

They are included in complex internal administrative divisions: autonomous republics, autonomous districts, oblasts (regions), okrougs (small administrative subdivision). They are increasingly inserted in regions of industrialization and in agglomerations of significant size, with many regional airports. This industrial development brings many immigrants from other parts of Russia into the country. In 2018, the natives of Arctic Russia were plagued by difficulties, which are often quite common with indigenous peoples in other parts of Russia.

The first point concerns the definition of indigenous status in Russia. In 2018, an amendment to the Framework Law on Guarantees for the Rights of Indigenous Peoples was discussed in the Duma. This amendment allows citizens to declare themselves a member of indigenous peoples, which has not been possible since the abolition of Soviet passports. Article 26 of the Constitution stipulates that “Everyone shall have the right to define and state their nationality”, but in practice indigenous people are confronted with the administration, which does not accept self-identification. Out of it depends on the exercise of rights to fish, hunt, and use pasture. The administration does not provide for the possibility of collectively registering entire communities or families. The natives must provide him with important documentation on their genealogy and their families while being obliged to register only individually. Indigenous people living in towns or villages could not be able to be recognized as indigenous.

Another point concerns the participation of Aboriginals in the exploitation of the resources of their territory, a classic problem which I devoted myself to a book 40 years ago concerning the Inuit of New Quebec, in Canada. Local governments must inform the population about possible land reclamation projects which is a minimum and must hold meetings and referenda. But, in practice, companies tend not to disclose information about their projects and not to hold meaningful consultation meetings with Aboriginal people. In an increasing number of cases, Environmental Impact Assessments are no longer publicly available. In particular, violations of indigenous rights have been noted in Yakutia where government or mining companies have obtained federal concessions and started operations without informing local authorities.

2. The Protection of Greenlanders by Law

For the moment, if it is proven, the wealth of the Greenland subsoil is only at the beginning of exploitation. And if Greenland will probably become independent now, it is still part of Denmark. It is the object of ambitions on the part of China and Russia. One may wonder which protections the law can grant it. The ambitions are explained not only by the abundance of wealth, but by the security offered by Greenland to investors.

2.1 The Security Advantage

The exploitation of these various wealthiness is not easy on the technical level. In addition to the climatic constraints, the infrastructures in Greenland do not facilitate transport: there are no roads in Greenland. In addition, there are only about 57,000 inhabitants in Greenland, scattered over a large territory as four times France. It will only take off in favor long-term strategic agreements with one or more major powers world. This is the policy followed by small states. For example, Mongolia has been engaged in a similar strategy since 2007 with France, precisely around uranium, despite its rather limited resources (49,300 tuns, 0.9% of global reserves), after two decades dedicated to the affirmation of a hybrid identity at the heart of the triple China-Russia-the United States. But Greenland has a considerable advantage: security. Greenlandic uranium will be one of the very few stable countries uncompromising eco-responsible, able to compete with Niger, Kazakhstan, or Namibia. Predictability is therefore a key element in fostering trust and attractiveness, both economic and geopolitical. Nuuk will be able to start new alliances with recognized nuclear powers. Apart from Germany, Denmark, Iceland and Norway, all observer countries or members of the Arctic Council today are nuclear powers. However, France, Finland, Sweden, Spain, Italy, Japan and South Korea have insignificant or depleted uranium reserves, and are looking for new suppliers. In this context, Greenlandic uranium poses as a diversification option, while offering security investments.

As for the workers, confronted with security issues, ecological land policies in sub-Saharan Africa or Central Asia, they would gain to be sent to the Far North rather than being on frequent alert. A very positive condition for foreign investment in Greenland is indeed the absence of political risk, which is not the case in many other countries of the world. At the international level, we note that the Declaration of Ilulissat of May 28, 2008, posits that all conflicts of interests in the Arctic region must be resolved peacefully. It dismisses the prospects of elaborating a specific international legal regime for the benefit of the application of the common law of the sea. These foreign investments can be envisaged at three levels for the Arctic region: the bilateral level, with the help of a state in Greenland; the regional level, through Nordic or co-operative partially supranational, American, or European like the European; at the international level, through private investment, especially in the energy sector, without neglecting state policies.

2.2 Russian and Chinese Ambitions

They are obvious in the case of China.

2.2.1 Chinese Politics in Greenland

Before defining the general policy, which China is following in relation to Greenland, there are two examples of Chinese investments: Kvanejfeld on the western

coast; Tasiilaq, on the east coast. Greenland Minerals and Energy looks for reserves of 11 million tuns of rare earth oxides and 593 million pounds of uranium. But the proponents of increased production of rare earths outside China (85% of production) were disappointed. It's Chinese Shenghe who has joined the mining industry Australia, acquiring 12.5% of the shares for 3.3 million euros. The mine of Kvanefjeld could process 3 million tuns of ore per year and employ 325 local employees. With just 2,000 inhabitants, Tasiilaq is one of the main cities of the East Greenland. Difficult to access, this place was colonized by the Danes only from 1892, a century and a half after Nuuk. If he is probably very rich and if global warming is conducive to its exploitation, isolation and weak infrastructure in Greenland are hesitant investors. The project London Mining, Isua, will therefore be an important test. The company is planning a three-year construction project, employing 1,000 to 3,000 people depending on the phase, which should drive up the population of island which today has 57,000 inhabitants. The majority of workers should be Chinese. London Mining said in 2010 that "the involvement of Chinese groups should according to forecasts allow significant cost savings." The company expects 810 jobs at the peak of the mine, of which it estimates that 55% could be occupied by Greenlanders. These two projects are examples of China's interest in Greenland. More generally, China favors a patient and intelligent approach, diplomatically, for the Arctic region. In 2011, a Sino-Icelandic mission joins the North Pole by explicitly registering in the philosophy of sustainable development, since it was entitled: Sino-Icelandic North Pole Expedition for environmental protection and sustainable development".

The Chinese want to have a large place in the Arctic. They are opposed at an international treaty which could have the effect of limiting it. They have organized several expeditions since the end of the 90s and put into operation a second icebreaker of 8,000 tuns in 2014. They often hide their real goals by claiming that they are only attracted to the Arctic by the effects of global warming and the future of shipping routes. Affirmation in 2009 by Zhenfu Li, Professor at Dalian Maritime University, seems closer to the truth: "Whoever will control the Arctic will control the world economy." China is preparing for a competition in this zone with Russia and the United States. Zhengyue Hu, Assistant Foreign Minister, expressed the China's support for the sovereign and legal rights of Arctic States over the continental shelf. But China thinks that the international laws in the matter must be redefined because of the circumstances resulting from the ice melting. Because this melting ice gives new importance to legal problems, such as the delimitation of territorial waters.

2.2.2 Russia's Claims in the Arctic

Half of the former Soviet coastline was in the Arctic Basin. Half of the new Russian territory is north of the 60th parallel, and one-third north of the Arctic Circle, home to 1 million people. The North Passage is destined to become a transoceanic route between the Atlantic and the Pacific. In September 2008, the Arctic Strategy Declaration declared Siberia a strategic base for Russia's natural resources. The Russian company Rosatom has started building ships to become floating nuclear power plants. They will be docked along the northern route and can ascend the Siberian rivers.

In an authoritarian tradition, the Russian State is subject to fewer constraints than its western neighbors about its indigenous populations. In 1987, in Murmansk, Mikhail Gorbachev delivered an important speech. The first third of the text deals with

disarmament in the context of the reciprocal abandonment of the United State and Soviet Euromissiles. The last two thirds are directly related to the Arctic. They contain a premonitory allusion to global warming, the reinforcement of western military, including a missile base in Greenland and the United State cruise missile tests in Canada. The main idea of the speech was to regionalize the Arctic in a peaceful way, with bilateral or multilateral agreements in the wake of the Mikhail Gorbachev ideology of the European Common House, poorly received in the West. It lays out some proposals: creation of a denuclearized zone in Northern Europe, reduced military activities of the Atlantic Alliance and of the Warsaw Pact in the Nordic seas, cooperative development of natural resources, environmental protection, opening of foreign ships from the northern route, Russia putting at their disposal ice-breakers.

What is the legal data regarding the current claims of Russia? The law of the sea defines a number of limits. The territorial sea extends 22 km from the coast, the contiguous sea which prolongs the territorial sea counts another 22 km. Then begins an exclusive economic zone of 370 km before the high seas begin and the continental shelf ends. However, a procedure exists to extend the continental shelf further 280 km. The Russians ask for recognition of the expansion of their plateau on the basis of the existence of the Lomonosov Ridge. This one occupies the middle of the underwater Arctic. It goes to the longitude of the river Lena or islands of new Siberia to pass under the North Pole and arrive to the island Ellesmere River in northwestern Greenland. Legally, it's the United Nations who decides on the extent of the continental shelves according to only criteria geological. This work is prepared by a Plateau Boundaries Commission continental, made up of about twenty experts in principle independent. They say the right provided that the parties subsequently rely on it or on the negotiation or international arbitration in the event of a dispute. Any country can be part of it. In some case, a state can obtain a continental shelf extended to 350 miles, which would place the North Pole in the Russian exclusive economic zone. Russia is backing on the existence of the dorsal to claim the entire area of the pole. The Russia would have an additional 1 million square kilometers. That question is obviously a bone of contention. In 2008, Canada introduced so-called scientific evidence that the Lomonosov Ridge belongs to the plate tectonics of Greenland and North America. For their part, the United States consider that it does not belong to any riparian state. It may be thought that the legal dispute will concern the status of the passages Northwest (Canada) and North (Russia). Melting ice continues, will it be inland waters or international straits? Canada and Russia argue that these passages will depend on their own legislation, while the United States, Norway, the European Union are in favor of internationalization.

2.3 The Legal Protection of Indigenous Peoples

2.3.1 The 2007 Declaration on the Rights of Indigenous Peoples

There are more than 370 million Aboriginals in more than 70 countries around the world. Overall, indigenous peoples have suffered for centuries from loss of identity, forced assimilation, destruction of their culture and genocide. The development of the United Nations Declaration has been a unique and democratic process. A critical element was that, for the first time, a United Nations instrument on human rights was created with the active participation of leaders of aboriginal peoples. Representatives of indigenous peoples participated in both working groups that developed the text. First the Working

Group on Indigenous Populations (hereinafter referred to as WGIP) and then the Working Group on the Draft Declaration (hereinafter referred to as GTPD). In 1977, indigenous peoples traveled to Geneva for the International Conference of Non-Governmental Organizations on Discrimination Against the Indigenous Peoples of the Americas. One of the results was the creation of the WGIP, which met for the first time in 1982. In 1985, the WGIP began to draft what would become the Declaration and worked on the text for nine years. The United Nations then set up the GTPD to continue work on the text with a 10-year mandate which was to end in 2004 and then was extended until 2006. For over two decades, representatives of Indigenous Peoples visited the United Nations and reported in detail on the human rights violations of which they were victims. With this collaboration, the articles of the Declaration were written, revised and finally adopted.

At the time of the 2007 vote, 144 states supported the United Nations Declaration. Only four countries, Australia, Canada, New Zealand and the United States, voted against. Eleven abstained, among them was Russia. States that did not vote in favor at the time of adoption could subsequently approve it or express their support. Since then, the four dissenting states have all changed their position and expressed their support for the Declaration. Colombia, Samoa and Ukraine, which had abstained, have now also endorsed the Declaration. The United Nations Declaration affirms the human rights of indigenous peoples, as well as individuals. The Declaration does not create new rights. It specifies the inherent or pre-existing rights of indigenous peoples. It applies existing international human rights standards to the unique historical, cultural and social circumstances of indigenous peoples around the world. The emphasis on collective human rights is an indispensable contribution to the development of the international human rights system. Collective rights are essential to the survival, dignity, security and well-being of indigenous peoples.

The United Nations Declaration contains 46 operational articles, as well as a preamble of 24 paragraphs. Together, they affirm the economic, social, cultural, political, environmental and spiritual rights of Aboriginal peoples. This includes rights related to governance, lands and resources, health, education, culture, language, environment, development, spirituality, sacred places and treaties. The United Nations Declaration has sometimes been the subject of extreme interpretations by some commentators. However, apart from the prohibition of genocide, the human rights contained in the Declaration are relative and not absolute. As stated in Paragraph 3 of Article 46, the provisions of the Declaration must be interpreted “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith”.

In the practice of the United Nations, a declaration is a solemn instrument that is used only in very rare cases for matters of major and lasting importance. Declarations on human rights differ from legally binding treaties or conventions to which states are bound after ratifying them. This does not mean that the statements have no legal effect. The former United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, emphasized, “Although technically a resolution, the Declaration has legal significance ... the Declaration is an extension of standards in various human rights treaties that have been widely ratified and are legally binding on states.” Throughout the negotiations, representatives of indigenous peoples insisted that the right to self-determination in international law be affirmed in the final document. The International Convention on Civil and Political Rights and the International Convention on Economic,

Social and Cultural Rights both state in identical terms. As stated in the two conventions, the right to self-determination is the right of all peoples to "freely determine their political status and to freely assure their economic, social and cultural development." This includes the right to freely dispose of their natural resources. "Under no circumstances can a people be deprived of their own means of subsistence. States have a duty to facilitate the realization of the right of peoples to self-determination, and to respect that right, in accordance with the provisions of the Charter of the United Nations".

France supports the Declaration but has written an interpretative declaration according to which it cannot recognize collective rights because the principle of the indivisibility of the Republic, New Caledonia being an exception. It recognizes the existence of indigenous peoples only in its overseas communities such as New Caledonia and French Guiana.

What about Denmark, which includes Greenland? The Danish development policy aims to reduce poverty in promoting sustainable development through economic growth in favor of poor. Equal opportunities and participation of men and women in development process, the promotion of human rights and democratization and the consideration of environmental aspects are cross-cutting Denmark's development policy. Emphasis on human rights and democratization as well as development, Danish development aid policy, which means indigenous peoples and their concerns should be included. Indigenous peoples must have a real influence on all issues that their economic, political and cultural situation, and the changes in development plan must respect the notion of belonging to the populations of aboriginal peoples, including membership of a given territory. Development cooperation must contribute to building the capacity of indigenous peoples to enable them to participate effectively in planning and implementing development programs.

The first "Strategy for Danish Aid to Indigenous Peoples" was formulated in 1994. In 2000-2001, a team of indigenous experts conducted a review of the strategy at formulated in 1994. The current strategy is based on the results obtained during the review and on a consultation process with Danish and international representatives of indigenous peoples and organizations working with and for indigenous peoples. This Danish aid strategy for indigenous peoples is an integral part of overall framework for Danish development policy, which is an integral part of Denmark's foreign policy. Promotion of security of all, the promotion of democratic regimes and human rights as well as the establishment of sustainable economic, social and environmental development are the main objectives.

With regard to Russia, in May 2018, the United Nations universal periodic review focused on the Russian Federation. Russia was asked to ratify the Indigenous and Tribal Peoples Convention, which formally adopt the United Nations Declaration on the Rights of Indigenous Peoples and apply its principles in its national legislation.[3] Russia has rejected these three recommendations as well as others concerning the adoption or ratification of complementary instruments for the protection of human rights on the basis that "decisions of this nature can only be taken if after a thorough examination of the existing situation, including the full range of essential factors and conditions to be taken

[3] See full text of the *Indigenous and Tribal Peoples Convention*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (accessed on October 6, 2023).

into account in becoming party to international agreements." But it accepted the recommendations of Nicaragua and South Africa to protect indigenous languages and strengthen the legal framework for indigenous sustainable development. Several indigenous rights defenders have been victims of reprisals for their cooperation with United Nations mechanisms.

2.3.2 The Law of Sustainable Development

Concepts specific to the philosophy of sustainable development have registered in several types of rights: international, European, French. In 1968, in a context of intense questioning of common values admitted, the Club of Rome is created. It brings together personalities occupying important positions in various countries, who are thinking about defining a model economic growth that would be more reasonable. In 1972, this Club of Rome publishes the Stop Growth report (the limits to growth) which was asked by a team of Massachusetts Institute of Technology researchers. The authors will publish an update in 2004, entitled Limits to Growth - The 30 Year Update, in which they believe that their predictions have been widely proven: extension of pollution, impoverishment cultivable soils, rarefaction of fossil energies.

In June 3-14, 1992, the third Summit of the Rio de Janeiro Earth, which embodies the term sustainable development, which is beginning to popularize in the general public, three pillars are defined: economic progress, social justice, preservation of the environment. In 2000, the United Nations Global Compact, adopted by the Economic Forum Global, insists on Corporate Social Responsibility. In 2000, the UNESCO Universal Declaration on Cultural Diversity affirms for the first time that cultural diversity is "proof of sustainable human being." This is an important point, because very often the exploitation of natural resources requires consideration of the rights of indigenous peoples who reside in the territories concerned by the development of these resources. In 2005, the General Conference of UNESCO reaffirms that this convention is a "fundamental springboard for sustainable community development peoples and nations". The same year 2005 comes into force on Kyoto Protocol on the reduction of greenhouse gas emissions in the European Union.

In Denmark, the Aalborg Charter on Cities was published in 1992 which is intended to apply at European level. In 2009, an international conference on the climate takes place in Copenhagen. In the European Union, part of the environmental law has gradually moved from the Member States to the European level. In 1986, the Single European Act has transferred certain competences of States to the European Economic Community: the environment, research and development, foreign policy. In 1993, when the European Union was created, the environment has been treated transversally in the first pillar of the European Union. The expression sustainable development appears for the first time in a community text, the 1992 Treaty of Amsterdam. In 2000, the Goteborg European Council decided that the Strategy on the Economy of Knowledge, defined at the Lisbon European Council in the previous year, would integrate explicitly the objective of sustainable development.

At the European level, sustainable development is reflected in a set of legal texts. At European level, directives; at the State level, legislative provisions. The Economic, Social and Environmental Council of December 7, 2012, created the International Tribunal for Nature, a court whose function is to judge the crimes against the future of humanity in the name of the right of future generations. On June 18, 2015, the Vatican publishes the

encyclical Laudato Si'of Pope Francis on the safeguarding of the common house. In France, in 1971, a Ministry for the protection of nature and the environment is created. On May 22, 1991, the first Minister Edith Cresson mentions the term sustainable development in his policy speech.

But it is only around the year 2000 that sustainable development appears in France as the need for companies to report the social and environmental consequences of their activities, in relation to demands of civil society. What results in a legislative provision on the communication in the law on the new economic regulations, which drives the development of sustainable development reports? The former French President Jacques Chirac pushed for the drafting of an environmental charter, in 2004, and stressed in a speech that France is the first countries in the world to include the environment in its Constitution.

We are witnessing the birth of a climate right and its litigation. Climate law was formalized at the Earth Summit in 1992, from which comes from the United Nations Framework Convention on Climate Change. Climate law was formalized at the Earth Summit in 1992, from which comes from the United Nations Framework Convention on Climate Change. In the 2000s the American judge will open the way to litigation climate change in the case of *Massachusetts v. Environmental Protection Agency* (549 U.S. 497) in April 2007: the Supreme Court of the United States imposed on the United States agency protection of the environment from regulating greenhouse gas emissions and greenhouse effect. Subsequently, climate justice has been implemented by other national jurisdictions around the world as exemplified by the Urgenda cases foundation versus Kingdom of the Netherlands, Ashgar Leghari versus Federation of Pakistan. The success of climate litigation rests in the hands of national judges.

In Denmark, the 2000 amendment to the Danish Declaration Act, the Danish Financial Statement Act, introduced the principle of reporting in Danish law. In 2008, a law introduced this obligation for 1,100 plus large Danish companies, depending on the number of employees and the turnover. Compared to other European countries, the particularity is that Denmark asks its companies to produce a report on their practices with regard to Corporate Social Responsibility (hereinafter referred to as CSR), and not on their performance in social subject. Unlike France, Danish law does not contain any list of information to include in the report on business practices in the field of work, as is the case in France. Member companies to the United Nations Global Compact or the Principles on Responsible Investment of the United Nations are exempted from this obligation. Other provisions of Danish law provide information on the exemplary nature of public authorities. The particularity of the Danish approach is the creation of numerous self-assessment tools based on standards promoted by international initiatives thus the 2005 CSR Compass, the Global Compact Self-Assessment Tool in 2010, Human Rights Compliance Assessment 2.0 in 2010. These standards make it possible to assess the conformity of a company's practices with the United Nations Global Compact and the United Nations Principles on Business and Rights of the man respectively. The Nordic Compass on CSR aims to promote CSR among Small and Medium-sized Enterprises in the Nordic countries (Denmark, Finland, Norway, Iceland and Sweden) by providing guidelines. In addition, the Danish government has set up the Portal on the risks by country of the Danish Institute for Human Rights (2010), which aims to identify and

manage human rights risks in countries where company is active or maintains links with suppliers.

3. Conclusion: An Unexpected Future

I do not have enough time to conclude on all of these problems which concern the countries bordering the Arctic, but the whole planet in relation to global warming, which is particularly sensitive in these areas. In addition, it should be noted that the Arctic includes many human populations, which is not the case of the Antarctic, which is deserted, apart from scientific stations in some countries, including France. Warming is also noticeable in this land, which is not a sea, but a continent. It should be noted that the development of the rights of indigenous peoples is one of the surprises of history. As I wrote in my handbook on these issues, nobody believed after the Second World War that indigenous peoples had any future that they had to be absorbed and dominated by a common rise in the standard of living. It has been not so.

Today, indigenous peoples are about 370 million people worldwide, with very different statuses. Often, as in North America with the Indians, they form a proletarian part of the population and their fate is very worrying in the Asian countries. Their future has been quite different from what we thought in our past. One can hope that their very ancient attitude towards natural phenomena, as Jean Malaurie has always said, will serve us as a lesson.

BIBLIOGRAPHY

Julie Babin, *Le grand jeu des puissances asiatiques*, Editions du Cygne (2015).

Michael Byers, *International law and the Arctic*, Cambridge international and comparative law (2013).

Ted L.Mc. Dorman (dir.) & Ed. Suzanne Laborde, *International law and the politics of the Arctic Ocean, Essays in honour of Donat Pharand*, Brill Nijhoff (2015).

Thierry Garcin, *Géopolitique de l'Arctique*, Paris, Economica (2013).

Norbert Rouland*, Les modes juridiques de solution des conflits chez les Inuit*, Études Inuit, numéro spécial, volume trois, 170 pages (1979).

Norbert Rouland, *Les Inuit du Nouveau- Québec et la Convention de la baie James*, Association Inuksiutiit et Centre d'études Nordiques, Université Laval, Québec, 218 pages (1978).

Norbert Rouland, -(Avec Stéphane Pierre Caps & Jacques Poumarède, *Droit des minorités et des peuples autochtones*, Paris, Presses universitaires de France (1999) (traduction en portugais, Edition Universidade de Brasilia, 2004).

Norbert Rouland, -*Les colonisations juridiques-de l'Arctique à l'Afrique Noire*, Journal of Legal Pluralism and Unofficial Law 29/19 190,89-161.

Norbert Rouland, -*Le Groenland : un Eldorado pour le XXIe siècle : à quel coût ?*, RRJ, 2018-2,498 -518.

Norbert Rouland, -*Présence et politique russes dans l'Arctique, à paraître dans la*, RRJ.

Norbert Rouland, -*Problématiques de la responsabilité sociale des entreprises: aspects juridiques et anthropologiques*, RRJ, 2017-3,XLII-168,894-910.

Norbert Rouland, -*Droit étatique, droit traditionnel et politique d'assimilation dans l'Arctique contemporain,* Actes du troisième colloque de l'association française des historiens des idées politiques, Presses universitaires d'Aix-Marseille III, 147-153 (1985).

Norbert Rouland, -*Anthropologie, exotisme et folklore : un regard sur les société inuit*, Bulletin de la SociétéArctiquefrançaise, 4 (1985), 16-19.

Norbert Rouland, -L'autonomie du Groenland: du droit à la réalité, dans : *Arctique, Horizon 2000, Les peuples chasseurs et éleveurs*, direction Jean Malaurie, édition du CNRS, Paris 135, 135-147 (1991).

The Nexus Maritime Security-Ecological Safety along the Maritime Silk Road

Douglas de Castro & Yan Cui[1]

Abstract: Considering the complexity and new environmental challenges in the world, this paper critically examines the ocean governance and the role of maritime security within it. The study argues that States tend to see marine environmental degradation as a security threat to their survival. It asserts that the current regime for ocean security is based on Western values and prioritizes commercial and sea power objectives, thus, under a constructivist approach to international relations, it examines China's Maritime Silk Road (hereinafter referred to as the MSR) under the Belt and Road Initiative (hereinafter referred to as the BRI) as a potential alternative under a constructivist approach. The methodological approach is qualitative, adopting the MSR as the case study while generating conclusions from content analysis research technique. The objective of the study is to understand China's distinctive viewpoint and its ability to support sustainable development and environmental security in maritime spheres by contrasting the MSR's guiding principles with Western maritime plans.

Keywords: Maritime security; Constructivism; Environmental degradation; Maritime Silk Road; Ocean governance; Sustainable development.

1. Introduction

The vastness of the oceans misleads humankind as an autopoietic system or a self-production system that finds its way to survive despite environmental pressures.[2] Climate change, predatory fishery, trade, and pollution, to mention a few, are part of the ocean's external ambiance that exerts pressure, which can re-arrange the elements to keep them alive.[3] However, that is a false perception, considering the accumulated scientific knowledge regarding the adverse effects of anthropogenic environmental interventions and their linkage to ocean degradation.[4]

Oceans have become a source of concern for states beyond mere navigational usage; thus, ensuring the freedom of navigation is not enough to secure the interests of states as the pressures over the ecosystems in the oceans and their interaction with other ecosystems pose an existential threat.[5]

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[1] Douglas de Castro, Professor at the Law School of Lanzhou University; Yan Cui, Associate Professor of Gansu University of Political Science and Law.

[2] See John Mack, *The Sea: A Cultural History*, Reaktion Books (2012).

[3] See Luhmann Niklas, *Introduction to Systems Theory*, Polity (2012).

[4] See Judith S. Weis, *Marine Pollution: What Everyone Needs to Know*® (illustrated edition), Oxford University Press (2014); Frid Christopher L. J. & Bryony A. Caswell, *Marine Pollution* (illustrated edition), OUP Oxford (2017).

[5] World Economic Forum, *Humanity's Most Existential Risks Are Getting Worse, Here's a Major Reason Why*, World Economic Forum (2018), https://www.weforum.org/agenda/2018/01/humanity-s-most-existential-risks-are-getting-worse-heres-why/ (accessed on June 30, 2023); Homer-Dixon & Thomas, *The Upside of Down: Catastrophe, Creativity, and the Renewal of Civilization*, Island Press (2006).

Maritime security draws attention to new challenges and assumes a non-traditional international security approach in which the environment becomes the referential object of a political process known as securitization. Oceans, seas, and rivers, as well as the resources, assets, and activities connected with them, are all included in the maritime domain, and the term "maritime security" refers to the collective measures and efforts aimed at securing and protecting these different components. Preventing and reducing dangers, including piracy, terrorism, smuggling, illegal fishing, environmental hazards, and other unlawful activities that can endanger maritime safety, national security, economic interests, and environmental sustainability, is the main objective of maritime security. Furthermore, maintaining the safety, security, and wellbeing of maritime operations, infrastructure, and resources calls for the collaboration of national and international organizations and the application of policies, rules, and technology.[6]

For some scholars, the degradation of the marine environment is an existential threat that places states on alert, or in other words, the protection and conservation of the environment adopts the dimension of a security issue that challenges the survival of the state itself as an institution. To this end, the government dislocates a matter that pertains to the political arena to the military one, instilling urgency and fear. Moreover, the fear and urgency of the matter led to the adoption of unprecedented political and legal adjustments that, in typical situations, would not be approved by the other branches of government or civil society; after all, "we are at war against it."[7]

Other scholars investigate it through the economic lens, which connects the ontological dimension of maritime security to elements of marine safety (accidents and pollution) and economic development (blue economy).[8]

For the objective of this study, the authors build the research design over the economic approach, arguing that environmental security mediates marine safety and the blue economy, thus presenting a more robust theoretical stance that includes, for instance, pollution, climate change, sustainable development, and biodiversity, which interaction has been part of the concerns for scholars. In addition, it connects with other critical societal variables such as food and human security. As such, the authors question to what extent global ocean governance presents environmental security aspects that would support sustainable development.[9]

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[6] See Sam Bateman, *Maritime Security Governance in the Indian Ocean Region*, 12(1) Journal of the Indian Ocean Region 5, 5-23 (2016); International Maritime Organization, *Maritime Security*, https://www.imo.org/en/ourwork/security/Pages/Default.aspx (accessed on November 14, 2022).

[7] See Buzan Barry & Ole Wæver et al., *Security: A New Framework for Analysis*, Lynne Rienner Publishers (1998); Nina Græger, *Environmental Security?*, 33(1) Journal of Peace Research 109, 109-116 (1996).

[8] For the purpose of this paper, the authors adopt the following concept of Blue Economy: "The Blue Econ omy espouses the same desired outcome as the Rio +20 Green Economy initiative namely: "improved hum an well-being and social equity, while significantly reducing environmental risks and ecological scarcities" (UNEP 2013) and it endorses the same principles of low carbon, resource efficiency and social inclusion, b ut it is grounded in a developing world context and fashioned to reflect the circumstances and needs of cou ntries whose future resource base is marine." See Blue Economy Concept Paper, https://sustainabledevelop ment.un.org/?page=view&nr=603&type=13&menu=1634 (accessed on November 14, 2022). See Gunter P auli, *Blue Economy-10 Years, 100 Innovations, 100 Million Jobs*, Paradig
Pubns (2010); Christian Bueger, *What Is Maritime Security?*, 53(3) Marine Policy 159, 159-164 (2015).

[9] See Bimal N. Patel, *Maritime Security and Sustainable Development and the Coastal Communities of India: An Empirical Analysis, Furthering the Frontiers of International Law: Sovereignty, Human Rights,*

Therefore, the authors set the hypothesis that the ocean security regime as of today is based on the Western tradition, predicated on seapower and economic exploration, both connected with hard-core national security imperatives.[10] In addition, the authors argue that the alternative is the MSR, as one of the crucial elements of the BRI as created and operationalized by China.

As for the theoretical framework, the authors apply constructivism, a theory of international relations that emphasizes the role of ideas, norms, and social constructs in shaping the behavior of states and international actors. Unlike other approaches focusing on material factors or power relations, constructivism highlights the significance of social interactions, shared beliefs, and the construction of meaning in the international system.[11]

At its core, constructivism argues that international relations are not solely determined by objective material conditions or power dynamics but are shaped by subjective interpretations and social practices. According to constructivists, states and other actors derive their identities, interests, and behavior from the social context in which they exist. [12]

Therefore, as an alternative and inclusive development model, the MSR reflects that China perceives the role of norms, values, culture, historical experiences, and shared understandings in its foreign policy. The deep wounds left by colonial exploitation in the past, the attempts to apply it again through subtle devices or international institutions, and the grave crisis that the current development model poses make it imperious to raise a form of resistance.

The qualitative nature of the study derived from the objective and hypothesis leads us to use the case study method, which is an investigation pathway that provides a fine-grain analysis of a particular and narrow social phenomenon, looking for an understanding and explanation of micro-causes, relations, and perceptions that quantitative research cannot capture.[13]

The MSR case provides the analytical boundaries for this study as it is a typical case for testing the hypothesis as posed in the introduction (Seawright and Gerring, 2008;

Sustainable Development, Brill Nijhoff, pp. 247-263 (2021); Jefferson Tamlin & Maria L.D. Palomares et al., *Safeguarding Seafood Security, Marine Biodiversity and Threatened Species: Can We Have Our Fish and Eat It Too?*, (accessed on June 30, 2023); Basil Germond & Antonios D. Mazaris, *Climate Change and Maritime Security*, 99(1) Marine Policy 262, 262-266 (2019).

[10] See Sam Bateman, *Maritime Security Governance in the Indian Ocean Region*, 12(1) Journal of the Indi an Ocean Region 5, 5-23 (2016); International Maritime Organization, *Maritime Security*, https://www.imo .org/en/ourwork/security/Pages/Default.aspx (accessed on November 14, 2022); International Maritime Org anization, *United Nations Convention on the Law of the Sea* (UNCLOS), https://www.imo.org/en/ourwork/l egal/pages/unitednationsconventiononthelawofthesea.aspx (accessed on June 30, 2023); Asia Society, *Mari time Security in the Indo-Pacific and the UN Convention on the Law of the Sea*, https://asiasociety.org/policy-institute/maritime-security-indo-pacific-and-un-convention-law-sea (accessed on August 25, 2023).

[11] See Burchill Scott & Andrew Linklater et al., *Theories of International Relations*, Red Globe Press (2013).

[12] See Albert Mathias & David Jacobson et al., *Identities, Borders, Orders: Rethinking International Relations Theory*, University of Minnesota Press (2001); Alexander Wendt, *Social Theory of International Politics*, Cambridge University Press (1999). The mainstream theories of international relations are realism and liberalism, see Stephen McGlinchey, *International Relations Theory* (edited by Rosie Walters and Christian Scheinpflug), e-International Relations (2017).

[13] See Bennett Andrew & Colin Elman, *Case Study Methods in the International Relations Subfield*, 40 (2) Comparative Political Studies 170, 170-195 (2007).

Gerring, 2006). The typical case is one that […] exemplifies a stable, cross-case relationship. By definition, the typical case may also be considered representative, according to the terms of whatever cross-case model is employed."[14]

First, accounting for the stability criteria, the MSR has been part of the Chinese foreign policy since 2013 under the direction of President Jinping Xi, who has kept the focus on presenting an alternative of development to Global South countries vis-à-vis the Bretton Woods institutions. "Jointly Building the 21st Century Maritime Silk Road" is a part of President Jinping Xi's speech at the Indonesian Parliament on October 3, 2013. The speech proposed jointly building the 21st Century the MSR for the first time. He pointed out that the Southeast Asia region has been a vital hub of the MSR since ancient times. China is willing to strengthen maritime cooperation with the Association of Southeast Asian Nations (hereinafter referred to as the ASEAN) countries, jointly build the 21st Century the MSR, and work together to build a closer China-ASEAN community of shared future.

Second, for the cross-case feature, the MSR presents themes, similarities, and differences across other maritime security regimes; thus, it can generate theoretical and empirical indicators that extrapolate to other cases. Third, the case study method seeks to clarify the MSR Concept and improve the MSR capabilities for sustained operations or enhancement.[15]

To systematize the case study and its analytical boundaries, the authors adopt content analysis as the research technique proposed by Bardin, which is "[...] a set of communication analysis techniques aimed at obtaining, by procedures, systematic and objective description of the message content, indicators (quantitative or not) that allow the inference of knowledge regarding the conditions of production/reception [...] of these messages. "[16]

In other words, it is the ability to perceive conditions and relationships between the word and phrases that lead to indicators, which produce a theoretical sensitivity that enables the application of the theoretical framework to experience through inferences to find minimally sufficient evidence, which begins building increasingly advanced levels of abstraction toward generalizing to other cases.[17]

In the analysis of the MSR case, words matter and count to explain and understand social behavior and are an essential source for inferences, which in investigating Chinese law and politics is crucial as ideology drives policies.[18]

Regarding the inferences, the analyzed messages and codes are interpretations to determine states, data, and phenomena. As explained by Bardin:

> [...] what is sought to establish when it is carried out an analysis consciously or not is a correspondence between semantic or linguistic structures and the psychological or sociological structures (for example,

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[14] See Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61(2) Political Research Quarterly 294, 294-308 (2008).
[15] See John Gerring, *Case Study Research: Principles and Practices*, Cambridge University Press (2006).
[16] See Laurence Bardin, *Análise de Conteúdo* (linguistica edition), Edições 70, p. 37 (2011).
[17] See King Gary & Robert O. Keohane et al., *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton University Press (1994).
[18] See Kevin Rudd, *The Return of Red China*, https://www.foreignaffairs.com/china/return-red-china (accessed on June 30, 2023).

> behaviors, ideologies, and attitudes) of the statements. In a very metaphorical way, one will speak of a synchronic plane or horizontal plane to designate the text and its descriptive analysis and a diachronic plane or vertical plane, which refers to the inferred variables. (Translated by the authors)[19]

The authors resource the online version of Voyant Tools (2022)[20] and Delve (2022)[21] as the *computer-assisted qualitative data analysis* software (hereinafter referred to as CAQDAS) to systematize the content analysis task. Both qualitative tools allow us to perform the content analysis, searching for the hermeneutical units' operationalization (codes), correlation, and context with the correlates in the *corpus*.[22] Additionally, the authors resort to bibliographical analysis and network to trace the positioning of scholars towards the MSR as an essential measure of civil society's reaction to the model. Thus, as the investigation unfolds, the authors expect the argument of the research to gain traction in inferences and empirical coverage.[23]

The primary document for the analysis is Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century the MSR (Vision) and its relationship to other official documents that reflect the international positioning of China concerning MSR and how the proposed projects possess the potential to increase environmental security of Chinese partners along the MSR. Considering the enormous scope of the MSR and other BRI projects, the authors narrowed down the focus of the empirical investigation to the Port of Gwadar in Pakistan, a part of the China-Pakistan Economic Corridor (hereinafter referred to as CPEC).

Furthermore, the content analysis will be conducted in the European Union, United States, North Atlantic Treaty Organization (hereinafter referred to as NATO), and African maritime security strategies, which should provide a comparative foundation to contrast the codes in the Vision and codes in these Western policy documents.

Furthermore, the authors mobilize the resonance of official and non-official documents in the epistemic community and meta-analysis by bringing news reports, papers, and other academic and non-academic sources to perform the conceptual and relational analyses in the codes, which provides insights on concerns and priorities in the study of the MSR, giving feedback for debates on public policy formation and changes.

2. The MSR Case

2.1. Background Conditions of the Case

The maritime communication among civilizations and, therefore, the beginning of the globalization process started in a different place than the West. *Au contraire*, the West

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[19] See supra note 17, at 47.
[20] The qualitative tool is available at https://voyant-tools.org (accessed on June 30, 2023).
[21] The qualitative tool is available at https://delvetool.com (accessed on June 30, 2023).
[22] See Dana Gablasova & Tony McEnery et al., *Collocations in Corpus-Based Language Learning Research: Identifying, Comparing, and Interpreting the Evidence*, 67(S1) Language Learning 155, 155-179 (2017).
[23] See Graham Gibbs, *Analysing Qualitative Data*, SAGE Publications Ltd (2008); Florian Kohlbacher, *The Use of Qualitative Content Analysis in Case Study Research*, https://www.qualitative-research.net/index.php/fqs/article/view/75 (accessed on June 30, 2023).

benefited from the expansion of China, Vikings, Arabs, and Indians in the year 1000 AD, a half-century before Columbus set foot in America. However, when the European navigation period started, the objective was to plunder and dominate other civilizations and uncharted territories. Usually, places with fewer natural resources had their population captured for the slavery trade.[24]

The globalization process started by the Eastern civilization in 1000 AD, which continued with the European countries 500 years later, left deep wounds in the world system that are open until today. One is the neocolonial features of the international institutions, which plunder and dominate developing countries under the subtle and disguised language of development.[25] As stated by Santos, it refers to a process that:

> It began as Christianity, colonialism, then capitalism and imperialism, and then metamorphosed into democracy, human rights, decolonization, self-determination, "rules-based international relations" - always making it clear that the rules were established by the West and were only followed when they served its interests - and finally, globalization.[26]

The imperialistic feature of international law resonates in the governance of the oceans, as the Great Navigation era, in which the freedom of navigation provided the legal justification for plundering the natural resources outside Europe and carrying the mission civilizatrice and continuing in the Post Second World era dominated by the systemic and symbolic violence of the neoliberal international institutions.[27]

Forming and maintaining the governance of oceans based on the Westphalia model is necessary to promote the separation of the social and natural world. The term "nature," which includes the human species, has been substituted by "the environment," which implies the things surrounding humanity. Even the term nature nowadays means positioning man as an outside observer of an object. The objectification of nature has the same ferocity as in the plundering initiated by the European empires in the medieval era, which puts the natural world at risk.[28]

The same rationale of the last paragraph regarding the ontology of European naval exploration does not apply to China. It is well established that under 1403 Emperor Di Zhu's rule, the navigation period was marked by the desire to trade and exchange experiences and traditions with other cultures.[29]

Regarding the oceans, the initial premises of the Chinese naval expansion are present in the MSR. They are based on the principles of equality and mutual benefits, and win-win cooperation in the context of an alternative for the development of civilizations,

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[24] See Valerie Hansen, *The Year 1000: When Explorers Connected the World—and Globalization Began*, Scribner (2020).

[25] See Douglas de Castro, *The Colonial Aspects of International Environmental Law: Treaties as Promoters of Continuous Structural Violence*, 5(2) Groningen Journal of International Law 168, 168-190 (2017).

[26] See Boaventura de Sousa Santos, *The Contraction of the West*, Critical Legal Thinking (blog), https://criticallegalthinking.com/2022/06/23/the-contraction-of-the-west/ (accessed on June 30, 2023).

[27] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press (2007).

[28] See Anne Orford & Florian Hoffmann, *The Oxford Handbook of the Theory of International Law*, Oxford University Press (2016).

[29] See Gavin Menzies, *1421: The Year China Discovered America*, William Morrow Paperbacks (2008).

providing a new model of social and economic development and a broader sense of security that challenges the Western colonialist approach.[30]

Since its inception, the MSR has been a vital part of the BRI. It has encompassed a broader and alternative understanding of the basis of the development process, which becomes evident by examining the official documents published by the Chinese government.[31] As stated by the Vision:

> The Initiative is harmonious and inclusive. It advocates tolerance among civilizations, respects the paths and modes of development chosen by different countries, and supports dialogues among different civilizations on the principles of seeking common ground while shelving differences and drawing on each other's strengths, so that all countries can coexist in peace for common prosperity.[32]

The MSR and the BRI emerge as an alternative to the Global North development model within this broad picture, a viable option consistent with China's and its partners' interests, considering their experiences with developed countries.[33] It reflects the real "end of history"[34] as the contradictions of the Western approach, especially the development model, have provoked successive international crises that make the world unequal and unsafe. The BRI reflects a new concept of global governance and reached a critical consensus in the international community. One of the core objectives of constructing the BRI is joint contribution and shared benefits. It means that all parties should share the interests and results of cooperative construction projects under the principles of fairness and justice. Thus, the ultimate win-win situation is the goal.

Along with the maritime routes that are part of the plans in the context of the MSR, China has leased ownership over several ports, including Gwadar, Pakistan; Kyaukpyu, Myanmar; Kuantan, Malaysia; Obock, Djibouti; Malacca Gateway; Hambantota, Sri Lanka; Muara, Brunei; Feydhoo Finolhu, Maldives; and Newcastle Port and Port Darwin, Australia.[35]

2.2. Findings and Discussion

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[30] See Keyuan Zou & Wu Shicun et al., *The 21st Century Maritime Silk Road: Challenges and Opportunities for Asia and Europe*, Routledge (2020).

[31] See He Li, *The Chinese Model of Development and Its Implications*, 2(2) World Journal of Social Science Research 128, 128-138 (2015).

[32] See State Council, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, https://www.fmprc.gov.cn/eng/topics_665678/2015zt/xjpcxbayzlt2015nnh/201503/t20150328_705553.html (accessed on June 30, 2023).

[33] See Flynt Leverett & Wu Bingbing, *The New Silk Road and China's Evolving Grand Strategy*, 77(1) The China Jornal 110, 110-132 (2017).

[34] Refers to the end of the Cold War and the fall of the Berlin Wall, marking the end of the ideological conflict with the unchallenged establishment of Western liberal democracy as the final ideological stage of human evolution. See Francis Fukuyama, *The End of History?*, https://www.jstor.org/stable/24027184 (accessed on June 30, 2023).

[35] See Ghiasy & Richard et al., *The 21st Century Maritime Silk Road: Security Implications and Ways Forward for the European Union*, SIPRI (2018), https://www.sipri.org/publications/2018/other-publications/21st-century-maritime-silk-road-security-implications-and-ways-forward-european-union (accessed on June 30, 2023).

The Chinese positioning in the global system as a driving force for development gained traction when President Jinping Xi assumed as head of the state in 2013, presenting a more robust and alternative vision for the development process throughout the BRI and MSR.[36]

As such, the first document in the corpus analyzed is the Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century the MSR (Vision) issued by the Chinese Government on March 30, 2015, which operationalizes the strategy laid out by President Jinping Xi during his visit to Kazakhstan in October 2013.[37] According to the Chinese government, 145 countries have signed the Memorandum of Understanding to join the BRI, reinforcing the Chinese position that the platform got worldwide attention. It possesses five significant goals related to cooperation with the participating countries: 1) Policy coordination, 2) Facilities connectivity, 3) Unimpeded trade, 4) Financial integration, and 5) People-to-people bonds.[38]

In the content analysis of the Vision, two words stand out: road (105 times) and cooperation (99 times). The high frequency of the word road is associated with the platform's name and appears several times in the document; however, it possesses analytical relevance considering that the associated words are prosperity and peace (Figure 1).

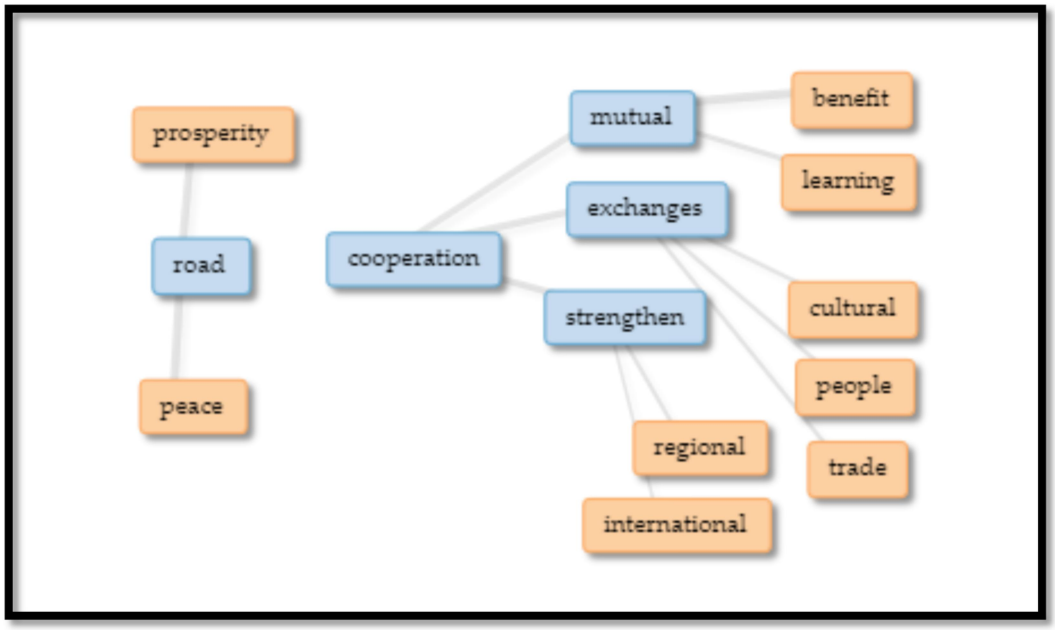

Figure 1-Content analysis of the Vision (made by the author).[39]

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[36] See Douglas de Castro & Danielle Mendes Thame Denny, *Economic Relationship between Brazil and China: An Empirical Assessment Using Sentiment and Content Analysis*, 11(1) Beijing Law Review 227, 227-243 (2020).

[37] See CSIS, *Parallel Perspectives on the Global Economic Order (2017)*, https://www.csis.org/analysis/parallel-perspectives-global-economic-order (accessed on June 30, 2023).

[38] See NDRC, *National Development and Reform Commission (NDRC) of People's Republic of China*, https://en.ndrc.gov.cn/ (accessed on June 30, 2023).

[39] The figure was made by the author using Voyant Tools, https://voyant-tools.org/?query=road&query=cooperation&query=belt&query=mutual&query=exchanges&query=strengt

2.2.1. Prosperity and Peace

Prosperity and peace are associated directly with the internal and external security dimensions in both traditional and non-traditional areas. For the study, the environmental dimension is the focus.

Due to several international commitments, especially within the climate change international regime, China had to start addressing internal environmental challenges resulting from the intense industrial activity policy and market opening initiated in 1979 by Xiaoping Deng. This approach has been vital to increasing internal ecological security, as the pollution levels, especially in large cities, generated social instability and triggered economic slowdowns.[40]

Among the regulatory changes to address the environmental challenges and to make economic and environmental security compatible, the Chinese Constitution incorporated the old ecological civilization concept via constitutional amendment in 2018, which directly affected the national regulatory framework.[41] As such, Zhou argues that the concept […] is not only a discourse but also a practical strategy. At the same time, it is also a Marxist response put forward by China in the process of promoting its own economic and social practice."[42] The authors provide some examples below.

The Guidance on Promoting Green Belt and Road entered into force "[…] share the ecological civilization philosophy and achieve sustainable development … is an essential effort to participate in global environmental governance and promote green development."[43]

The 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035 (14th Five-Year Plan) of China puts development at the center of the policies to be implemented by the country. However, it is possible to observe the connection between the development and the improvement of several societal aspects in the 14th Plan, among them the environment/ecological protection.[44]

Figure 1 below shows that through the 14th Five-Year Plan, it is possible to observe the Chinese preoccupation with the incorporation of environmental concerns in the development process, which, as seen in Figure 2, is the stance adopted by China in dealing with internal ecological challenges due to the economic expansion is "exported"

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hen&query=countries&mode=corpus&corpus=fe413bd2d8bed1e9596ced3bcf8a46db&view=CollocatesGraph (accessed on November 16, 2022).

[40] See Fuwen Wei & Shuhong Cui et al., *Ecological Civilization: China's Effort to Build a Shared Future for All Life on Earth*, 8(7) National Science Review 279, 279 (2021); Yifei Li & Judith Shapiro, *China Goes Green: Coercive Environmentalism for a Troubled Planet*, Polity (2020).

[41] See Changhao Wei & Taige Hu, *Annotated Translation: 2018 Amendment to the P.R.C. Constitution* (version 2.0), https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/ (accessed on March 11, 2018).

[42] See Xi Zhou, *Ecological Civilization in China: Challenges and Strategies*, 32(3) Capitalism Nature Socialism 84, 84-99 (2020).

[43] See Ministry of Ecology and Environment, *Guidance on Promoting Green Belt and Road*, https://english.mee.gov.cn/Resources/Policies/policies/Frameworkp1/201706/t20170628_416864.shtml (accessed on June 30, 2023).

[44] See Arlin M. Adams, *CSET Original Translation: China's 14th Five-Year Plan*, Center for Security and Emerging Technology (blog), https://cset.georgetown.edu/publication/china-14th-five-year-plan/ (accessed on June 30, 2023).

to the BRI partners via the Guideline of Environment Protection for Overseas Investment and Cooperation (Guideline).

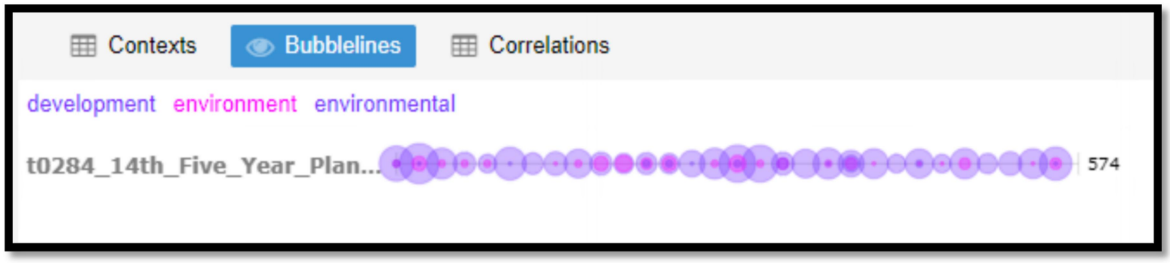

Figure 2 – Content analysis – the 14th Plan (made by the author using Voyant Tools)[45]

The Guideline addresses the concerns regarding how the country needs to handle the projects from an environmental standpoint. A closer look into the language used in the Guideline shows the frequency and correlation among the most cited term "environmental" (40 times), which is normal due to the objective of the Guideline. The collocates[46] of the "environmental" terms are "companies," "assessment," "accidents," and "regulations." [47]

The association of the collocates with the term "environmental" indicates the need to incorporate the Environmental Impact Assessment, considered one of the most critical techniques in applying the principles of prevention and precaution in dealing with environmental resources in projects.

That demonstrates the spillover of China's internal concerns with environmental protection to foreign policy.[48] Furthermore, the relationship between the terms reflects the consolidation of the tendency of China to exercise more control over the standards of private and public companies in doing business abroad, reflecting social responsibility, a dimension often associated with environmental protection. As confirmed by Tan-Mullins and Mohan:

> Together with the later 'Construction of a Harmonious Society' (社会和谐) idea, the Chinese government demonstrated clear interest in promoting CSR proactively (Zhou 2006). Henceforth, increasing media

[45] The figure was made by authors using Voyant Tools, https://voyant-tools.org/?lang=en&bins=30&query=development&query=environment&query=environmental&docId=f20c55e8369415f047980d978af946fe&corpus=461a910541499f457e8ce0b7815d788b&view=Bubblelines (accessed on November 16, 2022).

[46] For a deeper understanding of the collocates in linguistics analysis, see Richard Xiao, *The Cambridge Handbook of English Corpus Linguistics*, Cambridge University Press(2015), https://www.cambridge.org/core/books/abs/cambridge-handbook-of-english-corpus-linguistics/collocation/F3D394FD5B2D3952110F4AD8B8A52A9B (accessed on November 16, 2022).

[47] To provide transparency and replicability of the experiment, researchers can find the content analysis of the Guideline at https://voyant-tools.org/?corpus=d55672494afc3fef1b4ba6b7abbee254 (accessed on June 30, 2023).

[48] See Jonathan E. Hillman, *The Emperor's New Road: China and the Project of the Century*, Yale University Press (2020).

> concern with environmental issues, new environmental and CSR laws and regulations, and the harmonious society concepts, became domestic drivers for CSR in China.[49]

China's legal and policy framework shifts were fundamental to secure internal stability between the demands of economic growth and the protection of the environment, thus reassuring the commitment to internal and regional prosperity and peace throughout the BRI and the MSR.

For instance, this is what the authors observe in the case of the projects connecting China's extreme northern city of Kashgar to the port of Gwadar in Pakistan throughout the BRI and the MSR's flagship project, the CPEC. According to the Ministry of Planning, Development & Special Initiatives of Pakistan, it constitutes a "[…] journey towards economic regionalization in the globalized world. It founded peace, development, and win-win model for all of them […]," spilling over the whole region.[50]

The importance of higher standards for development was reinforced recently by the Work Report presented by President Jinping Xi during the 20th National Congress of the Communist Party of China, in which he stressed the need for China to sustain a high-quality development that involves preserving nature, peace, and prosperity of all people.[51]

Achieving peace and prosperity that leads to increased economic and environmental security at national and international levels depends on a higher level of cooperation that involves win-win scenarios. It is consistent with the principles of peaceful coexistence and mutual benefit. It is also closely related to and reinforces the theory of peaceful development and the core values of socialism.

2.2.2. Cooperation at Another Level

For mainstream International Relations theories, cooperation is possible in world politics. For realism and liberalism, cooperation under an anarchical international system is likely to maximize gains in survival or national interests relying on the material structure of the states.[52]

However, cooperation might be analyzed under the epistemological lens of the constructivist theory of international relations, in which the relations among actors in the global system are based on the meaning given to the material structure. In this sense, there is a social construction of reality through the identities and interests of the actors (and here, the state is just one actor that shapes the relationship) constructed by the interaction among them.[53]

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[49] See May Tan-Mullins & Giles Mohan, *The Potential of Corporate Environmental Responsibility of Chinese State-Owned Enterprises in Africa, Environment*, 15(2) Development and Sustainability 265, 265-284 (2013).

[50] See CPEC Authority, *Introduction*, China-Pakistan Economic Corridor (CPEC) Authority Official Website, http://cpec.gov.pk/introduction/1 (accessed on June 30, 2023).

[51] See full text of the Report to the 20th National Congress of the Communist Party of China, https://www.fmprc.gov.cn/eng/zxxx_662805/202210/t20221025_10791908.html (accessed on November 16, 2022).

[52] See Robert Axelrod & Richard Dawkins, *The Evolution of Cooperation: Revised Edition* (revised edition 2006); Nichola Raihani, *The Social Instinct: How Cooperation Shaped the World*, St. Martin's Press (2021).

[53] See Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46(2) International Organization 391, 391-425 (1992); Peter Katzenstein (ed), *The Culture of National Security* (illustrated edition), Columbia University Press (1996). "Constructivist theory emphasizes the

The observation of the usage and meanings of the term cooperation in the Vision and its association in the first level of relationship with the codes mutual, exchange, and strengthen (Figure 1) provides the empirical coverage to support the applicability of the constructivist theory to confirm the argument. The Western Ocean security regime is predicated on material forces seeking the maximization of survival and national interests, which are exclusionary vis-à-vis developing countries. The language of the Vision confirms the linkage: "win-win cooperation that promotes common development and prosperity and a road toward peace and friendship" (Annex 1).

As such, cooperation processes to reshape the material structure to include ideational and relational factors are essential to explain the MSR as a source of environmental security to China and its partners. The North-South framework presents the discontentment of the developing countries with the *status quo* order, which has not been responsive to the challenges, expectations, and values that the developing countries have raised for quite some time. As argued by Alam et al.:

> The global South is a robust theater for cooperation and competition among developing nations. Regional cooperation is expanding through intergovernmental organizations in each southern area. In addition, similarly, situated states in different regions often align policy positions globally. In international negotiations, they rally around the principles of "solidarity" and "common but differentiated responsibilities," largely to enhance negotiations with developed nations – the North.[54]

The MSR is a form of resistance against and an alternative to the dominant liberal international institutions and economic world order born in the aftermath of the Second World War, of which the Bretton Woods institutions are representative. The Vision asseverates the need for "new models of international cooperation and global governance and will inject new positive energy into world peace and development." (Annex 1)

To that end, the Bretton Woods institutions are charged with "[...] the persistence of extreme poverty in the global South is attributable not to random misfortune, but to a global economic order that systematically benefits the wealthy and disenfranchises the poor."[55] The Vision states that the importance of

> "Tolerance among civilizations, respects the paths and modes of development chosen by different countries, and supports dialogues among different civilizations on the principles of seeking common ground while

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meanings that are assigned to material objects, rather than the mere existence of the objects themselves. For example, a nuclear weapon in the United Kingdom and a nuclear weapon in North Korea may be materially identical (though, so far, they are not) but they possess radically different meanings for the United States. The belief that reality is socially constructed leads constructivists to place a greater role on norm development, identity, and ideational power than the other major theoretical paradigms.
Indeed, norms, identity, and ideas are key factors in constructivist theory.", https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0061.xml (accessed on November 16, 2022).

[54] See Shawkat Alam & Sumudu Atapattu et al., *International Environmental Law and the Global South*, Cambridge University Press, p. 553 (2015).

[55] Id., at 9.

> shelving differences and drawing on each other's strengths, so that all countries can coexist in peace for common prosperity." (Annex 1)

In addition, the Vision proposes a "pluralistic and open process of cooperation which can be highly flexible and does not seek conformity" (Annex 1), which contests the universalization principle as the core tenet of International Law. That means the perpetuation of inequalities in the world considers its ontology imperialistic and colonialist, thus excluding other world views, perceptions, traditions, or even alternatives that challenge the existing liberal development model.[56]

The ideational features of the Vision incorporated in the cooperation framework of the MSR connect to the second level of relationship with the code cooperation through the codes "mutual," "exchanges," and "strengthen" (Figure 1). The codes at the second level ("benefit," "learning," "cultural," "people," and "trade") express, in great extension, the tenets of the Constructivist Theory in which the social construction of the international relationships express higher values and solidarity concerning oceans.[57] The Vision confirms it:

> […] secure and efficient network of land, sea and air passages, lifting their connectivity to a higher level; further enhance trade and investment facilitation, establish a network of free trade areas that meet high standards, maintain closer economic ties, and deepen political trust; enhance cultural exchanges; encourage different civilizations to learn from each other and flourish together; and promote mutual understanding, peace and friendship among people of all countries. (emphasis added)

2.2.3. Environmental Security along the MSR – a New Paradigm of Sustainability

Although there is room for normative and theoretical debates regarding the concept of environmental security, the fact remains that the destruction or unsustainable use of natural resources poses a significant threat to peace.[58] For the sake of this study, the authors adopt the conceptualization of environmental security developed by Zurlini and Müller:

> The major challenge concerns the global environmental change, focusing on the interactions between ecosystems and mankind, the effects of global environmental change on environmental degradation, the effects of increasing social request for resources, ecosystem services, and environmental goods.[59]

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[56] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press (2007); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press (2004).

[57] See Carla P. Freeman, *An Uncommon Approach to the Global Commons: Interpreting China's Divergent Positions on Maritime and Outer Space Governance*, 241(1) China Quarterly 1, 1-21 (2020).

[58] See Ken Conca & Geoffrey D. Dabelko, *Environmental Peacemaking*, Johns Hopkins University Press (2002); Michael Sheehan, *International Security: An Analytical Survey*, Lynne Rienner Pub (2005).

[59] See G. Zurlini, & F. Müller, *Environmental Security, Encyclopedia of Ecology* (edited by Sven Erik Jørgensen & Brian D. Fath), Academic Press, pp. 1350-1356 (2008).

The analysis of the Vision indicates the presence of environmental security as conceptualized in the last paragraph. Environmental security within the MSR is grounded on the Vision through the code's "security" and "green," as seen in Table 1.

CODE SECURITY
The Initiative is an ambitious economic vision of the opening-up of and cooperation among the countries along the Belt and Road. Countries should work in concert and move toward the objectives of mutual benefit and common security.
CODE GREEN
The authors support localized operation and management of Chinese companies to boost the local economy, increase local employment, improve local livelihoods, and take social responsibilities in protecting local biodiversity and eco-environment.
CODE GREEN
The authors should promote ecological progress in conducting investment and trade, increase cooperation in conserving eco-environment, protecting biodiversity, and tackling climate change, and join hands to make the Silk Road an environment-friendly one.
advance cooperation in hydro power, nuclear power, wind power, solar power and other clean, renewable energy sources
CODE GREEN
promote green and low-carbon infrastructure construction and operation management, taking into full account the impact of climate change on the construction.

Table 1 - Content analysis – Vision (made by the authors using Delve)

A comparative analysis of the maritime strategy of the United States and the European Union shows the difference between the MSR approach and the Western one.[60] The terms Security and National are the ones with more significant frequency, while the authors selected the terms Development and Environment as representatives of the core understanding of the MSR.

	Frequency			
	Security	**National**	**Development**	**Environment**
United States	644	395	49	5
European Union	253	107	68	17

[60] See the corpus comprises the Domestic Outreach Plan for The National Strategy for Maritime Security, the Maritime Infrastructure Recovery Plan for The National Strategy for Maritime Security, the Maritime Transportation System Security Recommendation for The National Strategy for Maritime Security, and the Report on the implementation of the revised EU Maritime Security Strategy Action Plan.

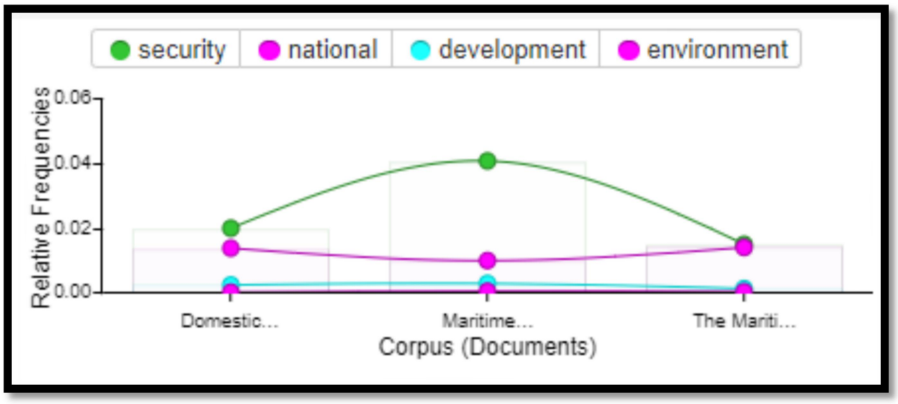

Table 2 – Frequency in the Corpus (made by the authors using Voyant Tools)

Figure 3 – Content analysis – the US Maritime Strategy (made by the authors using Voyant Tools)[61]

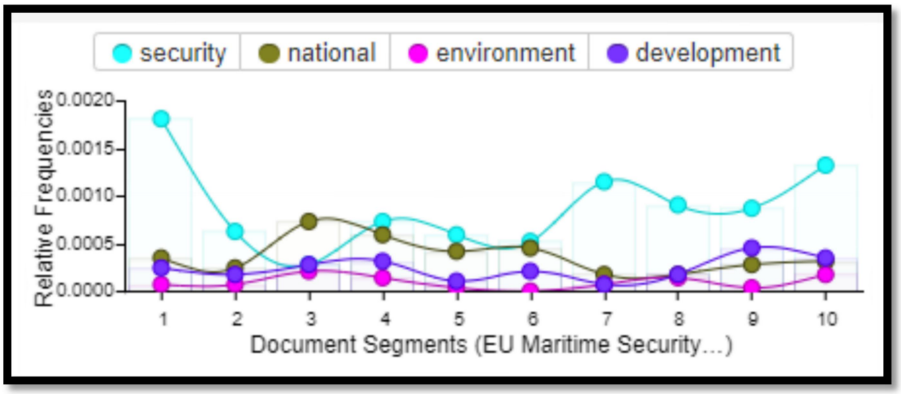

Figure 4 – Content analysis – the EU Maritime Strategy (made by the authors using Voyant Tools)[62]

The analysis of the United States and European Union's maritime strategies compared with the MSR presents a clear distinction of the relevance of environmental security vis-à-vis the traditional concerns over security. As shown in Figure 3 and 4, there is a significant gap between the term's "security" and "environment," meaning that environmental security concerns are slightly present in the narrative of the corpus. It is not just a matter of the frequency of the terms in the corpus but the conceptual distance of both isolated terms to form the operationalized concept of environmental security.

As such, the strategies show a more egoistical and materialistic approach proper of the realist and liberal theories of international relations in which the traditional security dimensions are at the core. *Au contraire*, the language in the Vision reflects a higher normative model of development of the MSR that encompasses the environmental dimension as part of the development process.

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[61] The figure was made by the author using Voyant Tools, https://voyant-tools.org/?lang=en&query=development&query=security&query=environment&query=national&corpus=cc8e88f806ff9c232d3c1d7e77d63aa&view=Trends (accessed on November 19, 2022).

[62] The figure was made by the author using Voyant Tools, https://voyant-tools.org/?lang=en&query=environment&query=development&query=national&query=security&mode=document&corpus=42719f04d813525663e670999389552e&view=Trends (accessed on November 19, 2022).

3. Final Remarks

MSR is a platform of cooperation in constant transformation and adaptation due to the internal and external demands of China and its partners; it is possible to affirm that they present an alternative development model.

The model incorporates an alternative understanding of the global challenges and opportunities more inclusive than the exclusionary and arbitrary model perpetrated by the Bretton Woods institutions that led developing countries to a permanent crisis. The growing social and economic inequality, which is exacerbated by environmental challenges, poses a potential risk to peace.

The findings of this study point out that a softer approach to international relations considers the environment as an essential dimension of the social construction of global relations (in opposition to the mainstream theories the authors mentioned in the introduction). The MSR case provides sufficient conditions to infer that China is seeking a higher quality in its development pursuit that incorporates the natural world into the social realm, which is the opposite of the narratives of the hegemonic pursuit of power or imperialistic venture.

With that in mind, the authors found that maritime security mediates the approaches to marine safety and economic development by incorporating the notions of facing the environmental challenges created by the detrimental and exclusionary Western development model and contributes to the groundedness of sustainable development principle, which still lacks parameters.

The limited scope of the analysis of the MSR case in this paper points out the need for future research agendas to investigate other dimensions of maritime security by applying the constructivist theoretical lens.

Climate Change Litigation Under the Paris Agreement: The Responsive Justice Model in the Shell Case

Yaru Wang[1]

Abstract: This article discusses the employment of the model of responsive justice in the judgment of *Milieudefensie v. Royal Dutch Shell*, arguing that by applying the responsive justice model, the courts could extricate themselves from the hurdles of caiusation and redressability during the adjudications, thus rendering more "environment-friendly" judgments. On May 26, 2021, the Hague District Court made history by rendering the judgment of *Milieudefensie v. Royal Dutch Shell*, ordering Royal Dutch Shell to mitigate 45% of its Scope 1, Scope 2, and Scope 3 emissions by the end of 2030 compared to 2019 as the baseline year. This pioneering judgment admitted that private corporations are responsible for climate change for the first time. The responsive justice model intends to resolve the tension between integrity and openness, which is reflected in the Hague District Court's interpretation of the private corporations' unwritten standard of care by incorporating climate attribution science, piles of soft law instruments, and Dutch tort law. Especially, the Hague District Court derived the mitigation objective of private corporations from the *Paris Agreement*'s 2°C temperature goal for the purpose of responding to social needs in reconstructing climate policies. Currently, climate change litigations such as *Friends of Nature v. State Grid Gansu Branch* have begun to emerge in Chinese Mainland, and the judgment of *Milieudefensie v. Royal Dutch Shell* can be used as a reference for promoting green economic and social development through judicial adjudications.

Keywords: Climate change litigation; Paris agreement; The responsive justice model; The shell case.

1. Introduction

An Intergovernmental Panel on Climate Change (hereinafter referred to as IPCC) report, namely, the Climate Change 2022: Impacts, Adaptation and Vulnerability, indicates that impacts and risks of climate change will increase dramatically in the coming decades, threatening human well-being and the health of the planet.[2]

The establishment of the Paris Agreement marks the inception of a new framework for addressing climate change. Its objective is to substantially reduce greenhouse gas (hereinafter referred to as GHG) emissions and cap the global temperature increase at 2°C within this century. Additionally, it seeks measures to limit any further increase to 1.5°C through the adoption of "Nationally Determined Contributions" (hereinafter referred to as NDCs), as outlined in Paragraph 2, Article 4. This entails countries making significant cuts in global emissions by half before the end of this decade. However, the

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[2] See *the Whole Text of the Climate Change 2022: Impacts, Adaptation and Vulnerability*, https://www.ipcc.ch/report/ar6/wg2/ (accessed on August 4, 2023).

United Nations Framework Convention on Climate Change (hereinafter referred to as UNFCCC) secretariat estimated that, based on the latest NDCs, countries are likely to use more than 89% of the remaining carbon budget between 2020 and 2030 (UNFCCC 2022a). Furthermore, the United Nations Environment Programme (hereinafter referred to as UNEP) has determined that recent pledges will "make a negligible impact on projected 2030 emissions." According to its 2022 Emissions Gap Report, existing policies suggest a potential 2.8°C increase by the close of this century.[3] In addition, there is little evidence of lawmaking pertaining to private corporations at the domestic level,[4] even though the Paris Agreement stipulated that the adaptation action "should follow a country-driven approach."[5]

The failure of the world's nations to take strong mitigation and adaptation measures to address climate change has prompted citizens and non-governmental organizations (hereinafter referred to as NGOs) to seek justice through the courts, hoping that the courts will undertake the social mission of reshaping climate change policy. According to the UNEP, climate change litigation encompasses cases brought before various administrative, judicial, and other adjudicatory bodies that raise substantive issues of law or fact pertaining to climate change mitigation, adaptation, or the science of climate change.[6] Notably, the number of climate litigation cases filed has seen a significant increase following the signing of the Paris Agreement in 2016, with just over 800 cases filed between 1986 and 2014, and over 1,200 cases filed between 2014 and 2022.[7] As of November 5, 2023, the Climate Change Litigation Database established by the Sabin Center for Climate Change Law at Columbia University has recorded a total of 2,478 climate change lawsuits, of which 1,669 have been filed in the United States from 2007 to the present, and 809 have been filed in other countries from 2011 to the present. In total, the database now encompasses climate change litigation from more than 55 countries.[8]

These climate change cases involve the application of either public or private laws to address the issue of climate change. Public climate change litigations are primarily directed against governmental institutions for their failure to implement effective policies for climate change mitigation or adaptation. These cases challenge government decision-making on the basis that environmental impact studies have inadequately considered climate change impacts. On the other hand, private climate change litigations aim to hold corporations accountable for climate change, either by seeking compensation or by

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[3] See UN Environment Programme, *Columbia Law School Columbia Climate School Sabin Center for Climate Change Law, Global Climate Litigation Report 2023 Status Review*, https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 (accessed on September 22, 2023).

[4] See Benoit Mayer, *Climate Change Adaptation and the Law*, 39(2) Virginia Environmental Law Journal 141, 141-176 (2021).

[5] See Article 7(5) of the Paris Agreement.

[6] See the United Nations Environment Programme Law Division, *Global Climate Litigation Review 2020 Status Review*, https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf (accessed on July 1, 2023).

[7] See Diya Krabill, *Global Climate Change Litigation: A New Class of Litigation on the Rise*, https://legaljournal.princeton.edu/global-climate-change-litigation-a-new-class-of-litigation-on-the-rise/ (accessed on September 1, 2023).

[8] See the Climate Change Litigation Database, *Global Climate Change Litigation*, http://climatecasechart.com/non-us-climate-change-litigation/ (accessed on November 5, 2023).

demanding preventive measures. Private climate change litigation takes various forms, with cases generally falling into the category of common law tort actions. This includes suing industrial polluters based on claims of negligence or nuisance. As a result, courts become a crucial forum for discussions and debates regarding transnational climate change regulation.[9]

In the context of climate change, Jacqueline Peel argues that litigation has often been strategically used in response to inadequate law-making by the government, aiming to prompt broader policy changes.[10] Navraj Ghaleigh describes this type of climate change litigation as "promotive," where "applicants are seeking to deploy more general legal norms which have no necessary climate-change characteristics in ways that can promote positive environmental outcomes by way of regulatory intervention sanctioned or even required by courts."[11] Hari Osofsky suggests the emergence of a body of "anti-regulatory" climate lawsuits, particularly initiated in the United States in reaction to "promotive" climate change litigation and resulting regulations.[12] Former NASA scientist James Hansen has called for a wave of lawsuits against governments and fossil fuel companies that are delaying action on climate change. This includes suing corporations like ExxonMobil, BP, and Shell for the damage they are causing to the environment and to future generations.[13] Geetanjali Ganguly, Joana Setzer, and Veerle Heyvaert assert that strategic private climate litigations are cases launched with the explicit aim of influencing corporate behaviors and strategies in relation to climate change.

The first wave of private climate litigation spanned from 2005 to 2015 and was primarily concentrated in the United States. However, it faced challenges related to the political question doctrine and causal reasoning, resulting in no successful cases.[14] The second wave of private climate litigations was motivated by the publication of the Carbon Majors study in 2013 and has spread beyond the United States into new jurisdictions, peaking in 2015.[15] While an increasing number of cases have emerged that name private parties as defendants and employ a variety of legal strategies, successful outcomes in climate change litigation remain rare. Cases such as *Comer v. Murphy Oil USA* in 2010, *Native Village of Kivalina v. ExxonMobil Corp* in 2012, and *Luciano Lliuya v. RWE AG* in 2015 all reflect the public's eagerness to seek climate justice through judicial action against private corporations.[16] However, in actual judicial decisions, courts often do not

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[9] See Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1(3) Climate Law 3, 4 (2010).
[10] See Jacqueline Peel, *The Role of Climate Change Litigation in Australia's Response to Global Warming*, 24(2) Environmental and Planning Law Journal 90, 90-105 (2007).
[11] See Navraj Ghaleigh, *Six Honest Serving Men: Climate Change Litigation as Legal Mobilization and the Utility of Typologies*, 1(1) Climate Law 45, 45 (2010).
[12] See Hari Osofsky & Jacqueline Peel, *Litigation's Regulatory Pathways and the Administrative State: Lessons from U.S. and Australian Climate Change Governance*, 25(1) Georgetown International Environmental Law Review 204, 216-217 (2013).
[13] See Jonathan Watts, *We Should Be on the Offensive—James Hansen Calls for Wave of Climate Lawsuits*, https://www.theguardian.com/environment/2017/nov/17/we-should-be-on-the-offensive-james-hansen-calls-for-wave-of-climate-lawsuits (accessed on September 1, 2023).
[14] See Geetanjali Ganguly & Joana Setzer et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38(4) Oxford Journal of Legal Studies 841, 841-868 (2018).
[15] Ibid.
[16] See *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010); *Native Village of Kivalina v. ExxonMobil Corp*, 4:08-cv-01138 (N.D.Cal); *Luciano Lliuya v. RWE AG*, Oberlandesgericht Hamm, I-5 U 15/17.

support the plaintiffs' claims due to reasons such as lack of jurisdiction, absence of corresponding statutory provisions, and challenges in establishing causation for climate change damages.[17]

The 2015 *State of the Netherlands v. Urgenda Foundation* (hereinafter referred to as the Urgenda Case)[18] established a groundbreaking path for addressing the adverse human rights impacts of climate change within the framework of national tort law. Following this, the 2021 *Milieudefensie vs. Royal Dutch Shell* (hereinafter referred to as the Shell Case) marked the first successful attempt in climate change litigation to hold private corporations accountable for their contributions to climate change. The Hague District Court played a pivotal role by employing the responsive justice model in adjudication. This involved leveraging various legal resources, including human rights, soft law instruments, and climate science, to broadly interpret the unwritten standard of care expected of private corporations. As a result, Royal Dutch Shell (hereinafter referred to as RDS) was ordered to reduce 45% of its Scope 1, Scope 2, and Scope 3 emissions by the end of 2030, compared to the baseline year of 2019, in alignment with the temperature goal of the Paris Agreement.

China, as a member state of the Paris Agreement, has determined to "contribute to the establishment of an equitable and effective global mechanism on climate change, work for global sustainable development at a high level and bring about new international relations featuring win-win cooperation,"[19] as well as to "raise ambition and foster a new architecture of climate governance."[20] Through the implementation of incentive policies, China has adopted a top-down regulatory approach to achieve societal decarbonization. The 20th National Congress of the Communist Party of China prioritized dual GHG goals of GHG peak and GHG neutrality, encouraging Chinese courts to promote environmental sustainability in economic and social development through judicial adjudication. Additionally, since 2019, the Supreme People's Court of the People's Republic of China has been exploring how to best use climate change litigations to achieve the target of carbon neutrality.[21] Climate change cases had not gained traction and lacked support from

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[17] See Anne-Sophie Novel, *Climate Change, A New Legal Topic*, https://zh.unesco.org/courier/2019-3/qi-hou-bian-hua-xin-fa-lu-ke-ti (accessed on August 3, 2023).

[18] See *Urgenda Foundation v. State of the Netherlands*, ECLI: NL: GHDHA: 2018: 2591.

[19] See *Highlights-World Leaders Open Paris Climate Change Talks*, https://uk.news.yahoo.com/hightlights-world-leaders-open-paris-climate-change-talks-124750130.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAEucMYra-kLpIyOfYrqF9ussMKqxhD9gkDwW03AD504uFGjGmBINUHUmd0YqAMC_ThIELg-Ex6V4TUU0pD3iyOYyzhzC5W7d_l-KX-Ifk2SJoRdt2RN02y3VktO79hxSnWCLrFVzdlHzAtx69QyRCNu4pZewdDTefltWQVorD8Ft (accessed on September 10, 2023).

[20] See *Jinping Xi Addresses Climate Ambition Summit*, https://www.chinadaily.com.cn/a/202012/13/WS5fd575a2a31024ad0ba9b7ac.html (accessed on September 10, 2023).

[21] Subject to "Environmental Resource Case Type and Statistical Standards (Trial)" issued by the Supreme Court in 2019, climate change litigations are divided into climate change mitigation cases and climate change adaption cases. The former refers to cases generated through processes aimed at reducing or avoiding greenhouse gas emissions, such as the development of renewable energy, improving energy efficiency, controlling substances depleting the ozone layer, promoting sustainable transportation, managing land-use changes, and forestry, among others. The latter refers to cases generated through processes aimed at promoting swift and long-term adaptation measures through policies, planning, projects,

courts in mainland China for an extended period, until the mediation agreement of *Friends of Nature v. State Grid Gansu Branch* was reached. Due to the absence of a well-established legal framework for adjudicating climate change litigations and the lack of a liability regime applicable to climate change, climate-related litigations in mainland China are heavily policy-oriented, and courts face limitations in providing judicial interpretation.

This article aims to analyze how the Hague District Court employed the responsive justice model in the Shell Case and argues that this approach could serve as an option for facilitating future climate change litigations in mainland China. Given that climate change litigation occurs in a rapidly evolving scientific, discursive, and constitutional context,[22] the deployment of the responsive justice model can overcome challenges related to the lack of statutory resources and the establishment of causality. This is achieved through a broad and extensive interpretation of the responsibilities of private corporations, ultimately contributing to the reconstruction of climate change policy through judicial activities. The structure of this article includes Section 2, which introduces the origins and characteristics of the responsive justice model; Section 3, which provides an in-depth analysis of its application in the Shell Case; Section 4, which discusses its adoption in climate change litigations in mainland China; and finally, Section 5, which presents the conclusion regarding the application of the responsive justice model in climate change litigations.

2. The Responsive Model of Justice: Origins and Characteristics

The concept of "responsive justice" emerged in the 1960s through the work of American scholars Philip Selznick and Philippe Nonet, notably in their book Law and Society in Transition: Toward Responsive Law.[23] During a time of social polarization, environmental pollution, and increased crime rates in the United States, public confidence in legal authority waned, prompting a restructuring of the legal order to address evolving societal needs. In response, Selznick and Nonet proposed a progressive legal development model, transitioning from repressive law to autonomous law, and ultimately to responsive law. These models represent three distinct approaches to balancing the integrity and openness of the legal system.

Repressive justice centers on the authority of the state and official discretion in judicial activities, prioritizing the maintenance of state coercion. Autonomous justice upholds a clear separation between justice and politics, strictly adhering to statutory law and procedural justice for the purpose of establishing official accountability. However, this approach can lead to legal closure in the pursuit of judicial consistency. Responsive justice, in contrast, represents a more advanced legal model that goes beyond procedural justice.[24] It seeks to define the public interest and is committed to achieving substantive justice, aiming to reconcile the dilemma between the integrity and openness of the law.

The responsive justice model features three major characteristics. First, the

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and actions, enhancing various capacities to better adapt to climate change. These cases aim to reduce various losses and impacts on human life, property, and public health resulting from the effects of climate change.

[22] See supra note 14, at 1.

[23] See Philippe Nonet & Philip Selznick, *Law and Society in Transition Toward Responsive Law*, Routledge, pp. 1-10 (2017).

[24] Ibid.

deployment of the responsive justice model implies that the court chooses to undertake extensive interpretation instead of a narrow interpretation during adjudication. This allows legal interpretation to remain flexible as time changes, without being restricted by the form of the rule. Second, the adjudications are made by applying various concepts, doctrines, norms, and principles based on legal application. This process involves "opening up legal knowledge" while "retaining a grasp on what is essential to its integrity while taking account of new forces in its environment."[25] Third, the judicial purpose is to respond to the demands of social transactions, thereby serving as the bridge between judicial activities and public advocacy for social reformation. Its aim is to "take a more complete and intelligent account of the social facts upon which law must proceed and to which it is to be applied."[26] Although the responsive justice model and judicial activism may appear similar at first glance, as both emphasize the initiative of the judicial department, the former places a stronger focus on responsiveness to society through judicial activities.

Noteworthily, the emergence of strategic climate change litigations, such as the Urgenda Case, exemplifies the feasibility of the responsive justice model. By framing climate change within the human rights framework and using climate science as an evaluative benchmark, the Urgenda Case is viewed as the first strategic case to recognize that insufficient action taken by the government constitutes a violation of human rights. The government is deemed to have a "duty of care" to mitigate national GHG emissions in compliance with the temperature goal of the Paris Agreement.[27] The success of the Urgenda Case has not only inspired but also provided a foundation for multiple courts to issue rulings and expand legal innovations on various climate-related issues. These include the impact of global warming on human rights, the judicial review of governmental action on climate change, the rights of future generations, and the binding nature of governments' international commitments on climate action.[28] Consequently, climate change litigations are no longer constrained by jurisdictional limitations, a shortage of climate-related statutory resources, or challenges in establishing causality.

Since 2015, the adoption of the Urgenda strategy in climate change litigations has surged to approximately 91%, with Europe being the most active region for rights-based climate litigation. Beyond European jurisdiction, the strategy of the responsive justice model has also proven effective. In 2015, the Lahore High Court in Pakistan ruled that inadequate climate legislation of the government violated the human rights of Pakistanis.[29] In 2018, the Supreme Court of Colombia determined that the government's inaction on deforestation in the Amazon was inconsistent with its Paris Agreement commitment and threatened the fundamental rights of Colombians.[30] In 2022, the Brazilian Supreme Court affirmed the enforcement of the Paris Agreement as a human

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[25] See Yu Hao, *Towards Responsive Laws: From the Perspectives of Transitional Societies and China*, 17(2) Journal of Northeastern University (Social Science) 193, 193-197 (2015).
[26] See supra note 23, at 10.
[27] See supra note 18.
[28] See César Rodríguez-Garavito, *Litigating the Climate Emergency*, In C. Rodríguez-Garavito (Ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge University Press, pp. 7-94 (2022).
[29] See *Leghari v. Pakistan*, W.P. No. 25501/2015, Lahore High Court Green Bench, Order of September 4.
[30] See Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, april 5, 2018, M. P. : L.A. Tolosa Villabona.

rights accord and held the government accountable for human rights violations stemming from omissions driving deforestation in the Amazon.[31] Furthermore, courts and human rights bodies in various countries, from South Africa to Indonesia, the Philippines, and India, have formally recognized climate harm as a human rights violation.[32] In contrast, at the international level, courts and human rights bodies have been comparatively conservative, particularly in acknowledging climate refugees and extraterritorial harm caused by specific defendants.[33] Many international cases are still pending.

The Global Trend in Climate Change Litigation: 2023 Snapshot indicates that climate change litigation is increasingly understood as a strategic tool to influence policy outcomes and/or change corporate and societal behavior.[34] Jacquel Peel, Hari Osofsky, and Anita Foerster identify certain trends behind current climate change litigations, suggesting the emergence of a "new wave" or "next generation" of climate change litigations. They find that courts are more willing to render favorable decisions in response to global climate change.[35] Peel and Hari Osofsky also note a noticeable "rights turn" in these litigations, signifying an extensive interpretation of climate harm under the human rights regime. Plaintiffs are demanding that governments or private corporations undertake effective adaptation and mitigation measures in the context of respecting human rights and assuming responsibility for future generations.[36] Batros B and Khan T indicate that such strategic litigations go beyond the situation of individual litigants but seek to use the courts and the law to generate social change.[37] Peel and Markey-Towel aim to distinguish the successful recipe of such litigations. They find that most cases are filed by NGOs, individual campaigners, members of Parliament, or political parties, who are selected to communicate a carefully designed message.[38] Meanwhile, actors who make the largest direct contribution to the problem (e.g., governments that can legislate and the largest emitters of CO_2), and actors who mislead the public about their climate action or consideration of climate risks, are targeted as defendants.[39] Michael Burger,

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[31]See Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (PSOL), Partido dos Trabalhadores (PT) e Rede Sustentabilidade v. União Federal.

[32] See *Earthlife Africa Johannesburg v. Minister of Envtl. Affairs*, 2017 (2) All SA 519 (GP) (S. Afr.); *Pandey v. India*, Original Application No. 187/2017, The National Green Tribunal Principal Bench, New Delhi; *Indonesian Youths and others v. Indonesia*, https://climatecasechart.com/non-us-case/indonesian-youths-and-others-v-indonesia/ (accessed on October 25, 2023).

[33] See *Sacchi et al. v. Argentina et al.*, Communication No. 104/2019 (Argentina), Communication No. 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Turkey).

[34] See Joanan Setzer & Catherine higham, *Global Trend in Climate Change Litigation: 2023 Snapshot*, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf (accessed on October 25, 2023).

[35] See Jacqueline Peel, *Shaping the "Next Generation" of Climate Change Litigation in Australia*, 41(2) Melbourne University Law Review 793, 793-844 (2018).

[36] See Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Litigation?*, 7(1) Transnational Environmental Law 7, 37-67 (2018).

[37] See Batros B & Khan T, *Thinking Strategically about Climate Litigation,* In C Rodríguez Garavito (Ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge University Press, pp. 97-116 (2022).

[38] See Peel J & Markey-Towler R, *Recipe for Success? Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, 22(1) German Law Journal 1484, 1484-1498 (2021).

[39] See Bouwer K & Setzer, *New trends in Climate Litigation: What works?*, British Academy COP26 Briefings Series, www.thebritishacademy.ac.uk/documents/2701/Climate-Litigation-as-Climate_Activism-

Jessica Wentz, and Daniel J. Metzger find that for the purpose of responding to societal demands requiring states or private corporations to take effective adaptation and mitigation measures, strategic climate change litigations especially employ attribution science to support, or defend against, claims based on (1) violations of community rights, as compared with individual rights; and (2) failures to adapt, as compared with failures to mitigate.[40]

Under this approach, courts turn to well-established mechanisms in other areas of law, such as human rights, to repurpose these existing legal tools for new climate-related ends, addressing the shortage of legal resources in climate regulation. Judges can instill an updated meaning to a specific state or corporation duty by connecting the law's provisions and principles with the broader societal context and advanced climate and attribution science.[41] Inspired by the success of the Urgenda Case, more courts extensively interpret climate change issues under the human rights regime to materialize certain adverse human rights impacts generated by particular governments or private corporations. They incorporate climate science into the adjudication with the pursuit of remedies that extend beyond the circumstances of an individual case to pursue more broadly framed social and policy change,[42] corresponding to the characteristics of the responsive justice model.[43]

The use of extensive interpretation enables courts to frame climate change litigations under the lens of human rights so that climate issues are no longer non-justifiable "political problems" but are transformed into rights-based problems that demand courts' adjudications. Meanwhile, some legal scholars have argued that the human rights regime is relatively robust and can offer climate change litigations a more mature litigation venue and abundant legal resources.[44] Generally, courts extensively interpret climate harm as human rights violations by either invoking constitutional right provisions or recognizing a justiciable right to government climate action that is in line with the magnitude and urgency of the problem. They also use human rights as an interpretative tool for further creating "climate due diligence" of states or private corporations.[45] Specifically, the clarification of human rights-climate change linkages recognized by the

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What-Works.pdf (accessed on October 25, 2023).

[40] See Michael Burger & Jessica Wentz et al., *Climate Science and Human rights,* In C. Rodríguez-Garavito (Ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge University Press, pp. 221-302 (2022).

[41] See Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example*, Leiden: Brill Nijhoff, p. 44 (2020).

[42] See supra note 28.

[43] See UN Environment Programme, *Columbia Law School Columbia Climate School Sabin Center for Climate Change Law, Global Climate Litigation Report 2023 Status Review*, https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 (accessed on September 22, 2023).

[44] See Bridgeman. N. L, *Human Rights Litigation under the ATCA as a Proxy for Environmental Claims*, https://openyls.law.yale.edu/handle/20.500.13051/5830 (accessed on September 22, 2023); Shelton. D, *The Environmental Jurisprudence of International Human Rights Tribunals,* In R. Piolotti & J. D. Taillant (Eds.), *Linking human rights and the environment*, Tucson, AZ: The University of Arizona Press, pp. 11-18 (2003).

[45] See César Rodríguez-Garavito, *Legal Strategy in Rights-Based Climate Litigation,* In C. Rodríguez-Garavito (Ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge University Press, pp. 95-220 (2022)

UN Human Rights Council,[46] the endorsement by the preamble of the Paris Agreement, and other human rights soft law instruments can all be invoked to serve such extensive interpretation.[47] More essentially, under the lens of human rights, the majority of courts are willing to assert their competence to review government climate policy and redress human rights violations stemming from it. Although granting governments latitude in setting climate goals and choosing policies to attain them, most courts have held that such decisions are not exempt from judicial review and that governmental discretion is not absolute.[48] Besides, the portrayal of climate change is no longer an abstract and intangible problem, located in distant lands and the far future, but can be materialized as the specific detrimental human consequences such as the threat to a specific right, which facilitates the reasoning.[49] For instance, *Leghari v. Federation of Pakistan* is an illustration that the court recognized climate change as a "defining challenge" and alleged that the inaction of the Pakistan government offended constitutional rights such as the right to life (Article 9), which includes the right to a healthy and clean environment, and the right to human dignity (Article 14) of Pakistanis. Additionally, considering that climate change can bring about uneven human rights impacts, it is essential to put climate change under the equality lens to make vulnerable communities more visible in the courtrooms.

Apart from the employment of extensive interpretation, courts in the responsive justice model are more willing to adjudicate based on judicial review of scientific evidence in addition to legal principles.[50] Although dismissals still exist, there is growing evidence of a "judicial consensus on climate science" in which "vast judicial agreement exists on the causes, extent, urgency, and consequences of climate change." The incorporation of climate and attribution science during adjudication eases the enforceability of the "fair share" of climate mitigation by providing evaluable benchmarks on one side and facilitating causality establishment on attributing particular harm to certain defendants under a future-looking scientific time frame on the other side. While the Paris Agreement does not provide litigants with a cause of action or impose enforceable limits on member countries' national emissions, litigation has a "supporting goal" in the implementation of the Agreement.[51] Questions such as what levels of ambition and urgency with regard to national emission reductions are effective to protect people from climate harm, or whether giant emitters' business projects or national policies align with the mitigation target that the government has formally adopted, are

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[46] See UN HRC Resolution A/HRC/7/78, on the Report of the Human Rights Council on its Seventh Session, p. 65 (2008).

[47] See Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7(1) Transnational Environmental Law 40, 40 (2018).

[48] See supra note 28.

[49] See J.H. Knox, *Climate Change and Human Rights*, 50(1) Virginia Journal of International Law 163, 163-218 (2009).

[50] See Maria L. Banda, *Climate Science in the Courts: A Review of U.S. and International Judicial Pronouncements*, https://www.eli.org/research-report/climate-science-courts-review-us-and-international-judicial-pronouncements (accessed on October 26, 2023); *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others*, http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/ (accessed on October 26, 2023).

[51] See Joana Setzer & Lisa C et al., *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, https://eprints.lse.ac.uk/100257/1/Setzer_Vanhala2019_EarlyView.pdf (accessed on October 26, 2023).

frequently raised by the plaintiffs in the climate change litigations.[52] By incorporating scientific evidence, the Hague Court in the Urgenda Case emphasized that the Dutch government needs to do "its part" in order to prevent dangerous climate change. The evaluation of "its own part" shall be relied on the IPCC's recommendation of temperature goal to adjust its own emission target, as the IPCC report represents the latest and best scientific knowledge. Furthermore, courts are using attribution science to establish the causality in climate torts, particularly with regard to advances in extreme events and impact attribution.[53] Sea level rise is one of the most palpable pieces of evidence when petitioners allege that insufficient adaptation measures leave certain communities or individuals at imminent risk. Climate change attribution research provides the foundation for these petitions, as it establishes the link between human activities and changes in the earth's climate system. Most importantly, attribution research can also be used in conjunction with forward-looking climate models and projections to strengthen arguments about the likelihood or foreseeability of future harm.[54]

The deployment of the responsive justice model can free courts from the constraints of jurisdiction, the challenges in determining plaintiff standing, and obstacles in constructing causality reasoning in non-strategic litigations. It empowers strategic climate change litigations to affirm publicly the scientific consensus regarding various aspects of climate change, counter misinformation, effectively communicate seemingly distant harms of climate change through claimants' stories, create new narratives about government and corporate responsibility for climate change, and mobilize the broader climate movement, aligning with societal demands.[55]

3. The Responsive Justice Model in the Shell Case

Climate change litigation offers civil society, individuals, and others a potential avenue to address inadequate responses by governments and the private sector to the climate crisis. In these cases, plaintiffs, petitioners, applicants, complainants, or communicants employ legal strategies in a range of national and international jurisdictions to compel more ambitious mitigation and adaptation goals from both public and private sectors.[56]

The Shell Case stands as a landmark ruling, establishing direct environmental liabilities linked to local damages caused by global emissions. It holds a single company partially responsible for climate change, marking the first instance of corporations facing legal jeopardy over their GHG emissions.[57]

In the past, private climate litigations faced two major hurdles: causation and

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[52] See supra note 28.

[53] See *Leghari v. Pakistan*, W.P. No. 25501/2015, Lahore High Court Green Bench, Order of September 4.

[54] See Michael Burger & Jessica Wentz et al., *Climate Science and Human Rights,* In C. Rodríguez-Garavito (Ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge University Press, pp. 221-302 (2022).

[55] See Grace Nosek, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories*, LLM Thesis, University of British Columbia, p. 763 (2017).

[56] See UN Environment Programme, *Global Climate Litigation Report: 2023 Status Report*, https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 (accessed on September 20, 2023).

[57] See Lattanzio Gabriele & Galloppo Giuseppe et al., *Punish One, Teach a Hundred: The Global Consequences of Milieudefensie Et Al. V. Royal Dutch Shell Plc*, http://dx.doi.org/10.2139/ssrn.4104361/ (accessed on September 22, 2023).

redressability. Restricted by traditional tort law theories and scientific uncertainty, courts in cases such as *Kivalina v. ExxonMobil Corporation et al.*, *Massachusetts v. Environmental Protection Agency (EPA)*, *Washington Environmental Council v. Bellon*, *Lliuya v. RWE*,[58] and others found it challenging to attribute specific environmental damage to the emitting activities of private corporations. Demanding that private corporations take effective preventive measures to withstand climate change was even more difficult. Additionally, private claims related to climate change often stumbled over the political question doctrine, which states that courts will not adjudicate certain controversies because their resolution falls within the purview of the political branches of government.[59] Furthermore, similar to the Defendant in the Shell Case, the GHG emissions caused by multinational corporations often involve complex liability distributions between the parent company and its subsidiaries across multiple jurisdictions, making it even harder to enforce emission obligations.[60]

The innovations in the Shell Case centered around how the Hague District Court used the responsive justice model to address the judicial dilemma in the context of climate change. Principally, the Hague District Court extensively interpreted "the event giving rise to the damage" by incorporating climate attribution science to establish the causation between the Defendant's corporate policy and the adverse human rights impacts suffered by Dutch residents and inhabitants of the Wadden region. Moreover, by interpreting the unwritten standard of care through a multitude of soft law instruments, the Hague District Court maneuvered to compel the Defendant to take preventive measures against climate change. Another essential aspect of this case is that the Hague District Court required the Defendant to apply the unwritten standard of care as a result of weighing the interests. This assessment is dependent on the hierarchy of desirable values and important societal and local interests at that specific point in time, all with the purpose of responding to the societal appeal, rather than solely considering the Defendant's business interests.

3.1 The Shell Case: A Summary

On April 5, 2019, seven NGOs represented by Milieudefensie and approximately 17,000 independent applicants (hereinafter referred to as the Plaintiffs) filed a class-action lawsuit against RDS PLC (hereinafter referred to as the Defendant) in the Hague District Court, the Netherlands.[61] The Plaintiffs alleged that the Defendant, as the parent company of over 1,100 separate companies established all over the world of the Shell group, had failed to fulfill their unwritten duty of care under Book 6 Section 162 of the

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[58] See *Kivalina v. ExxonMobil Corporation* et al., 696 F.3d 849 (9th Cir. 2012); *Massachusetts v. Environmental Protection Agency* 549 US 497 (2007); *Saul Luciano Lliuya v. RWE*, (2017) 20171130 Case No-2-O-28515.

[59] See supra note 14.

[60] See Tiffany Challe-Campiz, *Guest Commentary: An Assessment of the Hague District Court's Decision in Milieudefensie et al. v. Royal Dutch Shell plc. Climate law Sabin Centre Blog*, https://blogs.law.columbia.edu/climatechange/2021/05/28/guest-commentary-an-assessment-of-the-hague-district-courts-decision-in-milieudefensie-et-al-v-royal-dutch-shell-plc/ (accessed on September 11, 2023).

[61] Claimants are hereinafter jointly referred to as Milieudefensie et al. The claimants in the class action are individually referred to as Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, Jongeren Milieu Actief and ActionAid. The 17,379 individual claimants who have issued to Milieudefensie a document appointing it as their representative ad litem are referred to as "the individual claimants".

Dutch Civil Code by adopting inadequate GHG emissions policy.

According to the World Resources Institute Greenhouse Gas Protocol (hereinafter referred to as the GHG Protocol), GHG emissions are categorized into Scope 1, Scope 2, and Scope 3 emissions. Scope 1 includes direct emissions from sources that are owned or controlled in full or in part by private corporations. Scope 2 encompasses indirect emissions from third-party sources from which private corporations have purchased or acquired electricity, steam, or heating for their operations. Scope 3 covers all other indirect emissions resulting from activities of the private corporates but occurring from GHG sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of crude oil and gas purchased by the third parties.[62] Based on the GHG emissions reports written by the Defendant, the Scope 1, Scope 2, and Scope 3 emissions of the Shell group exceeded the total GHG emissions of many countries, including the Netherlands, thus posing a significant threat to global climate change, and contributing to the severe adverse human rights impacts upon the Dutch residents and the inhabitants of Wadden region.[63]

As a result of higher average temperatures in the Netherlands, the local population is exposed to health risks due to an increase in infectious diseases, deterioration of air quality, exposure to ultraviolet rays, and an increase in water and food-borne diseases. While the impacts of climate change on the inhabitants of the Wadden region may differ from those of the Netherlands in the short term, the consequences of climate change in the long term will be equally severe and irreversible; in the more serious cases, the Wadden region will be completely submerged in the future.[64]

Due to the lack of statutory sources, the Hague District Court comprehensively analyzed the following 14 aspects to prove the unwritten standard of care: (1) the policy-setting position of the Defendant in the Shell group; (2) the Shell group's CO_2 emissions; (3) the consequences of the CO_2 emissions for the Netherlands and the Wadden region; (4) the right to life and the right to respect for private and family life of the Dutch residents and the inhabitants of the Wadden region; (5) the United Nations Guiding Principles; (6) the Defendant's check and influence of the CO_2 emissions of the Shell group and its business relations; (7) what is needed to prevent dangerous climate change; (8) possible reduction pathways; (9) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand; (10) the European Union Emissions Trading System and other "cap and trade" emission systems that apply elsewhere in the world, permits and current obligations of the Shell group; (11) the effectiveness of the reduction obligation; (12) the responsibility of states and society; (13) the onerousness for the Defendant and the Shell group to meet the reduction obligation, and (14) the proportionality of the Defendant's reduction obligation.[65]

Finally, the Hague District Court rendered a judgment after the analysis of the aforementioned 14 aspects, ordering the Defendant to reduce its Scope 1, Scope 2, and

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[62] See *Milieudefensie v.s Royal Dutch Shell*, Judgment of The Hague District Court, ECLI:NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 2.5.4.

[63] See *Milieudefensie v.s Royal Dutch Shell*, Judgment of The Hague District Court, ECLI:NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 2.4.5.

[64] See *Milieudefensie v.s Royal Dutch Shell*, Judgment of The Hague District Court, ECLI:NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.6.

[65] See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.2.

Scope 3 emissions by 45% in 2030 compared to 2019 under the unwritten standard of care, thereby contributing to achieving the 2°C temperature goal under the Paris Agreement. In the procedural disputes, the Hague District Court first found standing for the Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, and Jongeren Milieu Actief as the plaintiffs under Book 3 Section 305a of the Dutch Civil Code, and then relied on the law of "the event giving rise to the damage" as set out in Article 7 of the Rome II Regulation (EC) to find that Dutch law should be chosen to apply in the Shell Case. In the substantive dispute, the Hague District Court relied on the unwritten duty of care of Book 6 Section 162 of the Dutch Civil Code and invoked international treaties and a wide range of soft law to create, for the first time, the establishment of the mitigation obligation of GHG emission under the unwritten standard of care on the part of private corporations.

3.2 Extensive Interpretation in "the Event Giving Rise to the Damage"

In past private climate change litigations, courts were conservative in establishing causation in climate change torts, which added to the obstacles in private climate change litigation.[66] Causation requires a plaintiff to demonstrate a clear connection between an injury and the defendant's action, satisfying the "but for" and adequacy test. Corporate defendants often argue that their contribution to GHG emissions is insignificant compared to historical emissions, or that there are multiple contributors to certain climate change damage, making it unfair to solely hold the corporate defendant responsible.[67] For example, in the initial hearing of the *Lliuya v. RWE* case, the Essen Court held that the complexity of climate change and its consequences made it impossible to establish a clear causal link between CO_2 emissions from the defendant's power plants and the endangerment to the plaintiff's home in Peru from glacial flooding.[68] In the appeal of *Smith v. Fonterra Co-Operative Group Limited*, a case brought against seven companies in the agriculture and energy sectors in New Zealand, the court of appeal reasoned that every person in the world is both responsible for causing the relevant harm and a victim of that harm, thus it was inadequate to accuse defendants as the responsible emitters.[69]

While climate change damage is distinct from other torts to some degree, establishing a causal relationship in law between a defendant's GHG emissions and the events that resulted in plaintiffs' losses requires interpreting scientific evidence through the lens of legal reasoning.[70] Therefore, courts need to extensively interpret the causality of climate change litigations by adapting their judicial knowledge to the rapidly advancing field of climate attribution science, which corresponds to the first

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[66] See Hodas. D. R, *Standing and Climate Change: Can Anyone Complain about the Weather?*, 15(2) Journal of Land Use & Environmental Law 451, 451-487(2000).

[67] See Jacqueline Peel, *Issues in Climate Change Litigation*, 5(1) Climate & Change Law Review, 15-24 (2011).

[68] See *Saul Luciano Lliuya v. RWE Az*, 5 U 15/17 OLG Hamm (n73) (2018).

[69] See *Smith v. Fonterra Co-Operative Group Limited*, High Court of New Zealand, NZSC 35, March 31, 2022 (New Zealand).

[70] See Rupert Stuart-Smith & Aisha Saad et al., A*ttribution Science and Litigation: Facilitating effective Legal Arguments and Strategies to manage Climate Change Damages*, https://www.smithschool.ox.ac.uk/sites/default/files/2022-03/attribution-science-and-litigation.pdf. (accessed on September 11, 2023); Hughes. S. & Romero-Lankao. P, *Science and institution building in urban climate-change policymaking*, 23(6) Environmental Politics 1023, 1023-1042 (2014).

characteristic of the responsive justice model.[71]

In the Shell Case, both the Plaintiff and Defendant agreed to apply Article 7 of the Rome II Regulation (EC) as the conflicting norm. This provision determines that the law applicable to the non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to the general rule of Article 4 unless the person seeking compensation for damage chooses to base his or her claim on the law of the country where "the event giving rise to the damage" occurred. The Plaintiff claimed that Dutch law should be applicable since the Defendant is located in the Netherlands, and it is the corporate policy issued by Defendant that gave rise to damage, while the Defendant rebutted that only the actual emitting activity can be seen as "the event giving rise to the damage." However, since the Shell group conducts emitting activities all over the world, the choice of Article 7 would lead to the applicability of a myriad of legal systems.[72] There are two major questions concerning the legal application. Firstly, what is "the event giving rise to the damage" concerning climate change damage? Secondly, since Defendant RDS is the parent company of the Shell group, which did not emit directly, can RDS have standing as a Defendant?

The Hague District Court extensively interpreted the corporate policy set by the Defendant as one of "the event giving rise to the damage," based on advancements in climate attribution science. This was done without calculating the actual emissions number. Furthermore, the Court innovatively linked the responsibility for emissions to the parent company, even if they were not the direct emitter. While Article 7 of the Rome II Regulation (EC) only mentions "an event" causing climate change damage, current climate attribution science has demonstrated that climate change attribution can be multifactorial. This means that harm results from the cumulative emissions of multiple parties, regardless of where or when they were emitted. The Hague District Court highlighted that the corporate policy of the Defendant, when combined with other GHG emissions, according to advanced climate attribution science, could significantly alter the probability or intensity of climate change damage.[73] This is especially pertinent considering the vulnerability of the Netherlands and the Wadden region to imminent climate change impacts. The GHG emissions released globally by the Shell Group could exacerbate adverse human rights impacts on Dutch residents and the inhabitants of the Wadden region.[74]

While in most jurisdictions, legal causation involves a counterfactual test to establish the "actual cause,"[75] supplemented by tests involving normative considerations, the Hague District Court believed that scientific attribution would be of the greatest use, as it aligns with the legislative interpretation of "the event giving rise to the damage."

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[71] See supra note 14, at 15.

[72] See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), paras. 4.4.1-4.4.4.

[73] See Petra Minnerop & Friederike E. L. Otto, *Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic*, 27(1) Buffalo Environmental Law Journal 49, 49-86 (2020).

[74] The Wadden region is in the north of the Netherlands and has a landscape similar to that of the Netherlands. The average temperature in the Netherlands has risen by 0.8°C compared to the pre-industrial period, which is twice as much as the rise in the rest of the globe. See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 2.3.7.

[75] See Van Renssen. S, *Courts Take on Climate Change*, 6(7) Nature Climate Change 655, 655-656 (2016).

The Court noted that Article 7 of the Rome II Regulation (EC) was formulated with reference to Article 1919 of the Treaty on the Functioning of the European Union, which mandates that the environmental policy of the European Union should be based on the precautionary principle and preventive action to curb environmental damage at its source. Additionally, according to Professor J. von Hein's interpretation of this provision in the Commentary on the Rome Regulations II (EC), if environmental damage is caused by multiple tortfeasors in multiple countries, the damage cannot be attributed to a single act. The Plaintiffs, as the aggrieved parties, have the right to choose any law that is favorable to them.[76]

Regarding carbon emissions, it was shown that the Shell Group was responsible for 2% of the annual global carbon emissions.[77] However, it is noteworthy that the Defendant, RDS, did not have substantial GHG emissions of its own. The 2% figure cited by the plaintiffs was accurate only when considering the emissions of all the Shell Group subsidiaries collectively. Courts did not follow the classical theories of limited liability that consider parent corporations and subsidiaries as separate entities.[78] Considering that the Shell Group subsidiaries were separate legal entities, they were deemed responsible for their own emissions. However, the Hague District Court viewed the Defendant as the major corporate policy decision-maker for the entire Shell Group. The Defendant played a crucial role in determining the climate change mitigation policy of the entire Shell Group, including setting the CO_2 emissions target and planning the transition to renewable energy. Consequently, the Court extended the emission liability to the Defendant due to its policy-setting influence and broad control over the Shell Group companies. This made the Defendant accountable for the emissions of Shell subsidiaries as if they were its own. Therefore, the Defendant was required to "take on a high level of care" to facilitate a transition to a sustainable society.[79] Similar reasoning was applied in the Urgenda Case, where the Hague District Court rejected the Dutch government's defense that it was not an actual emitter and did not cause imminent climate change. This was because the state had significant control over the entire country's emission targets.[80]

Ultimately, the Hague District Court determined that the Plaintiff could choose Dutch law since the Netherlands was one of the countries where "the event giving rise to the damage" occurred, irrespective of whether the Defendant conducted emitting activities itself.[81]

3.3 The Emerging Concept of "Climate Due Diligence"

Similar to other private climate change litigations, there are no statutory sources directly stipulating corporate responsibility in Dutch national law. While public climate change cases often challenge whether a government's mitigation efforts or policies are

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[76] See Jan von Hein, *Article 7 Environmental Damage, in: G-P. Calliess (eds.), Rome Regulations Commentary*, Kluwer Law International, 662 (2020).
[77] See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), paras. 4.4.1-4.4.4.
[78] See *Salomon v. Salomon and Co Ltd*., [1897] AC 22 (HL).
[79] See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021:5337 (Nederlandse versie), para. 4.4.23.
[80] See *Urgenda Foundation v. State of the Netherlands*, ECLI: NL: GHDHA: 2018: 2591.
[81] See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), paras. 4.3.4-4.3.7.

adequate to meet a constitutional obligation or commitments under the Paris Agreement, the Shell Case was more ambitious in proving that the Defendant had a "climate due diligence" obligation under Dutch tort law. The United Nations Human Rights Office of the High Commission indicated that there is an intrinsic relationship between climate change and human rights, and private corporations play a central role in mitigating climate change. Much of the CO2 emissions causing climate change stem from business-driven economic activities.[82] Considering the global urgency to curb GHG emissions for temperature control, this calls for preventive measures from all stakeholders. The obstacle is that no "hard law" can be relied upon to demand private corporations to take precautions. Domestically, state governments seldom legislate corporations' emissions targets due to scientific uncertainty, as doing so may impede the national economy. Internationally, there are no binding treaties protecting corporate human rights or clarifying corporate duty under climate change. Therefore, the Hague District Court needs to turn to well-established mechanisms in other areas of law to reinterpret existing legal tools for addressing climate change in light of the shortage of legal resources in climate regulation.

A distinctive feature of the responsive justice model is searching for implicit values in rules and policies rather than being shackled by the form or procedure of law. It involves interpreting laws in a flexible and dynamic manner by incorporating various doctrines and principles.[83] This approach aligns with the Hague District Court's invoking of unwritten standards of care stipulated by Dutch tort law.

By using the unwritten standard of care under Dutch law as a major interpretative tool, the Hague District Court was able to forge the "climate due diligence" with the aid of piles of soft law instruments. Since soft law is not "written standards," the invocation of soft law by courts is owing to its persuasiveness instead of binding forces. [84]This is because it does not contradict hard law and aligns with the public's expectations of the "common good."[85] Particularly, the intersections of corporate responsibility, climate change, and human rights are nascent human right theories, which are mostly addressed by soft law instruments such as the United Nations Guiding Principles on Business and Human Rights (hereinafter referred to as UNGPs), the UN Global Compact, and the OECD Guidelines for Multinational Enterprises. Soft law processes can yield relatively rapid results as they bypass lengthy and politically contentious domestic ratification and are more easily changed and hence more flexible in responding to dynamic situations, avoiding overburdening the international system with hard law.[86] To go a step further, the soft law instrument does not have any coercive force, and it can be repeatedly invoked because it is persuasive and naturally reflects a substantive justice order in its core values

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[82] See United Nations Human Rights Office of the High Commission, Human Rights, Climate Change, and Business Key Messages, https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMBusiness.pdf (accessed on September 12, 2023).

[83] See Philippe Nonet & Philip Selznick, *Law and Society in Transition Toward Responsive Law*, Harper & Row, pp. 1-10 (1978).

[84] See Barnali Choudhury, *Balancing Soft and Hard Law for Business and Human Rights*, 67(4) International & Comparative Law Quarterly 961, 961-986 (2018).

[85] See Pauline Westerma & Anne Ruth Mackor eds., *Legal Validity and Soft Law*, Springer International Publishing (2018).

[86] See A Newman & D Bach, *The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation*, 21(3) Journal of European Public Policy 430, 430-461 (2014).

that respond to societal demands.[87] Therefore, soft law instruments can be deemed as appropriate interpretative tools, especially when the court intends to apply more social facts to the legal interpretation by deploying the responsive justice model.[88]

The Hague District Court first invoked the unwritten standard of care under Book 6 Section 162 Dutch Civil Code as a bridge.[89] This provision establishes a general rule on fault-based liability under which both natural and legal persons can be held liable for their own intentional or negligent conduct. Accordingly, a person who commits an unlawful act against another, which can be imputed to the tortfeasor, must compensate the other for the harm caused. In general, unlawful acts can result from a violation of three types of norms: (1) a right; (2) a statutory duty; and (3) what is customary in society according to unwritten law, which includes an act or omission that violates unwritten law regarding what is seemly, becoming, or desirable in societal interrelationships.[90] The Hague District Court's reasoning was based on the third type of norm.

To establish private corporations' "climate due diligence," the Hague District Court first identified that there is a normative consensus mainly deduced from soft law instruments that climate change would generate adverse human rights impacts, which shall be addressed by private corporations. Then, it outlined the conduct standard of "climate due diligence," which demands private corporations take preventive measures in line with the temperature goal of the Paris Agreement, and further distinguished whether the Defendant's act or omission had breached such standard.

The Hague District Court argued that human rights should be "factored in" when interpreting the Defendant's unwritten standard of care toward the Plaintiffs due to the fundamental interest of human rights and the value for society as a whole they embody.[91] It has long been recognized that corporations shall respect human rights.[92] Illustrations include the United Nations Human Rights Committee affirming that environmental degradation, climate change, and unsustainable development should be recognized as the most imminent and serious threats to the global intergenerational right to life in communication in relation to the denial of refugee status to Ioane Teitiot in New Zealand.[93] In addition, *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment*, whose preamble recognizes the global agreements on the integration of human rights rules into environmental issues, including climate change.[94]

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[87] See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107(1) Yale Law Journal 273, 273-392 (1997).

[88] See Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9(2) Chicago Journal of International Law 515, 515-516 (2009).

[89] As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behavior.

[90] See Virginie Rouas, *Killing Two Birds with One Stone: Milieudefensie v. RDS, A Game Changer for Climate Change and Corporate Accountability*, Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries (2022).

[91] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.9.

[92] See Angelo Jr Golia & Anneloes Hoff, *Reducing is Caring: The Dutch climate case against Shell*, https://voelkerrechtsblog.org/reducing-is-caring/ (accessed on October 5, 2023).

[93] See *Ioane Teitiota v. New Zealand*, HRC CCPR/C/127/D/2728/2016, September 23, 2020, Section 9.4.

[94] See the whole text of United Nations Human Rights Special Procedures, Independent Experts & Working Groups, *Safe Climate: A Report of the Special Rapporteur on*

Accordingly, the Hague District Court concluded that there is a global normative consensus that climate change would produce adverse impacts on human rights. Thus, the severe and irreversible climate change occurring in the Netherlands and the Wadden region is and will be a threat to significant human rights in local populations, violating their right to life and to the enjoyment of family, which shall be considered by the Defendant when it enacts corporate policy.

Next, the Hague District Court turned to exemplify what kind of acts satisfy the conduct standard deduced from "climate due diligence." The Hague District Court argued that a necessary step in the Defendant's due diligence process is to commit to and carry out a significant reduction of the GHG emissions directly produced or "linked to" the Shell group's operations by their current and future investments, which aligns with the precautionary principle underlined in international environmental law. All these conduct standards rely on UNGPs, climate science, and the Paris Agreement as benchmarks against which the adequacy of a corporation's action should be assessed.

The Hague District Court first identified UNGPs as an authoritative and internationally recognized soft law instrument, adequately reflecting the consensus that private corporations have a responsibility to protect human rights from climate change.[95] This corresponds to other soft law instruments such as the ECHR, the ICCPR, and the OECD Guidelines for Multinational Enterprises.[96] Based on the UNGPs, the conduct standard under the unwritten standard of care of private corporations is twofold: first, to avoid causing or contributing to the adverse human rights impacts through their own activities and to address impacts that have already occurred; and second, to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services through their business relationships.[97] As aforementioned, the Defendant is the parent company of the Shell group and has the power to make decisions on the Shell group's investment guidelines to support the energy transition, as well as on the business principles of its subsidiaries. Consequently, the Hague District Court believed that the Defendant is capable of taking preventive measures by using its leverage on both the supply chain relationships (Scope 1 and Scope 2) and the end-users of the products (Scope 3). Therefore, the Defendant must take precautions with respect to CO2 emitted directly by the Shell group (Scope 1 and Scope 2) and those indirectly emitted by its suppliers or consumers (Scope 3) as well.

Moreover, it is noteworthy that improvements in science and technology have made it possible for the establishment of global temperature targets with scientific certainty and can be used in judicial decisions as the basis for factual evidence in climate change litigation cases.[98] The Hague District Court viewed the Paris Agreement's 2°C

Human Rights and the Environment, A/74/161, https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Report.pdf (accessed on August 4, 2023).

[95] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.11.

[96] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.15.

[97] For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

[98] See César Rodríguez-Garavito, *A Human Right to a Healthy Environment? Moral, Legal, and Empirical Considerations,* in John H. Knox and Ramin Pejan (eds.), *The Human Right to a Healthy Environment*,

temperature goal, GHG measurement standards, and Climate science reports as the benchmarks for accessing the specific emissions targets in fulfilling the Defendant's unwritten standard of care.

The Paris Agreement's 2°C temperature goal was developed with reference to Climate Change 2013: The Physical Science Basis from the IPCC.[99] This report aims to reveal the consequences of raising global temperatures, the concentrations of GHGs that contribute to these increases, and the pathways to reduce global warming by limiting warming to specific temperatures, reflecting the world's best scientific knowledge on how to mitigate global warming. The Hague District Court holds that the goals of the Paris Agreement represent the most credible scientific findings in the field of climate science, supported by a broad international consensus, whereby an unwritten standard of care has been constituted.[100] Reaching this temperature goal means that the amount of CO2 in the earth's atmosphere will ideally need to be limited to around 430 ppm by 2100, with a maximum of 450 ppm. Given that atmospheric concentrations of GHG have already reached 401 ppm in 2018, action to mitigate emissions over the next 10 years is crucial to preventing dangerous climate change around the globe.[101] The need for emissions reductions is even more urgent as the temperature in the Netherlands and the Wadden region is rising at about twice the global average. According to the IPCC Special Report on the Impacts Global Warming of 1.5°C,[102] achieving the optimal emissions reduction target of limiting global warming to 1.5 °C means that the Defendant's Scope 1, Scope 2, and Scope 3 emissions would need to be mitigated by 45% by 2030 compared to 2010 levels, and net-zero by 2050. However, the "Responsible Investment Annual Briefing" (hereinafter referred to as Annual Briefing) issued by Defendant in April 2020, was apparently not aligned with the mitigation obligation of both Defendant's direct and indirect emissions assigned by UNGPs, nor the emission target derived from the Paris Agreement, which could not effectuate as the Defendant's best effort in preventing climate change and can be seen as negligence under the unwritten standard of care. This Annual Briefing stated that the Shell group strived for a reduction of CO2 emissions to net zero in 2050, or sooner from the manufacture of all its products, or all of Scope 1 and Scope 2 emissions. With regard to Scope 3 emissions, the Defendant wanted to reduce the CO2 intensity of the Shell group's energy products per sold unit of energy (the NCF) by 30% in 2035 (20%) and by 65% in 2050 (50%).[103]

By elaborating the unwritten standard of care with an abundance of soft law instruments, the Hague Court decided that the emissions target of the Defendant must comply with UNGPs and the Paris Agreement's 2°C temperature goal. In addition, given that the Defendant's CO2 emissions in 2019 are higher compared to 2010, setting 2019 as

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Cambridge University Press, pp. 155-88 (2018).

[99] See the *Whole Text of* the *Climate Change 2013: The Physical Science Basis*, https://www.ipcc.ch/report/ar5/wg1/ (accessed on August 4, 2023).

[100] See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.27.

[101] See *Milieudefensie v. Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 2.4.6.

[102] See *the Whole Text of the IPCC Special Report, "Global Warming of 1.5°C"*, https://www.weforest.org/blog/ippc-global-warming-15-c-special-report-6-oct-2018/?gclid=EAIaIQobChMIscHSv8HEgAMVdhJ7Bx1ZHAK0EAAYAiAAEgKcjPD_BwE (accessed on August 4, 2023).

[103] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 2.5.18.

the Defendant's base year for emissions reductions would be more suitable regarding the Defendant's best-efforts obligation.[104]

3.4 The Proportion of the Hague District Court's Interpretation of the Defendant's Unwritten Standard of Care

The Hague District Court applies the unwritten standard of care by weighing interests, which depends on the hierarchy of desirable values and important interests of the society and locality in question at that point in time. This is for the purpose of responding to the societal appeal, rather than solely considering the Defendant's business interest.[105] This proportionate reasoning aligns strongly with the responsive justice model of the Hague District Court, which emphasizes societal demands for corporations to bear climate change accountability as a priority.

The Hague District Court considered that the interpretation of the Defendant's unwritten standard of care was proportional. They claimed that due to the massive size of the Shell group, the Defendant must fulfill its best-effort obligations. This is guided by the requirement that the Shell group's Scope 1, Scope 2, and Scope 3 emissions in 2030 must be 45% lower compared to 2019. The Defendant retains the authority to decide on the specific emissions reduction policies of the Shell group.[106]

The Defendant raised crucial arguments, challenging the Hague District Court's interpretation of the unwritten standard of care. They made four major rebuttals, mainly arguing that the judicial reasoning placed too much emphasis on public interest without adequately balancing feasibility and business interest. Firstly, they questioned whether a private corporation should bear GHG mitigation duty ordered by courts instead of states. States hold the highest authority in formulating rules related to GHG emissions reduction by private corporations. Only the state can implement reforms in the energy market through the formulation or adjustment of policies. This allows for consideration of sectoral differentiation and available technological solutions at a macro level. In contrast, private corporations cannot take action until states issue corresponding climate change policies.

Secondly, as the Defendant is subject to the European GHG Emission Trading System, they have already compensated for their own excess CO2 emissions by purchasing corresponding allowances. Therefore, it may not be necessary to assume the Plaintiff's request for emission reduction obligations.

Thirdly, the Defendant, as the parent company of the Shell group, has no means of interfering with the Scope 3 emissions produced by its end-users. Such interference would jeopardize its business interests, potentially disrupting the "level playing field" in the oil and gas market. Additionally, according to the Mapping of Current Practices around Net Zero Target published by Oxford University, there is currently no global consensus on whether private corporations should bear a duty of care regarding Scope 3

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[104] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.30.

[105] See Tiffany Challe-Campiz, *Guest Commentary: An Assessment of the Hague District Court's Decision in Milieudefensie et al. v. Royal Dutch Shell plc*, https://blogs.law.columbia.edu/climatechange/2021/05/28/guest-commentary-an-assessment-of-the-hague-district-courts-decision-in-milieudefensie-et-al-v-royal-dutch-shell-plc/ (accessed on September 11, 2023).

[106] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.54.

emissions.[107]

Finally, the Defendant argued that mitigating GHG emissions might lead to an unfair distribution of the global energy supply, particularly in light of increasing population growth.

The Hague District Court acknowledged that mitigating global climate change solely through the actions of a single private corporation would be challenging. However, this did not exempt the Defendant from their independent mitigation obligations as a private corporation. Furthermore, in the context of global warming, all private corporations bear the duty of care in mitigating their emissions and need to strike a balance between GHG emissions policy and business interests.[108] In particular, the Defendant holds a unique position as the main decision-maker of the Shell group and is therefore obligated to use their best efforts to reduce emissions.[109] While fulfilling this obligation will inevitably impact the Defendant's business interests negatively, the positive human rights impacts of emission reduction outweigh the Defendant's business interests. This is especially evident in light of the severe adverse human rights impacts on Dutch residents and inhabitants of the Wadden region.[110]

In response to the Defendant's argument that climate change policy should be developed and led by the state, the Hague District Court reiterated that there is a global consensus that mitigating climate change requires global public-private engagement and independent mitigation obligations from private corporations as well. The Defendant's status as a GHG-emitting giant demanded their best efforts to meet mitigation obligations, indicating that specific emission reduction targets must align with the Paris Agreement's 2°C goal, even though the Paris Agreement is not binding on the Defendants. Notably, Part IV of the Decision of the COP 21 adopting the Paris Agreement specifically calls on all non-party stakeholders to participate in climate change mitigation actions. This aligns with the international community's general consensus since 2012. The international community has generally recognized that combating climate change urgently requires the participation of non-party stakeholders, which include civil society, the private sector, financial institutions, cities, and other subnational authorities.[111]

The Hague District Court rejected the Defendant's argument that they had compensated for emissions in excess of their allowances through the European System of GHG Credits.[112] The European GHG Emission Trading System was established with

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[107] See Oxford University Net Zero Network, *Mapping of Current Practices around Net Zero Target*, https://netzeroclimate.org/wp-content/uploads/2020/12/Net-Zero-Target-Map.pdf (accessed on August 4, 2023).

[108] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.50.

[109] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.37.

[110] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.53.

[111] See *United Nations and Framework Convention on Climate Change: Decisions Adopted by the Conference of the Parties,* https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC_CP_2015_10_Add.1.pdf (accessed on June 2, 2023).

[112] See *Directive (EU) 2018/410 of the European Parliament and of the Council of March 14, 2018, amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-GHG investments, and Decision (EU) 2015/1814*, https://eur-lex.europa.eu/legal-

reference to the European Union's target of a 45% reduction in GHGs by 2030 compared to 2005. Therefore, it is challenging to effectively achieve the temperature control targets under the Paris Agreement. Consequently, it is insufficient to account for the Defendant's obligation to reduce emissions.[113] In addition, the European GHG Emissions Trading System only covers the Defendant's Scope 1 and Scope 3 emissions within the European Union, which is not equivalent to, and is far less than, the amount of the unwritten standard of care that the Defendant is required to fulfill.

The Hague District Court held that the Mapping of Current Practices around Net Zero Target was intended to highlight the lack of a clear and harmonized approach to effective mitigation. This did not support the Defendant's contention that private corporations do not bear a Scope 3 mitigation obligation. In accordance with Principles 17, 18, and 19 of the UNGPs, the Defendant has the ability to identify and assess adverse human rights impacts arising from their own activities or from their business relationships, products, or services (including Scope 3 emissions). They should use that influence to take appropriate action to cease or prevent such adverse human rights impacts. Even if the Defendant could not determine the prices of end-products independently, their position and influence as the final decision-maker on the prices of end-products and other energy products of the Shell group was indisputable. They could certainly influence the adjustment of Scope 3 emissions.[114] Regarding the rebuttal of disruption of the "level playing field," the Hague District Court emphasized that it is necessary to reduce worldwide oil and gas extraction and facilitate the curtailment of CO_2 emissions that lead to dangerous climate change. Other companies would also make contributions, and therefore the "level playing field" would not be disrupted.

According to the last rebuttal, the Hague District Court noted that the world today faces a dual challenge: the need to curb climate change by reducing GHG emissions, and the need to meet the energy supply needs of a rapidly growing global population. Nevertheless, the Hague District Court rejected the Defendant's argument that the reduction of emissions by the Defendant, as a fossil fuel giant, could lead to a decline in the global energy supply. This would result in an unequal distribution of energy resources globally, which would be inconsistent with the purpose of the United Nations Sustainable Development Goals,[115] calling for sustainable and balanced resources for the entire world. The Hague District Court pointed out that Sustainable Development Goal 13 aims to "take urgent action to combat climate change and its impacts," and the preamble of the Paris Agreement emphasizes the intrinsic connection between addressing dangerous climate change and ensuring fair access to sustainable development and poverty eradication as well. Therefore, it is recognized that the need to ensure a balanced supply of energy while combating climate change is a balanced solution to the twin challenges

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content/EN/TXT/PDF/?uri=CELEX:32018L0410 (accessed on August 4, 2023).

[113] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.46.

[114] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 2.5.3.

[115] See UN Woman, *Progress on the Sustainable Development Goals: The Gender Snapshot 2022*, https://www.unwomen.org/en/digital-library/publications/2022/09/progress-on-the-sustainable-development-goals-the-gender-snapshot-2022?gclid=EAIaIQobChMI2Ju2jcPEgAMVu20PAh2QawEsEAAYAiAAEgKlkPD_BwE (accessed on August 4, 2023).

facing the world today.[116]

4. Climate Change Litigations in Mainland China

From the perspective of the Chinese judiciary, a responsive justice model advocates for the judiciary to play a proactive role in responding to the needs of society.[117] In 2009, in response to the situation and tasks faced by the courts in the new era, Wang Shengjun, the president of the Supreme People's Court of the People's Republic of China, explicitly pointed out that Chinese courts shall endeavor to be "responsive, service-oriented, and proactive."[118] Since then, the responsive justice model has begun to enter China's rule of law discourse, and in 2011, the highly publicized cases of *Yao Jiaxin* and *Lean Meat Powder in Henan Province* were listed as the top 10 typical cases of the Supreme People's Court of the People's Republic of China in 2011. *The People's Court Daily* cited these two hot criminal cases as examples, recognizing the courts' practice of responding to public opinion and paying attention to society through justice.[119] Back then, the responsive justice model began to take shape in China's criminal trials. With the establishment of the Paris Agreement and China's efforts to achieve peak GHG emissions by 2030 and GHG neutrality by 2060, the responsive justice model has been given a new mission, aiming to respond to mankind's thirst for clean air through judicial means. From the late 2000s, China has grappled with severe environmental issues and a significant shift toward relying on courts and the legal system to address them.[120]

China signed the Paris Agreement in 2016, and since then, until the end of 2022, the people's courts at all levels across China have concluded nearly 1.12 million first-instance cases involving carbon issues. Among these, there was a noticeable increase from 2017 to 2019. Due to the diffusion of the pandemic, the number of carbon-related cases temporarily decreased in 2020, but in 2021 and 2022, it still maintained a roughly 5% year-on-year increase. With the termination of the pandemic and the revival of the economy, the number of carbon-related cases is likely to continue rising in the future. Unignorably, there is a significant number of cases in the cause of action involving energy structure adjustments, accounting for the majority. To be specific, out of the 1.12 million carbon-related cases, 900,000 involve disputes related to energy structure adjustments, making up 80.4% of the total cases. Another big portion of carbon-related cases focuses on disputes arising from energy service contracts or carbon emission trading contracts, such as the implementation of carbon emission quotas, and administrative disputes related to the clearance of carbon emission quotas.

On February 17, 2023, the Supreme Court of the People's Republic of China issued the Opinions on the Complete and Accurate Implementation of the New Development Idea and the Provision of Judicial Services for the Positive and Steady Promotion of

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[116] See *Milieudefensie vs Royal Dutch Shell*, Judgment of The Hague District Court, ECLI: NL: RBDHA: 2021: 5337 (Nederlandse versie), para. 4.4.42.
[117] See Jin Minzhen & Xu Tingzi, *On the Theory and Practice of Responsive Justice*, People's Court Daily, (November 21, 2012).
[118] See Ding Guangyu, *Exploring the Rules, Regulations and Norms of Active Justice*, People's Court Daily, May 12, 2010.
[119] See the full list of the top ten typical cases of the Supreme People's Court of the People's Republic of China, the People's Court Daily, November 6, 2012.
[120] See Rachel E. Stern, *From Dispute to Decision: Suing Polluters in China*, 51(206) The China Quarterly 294, 295 (2011).

GHG Peak and GHG Neutrality (hereinafter referred to as the Opinion), as well as the accompanying typical cases. In the Opinion, the Supreme Court of the People's Republic of China emphasized the need to promote the green and low-GHG transformation of the industrial structure through judicial adjudication, demonstrating the determination of the courts in the Chinese Mainland to persist in serving green development in accordance with the low-GHG policies.[121]

Apparently, there is a palpable scarcity of climate change litigation that complies with the definition formulated by the UENP, the cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change.

Professor Zhongmin Zhang perceives that climate change litigations in China's judicial practice primarily take on four distinct forms:

(1) The first category is environmental public interest litigation related to air pollution. Even though such litigation may not directly address climate change-related claims, its outcomes have a significant impact on mitigating and adapting to climate change owing to atmospheric pollution and climate change sharing common pollutants, as the burning of fossil fuel generates both sulfur dioxide and CO_2.

(2) The second category is contractual litigation involving carbon emissions trading and carbon offset transactions. In 2020, the Supreme People's Court of the People's Republic of China made amendments to the "Provisions on Civil Case Categories," adding disputes related to carbon emissions trading and carbon sequestration trading under the category of contract disputes. This means that cases involving carbon emissions trading and carbon sequestration trading now encompass both climate change mitigation and contract dispute elements. Currently, carbon emissions trading and carbon sequestration trading cases in China primarily revolve around issues such as whether there is a breach of contract obligations and whether the set penalty for breach is excessive. These cases are entirely adjudicated by using contract law regulations, which lead to the majority of them falling under the category of contract disputes. Despite these lawsuits being aimed at upholding the legal relationships of rights and obligations between the parties involved, they also play a positive role in advancing climate change mitigation.

(3) The third category is energy substitution litigation. Because clean energy replaces fossil fuels and new energy sources substitute traditional ones, which can significantly reduce GHG emissions, such cases are closely related to climate change. A representative case is *Yunnan Yingding Bioenergy Co., Ltd. v. Sinopec Refusal to Trade Case*. In this case, the plaintiff alleged that the defendant violated the "Anti-Monopoly Law" and "Renewable Energy Law" and demanded that the defendant incorporate the bio-diesel into the fuel sales system. Some scholars have pointed out that although the cause of action in this case falls under antitrust law, its essence is actually an energy substitution issue within energy law.

(4) The fourth category is climate change litigations, which directly raise material issues to address climate change mitigation, adaptation, and climate science. *Friends of Nature v. State Grid Gansu Branch* is regarded as China's first climate change litigation according to some scholars. *Friends of Nature* argued that the State Grid Gansu Branch's

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[121] See the Supreme People's Court of the People's Republic of China, *A Typical Case of Judicial Active and Steady Promotion of GHG Peak GHG Neutrality*, https://www.court.gov.cn/zixun-xiangqing-389361.html (accessed on June 28, 2023).

action of the curtailment of wind and solar energy led to increased GHG emissions, further exacerbating climate change.[122]

4.1 Hurdles in Climate Change Litigations in China

Although China has endeavored to stimulate climate change litigations for years, narrow climate change litigations defined by UNEP have barely appeared. Most climate change-related cases in the Chinese Mainland are contractual disputes with enterprises related to energy conservation and biotechnology, or cases regarding low-carbon economy transformation.[123]

There are three major hurdles in climate change litigations in the Chinese Mainland, which differ from other countries. First, China has not yet recognized CO_2 as one of the pollutants. Therefore, it is hard to find a direct legal basis for adjudicating climate change litigations, and it is even harder to request Chinese private corporations to be accountable for climate change. Although China established public interest trials of cases on compensation for damage to the ecological environment, which may provide legal resources, there is no clarification on the cause of actions under the context of climate change, and it is not applicable for a claim for compensation for personal damage or loss to the property of an individual or collective caused by environmental pollution or ecological damage. This limits the usage of such public interest trials under the context of climate change.[124] Second, there is an absence of a liability regime applicable to climate change litigations in the Chinese Mainland, especially since the current tort law regime in the Chinese Mainland could not hold that liability provides incentives for preventive measures. Third, climate change litigations are highly policy oriented. Correspondingly, it is the government rather than the judges who shape climate change litigations, and the initiative of the court is suppressed. Therefore, the deployment of the responsive justice model may be an option for future climate change litigations in the Chinese Mainland for Chinese judges' more flexible legal interpretation in responding to social demand under the context of climate change.

Moreover, China misconceives the conceptions of CO_2 and climate change, which further leads to the deficiency in Chinese environmental law for not recognizing CO_2 as a major pollutant. Corresponding to the Chinese environmental legislation, the identification of pollutants shall satisfy two conditions. First, pollutants come from environmental elements such as water and air, rather than being originally contained in water and air. Second, pollutants are harmful or "toxic" to public health and the environment. According to this concept, CO_2 primarily present in the atmosphere is not a pollutant.

Owing to the misconception of CO_2 and climate change, China did not build a specific law for combating climate change, which led to a shortage of legal basis, making

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[122] See Zhongmin Zhang, *The Chinese Paradigm of Climate Change Litigation-Also on the Relationship between it and the System on Compensation for Eco-environmental Damage*, 41(7) Political Science and Law 34, 34-47 (2022).

[123] See Zhao Yue & Lyu Shuang et al., *Prospects for Climate Change Litigation in China*, 8(2) Transnational Environmental Law 349, 349 (2019).

[124] See Kathryn McCallum, *Changing Landscapes: Enforcing Environmental Laws in China through Public Interest Litigation*, 20(1) Asia Pacific Journal of Environmental Law 57, 57-93 (2017); also see several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment (for Trial Implementation) (2020 Amendment).

it hard for Chinese judges to exercise discretion in climate change litigations.[125] Following the continental civil law tradition, China's legal rules are codified and promulgated by legislative or governmental bodies that have been given lawmaking power.[126] The codified legal rules then provide the basis for judicial decisions, while there is no specific statute stipulating rights or obligations directly related to climate change. The newly revised Constitution is greened and provides a favorable context for public interest litigation and climate mitigation. However, there are no specific words such as "climate change" and "climate mitigation." Moreover, due to the fact that the concentration of PM 2.5 has long been the biggest concern of air pollution, the damage caused by CO_2 has long been ignored. Subject to Article 2 of the "Atmospheric Pollution Prevention and Control Law of the People's Republic of China," GHG shall be conducted by cooperative control, which is not equal to atmospheric pollution prevention. In addition, climate change-related statutory provisions are scattered in the "Energy Conservation Law," "Circular Economy Promotion Law," "Renewable Energy Law," "Electric Power Law," and "Law of the People's Republic of China on Promoting Clean Production," and so forth. Most of the existing legislation primarily focuses on promoting emission reductions without mentioning specific GHG emission targets and obligations borne by private corporations. Consequently, enacted rules have only an indirect impact on addressing climate change, indicating that China's climate issues are more of a macroeconomic and industrial nature, which naturally leads to the barriers for judges to render judgments directly favorable for climate change, and amplifies the difficulties in legal interpretation. Not to mention, no legislation has been enacted that demands private corporations to be accountable for their GHG emissions or climate change.

Second, there is an absence of a liability regime applicable to curb emissions of private corporations in China. In contrast with the developments in the United States, the European Union, and some other countries, the environmental liability system in China, generally speaking, adheres to a private-law oriented approach. As such, its civil law, or more accurately, its tort law, plays a pivotal role in providing liability and compensation for environmental harm.[127] The primary aim of liability is to secure redress for victims. A liability rule should lead to compensation or other forms of reparation (such as restitution) that make good for the harm inflicted. The second aim is to change the behaviors of the actors that cause GHG emissions.[128] That may be a direct aim (for instance, when plaintiffs ask for injunctive relief) or may be an intended or unintended side-effect of the first aim.[129] The problem is that the current environmental liability regime in China could neither redress the climate change damage nor prevent the future potential damage incurred by private corporations.

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[125] See Zhou Chen, *Addressing Dilemmas over Climate Change Litigation in China*, 49(2) Hong Kong Law Journal 719, 719-748 (2019).

[126] See Wang Jiangyu, *The Rule of Law in China: A Realistic View of the Jurisprudence, the impact of the WTO, And the Prospects for Future Development*, 13(1) Singapore Journal of Legal Studies 347, 347-389 (2004).

[127] See Karen C Sokol, *Seeking* (*some*) *Climate Justice in State Tort Law*, 95(1) Washington Law Review 1383, 1383 (2020).

[128] See René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, Kluwer Law International, pp. 313-315 (1996).

[129] See Michael G. Faure & Andre Nollkaemper, I*nternational Liability as an Instrument to Prevent and Compensate for Climate Change*, 26(A) Stanford Environmental Law Journal 123, 140 (2007).

For instance, climate change litigations mainly depend on the tort law forum, which requires the victim of the tort to have the right to require the tortfeasor to assume the tort liability when his or her personal or property safety has been endangered.[130] Compared to plaintiffs in other environmental lawsuits, plaintiffs in climate change lawsuits face more difficulties in demonstrating that they have been directly affected by a particular defendant's GHG emission. Owing to the fact that the damage caused by climate change is "too general, too unsubstantiated, too unlikely to be caused by defendant conduct, and or/too unlikely to be redressed by the relief to confer standing,"[131] the damage caused by climate change is so widespread that there are hundreds, thousands, and even millions of emitters who all contribute to the severe climate change. Additionally, there are uncertainties of causation between emissions, climate change, and harmful effects.[132]

Not to mention that the current environmental liability regime has inconsistent regulation, providing judges with discretion in deciding who handles the burden of proof. According to Article 8 of the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigation (2020 Amendment)," the plaintiff is required to prove the preliminary evidence of causation between the defendant's act and the damage.[133] In contrast, the Civil Code dictates a reverse onus standard in environmental tort cases. This means that the party responsible for the action must demonstrate either that they should not be held liable or that their liability can be reduced under specific legal circumstances or prove that there is no causal link between their actions and the harm caused. This approach tends to be more advantageous for those potentially at fault, particularly in cases related to climate change.[134]

Furthermore, the current carbon-related provisions mainly consist of the best-efforts clause, which is vague in nature and lax in content. It often begins with requirements but ends without clear legal consequences for non-compliance acts, further complicating adjudication due to the lack of a condemning benchmark. Although the Chinese government continuously demands that private corporations transform behavioral patterns toward low-GHG emissions, no legally binding control mechanisms are enacted for supervision, making it challenging to concretely constrain the behavior of relevant legal entities. For instance, Article 40 of the Environmental Protection Law of the People's Republic of China is a "best effort" clause without clear, corresponding legal

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[130] See Article 1167 of the Civil Code of the People's Republic of China.

[131] See Ctr. for Biological Diversity v. Abraham, 218 F. Supp.2d 1143, 1155 (N.D. Cal. 2002). (holding that the concerns regarding global warming).

[132] See Michael G. Faure & Andre Nollkaemper, *International Liability as an Instrument to Prevent and Compensate for Climate Change*, 26(A) Stanford Environmental Law Journal 123, 123-180 (2007).

[133] For instance, Article 8 of the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigation (2020 Amendment)" states: "When initiating environmental civil public interest litigation, the following materials shall be submitted: (1) a complaint that complies with the provisions of Article 121 of the Civil Procedure Law, with copies submitted according to the number of defendants; (2) preliminary evidence that the defendant's conduct has harmed the public interest or poses a significant risk to the public interest; (3) If a social organization initiates the lawsuit, it shall submit the social organization's registration certificate, articles of association, annual work reports or annual inspection reports for the five consecutive years before filing the lawsuit, and a declaration signed by its legal representative or person in charge with no records of violations."

[134] See Article 1230 of the Civil Code of the People's Republic of China.

consequences for the non-compliance acts in essence. It stipulates that "the relevant departments of the State Council and the local governments at all levels shall adopt measures to promote the production and use of clean energy. Enterprises shall give priority to the use of clean energy, and adopt techniques and equipment with higher resource utilization ratios and less pollutant discharges, technologies for the comprehensive utilization of wastes, and technologies for the decontamination of pollutants to reduce pollutants."[135] In addition, although ceasing infringement, removing obstacles, eliminating risks, restoring the ecological environment, and compensating for the loss of the ecological environment service functions are the five approaches encouraged by the law to remedy the damage, when climate change litigation targets damages that cannot be accurately attributed to specific actions, it increases the difficulty of defining the extent of harm. Consequently, it becomes challenging to calculate or assess the actual value loss resulting from climate change damage. Even if judicial authorities provide specific figures for compensation, the effectiveness of such remedies remains uncertain. After all, post hoc remedies centered on compensation are often unable to "restore the status quo" regarding the climate, and therefore, cannot fundamentally address climate change.[136]

What is more, preventive climate change litigations are not possible under the current liability regime. There has not been a single preventive climate change case yet in China. Meanwhile, scientific assessments of the risks of anthropogenic climate change have shown that there is a reasonable concern for the possibility of irreversible large-scale adverse effects in the long term.[137] The UNFCCC claims that the precautionary principle is a keystone for addressing climate crises and risks.[138] Preventive cases are litigation procedures brought up before starting a project or an action that could negatively affect the environment, which is a necessary step for addressing climate change damage. Although the Environmental Protection Law specifies the "prevention" of pollution as one of its purposes, it does not specify whether preventive public interest cases are allowed. According to the 2020 amended "Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations," "for any conduct that pollutes the environment and damages the ecology, which has damaged the public interest or has the major risk of damaging the public interest, the plaintiff may request the defendant to assume the civil liabilities including but not limited to the cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state, compensation for losses, and apology."[139] Even so, it is very hard to bring a case under this article because it is not clear about the standards of "significant risk," and to date, most courts have been reluctant to act when presented with scientific uncertainty, even

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[135] See supra note 130.

[136] See Han Kangning & Leng Luosheng, *On the Chinese Paradigm of Climate Change Litigation from the Perspective of Preventive Justice-And Its Relationship with Environmental Public Interest Litigation*, 25(2) Journal of Beijing Institute of Technology (Social Sciences Edition) 119, 119-130 (2023).

[137] See J.P. van der Sluijs & W. Turkenburg, *Climate Change and the Precautionary Principle*. In: Elizabeth Fisher & Judith Jones et al., *Implementing The Precautionary Principle, Perspectives and Prospects*, Edward Elgar Publishing, pp. 245-269 (2006).

[138] Id., at 258.

[139] See Article 18 of Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations.

where the case involves irreversible damage like biodiversity loss.[140]

Third, Chinese climate change litigations are driven by top-down policy orientation, with the government taking the lead in shaping the evolution of these legal proceedings rather than the judges. Under this approach, the Chinese Government frequently employs command and control environmental regulations in an attempt to reduce GHG emissions and combat climate change.[141] However, this may lead to a standardization of climate change litigations that may not always align with societal demands.

A key document produced through this top-down policy approach is the Five-Year Plan, which illuminates China's path toward a low-carbon society. This involves accelerating the transition to renewable energies, moving away from the traditional fossil fuel-based economy that has contributed to current environmental degradation and climate-induced natural disasters.[142] The 14th Five-Year Plan, aimed at actively addressing climate change, encompasses several aspects: (1) Improving the dual control system of total energy consumption and intensity, and focusing on controlling fossil energy consumption; (2) Implementing a system with carbon intensity control as the mainstay and total carbon emission control as a supplement to support qualified localities, key industries, and key enterprises to take the lead in reaching the peak of carbon emissions; (3) Promoting the clean, low-carbon, safe, and efficient use of energy, and deepen the low-carbon transformation of industry, construction, and transportation; (4) Increasing GHG control; (5) Improving the carbon sink capacity of the ecosystem.[143]

However, these policy-oriented litigations also risk standardizing climate change proceedings and potentially diverging from societal demands. In contrast, in the international climate change litigation arena, various rights-based climate change litigations are primarily initiated by NGOs and individuals. These reflect the urgent societal demands for mitigating GHG emissions from a grassroots perspective through legal avenues, and the judges involved tend to exhibit greater initiative in interpreting existing rules or establishing novel rights and obligations.

Following this "policy-oriented" litigation strategy, Chinese courts often adopt the role of "rule-interpreting bureaucrats" rather than being "value-driven lawmakers."[144] This implies that judges tend to adopt a narrow interpretation based on enacted rules or policies, without actively exploring legal sources to enhance rights and obligations within the climate change context in a more forward-thinking manner.

Even when examining the "Ten Model Cases of Procedural Authorities Serving and Safeguarding Carbon Peaking and Carbon Neutrality" published by the Supreme People's Procuratorate,[145] or the "Eleven Model Cases Published by the Supreme People's Court on Positively and Steadily Advancing the Work Regarding Carbon Dioxide Peaking and

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[140] See Dimitri De Boer, *China Should Allow Lawsuits Before Environmentally Risky Projects Begin*, https://chinadialogue.net/en/business/11846-china-should-allow-lawsuits-before-environmentally-risky-projects-begin/ (accessed on September 16, 2023).

[141] See Giuseppe Poderati & Ou Shutian, *Tackling Climate Change in China: A Hybrid Approach*, 5(1) Chinese Journal of Environmental Law 141, 141-171 (2021).

[142] Ibid.

[143] See 14th Five-Year Plan (n 31) "Section 4. Actively respond to climate change".

[144] See Rachel E. Stern, *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, p. 2 (2015).

[145] See *Ten Model Cases of Procedural Authorities Serving and Safeguarding Carbon Peaking and Carbon Neutrality published by the Supreme People's Procuratorate*, https://www.spp.gov.cn/spp/xwfbh/wsfbh/202306/t20230605_616289.shtml (accessed on August 30, 2023).

Carbon Neutrality Through Judicial Means," none of the judgments invoked considerations related to climate change mitigation, adaptation, or climate science.

For instance, the case of *Friends of Nature Institute v. Ningxia State Grid* represents Friends of Nature's endeavor to activate climate change litigation in China. However, this case is still pending, and the Intermediate People's Court of Ningxia Municipality has consistently applied a narrow interpretation in its judicial reasoning. This reflects the conservative stance of Chinese courts toward climate change litigations, along with the substantial case acceptance fees they demand without showing initiative in reshaping the social order.

The Friends of Nature Institute initially filed the case in August 2016, alleging that the State-owned enterprise, Ningxia State Grid, failed to purchase all electricity generated by wind and solar power due to a high curtailment rate, thereby violating Article 2 and 14 of the Renewable Energy Law. This led to increased air pollution and GHG emissions, directly impacting climate change.

During the adjudication, although the Intermediate People's Court of Ningxia Municipality acknowledged the social responsibility of the Ningxia Branch of State Grid in using renewable energy to reduce CO_2 consumption and aid China in achieving the Double Carbon target, it did not support Friend of Nature's claim that Ningxia State Grid violated Article 14 of the Renewable Energy Law. It stated that Ningxia State Grid had met its renewable energy consumption target, as confirmed by the Reply Letter from the Development and Reform Commission of Ningxia Hui Autonomous Region on April 1, 2021. Additionally, it pointed out that the enterprise must continue to use coal-fired electricity to ensure grid stability, as the production of wind and solar energy is characterized by randomness, intermittency, and volatility. Therefore, requiring the purchase of all electricity generated from wind and solar energy could compromise the safety of electricity consumption.

In addition, the front-loaded case acceptance fee required by the Intermediate People's Court of Ningxia Municipality also burdened Friends of Nature in pursuing climate justice through the litigation approach.[146] The Intermediate People's Court of Ningxia Municipality followed a conventional case-filling strategy by not only requiring a clear definition of the environmental damage caused but also demanding that Friends of Nature provide the precise calculation of the case acceptance fee according to the claimed monetary damage.[147] Since Friends of Nature has determined that the calculation of damage should include the harm caused by the excess air pollutants produced by the coal-fired power generation used by the Ningxia State Grid, as well as the harm caused by the GHG emissions released into the atmosphere that contribute to climate change, the combined amount of damages calculated for these two types of harm amounts to a staggering 310 million yuan. Although the Intermediate People's Court of Ningxia

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[146] In China, acceptance fees can be high enough to compel plaintiffs to reconsider and slow down the litigation progress. The Court fees for cases involving less than 10,000 yuan (US$1,470) in requested compensation are cheap – a flat 50 yuan – but above 10,000 yuan, fees are calculated as a decreasing, sliding percentage of the amount requested. This ranges from 0.5 percent of requested compensation (over 200 million yuan requested) to 2.5 percent (between 10,000 and 1 million yuan requested). See Rachel E. Stern, *From Dispute to Decision: Suing Polluter in China*, 51(206) The China Quarterly 294, 294-312 (2011).

[147] See Friends of Nature, *the Friends of Nature Institute v. Ningxia State Grid, Leaving a Bright Future*, http://www.fon.org.cn/action/way/content/160 (accessed on September 11, 2023).

Municipality clearly noticed that this is a public interest litigation filed by an NGO that cannot afford such extreme amounts of acceptance fees, it explicitly informed Friends of Nature that the case acceptance fee must be calculated based on 310 million yuan without negotiation. In order to lower the case acceptance fee, Friends of Nature submitted its first application to amend the lawsuit after three years, requesting "orders for the defendant to pay for the damage caused to the ecological environment by the pollutants emitted by the curtailment of wind and solar power generation corresponding to coal-fired power generation from January 1, 2015, to June 30, 2016 (the specific amount of damage to be determined based on expert or assessment opinions)." Notwithstanding the Intermediate People's Court of Ningxia Municipality's approval of such a request for amendment, it insisted that Friends of Nature needed to pay the original amount of the case acceptance fee.

It is apparent that Chinese courts function as "rule-interpreting bureaucrats" by narrowly interpreting enacted rules and policies without elaborating on the specific rights and obligations that private corporations bear regarding climate change. Thus, their judgments only decide individual disputes without reconstructing climate change regulatory pathways in response to societal demands.

4.2 The Responsive Justice Model in Chinese Climate Change Litigation

The cases of *Friends of Nature v. State Grid Gansu Branch* and *Friends of Nature Institute v. State Grid Ningxia Branch* are two attempts made by Friends of Nature in the impulse of promoting climate change litigations in China. These two disputes both relate to material issues of law or fact relating to climate change mitigation, adaptation, and climate change science, and more essentially, the judgment made upon *Friends of Nature Institute v. State Grid Ningxia Branch* displays that court's commitment to employing the responsive justice model in climate change litigations.

These two cases share many similarities. They were both filed under the context that renewable energy is largely prompted by the newly promulgated laws and policies.[148] According to the data of the National Energy Bureau, the rate of wind and solar curtailment in the Chinese Mainland was 15% in 2015, which increased to 26% in 2016.[149] The annual rate of wind curtailment in Ningxia amounted to 13% (equivalent to 1.9 billion kWh of wind power) in 2016.[150] The issue of the grid company failing to purchase renewable electricity, or the renewable energy curtailment, has been prominent for years, and Friends of Nature would like to increase the awareness of different stakeholders on this issue by filing public interest litigation.[151] However, the two alleged

[148] In accordance with the Notice on publication of the "Measures for resolving curtailment of hydro, wind, and PV power generation" issued by the National Development and Reform Commission and National Energy Administration, it demands that the curtailment rate of hydro, wind, and PV power generation in Gansu and Xinjiang should decrease to about 30%, and in Jilin, Heilongjiang, and Inner Mongolia the curtailment rate of wind should decrease to about 20%, and generally, the curtailment rate of hydro, wind, and PV power generation will be effectively solved in China nationwide by 2020.

[149] See Friends of Nature, *Friends of Nature Institute v. Ningxia State Grid: Leave a Bright Future for Children*, https://weibo.com/ttarticle/p/show?id=2309404534664474788132#_0 (accessed on September 7, 2023).

[150] See Yang Yang, *National Energy Administration Issued Another Red Alert*: *Six Provinces shall not Approve New Wind Power Projects*, https://www.thepaper.cn/newsDetail_forward_1624649 (accessed on September 7, 2023).

[151] See Xueshen Wang, *Wind and Solar Energy Curtailment is Rising*: *the Friends of Nature Institute v.*

defendants are subsidiaries of State Grid, which aggregates the difficulty in adjudication since State Grid is a giant Chinese state-owned enterprise, accounting for 80% of the Chinese grid,[152] and having a generation capacity of 6.47 gigawatts.[153] In addition, both cases experienced a long pre-trial phase due to the Chinese courts' shortage of related adjudication experiences in the issues such as standing of defendants, causal reasoning, and the amount of case acceptance fees.

Although *Friends of Nature Institute v. State Grid Ningxia Branch* is still pending, the mediation agreement reached in *Friends of Nature v. State Grid Gansu Branch* demonstrates certain characteristics of the responsive justice model deployed by Gansu Provincial Mining District People's Court, which is a signal that the Chinese courts have the potential to resolve the tension between the integrity and openness of law and respond to societal demands in future climate change litigations.

On April 17, 2023, a mediation agreement was reached in China in the case of *Friends of Nature v. State Grid Gansu Branch*, which can be seen as the first climate change litigation that appeared in the Chinese Mainland, and its judgment was cast with some characteristics of the responsive justice model.[154] Subject to the "Renewable Energy Law," the plaintiff, Friends of Nature, alleged that the defendant, State Grid Gansu Branch, had caused vast amounts of GHG to be emitted as a result of its wind and solar power curtailment, thereby exacerbating climate change.[155] Accordingly, Friends of Nature requested the court to order the defendant to cease the acts of curtailing energy generated from wind and solar energy and to purchase the full amount of electricity capacity, while increasing its investment in new energy generation.

In the indictment, Friends of Nature required the Gansu Power Grid Company to (1) stop the infringing (public environment interest) activities; (2) purchase electricity generated from wind and solar plants in full amount; (3) compensate eco-environmental damages with 0.17 billion RMB; (4) publicly apologize in national and/or provincial media; and (5) pay for the litigation expenses.

The case of *Friends of Nature v. State Grid Gansu Branch* was dismissed by the Lanzhou Intermediate People's Court in Gansu Province in the first instance, stating that State Grid Gansu Branch was not a power generation company and did not have the justified standing as a defendant, as it had not actually conducted emitting activities. After entering the second trial stage, the Gansu Provincial Higher People's Court revoked the first trial ruling and appointed the Gansu Provincial Mining District People's Court to hear the case. According to the final mediation agreement, the State Grid Gansu Branch agreed to invest at least 913 million RMB in new energy-supporting grid construction to

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Ningxia State Grid Will Commence the Substantive Hearing, https://www.jiemian.com/article/2833198.html?spm=smpc.content.content.1.1549238400023WRl5 (accessed on October 9, 2023).

[152] See Joanna I. Lewis, *Cooperating for the Climate: Learning from International Partnerships in China's Clean Energy Sector*, Cambridge Massachusetts: The MIT Press (2023).

[153] See Chun Chun Ni, *The Xinfeng Power Plant Incident and Challenges for China's Electric Power Industry*, https://eneken.ieej.or.jp/en/data/pdf/382.pdf (accessed on October 10, 2012).

[154] See the Introduction from the Supreme People's Court of the Republic of China on the case of *Friends of Nature v. State Grid Gansu Branch*, https://www.court.gov.cn/zixun-xiangqing-228341.html (accessed on August 4, 2023).

[155] See Zhongmin Zhang, *The Chinese Paradigm of Climate Change Litigation-Also on the Relationship between it and the System on Compensation for Eco-environmental Damage*, 41(7) Political Science and Law 34, 34-47 (2022).

enhance the transmission capacity of new energy power generation.[156] By incorporating the case of *Friends of Nature v. State Grid Gansu Branch* into the classification of climate change response cases in the China Environmental Resources Trial (2019), the Supreme People's Court of the People's Republic of China has clearly pointed out that for climate change response cases arising from the emission of GHG, ozone-depleting substances, and other direct or indirect impacts on climate change, it should emphasize the use of a variety of judicial adjudication means to promote the implementation of the two means of response to climate change, namely mitigation and adaptation, and to promote the construction of a national governance system for climate change response.[157]

Under the guiding ideology of promoting national climate governance through judicial means, the case of *Friends of Nature v. State Grid Gansu Branch*, as the first instance of an environmental public interest organization litigating against a large state-owned enterprise, has already exhibited certain characteristics of a responsive justice model. Since 2016, when Friends of Nature first filed its petition, the case took three years to reach the substantive hearing. Initially, the first instance court held that "State Grid Gansu Branch, as a power grid enterprise that purchases, sells and distributes electricity, is not a power generation enterprise, and cannot specifically carry out the behavior of polluting the environment and destroying the ecology; the prosecution of Friends of Nature does not meet the conditions for environmental civil public interest litigation, and should be dismissed." After three years, the Gansu Province Higher People's Court was assigned as the trial court and adopted a more open-minded stance, stating that "the plaintiff in this case, Friends of Nature, aligns with the provisions of the law for bringing civil public interest litigation by social organizations, with clear defendants, specific litigation requests, and factual grounds, falling within the court's jurisdiction for civil litigation."[158] The Gansu Province Higher People's Court ultimately directed State Grid Gansu Branch to invest approximately 100 million RMB into supporting new energy industrial and commercial power generation, marking the early stages of China's climate change litigation against private corporations. This will likely encourage more environmental organizations to request that China's private corporations take on emission reduction obligations through judicial means. In the absence of relevant statutory law, China's private corporations assuming the responsibility to mitigate emissions is likely to gradually materialize through judicial decisions.

The responsive justice model aims to resolve the tension between the integrity and openness of the law. This model may shed light on climate change litigations in China, as Chinese courts have long been entangled by the lack of legal resources, the environmental liability regime, and the policy-oriented interpretation of climate change disputes. Specifically, Chinese courts should further clarify the endangerment caused by CO_2 in relation to climate change and progressively expand the definition of "pollutants" through broad interpretation during adjudications. Moreover, Chinese courts should incorporate more climate science and related treaties to assess the burden of proof and optimize the current liability regime to be more conducive to preventive climate change

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[156] See Wei Lu, *Mediation Reached in China's First Climate Change Litigation*, http://www.zhhjw.org/a/zfjc/wqal/2023/0426/17103.html (accessed on August 4, 2023).

[157] See the Supreme People's Court of the People's Republic of China, *China Environmental Resources Trial (2019)*, https://www.court.gov.cn/zixun-xiangqing-228341.html (accessed on June 28, 2023).

[158] See Civil judgement (Min Zhong No.679) issued by Gansu Provincial Higher People's Court in 2018.

litigations.

In China, the Supreme People's Court of the People's Republic of China partially assumes a legislative role by issuing judicial interpretations and providing guidance to all levels of courts. To promote civil public interest litigation, the Supreme People's Court of the People's Republic of China has formulated specialized judicial interpretations, such as those on civil public interest litigation and the settlement of environmental tort disputes.[159] In these interpretations, key concepts such as "public interest" and "social organization" are elaborated upon.[160] Although current environmental legislation has not explicitly defined CO_2 as a pollutant in the context of climate change, the Supreme People's Court of the People's Republic of China can fulfill its function by further explaining the interrelation between CO_2 and climate change through pronouncements in related judgments and judicial interpretations, progressively enriching the legal resources for climate change litigations. Similarly, the regulation of CO_2 was initially established through climate change litigations in the United States. Examples can be found in the 2007 judgment of *Massachusetts et al. v. Environmental Protection Agency et al.* issued by the Supreme Court of the United States. In this case, a group of private organizations petitioned the Environmental Protection Agency (EPA) to begin regulating the emissions of four gases, including CO_2, under §202(a)(1) of the Clean Air Act, which requires that the EPA "shall by regulation prescribe … standards applicable to the emission of any air pollutant from any class … of new motor vehicles … which in [the EPA Administrator's] judgment cause[s], or contribute[s] to, air pollution … reasonably … anticipated to endanger public health or welfare." Although the Clean Air Act defines "air pollutant" to include "any air pollution agent … including any physical, chemical … substance … emitted into … the ambient air," the Supreme Court determined that CO_2, as a "toxic" substance, contributed to climate change and could be broadly interpreted as an "air pollutant," thus requiring regulation by the EPA.[161] Moreover, Chinese courts should strive to clarify private corporations' responsibilities regarding climate change through judicial activities. Article 86 of the Civil Code stipulates that "in business activities, a for-profit legal person shall comply with business ethics, maintain the safety of transactions, receive government supervision and public scrutiny, and assume social responsibilities," providing certain legal resources for future climate change litigations.

Furthermore, incorporating climate science into the allocation of liability proof is essential for optimizing the Chinese environmental liability regime. The current carbon-related cases focus more on ex-post redress than ex-ante prevention, which is in compliance with the Chinese tort law regime but unaligned with the precautionary principle underlined in climate change and is impossible to be invoked to demand Chinese private corporations to take preventive measures. It is crucial for Chinese courts to understand that climate change damage is distinctive from other environmental damage, as climate change is generated due to the accumulation of GHG emissions worldwide, and everyone can be deemed as co-contributors to climate degradation. Instead of directly employing a reverse-onus standard of liability, it is more reasonable to

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[159] See Judicial Interpretations on Legal Application of Environmental Civil Public Interest Trials, the Supreme Court (January 2015); Judicial Interpretations on Environmental Tort Disputes Settlement, the Supreme Court (June 2015).

[160] See Judicial Interpretations on Legal Application of Environmental Civil Public Interest Trials, Articles 1-5.

[161] See *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

let the plaintiff bear the initial burden of proof by first demonstrating that the emitting activity may result in climate change degradation. Once the probabilities are confirmed by the court, the burden of proof shifts to the defendant by providing evidence that their emitting activities do not lead to potential climate change. Particularly, Chinese courts shall focus on proving that the actions causing climate damage by defendants were negligent or wrongful and that the damage can be attributed to the defendant's actions. Moreover, for the purpose of effectuating preventive climate change cases related to private corporations, Chinese courts shall use the temperature goal of the Paris Agreement or other international climate-related agreements as a benchmark to assess whether private corporations will cause "major risk" and pinpoint such reasoning by building relevant model cases.

In addition, although at the international level, China ratified the Paris Agreement in 2016 and submitted its intended nationally determined contributions to the Secretariat of the UNFCCC with the strong intention to actively participate in global climate governance and even take up a climate leadership role, Chinese courts seldom invoked ratified environmental treaties during adjudications.[162] The 2020 Deqing Minghe Thermal Insulation Materials Co., Ltd. and Qier Ming Environmental Pollution Case is the first criminal case in China, alleging that the use of controlled ozone-depleting substances (hereinafter referred to as ODS) leads to environmental pollution. It is also the first criminal case in the domestic polyurethane foam industry where a prison sentence was imposed for the illegal use of ODS. The People's Court of Deqing County, Zhejiang Province, in the first-instance judgment invoking the "Vienna Convention for the Protection of the Ozone Layer" and "Montreal Protocol on Substances that Deplete the Ozone Layer," emphasized that China, as the contracting party, has the obligation to fully fulfill the treaty commitments, in line with the "List of Controlled Ozone-Depleting Substances in China." Therefore, Trichlorofluoromethane, commonly known as CFC-1-1, is forbidden to be used and is considered a harmful pollutant to the atmosphere.[163] Although this case is not directly related to climate change, it is a showcase that Chinese courts are capable of invoking international environmental treaties to expound judicial reasoning and effectively fulfill treaty commitments through judicial activities.

What is more, China shall also be careful with other countries employing their "diversity jurisdiction" to sue Chinese corporations for the cause of GHG emissions. For instance, United States courts may have jurisdiction over cases between foreign states, or foreign citizens and citizens of the United States, as long as the amount in controversy exceeds $75,000.[164] The famous Inuit petition is another illustration that future climate change litigation may possess the characteristic of multi-jurisdictions. In 2005, the Inuit Circumpolar Conference filed a complaint against the United States to the Inter-American Commission on Human Rights, alleging GHG emissions from the United States were causing melting sea ice, rising sea levels, and irreparable damage to Inuit life

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[162] See supra note 130.

[163] See *2020 Deqing Minghe Thermal Insulation Materials Co., Ltd. and Qier Ming Environmental Pollution Case*, http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=e3f67c0fb1c745df904bad1700b01b97 (accessed on September 11, 2023).

[164] Diversity jurisdiction is codified in Title 28, Section 1332 of the United States Code (28 U.S.C. § 1332(a)). For a court to exercise diversity jurisdiction, the amount in controversy must exceed $75,000 and complete diversity of citizenship must exist.

and culture. Although this landmark case has not received a supportive judgment, and multi-jurisdictions climate change cases have often recurred, both Chinese courts and private corporations shall be prepared for the potential litigations in the future.

It is noteworthy that although the responsive justice model is encouraged to be deployed in climate change litigation in the Chinese Mainland, it does not mean that Chinese judges can fully use their power of discretion without considering the Chinese legal system, enacted rules, and policies. By using the responsive justice model, Chinese judges may better grasp the balance between integrity and openness in terms of climate change litigations.

5. Conclusion

This article analyzes the procedural and substantive controversies in the Shell Case and suggests that the decision in the Shell Case is characterized by a significant degree of responsive justice, which can be seen as a new development in climate change litigation. In the Chinese Mainland, the final judgment of *Friends of Nature v. State Grid Gansu Branc*h indicated that the courts in the Chinese Mainland began to serve the green economy and development through judicial activities. Thus, the analysis of the Shell Case can be an illustration for Chinese judges in climate change litigations in the future.

The Shell Case is the first private climate change litigation in which a court has successfully proved that private corporations have an obligation to mitigate GHG emissions, which is of landmark significance. In the Shell Case, the Hague District Court flexibly used human rights, Dutch tort law, climate science reports, and other soft law instruments as argumentative tools for the purpose of justifying the unwritten duty of care borne by private corporations, including the Dutch Civil Code, the ECHR, the ICCPR, the IPCC Fifth Assessment Report, Safe Climate: A Report of the Special Rapporteur on Human Right and the Environment, the UNGPs, the UN Global Compact,[165] the OECD Guidelines for Multinational Enterprises, and the International Energy Agency report, namely to achieve Net Zero by 2050.[166]

Owing to the fact that soft law norms can be repeatedly interpreted in climate change litigations and can lead to case law that contributes to the emergence of wider climate change litigation against private corporations, after the Shell Case, private climate change litigation against GHG emitting giants and fossil fuel companies steadily increased in the following 12 months. In addition, climate change litigation against private corporations is increasingly targeting various industries such as the food and agriculture, transportation, plastics, and finance industries.[167] For example, in 2021 the case of *Notre Affaire à Tous and Others v. Total*, plaintiffs have asked the court to order the oil and gas company Total to recognize the risks generated by its business activities and align its conduct with the Paris Agreement. In the same year, in another case of *Envol Vert et al. v. Casino*, a coalition of NGOs sued the French supermarket chain Casino for its supply chain emissions related to the cattle industry in Brazil and Colombia. In 2022, Smith, an indigenous tribesman from New Zealand, brought a case to the Supreme Court

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[165] See *the Introduction of the UN Global Compact*, https://unglobalcompact.org/ (accessed on August 4, 2023).
[166] See IEA, *Net Zero by 2050*, https://www.iea.org/reports/net-zero-by-2050 (accessed on August 4, 2023).
[167] See Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapchat*, Policy Report, p. 1 (2023).

of New Zealand alleging that seven businesses, including coal mining companies, dairy giants, and energy companies, had failed to exercise a duty of care, causing harm to his personal property and his community.[168] These cases have challenged "emissions outsourcing" and targeted a company that has low emissions profiles in their corporate home but whose products have caused significant pollution in other jurisdictions. The case is still in the preliminary stage.[169]

Besides, this ruling provides legislators with new political capital to pass stricter environmental regulations. This effect is already materializing in Europe, where legislators are working on a draft of new rules concerning what types of investments should be labeled sustainable under the new framework of Climate Benchmark (EU—Paris Aligned).[170]

The deployment of the responsive justice model is particularly beneficial to the private climate litigations in China. Although China has introduced a series of systems to encourage private corporations to mitigate emissions, at present, problems of unclear paths to realize GHG emission reduction, inaccurate disclosure of the amount of GHG emission reductions, and inadequate compliance with GHG emission reductions still exist.[171] Courts in the Chinese Mainland can learn from the responsive justice model to reconstruct Chinese climate change policy rather than function as "rule-interpreting bureaucrats." In particular, the Opinion particularly proposed to "hear cases of disputes over disclosure of corporate environmental information in accordance with the rules," reflecting the intention to combat the greenwashing behaviors of some business enterprises through judicial adjudication, and to further clarify the environmental information disclosure obligations of private corporations through judicial decisions. In addition, courts in the Chinese Mainland can also introduce multiple sources of law in the application of the law, such as climate science reports, international treaties, and decisions issued by the Chinese government, to clarify the responsibilities of private corporations in climate change.

While the responsive justice model can overcome hurdles in adjudications, such as causation, redressability, and the lack of statutory sources, it is not the panacea and still has certain limitations, especially considering the Defendant announced abolishing its current dual share structure, relocating its headquarters from the Netherlands to the United Kingdom, and changing the company's name from "Royal Dutch Shell plc" to

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[168] See Business & Human Rights Resource Centre, *New Zealand: Court is the Public's Last and Best Hope for Protection" Says Activist re Climate Lawsuit against 7 Fossil Fuel Users & Suppliers*, https://www.business-humanrights.org/en/latest-news/new-zealand-court-is-the-publics-last-and-best-hope-for-protection-says-activist-re-climate-lawsuit-against-7-fossil-fuel-users-suppliers/ (accessed on June 28, 2023).

[169] See *Envol Vert et al. v. Casino*, Judicial Court of Saint-Étienne, March 2, 2021 (France).

[170] According to which "underlying assets are selected in such a manner that the resulting benchmark portfolio's GHG emissions are aligned with the long-term global warming target of the Paris Climate Agreement and is also constructed in accordance with the minimum standards laid down in the delegated acts". See the information from https://ec.europa.eu/info/sites/default/files/business_economy_euro/events/documents/finance-events-190624- presentation-climate-benchmarks_en.pdf (accessed on June 28, 2023).

[171] See Edwina Kwan & Caroline Coops et al., *Greenwashing - Understanding (and Handling) the Heat*, https://www.kwm.com/cn/zh/insights/latest-thinking/greenwashing-understanding-and-handling-the-heat.html (accessed on October 26, 2023).

"Shell plc" on November 15, 2021, after the judgment of the Shell Case was released.[172]

Key questions arising from the Shell Case include: Should judges create laws regardless of whether climate change is inherently a political issue? Does the application of the responsive justice model grant judges' excessive discretionary power? Is the judgment issued by the Hague District Court binding on the future emission-related activities of the Shell group, given that no legal repercussions have been stipulated in the judgment? Moreover, does radical climate change litigation merely lead to a redistribution of authority between the courts and the government, offering limited advancements toward achieving the objectives of climate change adaptation or mitigation? Addressing how to implement this justice model without compromising the integrity of the law is a matter that requires greater academic scrutiny.

[172] See Shel-20211231, https://www.sec.gov/Archives/edgar/data/1306965/000130696522000012/shel-20211231.htm (accessed on October 30, 2023).

Conference Proceeding
The 4th China Fashion Law Symposium[1]

Welcome Address

Speaker: Jian Wang (Professor, Dean of Law and Politics School, Zhejiang Sci-Tech University; Chinese Dean of Institute of Fashion and Art Law)

Every October, in the beautiful season of osmanthus blossoming in Hangzhou City, we hold the China Fashion Law Forum on time to discuss the latest development and hot topics in the field of fashion law. Looking back, I am filled with emotion. In 2019, Zhejiang Sci-Tech University set up the Institute of Fashion and Art Law, and also co-founded the China Fashion Law Forum with the support of Kilpatrick Townsend & Stockton LLP. In the first China Fashion Law Forum, we discussed the power of fashion law. In the second forum in 2020, we focused on the opportunities and challenges of fashion law development under the new normal of epidemic. In the third forum in 2021,

[1] On October 15, 2022, the 4th Annual China Fashion Law Symposium was successfully held. The day-long conference was hosted by the Fashion and Art Law Institute, located at Zhejiang Sci-Tech University, co-hosted by Kilpatrick Townsend & Stockton LLP. The program includes a keynote speech and four panel discussions, focusing on cutting-edge legal issues in the fashion industry across the landscape of China, the United States, and the European Union. 21 guest speakers and industry thought leaders from China, the United States, and Italy joined the discussions. Fashion law is an emerging legal field that was developed to respond to the needs of the fashion industry. The fashion industry is a multi-trillion-dollar global industry that not only covers apparel, accessories, and footwear, but also beauty, cosmetics, textiles, lifestyle, home goods, etc. The subjects and issues discussed in the field of Fashion Law include, but are not limited to, manufacturing and production, distribution, marketing and advertising, retail sales, intellectual property, labor and employment, licensing, global trade, diversity and inclusion, sustainability, etc. It has gradually developed into a relatively complete system to serve and guide fashion professionals, creatives, and brands in the industry in the United States and Europe over the past 10 to 15 years. As China's fashion industry has become a strong and indispensable driving force in the world economy, there has been an increasing need to address the legal issues that uniquely exist in the fashion industry in China, and there is significance to developing its own Fashion Law system in China. In 2018, Sindy Ding-Voorhees, Counsel at Kilpatrick Townsend & Stockton LLP, founded the Fashion and Art Law Institute together with Zhejiang Sci-Tech University Law School, led by the Dean of Law and Politics School, Professor Jian Wang. The Institute is China's first academic center focusing on research about Fashion Law issues. Since its establishment, the Institute has published a Law Journal (Fashion Law Edition) through Zhejiang Sci-Tech University and hosted four annual China Fashion Law Symposiums. The symposiums aim to discuss the unique and cutting-edge legal issues in the fashion industry in China, the United States, and Europe, and connect international and domestic legal practitioners to Chinese fashion brands and professionals. This journal transcribes the 4th Annual China Fashion Law Symposium, including the presentations of the respective speakers. Editor-in-chief of Foundation for Law and International Affairs Review, Professor Wei Shen and Associate Editor of Foundation for Law and International Affairs Review, Deputy Editor-in-chief Xiaofu Li organized the compiling work of conference proceedings. Jiayi Zhu, Sheng Zhao, Jincheng Li, Muhan Qiu, Xiuyu Yi, Nan Bao, Chenyan Yu, Zhongyi Jin, Sai Ma, Xurui Duan, Chenghao Zhao, Zhengtong Su, Ming Xu, Siqi Zhou, Mingxuan Huang recorded the contents of the meeting. Resource Center of Kilpatrick Townsend & Stockton LLP participated in the proofreading of each article. All speakers confirmed the contents of their own speeches. This preface is made by Sindy Ding-Voorhees who is a lawyer of Kilpatrick Townsend & Stockton LLP. She is also foreign dean of Institute of Fashion and Art Law of Zhejiang Sci-Tech University.

we jointly discussed the Fashion Evolution. In this year's forum, with the theme of Building Strength and Co-creation, we are to discuss the IP protection strategies for non-traditional trademarks/ elements in fashion, trends in fashion brand asset protection and litigation in digital collections and metaverse, and legal issues in the second-hand fashion economy. We will also discuss topics such as freedom of design, market, and brand culture values.

After recent years of joint efforts, we can proudly say that China Fashion Law Forum has become a well-known brand, and fashion law has gradually become known to people. We have built a good communication platform between the industry, the legal profession, and the legal session. With the establishment of the China Fashion Law Forum, Zhejiang Sci-Tech University is vigorously developing the discipline of fashion law and carrying out fashion law teaching and talent training. If we started the cause of Chinese fashion law together in 2019, we could now say that fashion law has taken root in China.

Every time we meet, we have received great support from all of our friends in the Chinese fashion law community, the fashion industry, and the media. Every time, we have been honored by the great minds and young talents in the industry. We are very honored. Holding the Fashion Law Forum is a key link of our fashion law talent training system. I would like to ask all our experts and friends to continue to give us their support! For today's meeting, I would like to give special thanks to our friends from the United States and Italy. It is their evening time now, and it will be late at night when our meeting is over. Very hard work! I would also like to express my gratitude to our famous jurist, Professor Youde Zheng. Mr. Zheng has long been concerned about our Fashion Law Forum and the development of the discipline development of fashion law, and this time he will also give a speech in person to support our conference. We are very touched.

Forgive me for not being able to introduce other important guests due to time constraints. We also have friends from the media attending today's conference. Thank you for your support!

Speaker: Zhengrong Gao (Vice President, Zhejiang Sci-Tech University)

Jiangnan is the most memorable impression of Hangzhou. The most memorable thing about Hangzhou is the fragrance of osmanthus. Every year between September and October in the lunar calendar, which is the most intoxicating season in Hangzhou, the autumn color competition begins, and the entire city is covered in laurel rain.

In this most beautiful season, we jointly participate in the 4th China Fashion Law Forum in the brand-new Linping Campus, which is sponsored by the Institute of Fashion and Art Law of Zhejiang Sci-Tech University, and co-organized by Kilpatrick Townsend & Stockton LLP. On behalf of Zhejiang Sci-Tech University, I would like to express my sincere thanks to all the experts and scholars who attended the forum! Warm welcome to the leaders, guests, and friends who participate and watch this forum online! What's more, I wish this forum a smooth convening!

Fashion industry is one of the eight "trillion-level" industries in Zhejiang Province and one of the key supporting industries in the 13th Five-Year Plan period, which is one of the key development industries in our province. In keeping with the development decision of the fashion industry, Zhejiang Sci-Tech University has vigorously developed the fashion discipline and made leapfrog progress. Especially this year, Zhejiang Sci-Tech University ushered in the joy of housewarming: Linping Campus officially opened. Linping Campus, also known as the School of Fashion of Zhejiang Sci-Tech University, is committed to building a high-level fashion industry talent training base, high-level fashion scientific research product and development base, efficient fashion scientific and technological achievements transformation base, high-quality fashion education international cooperation base, and high-end international fashion release and exhibition center. Among them, the School of Law and Politics, as an important part of the Fashion Institute, has also settled in Linping Campus, ushering in a new starting point for sailing forward and leapfrogging development!

As the first academic center on fashion law in China, the School of Law and Politics, Zhejiang Sci-Tech University, has successfully held three sessions of China Fashion Law Forum, which has become the brand conference of Zhejiang Sci-Tech University and has exerted a wide and far-reaching impact in the international arena. Building on past achievements and forging ahead, today we are holding the 4th China Fashion Law Forum with the theme of Energy Storage and Co-creation. We invite the guests to share their views on the legislative trends and bills of the United States Fashion Law in 2022. We welcome all the experts to discuss how to use the law to protect the development of the fashion industry. The conference will focus on four aspects, including the protection strategy of non-traditional trademarks in fashion, digital economy, second-hand fashion, and brand culture. The theme of the forum is closely related to the specific situation, with the specific problems, facing the development of the fashion industry as the starting point. We believe that this forum is not only a grand gathering of legal theory, but also a practical meeting where the legal sector and the industry are fully connected. We sincerely look forward to the scholars in today's forum to exchange ideas, help to build China's first fashion industry entrepreneurship and innovation ecosystem, and contribute to the building of Zhejiang's fashion e-capital.

Finally, I wish this forum a great success! Meanwhile, I wish all the guests a smooth work and good health! Thank you all!

Speaker: Longyan Ni (Assistant Professor, Law and Politics School, Zhejiang Sci-Tech University; Member of Institute of Fashion and Art Law)

At present, the Fashion Law Forum has been held for four years in a row. It has been reported by Finance, Sina, Zhejiang Economic Vision, and other media, and become an international conference of fashion law research brand with a high influence. In addition, the Fashion Law Institute is also continuously improving its influence. Since 2019, it has opened a fashion law column in the Journal of Zhejiang Sci-Tech University (Philosophy and Social Science Edition), and has continuously published papers related to fashion law, becoming a social science column with the characteristics of the university. The forum gathers a team of fashion law lawyers to help the fashion industry, creates a Chinese fashion law website, opens the fashion law information public account, and continuously expands its influence through the network media. Including this forum, we also get the support of the Foundation for Law and International Affairs Review, an international journal with full-text inclusion in the databases of HeinOnline, VLEX|JUSTIS and the Library of Congress of the United States, etc., which will publish the proceedings of this conference in full.

The research direction of the fashion law research team mainly includes the theoretical research of fashion law and the fashion law teaching reform. Among them, the fashion law research fully combines the digital economy, digital art, cross-border e-commerce, and many other contents in our province, and discusses the advertising compliance of online internet celebrity sales in the post-epidemic era and the copyright of Non-Fungible Token, which are closely related to the characteristics of The Times. The team has obtained more than ten provincial and ministerial-level topics, and its members have published more than twenty fashion law-related papers, including three CSSCI papers and 17 SCI papers, such as Research on Copyright Attribution of Artificial Intelligence Generated Objects, and completed horizontal topics such as Analysis of the Nature of the Subject of Live Streaming Platform under the Vision of Advertising Law with Byte Jump, etc., so as to use the theoretical research to solve the practical problems encountered by enterprises and test the theory with practice. In the direction of fashion law teaching reform, on the one hand, the fashion law course is included in the teaching plan of undergraduate and graduate students, and it promotes the curriculum design and teaching implementation of the fashion law course from the practical level. At the same time, we have guided students to engage in fashion law research, among which the student's work, Legal Analysis of Business Model Game between Producers and E-Commerce Platforms in the Era of Digital Economy: An Example of the Battle between Pinduoduo and Tesla, won the third prize of the 17th "Challenge Cup" Extracurricular Academic and Technical Works for College Students. On the other hand, we have promoted the theoretical research of teaching reform, obtained the second batch of provincial teaching reform research project of the "13th Five-Year Plan", Research on Talent Cultivation Mode of LL.M. Fashion Law, and published Research on Curriculum Setting of LL.M. Fashion Law Direction in Universities.

We have also made the following plans for the next five years:

1. Create groundbreaking academic achievements and occupy a pioneering position in fashion law teaching textbooks

At present, the fashion law research team has compiled the first fashion law textbook in China, which is expected to be 200,000 words, and will be a comprehensive,

scientific and systematic construction of China's fashion law system, fully demonstrate the characteristics of China's fashion industry, and reflect the digital economy and other characteristics of The Times. The textbook will serve as one of the key academic achievements. At the same time, it will produce some high-level, high-quality, excellent papers, and expand the quantity and quality of original papers published.

2. Enhance the influence of academic platforms

The whole fashion law research team continues to publicize and voice on the fashion law research through forums, websites, public accounts, and other ways. At present, the fashion law research team has held three consecutive China Fashion Law Forums, which has produced a wide range of influence. In the future, the forum will continue to expand the forum scale, optimize the forum mode, and expand the international influence of the forum.

Meanwhile, with the help of this platform, the interaction between fashion law majors and brands will be promoted, the development of fashion law will be promoted with the actual needs of the fashion industry, and the benign and sustainable development of the fashion industry will be promoted.

3. Promote the training of fashion law talents

At present, the basic theoretical research on the educational reform of fashion law talent cultivation has achieved preliminary results, and the cultivation of fashion law talents for students has been promoted initially through subject guidance and other means. In the next five years, the undergraduate and graduate courses of fashion law will be promoted and promoted. On the one hand, the fashion law course is listed as the public selected course for our students to provide the opportunity to learn the fashion law. On the other hand, we will promote the popularity of fashion law courses to the whole society through online course construction and textbook promotion.

Finally, I would like to thank you for your love to the Fashion Law Forum and hope that the Fashion Law Forum can be better.

Keynote Speech

Moderator: Sindy Ding-Voorhees (Lawyer, Kilpatrick Townsend & Stockton LLP; Foreign Dean of Institute of Fashion and Art Law)

Topic: American Fashion Legislative Trends and Bills[1]

Speaker: Hilary Jochmans (Chairman of Jochmans; Founder of Politically in Fashion)

Thank you, everyone, for joining us. I'm honored to be here and participating in this conference I've heard Sindy talk about over the years. It's so impressive. Thank you so much for having me today.

Today I am going to talk a little bit about what's happening in the United States in terms of legislation and regulation that is important to the industry at the national level, but also what's happening in two states in particular, in California and in New York. It's really been an unprecedented time in the United States for legislation directly on point for the fashion industry. I want to talk a little bit about those, but also set a little bit of the context in which Congress will be considering these bills—talk a little bit about the political landscape, what's going on here.

November Elections

Right now, in the United States, we are just one month out from national elections. During that time, all 435 members of the House of Representatives are up for re-election for their two-year terms. In the Senate, one-third of the Senate is up for re-election for their six-year terms. Right now, Congress is very narrowly controlled by the democratic party, but after this election, there's a good chance that that will flip, and it will be controlled by the Republican Party. But again, it could still be a very narrow majority which makes it very difficult to pass legislation of any kind when you don't have an overwhelming majority.

It's called the midterm elections because it is the midterm of the president's term. We're halfway through President Biden's term. Historically, the party in power, in this case the Democratic Party, usually loses seats during the midterm election so a lot of people think the democrats will be losing control of the House of Representatives and the Senate in this upcoming election. If that does happen, we will see new chairs of all the committees. The leadership will change, and the focus of a lot of legislation will change for the new term which will start in January of 2023.

But as they finish out this year in Congress, there is a push to have certain legislation enacted. Members want to be able to run for re-election saying things that they voted for, things that they promoted. But with less than 30 days before the election,

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[1] Recommended reading by the Deputy Editor-in-chief: Guillermo C. Jimenez & Barbara Kolsun, *Fashion Law: A* Guide *for Designers, Fashion Executives, and Attorneys*, Bloomsbury (2014); Ashly Riches, *The Fashion Industry Is Not as "Green" as It Would Like You to Believe*, 33(1) Duke Environmental Law & Policy Forum 83, 83-111 (2023); Zofia Zwieglinska, *How New Legislation Will Affect Fashion Brands in 2023*, https://www.glossy.co/fashion/how-new-legislation-will-affect-fashion-brands-in-2023/ (accessed on October 4, 2023).

there's very little time to get a lot of things done. There are some opportunities for a few bills I'm going to talk about today, and then also some of them will have a chance going forward next year.

Proposed Federal Bills Important for Fashion Industry

These are the bills I would like to talk briefly about today: the Fabric Act, the Inform Act, and the Shop Safe Act. We will touch on trade briefly and also NFTs, or non-fungible tokens.

The Fabric Act

The main bill to focus on today is the Fabric Act. This is sponsored by Senator Kirsten Gillibrand from New York. This bill is really the first on point legislation for fashion in Congress in many years, if ever. The bill would set a minimum wage floor for how employees are paid. It would prohibit what is called "piece-work compensation," which is a way to get around the minimum wage laws that currently exist. What is particularly unique about this bill is that it would apply throughout the supply chain, so it is not just labor laws in the United States but all points throughout the supply chain.

There is also another interesting part of this bill which is to promote domestic manufacturing. There has been a real move here in the United States for brands to re-shore or onshore their production. In part, there is a move to embrace the "made in the USA" idea. And there is also a practical part of this; a lot of brands feel that now it is too challenging to source materials or to produce samples halfway around the world. They would rather be able to go halfway across town to do this production. But the problem in the United States is we just don't have the infrastructure anymore to produce garments. In the 1960s, over 95% of clothing sold in the United States was produced in the United States. Today, that is about 5%. Even if brands wanted to produce domestically, we do not have the infrastructure. We don't have the factories, and we don't have the workers who were trained on how to use the machines as well as the hand skills that are important for producing garments.

This bill would also create a 30% tax credit for brands who want to re-shore. It would also create a domestic garment manufacturing grant program so that brands could, in fact, use this money to update their equipment, to train their employees, and to make safety improvements that are so desperately needed in order to have viable and functioning factories in the United States. This bill was introduced in the spring. It has some support within the Senate. There is also support in the House of Representatives, but as the year is running out, it will not be acted on in Congress, so it would have to be reintroduced next year. But the senator has every intention of introducing it next year and pushing ahead to have a hearing and to move along this legislation.

Intellectual Property–The Inform Act and the Shop Safe Act

Another area that is really on point for the fashion industry in Congress are two intellectual property bills. The first is the Inform Act, and the other is the Shop Safe Act. Basically, both have to do with combatting counterfeit products online. They are individual pieces of legislation that may have a chance of being enacted this year. As Congress wraps up their business, they are going to have one or two really large bills that will have many, many different components to it. There is a good chance that these two bills will make it into the final package and be voted on before the end of the year.

Trade

There is a lot going on in the trade space. Briefly, obviously the 301 tariffs; the deal

might be with an extension there. We are unclear what President Biden is looking to do, unclear where Congress is. There is also the reauthorization of the expired Trade Adjustment Assistance programs. The Miscellaneous Tariff bill is expired, as are the Generalized System of Preferences, or GSP, programs. I think there is a chance that some of these, again, might make it into a large package that could pass before the end of the year, but we are just not sure at this point. There is a chance that that could happen.

NFTs-Non-Fungible Tokens

This next category, non-fungible tokens, or NFTs, we have seen a lot of development in NFTs in the fashion space, in particular the luxury space. We saw that during Fashion Week in New York. Many brands had collaborations in creating NFTs. What is interesting is that there is very little regulation in the United States surrounding NFTs, and even less legislation concerning NFTs. But I would keep an eye on this area because there is a concern that they might be subject to United States anti-money laundering rules. Congress has not acted yet, and the Department of Treasury, which is responsible for overseeing NFT and anti-money laundering bills, has not acted yet. But again, I would keep an eye out for what the Department of Treasury might do in the space going forward.

Bills in the States

I have talked about a few things that are pending at the national level in Congress. But it is important to also look at what the states are doing as well; in particular, in New York and California, obviously two states that are very big for the fashion industry. And while bills that come out of the states would only impact business transacted in those states, so only in New York or only in California, practically, if a piece of legislation like these were enacted at the state level, they would almost become the de factor national standard because brands and companies are not going to have one standard or one set of rules for one state and another one for the other 49 states. That is why I encourage people to really take a look at what states are doing. I will just talk about two examples right now.

The first is in New York. It is called the Fashion Act. This, for the first time, would require fashion retail sellers and manufacturers to disclose their environmental and social due diligence policies. The key word here really is "disclosed". There is not a requirement for what they have to do, what they have to say, but you have to disclose it. So, you may not be doing anything good. You might be doing something bad. But the requirement is just to disclose it. And there is some division within the advocacy community as to whether this is good or bad. Obviously, there are some people who don't want any regulation at all and would prefer not to have any type of bill like this. And there are others that do want legislation and regulation for the industry, but they can't decide if they feel that this goes far enough or not. Is it okay to just take a first step here, that you're just disclosing your practices, or should there be actual metrics that you have to meet in order for this legislation to be successful?

This bill did not get voted on this year in the state legislature, and in New York, their session has finished for the year. That means it would have to be reintroduced next year and start the process over. But this bill did get a lot of attention within the industry and within the media so I would expect this bill to come back again next year in 2023.

Also, in California, their bill did pass. It was enacted. It became effective January of this year. This bill is very similar to the Fabric Act that I was just talking about that

Senator Gillibrand put out. It is called the Garment Workers Protection Act, and again, it prohibits piecework pay. This is a new concept here and it only took a couple of years for this bill to go through in California from the time it was first introduced to the time it was enacted and became law. That is pretty quick for something like this to happen. Again, I would keep an eye out for something like this in other states. I know other states are looking at this. And of course, if Senator Gillibrand's bill were to become law, it would be in effect throughout the country.

Regulation-The Green Guides

We talked about legislation both at the federal level in Congress and also at the state level, but there is also regulation. And that comes out of the administration and the federal agencies are empowered to issue regulations. These would be agencies that are part of President Biden's cabinet. Today I want to focus on something the Federal Trade Commission, the FTC, is doing. In 1992, they issued what was called the Green Guides. It has been updated four times since then, and it is up for review this year. These guides are to assist businesses in making lawful environmental claims, and it's also to help consumers understand what these claims mean. Again, companies don't have to be doing anything particularly environmentally friendly, but if they are and they want to advertise that, they have to be truthful. You have to have data and metrics to back up what you are saying.

There are about a dozen examples in the Green Guides, and what is interesting is what is not included in the Green Guides. One of the examples they talk about is if you want to say something is recyclable, it has to be something you can actually recycle in the majority of places throughout the country, so it is really meaningful to people who can take advantage of this. But one thing that's not included is the word sustainability, and that's something that you're hearing as a buzz word so much in the industry, whether it be in fashion, in jewelry, in beauty, things like sustainability, green, environmentally friendly, things like that. What do these words really mean? You can look in the dictionary and get a definition of it, but everyone is operating under a different assumption of what these words mean. There is not a legal definition.

There is a possibility that the FTC will look to define this term. What some of us have been advocating for is to at least put guardrails on this term, some sort of way to provide a little more context and meaning for what sustainability is because there is a concern that if you start to throw around this word too much, it loses all meaning. This is when you get into the issue of greenwashing, the idea of just painting a picture that everything is great but not really having any substance to back up what your claims are. I won't go into this now, but if folks are interested in the greenwashing issue, I would also look at what the United Kingdom is doing as well as the European Union, and the Netherlands are pursuing a lot of different options in how to enforce green claims that are made by companies.

One last concept that I will leave you with here is the idea of a fashion czar. I am not sure how this translates, but the idea of a czar is a shorthand for a senior level advisor to the president, somebody who would really have the president's ear to look at the industry, look at the fashion industry, in a holistic way because right now, the way our government is divided up with the agencies, everything is very siloed. You have one agency that looks at environmental issues. You have one agency that looks at trade issues. You have one agency that looks at labor issues, et cetera. What we are advocating, and others have

been advocating for, is to create this position that can look at all of these different areas and see how they all fit together because fashion is an industry that transcends so many different industries and concepts, and we need to look at it in a holistic way. There has been broad industry support for this concept and a fair amount of advocacy and the request to the president to create this position.

So far, there has not been a response from the administration, but folks are continuing to push for this idea of having someone who can really look at this industry, respect and appreciate that this is, as someone said earlier, a multi-trillion-dollar industry worldwide. It is an economic generator. It employs thousands and thousands of people throughout the world in so many different aspects. And too often, fashion, I think, is thought of as something extravagant or a luxury item, but really it is a practical economic driver. It is an industry just like anything else, like financial services, like healthcare, like energy, and it needs to be looked at and examined in that way.

What do we expect to see in 2023? Well, first of all, it will depend somewhat on what happens with the election in November. If there is a switch in control in Congress, that may shape which legislation goes forward. I believe we will see a lot more debate on legislation and regulations that are impactful to the industry. I think we are going to see more action at the state level. We have already shown you New York and California, but there are many other states that are engaging on these and other issues, particularly in environmental and recycling plastics, that type of space, that impacts the industry as well. In addition to the states, the local government as well, so cities, are engaging on these issues, too. There will be a lot of different places to look and your clients would have to be knowledgeable of these different rules and regulations that would be in all the many jurisdictions throughout the country.

And finally, I think we will also see additional regulatory action by the federal agencies. As President Biden wraps up his term, there are things that he wants to have succeed in his administration. If he has a Congress who is not going to be on the same page as him, not going to be advancing his priorities through legislation, one way to do that instead is to go through the agencies. He has a lot of discretion to get action done at the agency level so I would expect to see additional moves there going forward.

I will stop there. Thank you so much for having me and I look forward to any questions that folks have as well.

Unit 1: IP Prosecution Strategies for Non-traditional Fashion-related Trademarks

Moderator: Sindy Ding-Voorhees

Topic: Intellectual Property Rights in 4D Printing Intelligent Fashion[1]

Speaker: Youde Zheng (Professor, Ph.D. Supervisor of Law School, Huazhong University of Science and Technology)

Hi, I will give a comprehensive explanation from four major aspects, namely overview of 4D printing, application prospect of 4D printing, application of 4D printing in the fashion industry, and challenges of 4D printing to the current IP system.

First, an overview of 4D printing. 3D printing technology, also known as additive manufacturing technology, is the process of manufacturing digital models/CAD modeling into 3D solid objects by adding material layer by layer. 4D printing was originally defined as 3D printing plus time, with the fourth dimension being time. Today's definition of 4D printing is that when 3D printing structures are exposed to predetermined stimuli, such as heat, water, light, magnetic field, pressure, pH, etc., its shape, properties, and function can change over time. 3D printing and 4D printing are the same contemporary climbing technologies as Al, big data, blockchain, quantum computing, human enhancement, and so on. 4D printing is in a whole new stage of development. In this regard, I compared the similarities and differences between 3D, 4D, 5D, and 6D printing. The most obvious difference between 3D and 5D printing is that 5D printing has a moving platform that allows the print head to make different angles and create curved layers from five dimensions, while 3D printers create flat layers on a fixed platform. 5D printed objects are three to five times stronger than 3D printed objects and use 25% less material, with the rest of the process being largely the same. Both processes use 3D scanners, the same type of 3D design, 3D files, and 3D printing materials. 4D printing is the most different of all three types of printing, relying on different kinds of 3D models and different kinds of programmable or smart materials that change in shape and function when stimulated by external physical and chemical conditions. 3D seeks to stabilize and create static objects. 4D seeks to change, to deform, to change its shape and function, to create dynamic objects. For example, starting with a static sculpture of a certain shape, it becomes a moving sculpture over time after using an external pre-

[1] Recommended reading by the Deputy Editor-in-chief: Farhang Momeni & Jun Ni, *Laws of 4D Printing*, 6(9) Engineering 1035, 1035-1055 (2020); Byoungho Ellie Jin & Daeun Chloe Shin, *The Power of 4th Industrial Revolution in the Fashion Industry: What, Why, and How Has the Industry Changed?*, https://fashionandtextiles.springeropen.com/articles/10.1186/s40691-021-00259-4 (accessed on October 4, 2023); Nkosilathi Zinti Nkomo, *A Review of 4D Printing Technology and Future Trends*, https://www.researchgate.net/profile/Nkosilathi-Nkomo/publication/328162917_A_Review_of_4D_Printing_Technology_and_Future_Trends/links/5bbe0179a6fdccf2978f17d4/A-Review-of-4D-Printing-Technology-and-Future-Trends.pdf (accessed on October 4, 2023).

programmed stimulus, such as temperature or water, and takes on a different shape when exposed to high temperatures. 6D printing is a fusion of 4D and 5D printing technologies, which uses five degrees of freedom to create the final object but uses smart materials to make the manufacturing process intelligent, so 6D printed objects can change in shape and function as much as 4D printed objects when stimulated by external physical and chemical conditions. The strength and efficiency of the resulting 6D printed objects will be 3-4 times higher compared to 4D printing.

The second is the application outlook for 4D printing. The 4D printing market was valued at USD 62.02 million in 2020, and is expected to reach USD 488.02 million by 2026, growing at a CAGR of 41.96% during the forecast period. Advances in biomanufacturing technology will drive the 4D printing market during the forecast period. In military applications, 4D printing is significant. Soldiers can have camouflage uniforms that can adapt to different environments and metals. Tanks, trucks, and military firearms can be changed according to the environment. The U.S. Air Force and the U.S. military are investing in 4D printing to strengthen the infrastructure and allow U.S. air power to continue to dominate in the future. 4D printing technology is advancing the medical field. In orthopedics, the main focus of 4D printing technology is to create specific tools and devices, including smart tissue engineering scaffolds that can release drugs or/and cells, and smart orthopedic implants that can change shape after implantation in the patient. Currently, the typical shape memory behavior of these smart implants can be used for spinal deformities, fracture fixation, joint replacement, and other related orthopedic applications, such as the conceived 4D printed heart valve that automatically changes shape due to sudden fluctuations in blood pressure.

Once again, it is the application of 4D printing in the fashion industry. 4D printing can disrupt the status quo in the fashion industry and will enable fashion products with self-assembly, self-adaptability, and self-repair to become a reality. I cited a series of examples to illustrate this, including a pure silk organza sari with a 4D floral digital print and a beautiful openwork border, a MoMA 4D dress with an intricate design based on the veins and crystal structure of a leaf, a NASA 4D printed Space Armor used to protect astronauts from flying meteorites, GRDXKN Patronace sportswear combined with innovative 4D technology and special printing paste, and the concept car, which can easily recover the original shape by stimulating heat or vibration. 4D printing can also change the shape of the wheels according to the road environment, and it is believed that the wheels of future cars will automatically change according to the steepness of the road. 4D printing enables clothing to change according to weather or activity in MIT's Self-Assembly Lab. The Kinematics Dress, the world's first 4D kinematic dress, is made of 2,279 unique triangular panel pieces connected by over 3316 hinges, and its main difference from other garments using 3D is its ability to automatically morph to fit the body. There are also 4D printed adaptive sneakers, textiles that change with the weather, and variable patterned women's shawls.

Finally, in the context of 3D printing, there is the challenge of 4D printing to the current IP system. 4D printing consists of four segments, namely application software or scanners to scan the original object to create a CAD file, online sharing platforms/private use/printing service providers to use the CAD file, printing 4D objects through 3D printers and smart materials and through traditional or non-traditional channels, and licensing methods to use 4D printed objects. Among them, the intellectual property law

protection of 4D involves the following five aspects, namely invention patents and trade secret protection for 4D equipment and processes, invention patents and trade secret protection for new materials and preparation processes for 4D, copyright protection for 4D equipment control software and application software, 4D design software (CAD document) invention patent, copyright protection and design patent, copyright protection of the scanned original objects and 4D items used for 4D. The intellectual property protection of new intelligent materials and intelligent design software is the two keys to determine the future development and sustainable innovation of 4D.

For copyright protection, first of all, do 4D printed dynamic objects belong to the protection object of The Copyright Law of the People's Republic of China, namely audio-visual works? Take the 4D-printed aquatic plants as an example. The Copyright Law of the People's Republic of China constitutes three elements for works which refers to the fields within literature, art and science, works with ingenuity, and intellectual results that can be expressed in a certain form. The Copyright Law of the People's Republic of China was revised for a third time on November 11, 2020, changing the type of work from film works and works created in a similar way to film making to audio-visual works. In the field of 4D printed objects, themes and expression modes are dynamic. What 4D printed object designers want to convey is that specific dynamic expressions can create aesthetic attraction through the deformation ability of 4D objects themselves, and do not depend on the subjective experience of the viewer. Article 2 of the Beijing Treaty on Audiovisual Performances defines an audiovisual recording as an embodiment of a moving image, whether or not accompanied by sound or a sound representation, from which the moving image can be perceived, reproduced or transmitted by means of some device. Article 2 of the Treaty on the International Registration of Audiovisual Works defines an audiovisual work as any work consisting of a fixed series of related images, with or without accompanying sound, which can be easily visualized and, in the presence of sound, easily heard. The definition of cinematographic and film-like works in Article 4 of the Regulations for the Implementation of the Copyright Law of the People's Republic of China is also basically the same. Combined with the above definition, I believe that 4D printed motion pictures can be protected as audiovisual works. Secondly, on the question of whether 4D printed CAD files can be protected as compilation works/investment-formed databases and computer software works respectively, I combine the provisions of Article 2 and Article 3 of the Regulations on the Protection of Computer Software of the People's Republic of China and Article 10 of the Copyright Law of the People's Republic of China, and held that the creation of 4D printed CAD files involves digital modeling design data and design software, and the latter two can, under certain conditions, can be protected as compilation works and computer software works under Chinese copyright law.

For designs, combined with the provisions of Article 2 of the Patent Law of the People's Republic of China, Article 27 and Article 28 of the Implementing Rules of the Patent Law of the People's Republic of China, I believe that dynamic designs generated through 4D printing can be broken down into a series of static designs that correspond to the different shapes into which 4D printed objects can mutate, and thus be protected by industrial designs. Protection can be granted if the appearance does not merely originate from its technical function and meets the substantive requirements of the Design Law of the People's Republic of China.

For trademark protection, I believe that we can start from two aspects. First, applying for trademark registration for 4D printed CAD documents. Second, applying for trademark registration of dynamic trademark/non-traditional trademark registration for 4D printed objects themselves. Dynamic trademark is a sub-type of non-traditional trademark that adds time process elements to the traditional trademark elements such as characters, graphics, letters, numbers, 3D logo and color. It mainly shows the change of action, appearance, position, and the relative relationship, and can identify the source of goods or services. Whether it can be registered according to law mainly determines whether the source of the logo indicating similar products is significant. The most prominent feature of dynamic trademark is that it has dynamic elements, which is also the core of distinguishing static trademark. Therefore, it is much more difficult to judge its saliency than the general static trademarks, especially some dynamic trademarks that also have obvious abstraction. I have argued that special regulations on the significance of dynamic trademarks should be strengthened, such as adding detailed written explanations when applying.

As for the protection of invention patents, many American scholars suggest that the 4D-printed CAD documents should be regarded as the digital manufacturing of Article 101 of the U.S. Patent Law. If true, the CAD document will be the object of the invention patent rights and will be more widely and strictly protected by the copyright law. However, the ultimate object of 4D printing is a tangible and dynamic product, whose CAD document is basically the electronic blueprint or computer instructions used to create the printed product, but not the physical object itself. Therefore, whether the CAD document belongs to the 4D printing product manufacturing or its method remains to be discussed. The objectors have the following points. First, the CAD documents are non-abstracted concepts. Because 4D printing products are essentially closely related to the software in the CAD document, if the software invention concept is not connected with the CAD document, the final printed product will not appear. Secondly, the CAD document is not just a design blueprint or instruction, it has the conversion function, and the 4D printer can only print out the product through this document. The inventions and creations protected by the Patent Law of the People's Republic of China are divided into three kinds: namely invention, utility model, and appearance design. Paragraph 1 of Article 2 of the Detailed Rules for the Implementation of the Patent Law of the People's Republic of China defines an invention as the new technical scheme proposed for product, method, or its improvement. Product refers to all kinds of new products that can be manufactured in the industry, including solid liquids and gases of certain shapes and structures. The so-called method refers to the processing of raw materials into various products. At present, China's software invention patent has four types of protection themes: namely method, virtual device, storage media, and computer equipment. After the revision of the Patent Review Guidelines in 2016, it is clear that the scheme of all based on the computer program process can be written as a method claim or method patent. The claims of the program module framework may also be expressed in a more direct way. If the 4D printed CAD document is extended to be the protection object of the invention patent in the Chinese patent law, is it the product invention or the method invention? Or maybe both? Chinese computer program invention patent defines computer program as solidified in hardware rather than independent computer program. The computer program itself differs from an invention involving a computer program which

allows for patent protection. Therefore, the 4D printed CAD document can obtain a software patent for the computer program steps, which belongs to the method invention. For the program module, computer storage media, computer equipment obtained the patent, it belongs to the product invention.

Finally, for the protection of trade secrets, at a certain time to activate 4D printing related external physical, chemical and other raw data or information, as well as in different media of excitation parameters, data sets, build 4D printed CAD documents of various data sets and running algorithm, as long as meet the trade secret constitute three elements (secret, value, confidentiality), can be used as trade secrets by the Anti-unfair Competition Law of the People's Republic of China to stop unfair competition protection. The formulation and manufacturing process and method of 4D printing smart materials can also be protected as trade secrets by anti-unfair competition laws.

Thank you.

Topic: Protecting Non-traditional Marks Under the U.S. Law[1]

Speaker: Ted Davis (Partner, Kilpatrick Townsend & Stockton LLP)

Hello, I appreciate the opportunity to speak with you today. My name is Ted Davis, and I practice in the Atlanta office of Kilpatrick Townsend & Stockton LLP. Today, I'm going to talk about the protection of nontraditional marks under the U.S. Law.

When we talk about the prerequisites for protection for trademarks and service marks under the U.S. Law, we generally talk about three requirements for protection. First of all, subject to some exceptions in the registration process, a claimed trademark in the United States must be used in commerce. In other words, it must be the subject of some transactions with independent parties that have no relationship to the claimant. Second, it must be nonfunctional in the sense that it does not have any utilitarian advantages. If it does, then it properly is the subject of utility patent protection instead of trademark protection. And then, finally, it must be distinctive. Distinctiveness under the U.S. Trademark Law is a little bit difficult to explain, but it basically means that consumers recognize the claimed trademark *as* a trademark, and they associate it exclusively with the trademark owner even if they don't know precisely who that owner is.

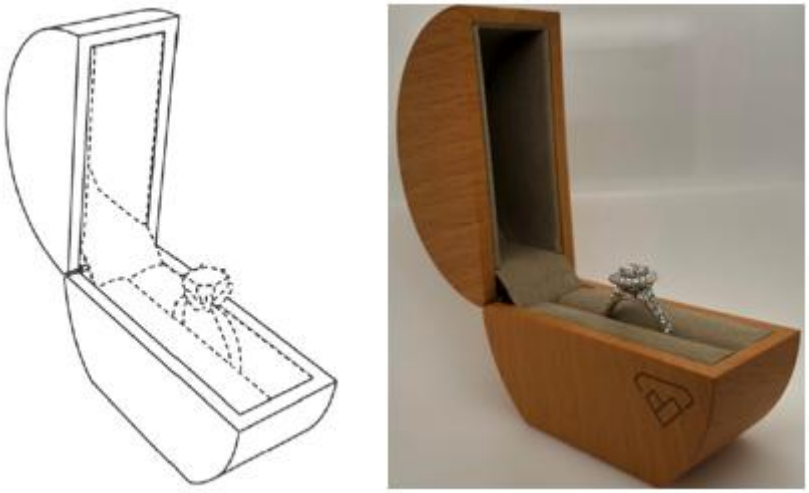
The breadth of trademarks and service marks, or potential trademarks and service marks, that may be eligible for protection means that there are any number of categories of marks that might qualify for protection. First of all, you have conventional trademarks. These are generally word marks. These are things that we're all used to. I won't be spending a whole lot of time talking about those.

But as far as nonverbal trademarks go, the U.S. Trademark Law acknowledges and allows for the protection of two-dimensional design marks. What do those look like in the fashion industry? Here's an example. This is a trademark owned by a company called Lucky Brands. What I have here is a United States trademark registration, and what you see on the left-hand side of the screen is how the claimed trademark is presented in the certificate of registration. And what you see on the right-hand side of the screen is how that trademark is used in commerce; in other words, how it appears in the actual marketplace. This is a pretty standard nontraditional mark. It's nonverbal but nonetheless, this is the sort of thing that most people are familiar with.

[1] Recommended reading by the Deputy Editor-in-chief: Irene Calboli & Martin Senftleben, *The Protection of Non-Traditional Trademarks: Critical Perspectives*, Oxford University Press (2018); Maria Del Mar Marono Gargallo, *Non-Traditional Marks. Special Reference to the Pattern Mark, the Position Mark, and the Colour Mark*, 15(1) Cuadernos Derecho Transnacional 491, 491-516 (2023).

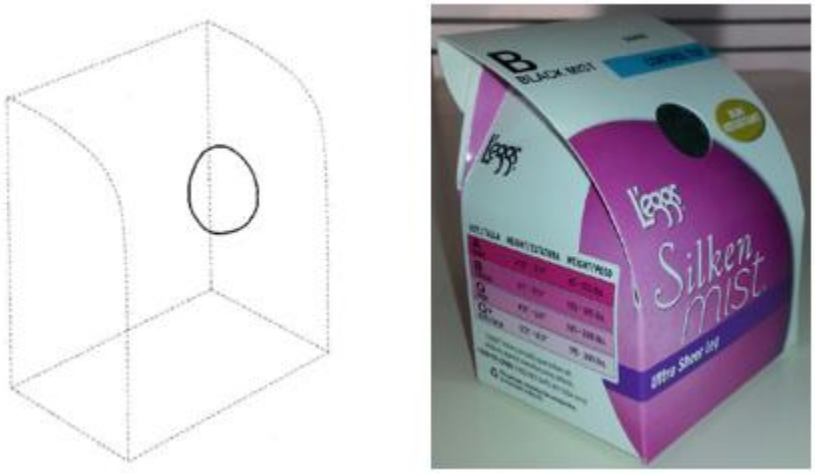
(Figure 1)

Next up, nontraditional marks can include product packaging. Here are two examples of successful claims to product packaging in the fashion industry. First of all, here is a package for a ring, and you can see on the left-hand side of the screen how this trademark is presented in the registration. And then on the right-hand side of the screen, you see how this particular package appears in the marketplace. This isn't a terribly elaborate package, but it does have at least some creativity reflected in it. A high degree of creativity isn't necessarily a prerequisite for trademark protection for a package, and here's an example showing why that's the case.



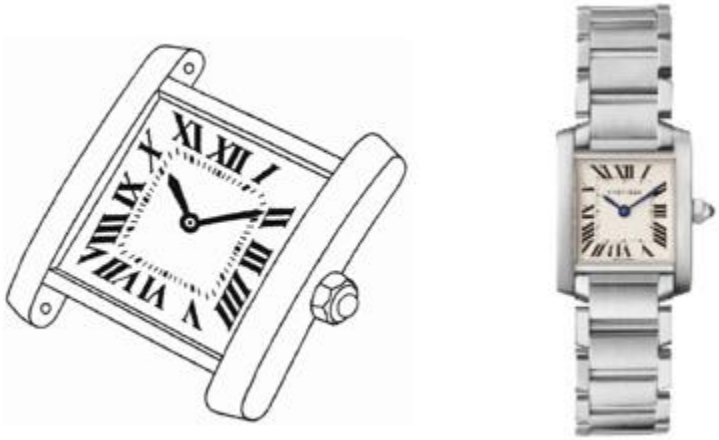
(Figure 2)

Another packaging trademark that has successfully been registered in the United States Patent and Trademark Office. You can see on the left-hand side of the screen how this mark is presented in the certificate of registration, and then on the right-hand side of the screen, you see how it appears in the marketplace. Here, you have a trademark claimant that has successfully sought and received protection for the hole in a package through which the product can be taken out. In this case, the product is pantyhose. Again, these are two examples of how packaging can be protected as a nontraditional mark in the fashion industry.



(Figure 3)

Next up is product design. The configuration of particular products can be protected as trademarks and service marks. In one sense, we're talking here about the product itself. You may be familiar with this representation of a watch by Cartier. This is covered by a U.S. trademark registration. You can see how it's presented in that registration on the left-hand side. And again, on the right-hand side of the screen, you can see how this product actually appears in the marketplace.



(Figure 4)

Protection for a product design might consist of this type of presentation. But it might also attach to ornamentation attached to the product. Here's an example of that. This is a trademark registration owned by Tory Burch. And you can see that this isn't necessarily a claim for protection to this entire shoe, but it is a claim to protection of the ruffles appearing on the side of the shoe associated with the laces.

(Figure 5)

Here's another example of that. You frequently see producers of clothing successfully claim protection in the ornamental stitching that they incorporate into their products. And you can see here how that kind of stitching appears in the marketplace on the right-hand side of the screen. And on the left-hand side, you can see how it appears in this trademark registration. This is probably the most common type of successful claim to a nontraditional mark in the fashion industry, namely, ornamentation attached to clothing.

(Figure 6)

But the product design can also include a particular texture or the appearance of a particular texture. Here is an example of such a claim of successful rights to a mark falling into this category. This is a Dior trademark registration, and you can see in the upper half of the screen how the mark is presented in the certificate of registration issued by the United States Patent and Trademark Office. You can look at this presentation and think well, what this probably consists of is the ornamentation, the texture, that has been embossed or otherwise incorporated into clothing, and it's certainly the case that Dior has done just that. But it's also the case that this registration covers sunglasses. If you look at the earpiece on this particular pair of sunglasses, you can see what's going on here. The earpiece has the appearance of something that looks soft, but it really is embossed plastic.

It's been molded into this product, and this also is an element of a fashion product that has been successfully protected under the U.S. Law.

(Figure 7)

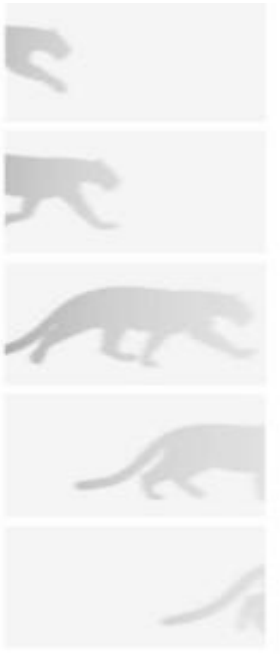
Protection also can attach to the colors of particular products. An outstanding example of that under the U.S. Law is what Christian Louboutin has accomplished with the red soles of his shoes. That red sole presentation is the subject of a federal trademark registration in the United States. Again, you can see how it appears in the registration on the left-hand side of the screen and how it appears actually in the marketplace on the right-hand side of the screen.

(Figure 8)

Protection for nontraditional marks can even extend to sounds used in a particular industry. I had difficulty finding a good example of a sound mark in a fashion-related context. But let's say you've been hired by Lucas Film or Disney to produce masks corresponding to the appearance of Star Wars characters. As long as you're doing that, why not claim sound mark protection in this particular mark? Here, you have a fashion accessory of sorts that makes a sound, and the producer of this particular mask has successfully registered the sound in the United States Patent and Trademark Office.

(Figure 9)

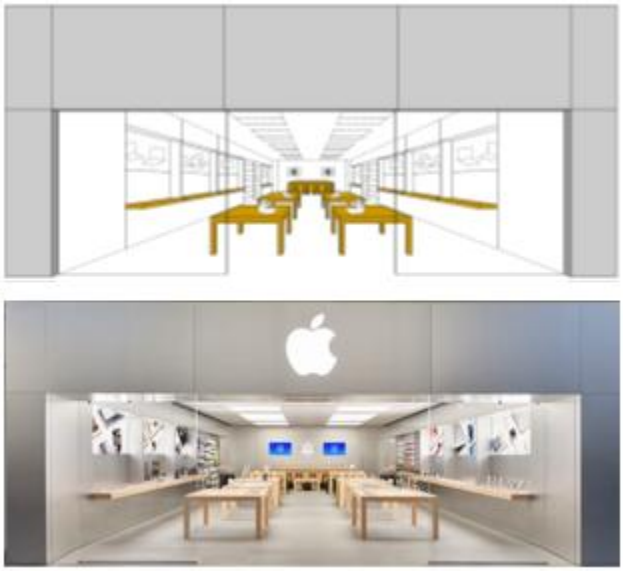
You can even successfully seek protection for motion marks under the U.S. Law. You may be familiar with the panther that has been incorporated into Cartier products and Cartier advertising for decades. Cartier has successfully registered a motion mark consisting of three seconds of a stylized panther walking across the screen. When you register this type of mark in the United States Patent and Trademark Office, you have to depict the mark in a series of still shots. You can see that here on the left-hand side of the screen. You can see the animal coming in from the left, proceeding across the graphic, and then disappearing on the right-hand side.



(Figure 10)

Finally, although not necessarily a fashion item, it is relatively common for the

United States trademark owners to successfully pursue protection for the interior and exterior retail space in which they provide their goods and services. Probably the best-known example of that under United States law is the federal trademark registration that Apple has secured for the configuration of its Apple Store. Here, you have that registration on the top half of the screen. You can see how this service mark is presented in the service mark registration, and, at the bottom half of the slide, you can see how that presentation actually appears in the marketplace.



(Figure 11)

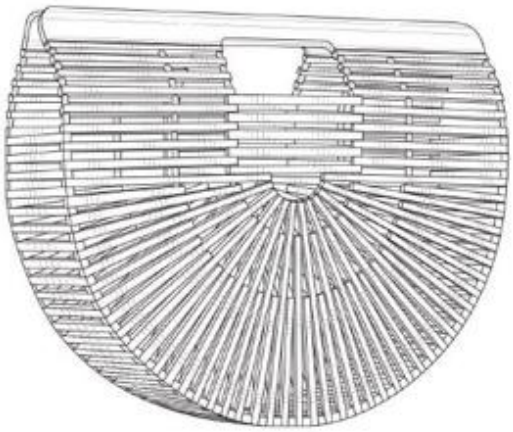
Then here's another example of that. You may know that Bulgari has invested a good deal of money in its flagship store in New York on the 5th Avenue. You can see that store on the right-hand side of the screen, and Bulgari has actually taken one element of that storefront, the repeated presentation, and secured a United States service mark registration for that presentation. You can see what's covered by that registration on the left-hand side of the screen.

(Figure 12)

Having suggested to you that any number of categories of claimed marks might

qualify for protection under United States law, it's important to recognize that claimants to protection of nontraditional marks do face certain challenges. The primary one is that it often is difficult to prove the distinctiveness required for a nontraditional mark to qualify for protection. Again, distinctiveness, you may remember, is the requirement that consumers recognize a claimed nontraditional mark *as* a mark.

Some of the problems associated with the claims of distinctiveness for nontraditional mark are that the nontraditional mark may be considered generic for the particular category of goods and therefore not protectable under any circumstances. What does a generic nontraditional mark look like? It could look like this. This is a citation to a failed application to register the wooden Japanese style clutch purse that you see on the screen. The United States Trademark Trial and Appeal Board found that this claimed configuration was generic. Why did it do so? This configuration is generic because it has been used for hundreds of years for these types of purses. As a consequence, this configuration was deemed unprotectable under the U.S. Law.



In re Jasmin Larian, LLC, 2022 U.S.P.Q.2d 290 (T.T.A.B. 2022)

(Figure 13)

Proving distinctiveness can be difficult for another reason, which is that, although there are some categories of nontraditional marks that can qualify as inherently distinctive, inherently distinctive designations of the source from which they come, others cannot be found inherently distinctive under the U.S. Law. And the two main examples of that are product designs and colors. Because they cannot be inherently distinctive, they can only be protectable if they are found to have acquired distinctiveness. And they also must have acquired distinctiveness before someone else comes along and copies them. Because of this, claimants to product designs and colors as trademarks should emphasize those claimed marks in their advertising to draw consumers' attention to them.

How can you do this? Here's an example. This is a federal registration covering a flap appearing on the back of denim pants. This registration has been cancelled since it issued, but nevertheless, it's a good example of how you can do this. Here is what the claimant did to emphasize to consumers that this presentation was a protectable trademark. You can see, and I have it flagged with a red arrow, that the claimant here

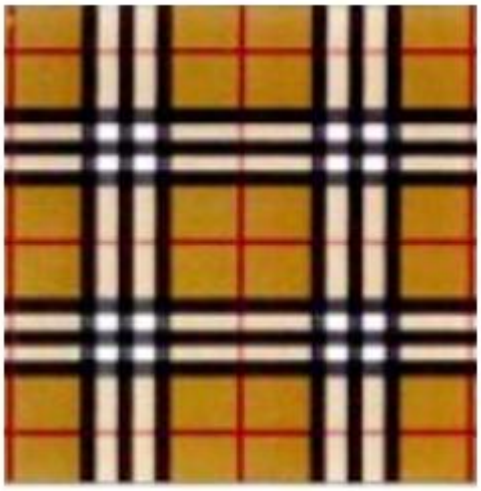
encouraged consumers to look for the distinctive design element. You can see the advertising emphasizes the design element well. Again, this is a very good example of how to go about this.

(Figure 14)

(Figure 15)

There also is another example as well, and that is what the company Burberry does. I think most of us are familiar with the plaid presentation incorporated into all sorts of Burberry goods. That presentation is the subject of numerous United States trademark registrations. How did Burberry successfully establish the distinctiveness of this plaid pattern? Again, this company has a very well-organized way of drawing consumers' attention to the plaid as a trademark. One way in which it does this is it affirmatively says this is a trademark of the company in its labels. You can see an example here in the form of the express recitations that the Burberry check, the equestrian knight device, all are trademarks belonging to Burberry. Burberry also does a very good job of incorporating this plaid pattern into its retail store presentations. Here, you see an example of that on the right-hand side of the screen. Then Burberry, for good measure as well, presents these

plaid designs on its packaging even if they are not necessarily incorporated into the products shipped in the packages.



(Figure 16)

(Figure 17)

(Figure 18)

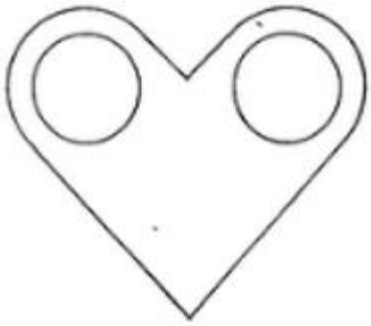
I mentioned a minute ago that Christian Louboutin had successfully registered the color red as it appears on the soles of women's shoes. How did it go about emphasizing that this color red was a trademark of the company? Well, one way in which it did so is it incorporated this presentation into all sorts of promotional materials including its letterhead, which you see on the left-hand side of the screen. This happens to be a handwritten note from Mr. Louboutin himself. And you can see that at the top of this note off to the left-hand side, that his letterhead includes this particular presentation of the color red. On the right-hand side of the screen, you see an enlarged business card of somebody with the company, and you can see on either side of the business card this same presentation again, emphasizing again and again and again in the company's materials and its advertising that it's claiming protectable rights to this design even if these presentations aren't accompanied by the same sort of affirmative claim to protection as we saw in the Burberry tag.

(Figure 19)

Another obstacle to proving protectable rights to a nontraditional mark is the requirement that the mark be nonfunctional. There are a number of things about which you have to be careful if you're claiming protection in a product design. First of all, if

you previously have secured a utility patent for your design, the disclosure of that patent may be very powerful evidence that what you're claiming is functional and therefore unprotectable. By the same token, if you have emphasized the utilitarian advantages or functional advantages of your design in your advertising, that too may be something that can be used against you. If, as it turns out, there are very few commercially viable competitive alternatives in the marketplace, that also is evidence of functionality, as is evidence that your particular design is cheaper or more economical to manufacture than competing ones. All of these considerations come into play in the general inquiry as to whether or not your design does something. If it does something more than having aesthetic appeal, it may well be functional and therefore unprotectable.

What does a functional fashion item look like? Here's an example. This is the pendant that hangs off of a necklace. It was once covered by a registration in the United States Patent and Trademark Office. But that registration was ordered cancelled by a court. Why? It's because this particular configuration does something. It's shaped as a heart. Yes, that may be decorative, but the two holes in the left and right-hand upper corners are where the chain feeds into that allows this to be hung from somebody's neck. That sort of utilitarian feature is evidence of functionality so the court found that this design impermissibly functional.



(Figure 20)

Finally, it sometimes is difficult to prove infringement of a nontraditional mark even if you've successfully established that you have protectable rights to that mark. The test for whether your rights have been violated under United States law is generally whether a defendant's use is likely to cause confusion. In other words, are consumers likely to confuse the party's products and think that one party's product comes from the other or that there's some other kind of relationship between the parties? Again, proving that can be difficult for several reasons.

First, when you're talking about the infringement of conventional word mark and the plaintiff is able to demonstrate that the defendant has intentionally copied that word mark, that type of evidence almost always weighs in the favor of a finding of infringement. But it sometimes doesn't when you're talking about nontraditional marks. In the nontraditional mark context, courts sometimes hold that evidence of intentional copying is entitled to less weight.

The same thing is true if you, as a plaintiff, have evidence of actual confusion between the parties' marks. In the word mark context, that always favors a finding of infringement very strongly. But again, sometimes courts will discount that evidence in the nontraditional mark context. Finally, especially where product designs are concerned,

the United States courts often hold that a defendant's use of its own name on a product can prevent likelihood of confusion from occurring.

What are the key takeaways if you're interested in protecting nontraditional marks under United States law? They are generally that there are no insurmountable obstacles to that protection, including the protection of nontraditional marks in the fashion industry. But establishing the prerequisites for that protection usually is more difficult than doing so to protect conventional work marks. And for that reason, brand management techniques are as important, if not more important, in the non-traditional mark context. In other words, it's important to do the same things to protect nontraditional marks as it is to protect your conventional word marks.

Thank you very much for your attention today. I appreciate the opportunity to speak with you.

If you have any questions about this presentation, feel free to send them to the email address that appears on the screen. That's TDavis@KilpatrickTownsend.com.

And again, thank you very much.

Topic: The IP Prosecution Strategies for Non-traditional Fashion-related Trademarks in EU and Italy[1]

Speaker: Rita Tardiolo (Partner, Bird & Bird Honghu Law Firm in Milan, Italy)

I am Rita Tardiolo. I'm an IP lawyer and I work in the IP practice of Bird & Bird, Milan Office, Italy. I will try to briefly explain in the next 20 minutes, more or less, which are the IP prosecution strategies for fashion-related unconventional marks in the European Union and Italy.

First of all, what is the legal framework in Europe? We have to go back to European Regulation 2017/1001 (EUTMR), which introduces a new definition for the European Union trademark, abolishing the graphical representation requirement. In particular, Article 4 of EUTMR states that an European Union trademark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colors, the shape of goods, or of the packaging of goods, or sounds, provided that such signs are capable of (a) distinguishing the good or services of one undertaking from those of other undertakings; and (b) being represented on the Register of the European Union trademarks in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor. The graphical representation requirement is not there anymore, and we will see that this has allowed trademarks other than the graphical ones to be included in the protection.

The other important regulation at European Union level is the Implementing Regulation of 2018/626, one year later, which contains general principles about types of marks and specific representation requirements. In particular, Article 3 states that the trademark shall be represented in any appropriate form using generally available technology, as long as it can be reproduced on the Register in a clear, precise, self-contained, easily accessible, intelligible, durable and objective manner so as to enable the competent authorities and the public to determine with clarity and precision the subject matter of the protection afforded to its proprietor. The representation of the trademark shall define the subject matter of the registration.

As far as Italy is concerned, we have to look at Legislative Decree 30/2005, as subsequently amended, which contains the Italian IP Code, and in particular at Article 7, which is about the subject matter of registration and reproduces the same rule in force at European Union level I mentioned before.

What are the types of unconventional trademarks? We have sound marks, color marks, pattern marks, shape marks, position marks, motion marks, multimedia marks, hologram marks, smell /olfactory marks, taste marks, tactile marks, layout of a retail store and tracer marks. We will see, for each of them, which are the characteristics they must have to be registered.

The definition of "sound mark" is a trademark consisting exclusively of a sound or combination of sounds. How to represent it? Through the submission of an audio file

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[1] Recommended reading by the Deputy Editor-in-chief: Paige Holton, *Intellectual Property Laws for Fashion Designers Need No Embellishments: They Are Already in Style*, 39(1) Journal of Corporation Law 415, 415-430 (2013-2014); Violet Atkinson & Viviane Azard et al., *A Comparative Study of Fashion and IP: Trade Marks in Europe and Australia*, 13(3) Journal of Intellectual Property Law & Practice 194, 194-211 (2018); The Bird and Bird IP Team, *Fashion-related IP Decisions Round-up 2020*, 16(6) Journal of Intellectual Property Law & Practice 595, 595-625 (2021).

reproducing the sound or an accurate representation of the sound in musical notation. However, we have to consider that in practice current requirements are: (i) musical notation (with optional sound file) or (ii) a sonograph, which must be accompanied by a sound file. No description is possible. The admitted formats are JPEG and MP3 with a maximum of 2MB of capability. The office requirements do not allow the sound to stream or loop. An audio file may be submitted only in e-filings. Filing of an electronic audio file separate from the application is not accepted; and if the applicant submits both an audio file and musical notations, it will be asked to choose which of the two it wishes to retain.

What have decisions at European level said about sound marks? A very interesting decision is the judgement on September 13, 2016, Case T-408/15, Globo Comunicação and Participações S/A v. European Union Intellectual Property Office. In this judgement the General Court stated, among other things, that "it is necessary for the sound sign in respect of which registration is sought to have a certain resonance which enables the target consumer to perceive and regard it as a trademark and not as a functional element or as an indicator without any inherent characteristics. That consumer must thus regard the sound sign as having the ability to identify, in the sense that it will be identifiable as a trade mark" and that "A sound sign which is characterised by excessive simplicity and is no more than the simple repetition of two identical notes is not, as such, capable of conveying a message that can be remembered by consumers, with the result that consumers will not regard it as a trade mark, unless it has acquired distinctive character through use… Accordingly, the mark applied for will be perceived by the relevant public only as a mere function of the goods and services covered and not as an indication of their commercial origin." Moreover, according to this decision "a trademark consisting of sounds resembling a ringing sound cannot perform an identifying function unless it includes elements capable of distinguishing it from other sound marks"; however, it is not necessary for that mark to be original or fanciful. It has to be distinctive.

In another case from the General Court, in its judgement of July 7, 2021, Case T-668/19, *Ardagh Metal Beverage Holdings GmbH & Co. KG v. European Union Intellectual Property Office*, stated that "the criteria for assessing the distinctiveness of sound marks are therefore no different from those applicable to other categories of marks." It is necessary for the sound sign in respect of which registration is sought to have a certain resonance which enables the target consumer to perceive again, the same principle indicated above, and regard it as a trademark and not as a functional element or as an indicator without any inherent characteristic.

The definition of "color mark" is a trademark consisting exclusively of a single color without contours. How to represent it? A reproduction of the color and an indication of that color by a reference to a generally recognized color code. Currently, a color code is obligatory. Description is not required, and the format admitted is JPEG. This is for the single color. The definition of a "combination of colors" is a trademark consisting exclusively of a combination of colors without contours. How to represent it? A reproduction that shows the systematic arrangement of the color combination in a uniform and predetermined manner and an indication of those colors by a reference to a generally recognized color code. A description detailing the systematic arrangement of the colors may be added.

An example of a color trademark is the "Ferrari red." I think everybody knows it.

The use in concrete terms of such a color which has been used for decades by Scuderia Ferrari in the sport industry has assumed an absolute qualifying value. Other examples are the "Tiffany blue", the Gucci's green/red/green ribbon mark, the red of Louboutin's high-heeled shoes which have been all recognized as valid color trademarks. On the contrary, we have two examples of contra decisions, one of which was issued on March 18, 2008, by the Italian Supreme Court. The Italian Supreme Court, in this case, said that the possibility of registering trademarks for individual monochrome colors is limited by the general interest in not unduly restricting the availability of colors of other operators who offer similar or the same kind of goods or services. The other decision was issued by the European Union Court of Justice, Case C-521/13 P, *Think Schuhwerk GmbH v. UAMI*, who dismissed the appeal against the decision of the General Court, thus confirming the EUIPO First Board of Appeal's finding that the use of red aglets on shoe laces would not make an impression which differed substantially from the normal configuration of lace-up shoes… the consumer would see no more than another variation in shoe design and, therefore, he/she would not perceive the mark for which registration is sought as an indication of the origin of the goods.

The definition of "pattern mark" is a trademark consisting exclusively of a set of elements which are repeated regularly. How to represent it? It must be represented like a reproduction showing a pattern of repetition. The description is optional, and again, admitted format is JPEG. The distinctiveness requirement may not always be fulfilled at the very outset. In principle, distinctiveness may be however acquired through the use made of the sign and the resulting effect on consumer perception. Here you have some examples of pattern marks by Guccio Gucci, Missoni, Louis Vuitton and Burberry Limited. They are very famous pattern marks.

I want to talk about a recent decision of the court of Milan about the repeated G pattern marks where the court said that the above mark does not have a particular aesthetic value and ornamental merit such that it is a determining factor in consumers' purchase choices. Rather, it appears to be a relevant element in the choices of purchase by virtue of its distinctive force as a sign that recalls in the mind of the consumer the Gucci production. This is the main reason why this trademark has been protected.

Other examples of unconventional marks are the shape marks, such as the Birkin bag of Hermes and the Tiffany earrings. There are very interesting decisions also about shape marks. The definition of a "shape mark" is a trademark consisting of, or extending to, a three-dimensional shape, including containers, packaging, the product itself, or their appearance (the term "extending to" means that shape marks may cover not only the shapes per se, but also shapes that contain other elements such as word elements, figurative elements, or labels). The representation must be a graphic reproduction of the shape, including computer-generated imaging, or a photographic reproduction that may contain different views. Where the representation is not provided electronically, it may contain up to six different views of the same shape.

Some examples are the very famous lipstick of Guerlain and the inverted omega of Ferragamo. As for important decisions concerning these trademarks, the court of Florence, with decision dated May 24, 2018, No. 1539, declared that Ferragamo's inverted omega is a renowned trademark, it being "a sign that imprints itself on the minds of consumers who automatically associate it with Ferragamo and its products so much so that it has become the general trademark of the entire production of this fashion house,

and so much so that it has such an extensive market distribution that is known by almost all consumers." This is the main reason why this trademark has been protected.

We have to consider about shape marks what are the limits. Probably you know them, but they are very well explained in Article 7 of EUTMR that excludes from registration signs that consist exclusively of (i) the shape or another characteristic that results from the nature of the goods themselves; (ii) the shape or another characteristic of goods that is necessary to obtain a technical result; or (iii) the shape or another characteristic of the goods that gives substantial value to the goods. Regardless of whether that particular shape or another characteristic might actually have acquired distinctive character in the marketplace. In front of these occurrences, you cannot gain protection for a shape mark.

As for position marks, a very well-known example of position mark is the red stripe of Prada which is placed longitudinally along an item of footwear. Probably everybody knows it. The definition of a "position mark" is a trademark consisting of the specific way in which the mark is placed or affixed on the goods. It has to be represented by means of a reproduction which appropriately identifies the position of the mark and its size or proportion with respect to the relevant goods. The elements which do not form part of the subject matter of the registration shall be visually disclaimed preferably by broken or dotted lines to allow the public to understand where the position inside the product is. What is the problem with this trademark? An objection can be raised under Article 7 of EUTMR for those goods on which the positioning of the mark is unclear. For example, if a position mark is applied for in respect of clothing, footwear, and headgear, but the representation identifies the position of the mark on footwear only, an objection should be raised for clothing and headgear. In this case, the Office will notify a formality deficiency requesting the applicant to amend or delete the description, as the position of the mark must be clearly defined with respect to the relevant goods.

An interesting decision concerning position marks is the judgement issued by the General Court of June 15, 2010, Case T-547/08, *X Technology Swiss GmbH v. OHIM.* What are the interesting principles said here? The General Court said that "to the extent to which average consumers are not in the habit of making assumptions as to the commercial origin of goods on the basis of signs which are indistinguishable from the appearance of the goods themselves, such signs will be distinctive within the meaning of Article 7(1)(b) of Regulation No. 40/94 only if they depart significantly from the norm or customs of the sectors." So "it is necessary to determine whether the mark applied for is indistinguishable from the appearance of the product designated or whether, on the contrary, it is independent thereof."

You may raise a question which is what is the difference then between a shape mark and position mark? Should I ask for the registration of a shape mark or of a position mark? First of all, when assessing the application, the Office is bound to the information in the application form so what you write is what is binding for the Office. Secondly, position marks are similar to the categories of figurative and three-dimensional marks as they relate to the application of figurative or three-dimensional elements to the surface of a product. The decisive factor for the scope of protection of the mark is not the categorization of the sign in question as figurative, three-dimensional, or position sign, but the way in which the mark will be perceived by the relevant public in relation to the goods concerned. The way of perceiving the mark is liable to be influenced only by the

nature of the sign as registered.

Another decision about position marks which is very famous is the one about Adidas, i.e., judgement of the European Union Court of Justice of April 10, 2008, Case C-102/07, *adidas AG and adidas Benelux BV v. Marca Mode CV and others*. Probably you all know it. I will just highlight a passage. "Stripe motifs as such are available and may therefore be placed in a vast number of ways on sports and leisure garments by all operators." Nonetheless, said the courts, "the competitors of Adidas cannot be authorized to infringe the three-stripe logo registered by Adidas by placing on the sports and leisure garments marketed by them stripe motifs which are so similar to that registered by Adidas that there is likelihood of confusion in the mind of the public. It is for the national court to determine whether such a likelihood of confusion exists."

The motion mark is a trademark consisting of, or extending to, a movement or a change in the position of the elements of the mark (the term "extending to" means that, in addition to the movement itself, the mark may also include words, figurative elements, labels *etc.*). How to represent it? By submitting a video file or a series of sequential still images showing the movement or change of position. The description is optional, previously it was mandatory. For still images, they may be numbered or accompanied by a description explaining the sequence.

Let's see some examples of motion marks that have been rejected. The first one was a trademark comprising a moving image consisting of a toothbrush moving towards a tomato, pressing onto the tomato without breaking the skin, and moving away from the tomato. EUIPO rejected the application as it was not possible to establish the precise movement from the description provided along with the representation. The other one was also rejected. It was a trademark consisting of a representation of an animated sequence on a plain background, namely a door that can be opened in three stages. The EUIPO rejected the application because a sign such as the one at issue that consists of the opening and closing of a door by pushing buttons on the left or right of the latter is subject to the consumer's personal interpretation. It cannot fulfil the clarity and precision requirements under Article 4 of EUTMR because each consumer would interpret it in a different way and would be subjected to a different sequence of the movement mark. Here the ground for rejection was that these kind of motion marks are subject to personal interpretation by the public.

The definition of "multimedia mark" is a trademark consisting of, or extending to, the combination of image and sound (the term "extending to" means that the mark may also include words, figurative elements, labels, etc. in addition to the image and sound).

EUTM application No. 018117130 was rejected. Why was this rejected? For many reasons but one very important is that, as stated by the EUIPO, the sign consists merely of a non-distinctive image (including verbal, graphical, colour and movement/changes) and sound element which will neither individually nor in combination be interpreted by the targeted consumer as indicating the commercial origin of the goods and services applied for. Therefore, due to the impression produced by the mark as a whole, the connection between the relevant goods and services and the mark applied for is not sufficiently indirect to endow it with the minimum level of inherent, again, distinctiveness required under Article 7(1)(b) of EUTMR.

A hologram mark is a mark consisting of elements with holographic characteristics. You can represent it by submitting a video file or a graphic or photographic reproduction

containing the views which are necessary to sufficiently identify the holographic effect in its entirety.

Smell/olfactory marks. It is currently not possible to represent a smell in compliance with Article 4 of EUTMR as the subject matter of protection cannot be determined with clarity and precision with generally available technology. Article 3(9) of EUTMR specifically excludes the filing of samples or specimens as suitable representation. Examples of non-satisfactory means of representation of a smell are: (i) chemical formula, which is not suitable to represent a smell as only specialists in chemistry would recognize the odor in question from such a formula; (ii) representation and description in words, again, not suitable. The representation requirements are not satisfied by a graphic representation of the smell, a description of the smell in words, a combination of both graphic representation and description of words. An example of an olfactory mark applied for was the combination of a figurative element, the image of a red strawberry, and a description in words "smell of ripe strawberries." What the European Union General Court said, in judgement of October 27, 2005, Case T-305/04, *Eden SARL v. EUIPO*, about the word element is that since the description of "smell of ripe strawberries" could refer to several varieties and therefore to several distinct smells, it is neither unequivocal nor precise and does not eliminate all elements of subjectivity in the process of identifying and perceiving the sign claimed. About the figurative element, the court said that since the image of a strawberry contained in the application for registration represents only the fruit which emits a smell supposedly identical to the olfactory sign at issue and not the smell claimed, that does not amount to graphic representation of the smell. As for the combination, the court said that since the two elements are not valid graphic representations, neither can their combination be a valid representation.

More or less, we have the same difficulties about taste marks and tactile marks. Indeed, it is not possible to represent a taste in compliance with the requirements of the EUTMR that specifically excludes the filing of "physical" samples, and the subject matter of protection cannot be determined with clarity and precision with generally available technology. This is mainly the reason why these kinds of trademarks cannot be registered.

We can protect the layout of a retail store. In the first case, we have the Apple store, and in the other case, we have the Italian Supreme Court's decision dated of April 30, 2020, No. 8433, on the Kiko v. Wycon stores. The difference is that in the first case, the court said that we have a three-dimensional trademark. In the second case, the interior decoration was protected by Italian copyright law.

The last category of unconventional marks are tracer marks. Tracer marks are colored lines or threads applied to certain products. They are popular in the textile industry. The description contained in the application for registration indicates that the mark is a "tracer mark." Examples of registered tracer marks are EUTM 007332315 and 003001203.

To conclude, how difficult is it to register these kinds of trademarks? First of all, it is difficult because there is a growing relevance of the absolute ground for refusal/invalidity concerning signs that consist exclusively of a shape or another characteristic that gives substantial value to the goods. Based on this ground, there are many refusals.

The other one is distinctiveness threshold. Only a mark which departs significantly from the norm or customs of the sector of the goods and services at issue and thereby

fulfils its essential function of indicating origin is not devoid of any distinctive character. This is the other main reason on the basis of which unconventional trademarks are often rejected.[2]

In conclusion, of course there is the public interest justification underpinning both the substantial value absolute ground as well as the other functionality grounds and the approach of distinctiveness of marks. The risk is to unduly restrict competition, and the other thinking is that trademark law should not become a means to extend unduly and potentially perpetually the IP protection available under other IP rights. According to the European Union Court of Justice, the aim of the functionality grounds for refusal is to prevent the exclusive and permanent right conferred by a trademark from being used to perpetuate without limitation in time other rights which the European Union legislature wished to subject to time limits expiry. This is the second main reason. The other one is to prevent trademark rights, as I said above, from granting an undertaking a monopoly on technical solutions or functional features of a product which a user is likely to seek in the products of competitors so as to form an obstacle preventing competitors from freely offering for sale products incorporating such technical solutions or functional characteristics in competition with the owner of the trademark.

The road ahead, what we will see probably. Well, of course we can try to ask trademark protection instead of copyright protection or instead of only copyright protection. Indeed, you can have different IP rights' protection provided, of course, that the relevant requirements are met, such as protection under both design and trademark law. And creative protection and enforcement strategies. When you have an object, a trademark, a sound or a packaging, whatever, you have to think in a creative way trying to understand which are the best instruments currently offered and probably the best way is to try to gain protection having in mind which are the limits that have been underlined and shaped by now for these unconventional trademarks, which are however very important trademarks. We hope we will have more protection for them in the future.

Thank you.

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[2] With respect to Louis Vuitton's chequerboard pattern, two European Union proceedings are relevant. As for the first one, EUIPO Board of Appeal's decision in Case R 274/2017-2 that rejected the mark was annulled by the General Court, with judgement of June 10, 2020, Case T-105/19, Louis Vuitton Malletier v. EUIPO – Wisniewski, because, according to the General Court, the Office erred in law by choosing to examine only a part of the evidence submitted by the applicant on the acquired distinctive character through use in all European Union Member States and to disregard the other pieces of evidence, without providing any explanation for that choice. General Court pointed out, among other things, that the Office was required to carry out a global assessment of all the relevant evidence, as no provision of Regulation (EU) 2017/1001 requires that the acquisition of distinctive character through use be established by separate evidence in each individual Member State. As for the second one, judgement of the General Court of October 19, 2022, Case T-275/21, Louis Vuitton Malletier v. EUIPO – Wisniewski, which dismissed the action as -*inter alia*- the applicant had not demonstrated that the mark had acquired distinctive character through its use in all European Union Member States, was appealed before the European Union Court of Justice, Case C-788/22 P, whereby the appellant claimed differences in the General Court's assessment of distinctive character acquired through use with respect to case T-105/19. With order of March 21, 2023, the European Union Court of Justice found the appeal not allowed to proceed as -*inter alia*- applicant did not explain where the alleged contradiction lied.

Unit 2: Protection and Litigation Trends of Non-Fungible Tokens and Fashion Brand Assets in Metaverse

Moderator: Longyan Ni

Topic: NFT Related Litigation[1]

Speaker: Rob Potter (Partner, Kilpatrick Townsend & Stockton LLP)

Hello, everyone. My name is Rob Potter. I'm a partner here in New York at Kilpatrick Townsend & Stockton LLP. I practice in copyright and trademark litigation and increasingly in connection with NFTs. I'm very happy to be here today to give you an update on some key NFT litigation that's been happening in the United States, or as I like to call it What the Heck is Going On?

A couple of notes before we begin. You'll see there's about seven cases involving NFTs in the Federal Courts of the United States that we're going to talk about today. And you'll see that three of them are already resolved through settlement. Four of them remain pending. You'll also notice that each of these cases has been filed either in the Southern District of New York or in the Central District of California, which makes sense because New York City and Los Angeles are some of the biggest entertainment cities in the country and where a lot of these disputes are likely to arise. Let's jump right into it.

The first case was indeed an entertainment case brought in June 2021, in the Southern District of New York by Roc-A-Fella Records, Jay-Z's record label, against Damon Dash. Mr. Dash was one of Jay-Z's former business associates, and Mr. Dash was advertising that he was going to sell as an NFT the copyright to Jay-Z's debut album Reasonable Doubt in connection with celebrating the album's 25th anniversary. The problem, as Roc-A-Fella Records pointed out, is that Mr. Dash does not own the copyright to that album, and so he's unable to sell it, whether as a NFT or in any other way. Not surprisingly, this case settled in June 2022.

A similar case arose in November 2021 in the Central District of California when Miramax, the movie studio, sued Quentin Tarantino, the famous movie director, regarding the Pulp Fiction film that they had made together many years ago. Mr. Tarantino was advertising that he was going to sell, and I believe did sell, NFTs that were associated with unaired scenes and some materials from the script and other things associated with Pulp Fiction. Miramax took the view that it owned the intellectual property rights to all of those elements and that any rights that had been reserved to Mr. Tarantino were very limited and did not include NFTs. This case settled in September 2022. Both of these cases are fairly straightforward and not really NFT-specific cases insofar as they simply involved allegations that someone was selling intellectual property for which they did not own the rights.

The next case that has been brought and resolved was also brought in the Central District of California. That would be in March 2022. This case is called Halston Thayer v.

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[1] Michael D. Murray, *Trademarks, NFTs, and the Law of the Metaverse*, 6(3) Arizona Law Journal of Emerging Technology 10, 10-30 (2022-2023); Grace Hodges, *How High Fashion Brands and NFTs Are Changing the Future of The Art Market and Trademark Prosecution*, 33(3) DePaul Journal of Art Technology & Intellectual Property Law 1, 1-13 (2023).

Matt Furie, et al. and alleges fraudulent inducement. The fact pattern here is a little interesting. Matt Furie, the defendant, is the artist responsible for Pepe the Frog, who is the character shown in the image on your screen. Mr. Furie advertised that he was going to release a one of a kind, single, exclusive, and unique NFT associated with this particular image of Pepe the Frog. It was expected to have some value, and Mr. Thayer, the plaintiff, purchased this NFT from Mr. Furie for more than $500,000.00. A short time later, Mr. Furie and his associates caused to be released 46 additional NFTs associated with the same image, for free. Mr. Thayer was understandably upset that he had paid so much money for something that was later made available for free, and so he brought an action against Mr. Furie alleging fraudulent inducement. This case settled in August 2022. Again, you'll see that although this case nominally involves NFTs, it's not really an NFT case so much as is a case alleging fraudulent inducement under existing legal theories.

Now we're going to get into the active cases that are still pending in the United States. First is a case that was brought in July 2021. This case is known as Jeeun Friel v. Dapper Labs. Dapper Labs is the entity responsible for creating the very successful NBA Top Shot memories NFTs. If you're not familiar with Top Shot NFTs, these are essentially digital basketball cards. But unlike traditional basketball cards that can feature an image on the front and some statistics on the back, these cards—because they are digital assets associated with NFTs—can include all kinds of video and other multimedia elements that make them much more robust than the standard traditional basketball card.

The allegation is brought as a class action claim for securities fraud alleging that these Top Shot NFT products are actually securities that should be regulated by the Securities and Exchange Commission in the United States. The test to determine whether something is a security is three parts. It asks (1) is there an investment of money; (2) in a common enterprise; and (3) with the expectation of profits derived solely from the efforts of others? Dapper Labs claims here that these can't be securities because they are non-fungible collectibles, which they call digital basketball cards. And they say because each one is different and each one is necessarily going to be worth its own unique value, there can't be any sort of coordinated securities efforts here. For their part, the plaintiffs argue that fungibility is not required for investments and that here, these are not really collectibles and they've actually been marketed more as, and are serving as, true investments. Very interesting allegations, very interesting defenses. Dapper has filed a motion to dismiss this case on August 31, 2022. This motion remains pending at the time of this presentation, and we look forward to seeing how the court will rule.

Another very interesting case currently pending and involving NFTs directly is Hermés International v. Mason Rothschild. If you're not familiar with this case, it involves what's known as MetaBirkins NFTs. Mr. Rothschild, who fancies himself an artist of some sort, created what he calls MetaBirkins NFTs, and each of these NFTs, as you can see in the images here, depicts a Birkin bag of the type famously made by Hermés. For those who don't know, the Birkin bag is an enormously iconic and successful bag. The images here show that very bag, however with unique or furry designs that Hermés itself does not use. Hermés brought suit alleging that Mr. Rothschild's use of the trade dress and the trademarks associated with the Birkin bag in this context constitutes trademark and trade dress infringement.

An interesting point about this case, there was some discussion when NFTs first appeared as to whether existing trademark registrations for goods and services in the real

world, so to speak, could be used to assert infringement claims against uses made online or in the metaverse, or would brands have to register trademarks in classes specifically associated with online activity in the metaverse. I was certainly of the view that traditional trademarks should work fine and that you do not need to obtain specific trademarks. And in this case, Hermés notably brought its claims based on its real-world trademarks. It does not base its claims on any specific NFT trademarks. And neither Mr. Rothschild nor the court has yet made any issue with this because as I suspect, the real-world trademarks are plenty sufficient to go after similar digital goods online.

Here Mr. Rothschild, of course, disagrees with Hermés's allegations and in fact, brought a motion to dismiss the claims. Mr. Rothschild's argument is that because he has created artworks that include a famous trademark in the name, the appropriate test for infringement in this case is what's known as the Rogers v. Grimaldi test. This test came out of a Second Circuit case in 1989, and it asks, for allegedly artistic or expressive works, (1) is the trademark at least minimally artistically relevant to the product; and (2) does the use explicitly mislead as to content, authorship, sponsorship, or endorsement. Mr. Rothschild argued here that it fit both of the criteria. The court disagreed and denied the motion. The court held that the Rogers test should apply because digital images of handbags can represent artistic expression. But regardless of whether the use of the Birkin mark was minimally artistically relevant here, the court found that Hermés had adequately alleged that the MetaBirkin label was explicitly misleading and so it had stated a valid claim, which was all that it needed to show at this stage.

The parties then went through some short discovery. And just within the last two weeks, Hermés has moved for summary judgment arguing that it is entitled to judgment now without the need for a trial. And in doing so, it argues that it needs relief against both the images, which implicate the trade dress, but also the very NFTs themselves, i.e., the underlying smart contracts that reside on the blockchain because those are advertised as MetaBirkins and therefore, they too are infringing. This is important, and I think we're going to see more and more plaintiffs bringing their allegations in this way because if you bring your allegations only against the visual element, the digital asset associated with the NFT, the creator of the NFT can just change that asset but still market the same NFTs. Here, to avoid that, Hermés is going after the NFTs and the images to try to bring this all to an end. We will see how the court rules on Hermés's motion for summary judgment, and this is another one that we're watching closely.

The next case, also in the Southern District of New York, was brought in February 2022. This case was brought by Nike against StockX. I'll note that my firm, and myself directly, are representing StockX in this matter. We are co-counsel with the Debevoise & Plimpton law firm defending StockX. So, everything I'll share will, of course, be only publicly available information. Here the allegations involve trademark infringement and counterfeiting associated with StockX's introduction of what it calls its Vault NFT program. StockX is a sales platform online that allows users to sell collectible goods, primarily sneakers, that in the resale market can become worth lots of money.

StockX prides itself on the fact that when you shop on its site, you can trust that the products you're buying are authentic goods. The way that StockX does this is by personally investigating each and every product sold on its site. So, before I can sell a pair of shoes to someone else, I have to send those shoes to StockX. They will look at the shoes to make sure that they are as advertised, they're in the right condition, the right size

and, at least as far as StockX can tell, that they are not counterfeit. Only after StockX has performed this review will it then send the shoes on to the buyer and release the money to the seller. This is great for making sure that the shoes are genuine, but it takes time, and it adds layers of friction because now you have to ship the shoes and wait some period of time before you can complete the sale.

StockX came up with an idea to try to remedy this, and they called it their Vault program. StockX purchased a large number of very valuable sneakers on the resale market and put them in a climate-controlled, incredibly secure vault where nobody could access or harm them. Then instead of selling physical sneakers to its users, StockX offered instead an NFT. And the digital asset for each NFT, as you can see here on the left of your screen, showed a picture of the specific individual pair of sneakers that that NFT was associated with. This way, if someone wanted to sell the sneakers, they wouldn't have to move the physical pair to anyone else. They could simply transfer the NFT instantaneously and digitally. And if anybody ever wanted to redeem the NFT for the actual sneakers, then they could do so, and they'd receive the physical sneakers.

Nike took offense to this program because it believes that the NFTs, the digital assets associated with the NFTs, which feature a large, glossy photo of a Nike shoe, constitutes trademark infringement. They've also made some anti-counterfeiting allegations as well. StockX vigorously disputes these allegations, and as far as the NFTs go, StockX maintains its use of these images is certainly not infringement but rather is nominative fair use, the same type of fair use that resellers of any product can use when they show an accurate depiction of the products they sell. Indeed, StockX has argued in its answer that it is no different than major e-commerce retailers and marketplaces who use images and descriptions of products to sell physical sneakers and other goods online and which consumers see and are not confused by every single day. This case is currently in fact discovery, and we'll be keeping an eye on it as well, certainly.

Finally, the most recent active case is Yuga Labs v. Ryder Ripps. This one was filed just last June in the Central District of California, and it too has a pretty unusual fact pattern. If you're not familiar with Yuga Labs, they're the entity behind the Bored Ape Yacht Club. The Bored Ape Yacht Club is a series of collectible NFTs that include images of what they call bored apes like those shown on your screen made up of different elements. Some apes have different hats. Some have different shirts. Some have different sunglasses, things like that. They have become extremely popular and extremely valuable. Indeed, the rarest Bored Ape collectibles can sell for hundreds of thousands of dollars.

The defendant in this case is an individual who identifies himself as a conceptual artist named Ryder Ripps. Mr. Ripps launched an online campaign last April with videos and other postings alleging that Yuga Labs and the Bored Ape Yacht Club contained and celebrated Nazi imagery and iconography in some ways. On the heels of this, in May 2022, Mr. Ripps created his own set of collectible NFTs, called the Ryder Ripps Bored Ape Yacht Club NFTs, that looked identical in every way to Bored Ape Yacht Club NFTs, including the use of certain trademarks. Indeed, you can see here on your screen on the left at the top with the blue background is an authentic Bored Ape Yacht Club NFT. It's numbered 1058. You can also see on the right Ryder Ripps's version of that NFT looks identical and is also numbered 1058. Some of the NFTs include trademarks like these here where it shows Bored Ape Yacht Club and their logos, and that gave rise to the claims for common-law trademark infringement.

Now interestingly, there were no copyright claims here. And that may be because Yuga Labs doesn't believe it owns copyright in its Bored Apes because either it assigned those rights to its users or because the images were created by computer or perhaps it's that Yuga Labs never registered the copyrights and so would be unable to assert them in a lawsuit in any event.

Yuga Labs did bring a lawsuit trying to stop Ryder Ripps and his lookalike NFTs. Ryder Ripps responded by filing a motion to dismiss the case along with an anti-SLAPP motion. An anti-SLAPP motion is a motion brought under California law that basically claims that you are being sued only to silence you or to stop your public participation in certain topics of interest. And Mr. Ripps argues in this case that he's being sued to stop his spread of information about the alleged Nazi association with the Bored Ape Yacht Club assets.

Also of note, and in connection with the first active lawsuit we looked at, the Securities Exchange Commission in the United States announced just last week that it's launched a probe into Yuga Labs and whether its sale of digital assets violates federal law. This just underscores that NFT activity is becoming increasingly scrutinized in connection with securities law.

But in general, we've got a wide and interesting number of lawsuits already pending about NFTs, and I suspect we're going to see more and more as time goes on. If you have any questions about any of these, I'd be happy to answer them via email or even to speak directly at any time about NFTs. My contact information is here. Please don't hesitate to reach out. And otherwise, it's been a great pleasure to speak with you here today, and I appreciate the opportunity.

Thanks so much for your time and your attention. Have a great day.

Topic: Digital Transformation, Token Economy and NFT Qualitative[1]

Speaker: Jidong Chen (Associate Professor, Law School of Tongji University)

The topic I will share with you is the theory of balance between token economy and NFT bond. In this context, we will identify the legal nature of NFT. The digital economy we usually say is divided in three steps. The first step is the data becomes a resource, that is, it is discovered before it can be processed. That is to say, data becoming a resource is the process of discovering and exploiting the value of data. When we talk about NFT or other digital assets, we are actually talking about it in this sense. The other part of NFT is from asset to capital, asset value can be determined, and its value can be realized in the process of trading and circulation of data assets, that is, the value and use value of data assets can be capitalized. So, I think that's the rough part of the data economy that we normally understand inside China.

What about the relationship between the token economy and the digital economy? My basic understanding is that the evaluation of the value of digital assets has a premise, that is, the property in the real space should be authenticated. Certification economy must be discussed in the context of digital economy because it is the incentive mechanism in the whole blockchain space economy activities. Only with justice can the digital economy be done well because that is the real incentive. But the development of our digital economy is not dealing with this problem. Therefore, when we study data trading and NFT trading, we mainly discuss its financial attributes, which is a big problem and may need further study.

The NFT as a token is actually set up in the economic context of General Motors. Let's take a look at the case. The court believed that the NFT trading model is essentially a buying and selling relationship with digital content as the trading content. Therefore, he first defined that NFT transaction itself is a buyer-seller relationship, which is not too controversial. Next, he stated that what the purchaser had acquired was actually a property interest. Because he defined the alleged relationship as a transactional relationship. But the key is in how to further identify the legal nature of NFT under the property interests, which is what I would like to report to you today. Now we have a lot of theories, the data theory, the property object theory, the money theory, the security theory, and so on, but I don't think these ideas are possible because they're not discussed in the context of the token economy. So, I was wondering if my report might shed some new light.

The NFT itself is the result of asset certification. The generation of NFT in the blockchain space is actually a process of asset token, that is, transforming the assets in

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[1] Recommended reading by the Deputy Editor-in-chief: Müller & Julian Henrik, *Pathways to Digital Transformation: The Adoption of Emerging Technologies*, ETH Zurich (2022); Leon Pawelzik & Thies Ferdinand, *Selling Digital Art for Millions-a Qualitative Analysis of NFT Art Marketplaces*, https://www.researchgate.net/profile/Ferdinand-Thies-2/publication/361461561_SELLING_DIGITAL_ART_FOR_MILLIONS_-A_QUALITATIVE_ANALYSIS_OF_NFT_ART_MARKETPLACES/links/62b2d109d49f803365b0be12/SELLING-DIGITAL-ART-FOR-MILLIONS-A-QUALITATIVE-ANALYSIS-OF-NFT-ART-MARKETPLACES.pdf (accessed on October 4, 2023).

the real world into the digital token in the blockchain system, and transforming the asset equity into the digital form in the blockchain, which is the starting point where we can judge this issue in my opinion. For example, we use a smart contract to buy a car or a VCD copyright, the premise is that the VCD copyright or the value of the car, must be able to calculate, or another step back is that you have to be able to authenticate.

So what construction is the NFT after you get the result of tokenization? As we can see from this figure, everything is built on the basis of blockchain, including the issuance of domestic NFTs, which are either connected to the power supply or build their own alliance chain. Most of them are alliance chains. With this foundation comes the three elements of NFT. With the three elements, we say that the overall NFT points to the original data. Where did the original data come from? It describes the subject property. Then there is the question of where is the original data and the underlying property? At present, we know that it may exist on the chain, but the underlying property is more likely to exist off the chain, because of the cost and efficiency of storage. This is the picture I share with you which show how to identify the legal relationship that NFT represents in reality. The premise of discussing this problem is that there are two casting methods of NFT. The original casting method is that the creators directly create digital works of art through digital technology and encryption technology. Another derivative is that the author will have art works with traditional entity carriers in the real world, authorize NFT publishers to generate metadata, and generate NFT after the hash algorithm calculation. Having these two ways, we make a judgment, that is NFT itself represents the creditor relationship between the oblige and the platform. Why is that? Firstly, the establishment of service contract between platform and user is the legal fact that causes NFT relationship. The second is that the rights enjoyed by users must be recorded on the blockchain and must be recognized by others, so it has no effect on the world. It is essentially a claim right. What exactly is the content of the debt? I think there are three points. The first point is the problem by the creditors. NFT holder can be in accordance with the agreement shall enjoy the right of access to the underlying property, his rights to the other party claims can only be online at any time of observation, the right to enjoy painting or music works, and then he also obligated to unconditionally comply with the behavior of the platform, the meaning of the specification is subject to party management, and then have to pay. The trading platform itself has the obligation to manage, maintain and ensure the normal operation of the platform. It should respect users and freely use the platform without violating the code of conduct. After that, it has the right to charge fees and the right to deal with users in accordance with the regulations when they violate their obligations. Now let's talk about the embodiment of the claims, and you can see the right-hand side. The materialization of the debt itself is a matter of raw data from smart contracts and NFTs. NFT essentially reflects the right relationship is the creditor relationship, but the NFT itself is not the creditor, itself he is the creditor. This point should be distinguished. NFT is neither the rights itself, but also the object of rights is different from other related. In practice, we believe that most NFTs actually represent a kind of interest in digital multimedia files. NFT and its representative right object are also mutually independent in essence, and it itself is only used as the so-called debt certificate, which is also its core function. It is not the creditor's right power itself and not the object of the right, but just the proof of the right. For example, if there is obviously a copyright on a digital work, the copyright will eventually be minted. What

NFT itself refers to is the copy of the work, and the content represented by the right is the access right of the holder, so the relationship between the three can be clearly seen.

People have different opinions on how to view the NFTs themselves. The basic reason is that when we look at the NFTs from the perspective of the source of value, they are related to the underlying assets in terms of rights. There are really the same genes in terms of value. There are two judgments. The first judgment is that for the whole NFT, if you initiate a project, the NFT is the subject of the service contract, and the trading platform and the developer of blockchain technology have the obligation to ensure the normal access of users to it and its own security. The second judgment is for the legal relationship between the user and the debtor, NFT is the creditor certificate, so that the user can request the debtor to provide the corresponding services.

Thank you.

Topic: Protecting Copyright Law in Metaverse Community Clothing Design[1]

Speaker: Yang Gao (Assistant Professor, Master Tutor of Shanghai University of International Business and Economics)

2021 was known as the first year of the meta-verse, the meta-universe has been extended in many industries. As the fashion industry meta-universe has slowly begun to develop some new industries, so for clothing design has reached the meta-universe, is it a gimmick or a challenge? We can see that many design brands have opened the meta-verse clothing design link this year. In addition, some games in the meta-verse have also begun to invite some costume designers to design costumes for his characters. The first China Original Universe Costume Design Competition was also held in Wuhan.

My sharing today will expand on the following sections. First, the question that in the meta-verse community, can these clothing designs be protected, and how to obtain protection according to the current copyright law is raised.

First of all, let's take a look at the current situation of clothing design protection in traditional physical spaces. As a meta-universe space this virtual clothing, it usually has the following types when obtaining copyright law protection, the first may obtain the protection of a work of art, then the second is the protection of graphic works, if you want to obtain protection of works of art, you need to meet the two-step judgment method, these two steps of judgment method is related to a development concept of clothing design, then you can see through this series of screens that the concept of clothing design has changed from ancient times to the present, Returning to our modern digital era meta-verse era, its design concept has changed dramatically. In current judicial practice, costume design as a work of art needs to meet two points, the first is the separation standard of independent existence, and the second is the standard of artistic originality. So, what are the independently existing classification criteria? We explain it to you through some judicial practices. In this judgment, the court pointed out that if a garment is to obtain the protection of a work of art, it needs to realize that its physical design and its aesthetic design can be separated from each other. Then this requires an independent existence situation, that is, its artistic design can exist independently in its use function. So, there are two main kinds of separation here, the first is physical separation, what is physical separation? Here is a case of children's clothing design. The base color pattern of children's clothing design is camouflage pattern and there are two very beautiful logos attached to the clothing ready-to-wear. The plaintiff is suing about the issue of logo infringement. Due to the logo that is attached to the clothing after the completion of the clothing to play a decorative role, the physical we only cut or remove the logo and it does not affect the use of clothing at all. In this case, we believe that this physical separation criterion is satisfied. The next three cases will introduce the conceptual separation standard, which is also a major type of the second separation standard. Conceptual separation is less easy to determine and identify than physical separation criteria. Because

[1] Recommended reading by the Deputy Editor-in-chief: James M. Cooper, *Intellectual Property Piracy in the Time of the Metaverse*, 63(1) IDEA 479, 479-516 (2022-2023); Emily Huggard & Natalia Särmäkari, *How Digital-only Fashion Brands are Creating more Participatory Models of Fashion Co-design*, 10(4) Fashion, Style & Popular Culture 583, 583-600 (2023).

for this kind of clothing that is practical, aesthetic design has been integrated with functional design. We also say that clothing design should pursue the unity of beauty and practicality, so purely rely on conceptual separation, it is difficult to separate aesthetic design from practical function. Because it is easy to confuse the functional design of practical items themselves with the functional part enhanced by aesthetic design. So, first of all, in the first case of the sunset silk suitcase, the court pointed out that the combination of silk double-layer shirt and asymmetrical skirt on the shoulders of the clothing design in this case is a simple, light, comfortable and natural use of functionality. Therefore, in this case, the court held that its artistry and its functionality could not be separated. The case of the same conclusion is also reflected in the Golden Feather Festival down jacket. This down jacket is through this dovetail design, which formed a clear difference from the general down jacket, but the court is that this dovetail zipper and pocket design is to put on and take off convenient, light warm, easy to use. This kind of design is required for this practical function, so it does not meet the standard of separating this aesthetic from practical function. In the third the Heart Fan Yarn Dream case, unlike the previous two cases, the court pointed out that the plain mesh splicing embroidery net and the asymmetrical skirt design in the case, even if they are changed, will not affect the functionality of the clothes in question. So, it is here that its artistic function and aesthetic function can be conceptually separated. The court here considered the influence of the aesthetic design on the practical function, because it cannot change the practical function, so that it constitutes a separable aesthetic. The second is the clothing design that we say. If you want to get the protection of art works, it also needs to meet a certain artistic height. The height of art here usually refers to the general public as a work of art, namely buying clothes not for wear but for collection. The second is its unique aesthetic significance. We look at a case, in this case, the court believes that the artistic height is reasonable. If the creative height is too low will affect the legitimate use of public design elements in clothing design and damage the public interest, so it is necessary to properly handle the relationship between the originality of the work and the height of creation. Such a result is to maintain the unity of the basic requirements for copyright protection, and to ensure that there is a prominent demand for various types of works and applicable related protection fields. So, for fine art works, the court believes that there is a certain originality in the requirements. Therefore, it is said that the artistic part of the art clothing of the art, it must not only look at the shape structure and color of the garment, but also the overall shape that reflects a unique arrangement and choice of the author with artistic beauty. What is artistic beauty? In one jumpsuit case, the jumpsuit was a designer brand jumpsuit, and also known as a jumpsuit worn by supermodel Wen Liu. Since the production of this one-piece library was discontinued, the court found that the public did not buy or collect the jumpsuit for the purpose of art. So, the work in question advocated by the design company is a practical product, which does not reach the artistic height of a copyright law protection required by our art works. Therefore, for a real product requirement that wants to buy and collect just like art, is relatively high. Then the same similar cases are *Lu Kun v. Rongmei* and *Yulan Xin v. Clothing* Involved, both of which are all cases in which the court believes that they have not reached an artistic height, for this design is so common in our clothing design field that the public does not treat this design as a work of art, namely, it does not reach a height of what we call a fine art work. The turning point was in the New Dream Dance case, which was

prosecuted in two courts for the same costume, the first being tried by the People's Court of the Chongqing Pilot Free Trade Zone, which held that this way of using a sundress shape, combined with a pattern of white polka dots and this unique arrangement and combination, can reflect the creative labor of the author's personalized choice of design layout. Therefore, the court believed that its clothing design met the requirements of our art works, which can be protected by the Copyright Law of the People's Republic of China. In terms of the same clothing work, Guangzhou Internet court held a view that the clothing v neckline, short sleeve waist, invisible pull, bubble sleeve spell color, lotus leaf skirt and the sweet pig belt design and collar stitching is our clothing design usual design and common combination, not the designer original, so the clothing is not to an original height of art works, cannot get the method of protection. This is a conservation issue for the first type of fine art. The second is the protection of graphic works. Graphic works are not to protect the design of the garment itself, but to protect the design, clothing design drawings and sample drawings. Because the clothing design drawings and sample drawings are drawn for the production of clothing, not like art works to give people beauty. So, do you think that it constitutes a graphic work, and that the copyright law can give it a strong protection? Let's look at a dispute between Jin Yujie Company and Bosideng Company. If the infringement identification of graphic works needs to meet the condition of infringing the reproduction right of graphic works, that is, two aspects should be considered, whether it constitutes plane to plane reproduction and whether it constitutes plane to three-dimensional reproduction. In this case, the court believes that although the company clothing processing time late, but Jin Yujie company has no way to proof that the company can access to Jin Yujie company clothing design and model figure, so on the basis of our copyright infringement of contact with similar substantially similar basic principle, that it does not constitute infringement. On the second level, the plane-to-three-dimensional reproduction, for the Bosideng company, it is produced based on its own clothing design drawings and manuscripts. Therefore, if the construction or production is carried out according to the engineering drawing and product design drawing, it is not recognized as the object of copyright protection, that is, it does not belong to the so-called reproduction of the copyright law.

Then back to our meta-universe community, this problem is even more acute. Because for the meta-universe, the clothing design of the meta-universe community is usually not worn on the physical person, it is attached to the virtual digital human which is not only a static physiological simulation of human beings, but a comprehensive simulation of human physiological attributes and social attributes by comprehensive means of various new technologies with social function. On the one hand, the virtual clothes of the meta-verse can be applied to the digital people, and on the other hand, the real people can also be made in a digital mapping, that is, the real people can form a 3D picture of their bodies on the Internet so as to wear these virtual clothes. Although these are the simulation of people, but for digital people, their virtual clothes do not have the practical function of traditional clothes to keep warm. Let's use a game description. Why use games? Because we all know that the emergence of such virtual digital people and virtual body doubles first came from massively multiplayer online role-playing games, which use digital characters and digital body doubles to complete a certain task for the user. Then the virtual avatars developed and evolved in this game were introduced into the meta-universe, forming what we now call virtual avatars. This shows that in the meta-

universe environment, the functional transformation of clothing design is essentially a virtual functional transformation. After entering the game, you should first choose a character. Have entered the relevant scene, you can see the multiple structure of the game map, including plains, rugged mountainous places, etc. And the character needs to wear different clothes in different environments, such as wearing cold clothes in the cold areas, otherwise it will feel cold. If it wants to climb the mountain, it must also have clothing with mountaineering functions. Under this interface, you can see that if the character doesn't wear enough clothes in the cold area indicated by the pointer, it will shiver with cold, so we need to choose to wear warm clothes for him at this time. This dress is also very beautifully designed, the representative colors and unique lines of clothing of different races in the game, are full of aesthetic feeling, with aesthetic value. Apart from it, if the character wants to climb the mountain, then it needs to have other costumes to increase the climb with low physical output. But you can see that these clothes actually do not have any warmth effect on us real people. So, you can see that in the meta-universe space, in fact, its aesthetic design has been confused with functional design.

The second point is that the customary design and aesthetic height of virtual clothing in the meta-universe community is very difficult to define. We say that a type of virtual clothing is a digital mapping of physical space clothing. The early QQ show is a pure flat texture, developed to the present QQ cm show, it is mainly some virtual clothing, which is based on a virtual engine of a 3D image. The design here is basically very different from the clothes in our traditional physical space. Because virtual clothing is not limited by the practical requirements of physical clothing tailoring and wearable, its design can be unrestrained, its material style, tailoring does not need to consider the main body and other elements. Usually clothing tailoring is functional, but for virtual clothing, it is suitable for all shapes. So, we can think about a question, whether all virtual clothing in the meta-verse community can constitute works protected by copyright law? What is this usual virtual design for virtual space? Therefore, the design of virtual design and virtual clothing is full of bumps in our current path of application of the current copyright law, and it is difficult to apply the current copyright law for protection, that is, it poses a lot of challenges to the current copyright law. Let's take a look at the current pictures of virtual clothing, which reflect the current trend. Some users or some stars will buy virtual clothing as NFTs and as digital assets. Then wear it on their own digital picture. You can see that this picture which is the only digital clothing in the world gives people the feeling of a super modern kind of female warrior. Thus, beauty is a kind of subjective sharing of different opinions. Everyone has different feelings about the beauty and ugliness of a dress. Whether it has reached the artistic height of the art works, the answer in everyone's heart is also different. Therefore, for virtual clothing, it is difficult to use copyright for protection, and how to implement the current copyright law theory in the field of virtual clothing has some challenges.

So, let's take a look at some of the paths outside the territory regarding the protection of fashion design. First, I take the United States as an example. The United States protects clothing design as a practical work of art, which is the same as Chinese judicial protection path. The works that constitute the protection of the copyright law need to meet the two-step judgment method, that is, the first to have a physical separation, and the second is to meet the originality. After a long period of judicial practice, the United States has produced nine separation criteria, but there is no unified standard of

separation criteria in the United States, and each court has their own understanding of it. We combine the most classic cases which was determined by the Supreme Court of the United States in 2017. It's a copyright law protection case against a cheerleading uniform. In this case, the sixth circuit court for the second trial and determined that the uniform is combined with the design process and concept necessity of the two separation standards, the design graphic design for the implementation of cheerleading clothing purpose has no effect, and before the graphic design applied to clothing manufacturing, the designer has on their own design drawings formed the design of the pattern. The case was approved by the Supreme Court that it met the separation standard and could be protected by copyright law. After a long push by the clothing design industry, in 2009, it enacted a bill made specifically for clothing design. It includes all clothing, including adult clothing, children's clothing, and men and women's clothing. Further, the Act provides for several authorization requirements. The act governs the originality of clothing, but is not compared to customary designs, but to existing similar works. It needs to be significantly different and is not trivial, and it is not the result of plagiarism. However, once the garment design has met this original standard, it can receive a three-year protection of proprietary rights under the Act. The purpose of such a short period of protection is to solve the balance of interests between the protection of exclusive rights of clothing design and the use of the public. The fashion industry is a very fast-changing industry, so clothing it cannot get a longer period of protection, so the United States proposed a period of three-year exclusive rights. Thereafter, in 2010, the United States changed it from Act 2196 to introduce Act 3728. This bill has four major changes compared to Bill 2196. The first is to modify the method of infringement judgment, compared to the protected original design, the tort design requires substantially the same or similar judgment, rather than the design parts. Second, the Act once again defines the meaning of the original design. Compared with the existing design, its original design requires that the design must be distinguishable and distinctive and non-practical matters. It is also emphasized here that our clothing design does not protect the practical functional design, only to protect its aesthetic design. Because practical function design is the category of patent law, if the design is to achieve a certain practical function, then it should seek the protection of patent law. However, the protection and authorization requirements of the patent law are very strict. If the provisions of the copyright law are followed, that is, from the completion of the work, to protect the practical design can be protected, it is very unfavorable to the public. Therefore, the protection of clothing design in the copyright law should emphasize the separation and protection of artistic design. Third, it eliminates the necessary conditions for copyright registration. Fourth, in a tort action, the plaintiff needs to prove that the design involved is protected and meets the authorization requirements of protection. The defendant's design needs to be substantially the same or similar to the plaintiff's design. The defendant is aware or accessible to the plaintiff's design, and it also needs to meet the requirements that the plaintiff has made his design public, as to obtain the protection of exclusive rights.

Through the above analysis, we can actually see that the original universe is both an opportunity and a challenge for the clothing industry. The original universe is an opportunity for designers to make the design freer, making the design more in line with the diversified and personalized characteristics. Moreover, it also allows the design to deviate from the constraints of the physical space. And because there is no need to

produce entities, only through the use of digital technology can complete digital works, so it is environmentally friendly. Its challenge is that the probability of infringement in this environment is greater, and the malicious imitation of malicious copying will be more rampant.

So, in this urgent situation, I have made some immature suggestions on improving the copyright protection of meta-verse clothing design. The first point is to design an independent type of work, namely practical art, and the need to distinguish the duration of its protection from other works. As an industry with a relatively fast update and iteration, the clothing industry is not suitable for the long-time protection period of the traditional copyright law, and its effective protection period is appropriate to three years. The second point is to clarify the standard of originality, and its originality evaluation should be whether it can form a significant difference from the existing design. The third is to establish a clear classification standard, the design classification standard should be considered in the design process of the design purpose. Just shared in the game, if the purpose of the design of the clothing is to achieve a certain virtual function, you can keep your character warm, let its climbing strength strong.

Thank you.

Topic: Digital Collection Compliance in Practice[1]

Speaker: Xiaonan Shi (Partner, Beijing Merits Tree Law Firm)

Thank you for giving me this chance to talk about the current market for digital collections in China and one of the compliance issues of digital products in China's large regulatory context. Today, I will discuss three parts. One is to discuss current development of digital collections in China, then I want to talk about the Domestic regulatory requirements for digital collectibles. Finally, I will talk about the qualifications required for the operation of data product platforms in the legal environment in China.

First, we must distinguish the concept of NFT, digital collectibles and blockchain. In my understanding, the so-called digital collection is a digital asset under the blockchain, which is a virtual product with collection value, with unique identification and ownership information. The whole industrial chain of digital collection is not only in China, but also in the whole world can be divided into three layers, including infrastructure layer, project creation layer and derivative application layer. Infrastructure layer is based on a public or affiliate chain. it needs very strong technical support for the underlying facilities. Right now, there are some companies that are investing in the infrastructure layer of the digital collection. When the infrastructure layer is built, we can set up the project creation layer on the basis of the blockchain. In China, it is to build a publishing platform on the basis of the alliance chain. Casting or distributing digital collections is on such publishing platform. In foreign markets, the derivative application layer is mainly used for trading such as Opensea. In addition, there are also related applications for social networking and exhibition planning on the derivative application layer.

Let me introduce some of the most mainstream Digital collection distribution platform in China at present, you may also have heard of, such as Alibaba's whale exploration, Tencent's phantom core, Bigverse, The One Art and JD's Lingxi. As we know, phantom core is currently being withdrawn from the market. We made a detailed comparison between these platforms from the perspective of functions, transactions and sharing, such as whether Gas fee is charged or not. Let's look at the whale hunt first, which is built on the Alliance chain. Actually, it is built on the ant chain which is also made by Alibaba. And it can only be traded by RMB, not virtual currency. As we know that NFT in platforms abroad can be traded by virtual currency. But in the domestic digital collections market, for regulatory demands, we are now all payment can only limit in the Yuan. E-RMB as a kind of RMB can also be used in the transaction of digital collections. At the moment, our biggest concern is whether digital collections can be traded. Digital collections cannot be traded on the whale-spotting platform. However, after 180 days, the digital collection can be transferred. If you want to re-gift it, you need to do it after 2 years. At the same time, we can look at its specific sharing proportion, which has a two-layer agent mechanism. The platform takes a 70 percent cut once the product is on sale, and another 50 percent when the product is sold. Artists receives only 15 percent of the sale price and now they are in a state of stagnation. Then we look at the

[1] Recommended reading by the Deputy Editor-in-chief: Rebecca D. Watkins & Abigail Sellen et al., *Digital Collections and Digital Collecting Practices*, https://dl.acm.org/doi/abs/10.1145/2702123.2702380 (accessed on October 4, 2023); Hoes Anne-Charlotte & Lan Ge, *Digital Compliance: Perspectives of Key Stakeholders*, Wageningen Economic Research (2017).

phantom core, which is also on the alliance chain, can only be traded in RMB, and from the trading restrictions, it cannot be transferred or traded at all. Under the phantom core, the proportion of digital collection transactions is not yet clear. The NFT China (Bigverse) will actually go a little bit more cutting-edge, it is actually built on Ethereum, the transaction payment method can be used in E-RMB and RMB. Because it is built on a supply chain of Ethereum, the digital collection in The NFT China can completely be transacted. For transaction the platform will charge the corresponding Gas fee, which is now 10%, plus 33 yuan of Gas fee. The One.art is the same as the NFT China. It is based on the supply chain and it is tradeable. Because of China's regulatory requirements, it can only use RMB for payment and cannot use virtual currency for transactions. Then JD Lingxi is also built on this alliance chain, the supreme chain built by JD itself, which can only use RMB to transact and cannot be transferred or traded.

Then let's take a look at the topic that I want to discuss with you most -- the concept of Digital collection and NFT. First, let's take a look at the English word of NFT. The core of it is the token, but we really need to focus on the part before it "Non-Fungible". As we all know, NFT is a technology that has emerged from blockchain technology, which is produced from Bitcoin. Bitcoin is fungible. Just like currency, every one yuan (RMB) can be substituted, because they are a fungible. At the beginning of block chain technology appear, one of its underlying logics is that chain of every block is no different from each other, it is completely can replace each other. With the emergence of smart contracts, token turn into non-fungible, making each blockchain has a unique identifier, each blockchain cannot be replaced. At this time NFT first appeared. We can use NFT to represent different specific item. It is based on the premise that the code behind every item is different, so when we talk about NFT, the core nature of it is "non-fungible". Digital collection is actually also irreplaceability, behind every digital product is also a code which shall not be replaced by others. Compared to traditional goods, NFT is a digital asset. Generating NFT does not require a lot of cost and it is free to set price. Therefore, it has financial properties and can be easily used for speculation. Under China's financial supervision, NFT needs to be regulated and definancialized. So, when we talk about NFT, we don't emphasize its financial properties but to emphasize its copyright property such as art, collection and so on. For digital collection as I have mentioned just now, it is added in the league chain. Due to China's regulatory needs, every node on the blockchain must be monitored. Because of the existence of a center, the alliance chain can meet this requirement. But for NFT aboard, it is based on Ethereum. Compared with the alliance chain, the public domain chain based on Ethereum has the attributes of decentralization. Therefore, it is public and everyone can set up nodes on it. For digital collections, most domestic platforms will conduct copyright review to prevent copyright infringement and other phenomena. Foreign NFT platforms do not carry out copyright review. Domestic digital collections can only be traded in RMB as the transaction currency, while foreign NFT is mostly conducted in virtual currency. For legal supervision, domestic digital collections are reflected in de-financialization, and speculation is strictly prohibited. There is no such restriction for foreign NFTS.

To sum up in two sentences, prohibit financial securitization and prohibit speculation. However, these regulations are only the "Initiative on Preventing Financial Risks Related to NFT" jointly issued by the Internet Finance Association of China, the China Banking Association and the Securities Association of China, and are not laws and

regulations. However, it can be seen that China's existing legislative attitude will also be reflected in formal laws and regulations in the future.

Based on the above regulations, China's existing digital collection compliance focuses on price control and real-name authentication. The purpose of price control is to prevent financial risks and prevent speculation. Real-name authentication ensures that each transaction node is traceable and can be traced back to a specific perpetrator if a related crime occurs. In addition, according to the current regulations, digital product platforms need to have corresponding qualifications. First of all, it must pass the blockchain information service filing and security assessment and obtain the ICP license. At the same time, according to the provisions of the Regulations of the People's Republic of China on the Security Protection of Computer Information Systems, the platform needs to file for public security network security. Involving audio works, etc., the platform also needs to obtain network culture business license; Involving works of art, art business records need to be made; Involving publications, it is necessary to obtain a network publishing service license.

Thank you.

Unit 3: Legal Issues in the Second-hand Fashion Economy

Moderator: Denni Hu (Chinese Expatriate Reporter, Women's Wear Daily)

Topic: Challenges and Countermeasures in the Operation of Second-hand Luxury Goods[1]

Speaker: Feng Li (Co-founder, CFO of Beijing Panghu Technology)

Hello everyone, I am Li Feng, co-founder and CFO of Beijing Panghu Technology. I would like to share with you some feelings from the perspective of domestic second-hand industry. The last guest shared with us a lot of judgments on sustainable fashion. We've also made some upgrades to our corporate strategy over the last few years. We have transformed ourselves from a luxury e-commerce into a distribution platform called sustainable fashion. According to such a fashion climate convention of the United Nations, taking second-hand bags as an example, in fact, the recycling of each second-hand bag can reduce carbon by 9.7 kilograms on average. In fact, such a recycling process is a process of carbon reduction. Therefore, domestically, we also make a judgment on this industry from the perspective of the country and industry supervision, as well as from the perspective of the circular development of green economy. So, for China, what we do best in recirculation is actually second-hand luxury goods. At present, almost 70% of the design and sales achieved by Chinese consumers are formed abroad, because there is a price difference, and we travel a lot abroad. Since 2020, in fact, because such a restriction to go abroad, including purchasing difficulty increase, so our consumption of luxury goods has declined. In the previous 15 years or so, the Chinese consumers to buy, which also caused a substantial amount of China's luxury goods or high-end consumer goods stocks. According to the industry analysis conducted by research, we can see that there is a large amount of idle second-hand luxury goods in China. From this year, the sales growth of both first-hand and second-hand luxury goods in China has slowed down greatly. But one of the good things about the growth of the past few years, we should see that China has actually built up the world's most digitalized supply chain system of this kind of used or idle high-end consumer goods. Our supply chain system can, I unashamedly have said we should, we are the world's strongest digital ability. There are several points, one end is the upstream, connecting the end consumers, the receiving end is composed of small b-franchise stores, buyer system and Xianyu and other general second-hand platforms, different c-end trading platforms, through the middle core quality inspection and professional content supply chain and storage processing process after a sale. In this case, the most traditional sales are offline retail, which is actually a sales system that has been hit the hardest in recent years. Then the second in the system is the private domain of the system. It used to appear more through Daigou Moments, but in the

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[1] Recommended reading by the Deputy Editor-in-chief: Miriam García Calaza, Cristina Varela Casal & Juan Manuel Corbacho Valencia, *Second-hand Selling Apps and The Notion of Luxury: Trend Networking and Circular Economy*, 16(1) International Journal of Fashion Design, Technology and Education 70, 70-80 (2023); Wen Qi & Pengpeng Yang, *Research on the Interaction Design of Mobile APP for Second-hand Luxury Goods Transaction*, https://ieeexplore.ieee.org/abstract/document/945898
8 (accessed on October 4, 2023).

past two or three years, the upgrade has evolved into live streaming using WeChat video numbers, which actually enables these small businesses that used to conduct small-scale online sales in the private domain. The biggest system is definitely the online public domain, which was originally carried out under the previous generation of shelf e-commerce mode. In fact, Taobao, JD and so on have no way to deal with this kind of sales very well. So, why can we run one of the strongest systems in the world. I think one of the biggest reasons on this picture is that the advantages have been seamlessly connected to the latest generation of e-commerce. That is to say, the mode of live streaming e-commerce and its algorithm is a place where we have an advantage in the sales end compared with other countries.

For the re-circulation of luxury goods, people are worried about the authenticity and pricing issues. In China, when people mention second-hand luxury goods, they think more of Japan. But in fact, Japan is developed by the traditional offline model, and we have a strong late-mover advantage, that is, when a large number of large businesses appeared in 2015, we seamlessly received from the era of e-commerce, and we were the first to transfer to live streaming e-commerce. Before the rise of live streaming e-commerce, this was a symptom, and supporting the development of business model was a thing at the bottom. First, because at the beginning, everyone also did e-commerce and data, which has great advantages compared with foreign business platforms, so our pricing is definitely the strongest based on the style judgment based on the figures. At the same time, the advantage of matching also lies in the global tight sales of luxury goods. In the past 15 years, maybe 40%~50% of its consumption has finally flowed into China, but we do not have the largest supply, which means that we will have a great global advantage in both the accuracy of the price determination and the realization of the price. This is a problem at the top of the industry, and our identification and pricing logic is different from foreign countries. In Europe and the United States, the authorization logic is based on the contract and based on the identification of the brand party itself to determine whether this thing is true or false. Basically, there is no public power to intervene. In other words, in theory, a LV store selling LV must be true, a Chanel store selling Chanel must be true. Chanel's company can identify the authenticity of Chanel, and LV's company can identify the authenticity of LV, which is the basic logic of foreign countries. China's basic logic is based on public power. China's judgment went to some appraisal institutions, and it has the appraisal qualification, and the appraisal result issued by it has the judicial effect. For example, the China Identification Center can identify it as long as it thinks it is capable of identification. Its identified results can be supported in the Chinese courts, so that the so-called LV counter selling fake goods appeared. But is this kind of identification of public power good? From a business perspective, we must think it is good, because of the brand, the equivalent of said secondhand set its entire transaction process for an endorsement. Similarly, it can be identified by the same organization in the same kind, which can effectively improve the efficiency. c-end consumers can trust the state-recognized appraisal institutions, and trust the things sold on our platform itself is true. In fact, it greatly reduces the psychological threshold of consumers' consumption of second-hand luxury goods, and also improves the effect of sales expectations. The advantages in goods, data capabilities in pricing and data, as well as the appraisal system established by public power, all have advantages for improving efficiency and enhancing credibility, which have greatly promoted the overall

development of China's second-hand luxury goods industry and made the industry become more and more mature.

At present, one of the main forms of sales is the traditional e-commerce, which is the shelf e-commerce, small program APP, and offline store live streaming. Because the live broadcast is actually one thing for one display, so it is particularly suitable for the sale of second-hand goods. These three models are now our biggest sales model for second-hand luxury goods operation. However, judging from the development of the overall industry as a whole, the basic business logic of luxury brands is very arrogant and will not cater to the preferences of consumers. The technical logic of some luxury brands, founded in Europe, is to lead the aesthetic and sales. But most consumers today, especially young consumers, do not accept the logic that they want to buy what they like, rather than be dominated by businesses. This reflects the differentiation of consumers, and the brand side takes the different preferences of consumers to provide different products and consumption. This has led to community-based sales, and now many re-creations. Maybe three years ago, we thought more about how to meet consumers' demand for the cost performance of luxury goods, but now we want more to meet their demand for different consumer goods, that is, how to meet consumers in the era of the so-called matching recovery.

Intuitively speaking, this is a concept of matching recovery. In addition, other countries have called it economic recovery, and some industries have developed rapidly in the post-epidemic era. Similarly, in some traditional consumer industries, like high-end consumer goods, the recovery could be in the first quarter and Europe before the first quarter. The logic is that the higher the high-end products, the better the consumption, which is why from the fourth quarter of last year to February of this year, the price of high-end watches rose by an average of 50% to 100%. But in some conventional middle-class consumer goods, both price and consumption are falling. However, we can see that after the beginning of the international conflict between Russia and Ukraine and the domestic closure from Shanghai, these upward ultra-high consumption has declined. The most typical example of the response is the high-end watch prices, which fell off a cliff starting in February and may now fall back to 2019 levels. But this is not yet obvious in Europe, because it has exchange rate problems, which will cause many people to spend. In addition, consumers from Turkey, the Middle East and the United States have flowed into Europe to spend high-end luxury goods. In China, if you now walk into the Beijing SKP or Wangfujing Hermes, Chanel stores, you will find that the spot is unprecedented, at least 5 years there has never been so much spot in their store. Because the highest consumers have been suppressed, their consumption power has been limited. Besides, there may be some changes in taste, Chinese consumers are not able to accept some particularly African American aesthetic goods, resulting in the recent half a year can be said to be the highest end of this consumption, in fact, is a very severe decline.

So, how to deal with the decline of high-end consumption? We are actually constantly expanding the second-hand luxury goods, or the re-circulation of such valuable consumer goods. What we are more concerned about now is the second innovation, because today' young people like these things very much. They can peel off the LV and make some changes to their bags. This is actually from the original individual behavior into a commercial behavior of many businesses now. This involves the boundary of the rights to identify in the Chinese market. There is no problem with

individual transformation behavior, but how should we define the reaction nature of commercial transformation? This is a relatively big problem facing us at present. At present, at least in China, the brand side does not particularly advocate to suppress this transformation behavior. Instead, our industrial and commercial departments will impose more restrictions on these behaviors for law enforcement considerations, such as the industrial and commercial departments often check some LV transformation factories or businesses. In fact, LV is not particularly concerned about users or small businesses to transform some of its things, because it is a kind of communication. What I think about here is the boundary of rights, and then the other one is the boundary of creativity. The expansion of creative boundaries may have been more of a niche enterprise in previous years, but it is now widespread. And very receptive for young audiences, they will even think that the original product is vulgar and not cool. The situation of luxury brands may increase as the younger audience increases. And the spoof itself is actually will or at least now may be suppressed by the brand side, more brands can be unlimited operation, can spoof themselves. But because in their opinion, spoof is a bigger crime than transformation, because the brand will not do the own transformation, but the brand will do the so-called joint name. Co-branding and spoof are actually the same thing to me. So, the spoof will actually be more suppressed by the brand side, but also produced some lawsuits. But the more lawsuits arise, it will arouse the resistance of young people.

The third is the present medium boundary. This year, all the subjects are doing IP. Once the brand side's IP is more doing some market-oriented behavior, it is basically the market department using the market budget to do this thing. But from the perspective of trading platform, if everyone does IP including meta-universe, it does it more from the perspective of trading and sales. And the user acceptance is also relatively high, but this expansion of the media can meet the sustainable hotspots and real needs. I think it's still doubtful. As can be seen in the following two pictures, in fact, we are also following up some cooperation plans. I believe that these products we produce can be sold, but how to publicize, how to define the product itself and other issues are in the process of further discussion.

Thank you all.

Topic: Infringement in the Re-sale and Reprocessing of Second-hand Goods[1]

Speakers: Su Chen & Yunyun Zhao (Lawyers, Beijing Merits & Tree Law Firm; Member of Fashion Industry Legal Affairs Professional Committee of Beijing Culture and Entertainment Law Society)

Distinguished guests, good afternoon. The reason why I pay attention to such a theme is that it is of increasing importance in the development of second-hand economy. On the one hand, as Mr. Feng Li just talked, consumer demand is more and more diversified, so, when the operator optimizes the commodity, it is inevitable to optimize in a variety of reprocessing ways. On the other hand, in fact, the second-hand economy is also shouldering the goal of low carbon channel. Re-sales and reprocessing will become a point of further deepening the development of the second-hand economy in the future.

It can also be seen in the Circular Economy Promotion Law of the People's Republic of China and the policy documents issued by the State Council and the National Development and Reform Commission in recent years. It can also be seen that the renovation and processing behavior of the full use of materials are encouraged and supported by national policies.

Let's look at reprocessing in the second-hand fashion economy. Overseas, we will see some high-end consumer brand goods sold after processing. In fact, in the traditional sense, it is the brand that is not less welcome such behavior, but the situation is in change over the years. For example, the brand Gucci, it first established a second-hand trading platform, and the platform is clearly positioned to recycle the old objects of the brand. After logging into the platform, the designer can upgrade the old objects again and sell them later. As for the ordinary bag we see, which was originally a product from the 1960s, and then the designers modified it, with a different handle and a shoulder strap, thus creating a modified product for sale. If Gucci is a model of reprocessing its own goods, the next brand, RE/DONE, is going the other way. What did it do? Starting in 2015, it is working with well-known brands like Levi's, specifically using their old clothes as cloth, and then making new clothes after cleaning and other processing processes. In the domestic second-hand goods market, we also can see this kind of rework phenomenon. First look at the figure on the left, the chart is from Jingdong (JD) second-hand channel, in the channel are mainly mobile phones, computers, game consoles, the second-hand sales of the electronic products with the most common word, namely, official. In fact, if we recall 2017, we will see more reprocessing forms in JD than it is right now. This

[1] Recommended reading by the Deputy Editor-in-chief: Patricia van Loon & Charles Delagarde et al., *The Role of Second-hand Markets in Circular Business: A Simple Model for Leasing Versus Selling Consumer Products*, 56(1) International Journal of Production Research 960, 960-973 (2018); Sushma Rani & Zeba Jamal, *Recycling of Textiles Waste for Environmental Protection*, https://d1wqtxts1xzle7.cloudfront.net/79113081/4-1-32-981-libre.pdf?1642651248=&response-content-disposition=inline%3B+filename%3DRecycling_of_textiles_waste_for_environm.pdf&Expires=1700300828&Signature=SYKRGtQz2RSInW0W6YClzaM3QlclRZA4kmRmZVWHUIlsqsmlrDLTjqk~zyNkowGBLXZK6HoRtcLfbd6EcBrWHPz8TuNUnilmPl4OIzoDoPHW7~uTHsMcOclJpqsSBy415HN04vgrsbG2Nz8xkAiczerGs01Dv7nHEGPlNG9dMkO5hThstc~5o~V8TV402fdE6vkVqfgETJK6uyA8gQdmZw1c7n4A-zcundsrYYBVTOZK8c5YhuoA3ecx4rZhTSk5YOgEMoxIYEfs8qySGGEh-3RfZ0TxXFvn~p6WTd3PcwuGFMGS-~tK0aXiYN9E95bfpfsTHMAwVwAsnhc9YDdCNg__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA (accessed on October 4, 2023).

picture in the middle actually represents another form of reprocessing, which is hand-painted on famous products, such as LV bags. This picture is done by the brand side employing a designer itself. Actually, there are some other common phenomena in the second-hand commodity market: the operator did not cooperate with the brand side, but bought the bag of the brand by himself, and then painted the decoration, and then sold the higher value of the goods. Other guests have also mentioned that the old LV bag leather is made into new bags for resale. The picture on the right reflects a phenomenon of second-hand luxury goods transformation. From this phenomenon, we can find that one implicit motivation of second-hand goods is for you to buy higher matching goods with less money.

In the reprocessing of second-hand goods, there will be major legal risks. In fact, the reprocessing of second-hand commodities mainly exists in the transaction mode, that is to say, in the case of second-hand commodity operators, it will reprocess the commodities. And because operators and sellers are the source of goods, the relationship between them often has two situations, one is consignment, the other is a direct purchase and procurement. In the consignment mode, the commodity is often rarely reprocessed, so in fact, the reprocessing of the commodity mainly occurs in the direct purchase of the second-hand commodity operators. The scope of our discussion today is also based on this behavior.

Like some common cases of counterfeiting, we won't discuss them here today. How reprocessing behavior is defined? Mainly in the Measures for the Administration of Second-hand Goods Circulation and the Circular Economy Promotion Law of the People's Republic of China, we can see some representations of this act. We can summarize the reprocessing behavior into two core elements. One aspect is that it is different from the development of new products, and it is based on the products that have entered the market. Another element is its reprocessing behavior, which is different from the usual maintenance behavior of cleaning and dust removal, because it has the goal of causing the change of the appearance and function quality of commodities. From the perspective of the second-hand fashion economy scene, we can also divide the reprocessing behavior into two categories, namely the refurbishment category and the creative category. The refurbishment class is mainly the processing behavior aimed at restoring the quality of commodities, while the creative class is the processing behavior aimed at changing the appearance or function of the commodity. Make this distinction, mainly in the assessment of their infringement risk may be slightly different.

For operators of second-hand goods, its upstream and downstream faces two main aspects of the relationship. One is the source of goods, namely the source end of the goods. The other is the downstream means of consumption, and the legal risk it faces is the risk of whether the trademark infringes on the commodity trademark owner, as well as the risk of consumer protection liability. In addition, the reprocessing of creative categories also needs to consider that it may infringe on others' copyright and constitute unfair competition. The change of the appearance of second-hand goods does not necessarily involve copyright infringement, because the protection of practical art needs to meet certain conditions. From the point of view of trademark, the first and the most important point of dispute is whether it constitutes the defense of the principle of exhaustion of trademark rights. Because generally speaking, there is no need to regain the authorization of the original trademark owner when selling second-hand goods, but in the

case of second-hand goods resale, this principle may not be applicable. At present, although this principle is not stipulated in our domestic law, but in judicial practice, the case of the court has reflected the elaboration of this principle. For example, in the typical cases of intellectual property in 2020 released by the Supreme People's Court of the People's Republic of China, there was a case where Higher People's Court of Guangdong Provincial changed the sentence in the second instance, which reflected the principle of exhaustion of trademark rights. The goods it involved were a code jet machine, and the court finally ruled that the defendant involved the reprocessing of the two products. One of the two acts did not constitute infringement and the other act constituted infringement of trademark right.

Then I will give you what separates between them. First of all, look at the box on the left. This box represents an empty machine, the brand above it is the brand of the defendant, but the motherboard inside the printer machine is the plaintiff's old machine. The above motherboard has not been removed, so the plaintiff's brand will be displayed when the machine is turned on. Finally, the court determined that such conduct of defendant does not infringe upon plaintiff's trademark rights, there are three reasons. One is that the brand of the defendant's trademark will not cause confusion, mistaken for the trademark of the code jet machine. Second, the rights of the trademark owner should not be unlimited, and there should be a reasonable balance of interests between it and this reasonable resource recycling. Finally, the court mentioned that the defendant assembled the recycled used motherboard and did not actively change the logo.

Let's look at the picture on the right, the box on the right also represents a code jet machine with the brand of the original brand. The model is called the e50, but the ink road inside it was replaced. The Defendant changed the ink road and then sold it to consumers. The court finally found that it has trademark infringement for three reasons. First of all, the court held that the ink road is the core component of the machine, and you change the ink road, leading to a substantial change of the goods. The second point is that the defendant implemented this change of goods without the consent of the trademark owner, and the act of selling the trademark attached to the original label hindered the function of the trademark. Finally, the court held that such behavior has substantially damaged functions such as trademark recognition. To sum up, we can actually see that whether, for the re-processing behavior of second-hand commodities, it will infringe on the rights of the original trademark owner, which is actually a problem that needs to be judged by combining individual cases. It also involves whether the reprocessing goods damage the quality of the selected goods, and whether they block the relationship between the trademark and the commodity, which is the judgment of the principle of proportion. Of course, it is important to note that, although this use of recycling and reproduction of parts on second-hand goods is not identified as an infringement of trademark rights, but it does not mean that it does not constitute an infringement of other rights. For example, as we just mentioned, the demolition of the old commodity on the leather goods into a new commodity, it may still infringe on the copyright of the right holder or constitute unfair competition. Even the goods like the LV trademark printed on the leather, using the leather to re-manufacturing may be directly related to the trademark protection issues. In terms of consumer infringement, the risk of infringement faced by sellers of second-hand goods is mainly that they are found to be fraudulent and lead to punitive damages. A 2021 judgment by the Beijing Internet Court highlights the risk of

infringement by sellers of second-hand goods. The plaintiff bought a second-hand iPhone in JD's official flagship store. After buying it, he found a third-party testing agency and found that both the front and rear camera battery boards had been replaced. So, he sued to the court, said that his machine is the original mobile phone copy, which constituted a misleading and deception to him. The court sustained his claim, giving him a treble return. In addition, it is worthy of our attention that the court analyzed three other factors related to fraud of the second-hand seller: the seller status, the description of the after-sales condition that does not support 7-day return without reason and the publication of the seller's registration information.

From the perspective of second-hand commodity operators, these infringement risks all need to be paid attention to, and it is very important to identify, prevent and handle these risks. So, we put forward some discussion and suggestion from three aspects. Firstly, pay attention to the full compliance of the protection of consumer rights. Comprehensive compliance of product labeling is not only saying that you do reprocessing, marking on the goods, it is also included in the sales instructions. For these second-hand goods with reprocessing, it also involves the retention of the purchase channels, the purchase records, and the preservation of the authorization certificate authorized by the relevant right party. Secondly, prevent the occurrence of trademark infringement risk of the original trademark owner. Whether it is using other second-hand goods to make a new product, or only to transform the product and use its original brand for sales, there may be a risk of trademark infringement. So before doing this, evaluation is needed, if operators' behavior is possibly infringing or not obviously safe, operators may consider seeking cooperation from the brand side. After all, there have been many successful win-win cases, both at home and abroad before. Finally, in the aspect of responsibility sharing, operators should build a mechanism of responsibility sharing. In some infringement cases, the court only ordered the second-hand commodity operators to assume the responsibility, but when you look at this behavior, you will find that this behavior is not only essentially caused by the second-hand commodity operators, but also involves the purchase source channel subject and partners. Therefore, we suggest that second-hand commodity operators need to pay attention to the contract provisions, including some extraordinary mechanism responsibilities, sharing mechanism and liability for breach of contract, and build a system of sharing tort liability with the upstream and partners.

The above are our thoughts on the risk of resale and reprocessing in the second-hand market economy. I sincerely hope you can criticize and correct any improper points, and we keep in touch having more discussions.

Thank you.

Topic: Unfair Competition in Commercial Promotion[1]

Speaker: Jin Liu (Associate Professor, Law and Politics School, Zhejiang Sci-Tech University)

Thank you, good afternoon, the topic I want to report is the unfair competition behind the commercial promotion. I think it is not a legal concept. From the legal field, from the perspective of legislation of the laws and regulations, mainly in the Anti-unfair Competition Law of the People's Republic of China, are Article 8 and Article 10. Article 8 is about the provisions of the false propaganda. Article 10 is about the provisions of improper prize sales. So, in 2020, China supervision bureau issued specification promotion regulations, so we see the new rules, Chapter 3 and Chapter 4, actually their scopes are very narrow. One is a prize sales promotion specification, and the other is the price promotion behavior. These two are not in a plane, not in a level of classification standard.

From this point of view, our legislative provisions are very simple. Let's take a look at the categories of marketing promotion from the perspective of marketing. This category is very rich, the first is commercial advertising, the second is personnel marketing, the third is sales promotion, the fourth is public relations, so our legislation for commercial advertising is more, and for personnel sales and sales promotion of tools, especially the specification of public relations is rare. Let's take a look at a broad classification of business promotion in marketing, which can use a lot of tools to carry out business promotion: advertising, personnel sales promotion, sales promotion, and public relations promotion. Therefore, from the perspective of marketing, commercial promotion is a very broad concept, so here we see the problem is that in practice, the types of commercial promotion are rich and diverse, but the legislative coverage is very narrow, resulting in a gray area of the anti-unfair competition law applicable to commercial promotion behavior.

Next, I will talk about the legal determination from two behavior perspectives. The first is the problem of favorable cash rebate, and the second is the invisible market behavior in large sports events.

Praise cashback, I believe that there was e-commerce and network transactions of the consumer. Everyone here is very familiar with more and more companies try to use material rewards prompted consumption to praise, so as to realize marketing, so the material rewards involve gifts, cash, price discount, and praise cashback is one of them to return cash to get consumer praise. When we shop online, we often see this card should be very familiar with it. The questionnaire survey of Guangdong Consumer Committee shows that 98% of people have encountered the experience of praise and courtesy from e-commerce when online shopping. I believe all of you here also have great experience. So, what is the impact of the return on competition? I would like to analyze from three aspects, one is the impact on consumers, the other is the impact on other operators and the last one is market competition order.

Influence on consumers, praise cashback for consumers first, is the influence of

[1] Recommended reading by the Deputy Editor-in-chief: Yaotian Chai, *The New Anti-Unfair Competition Law of the People's Republic of China 2018*, 13(12) Journal of Intellectual Property Law & Practice 998, 998-1008 (2018); Shujie Feng, *The Reform of Passing off in Chinese Law: Effects of the 2017 Revision of the Anti-Unfair Competition Law*, 11(3) Queen Mary Journal of Intellectual Property 314, 314-338 (2021).

cashback on consumer purchase decision. Beijing Digital Market Research Consulting Co., Ltd. released an online consumer attitude and behavior evaluation report in 2014. The report used a questionnaire survey, asking, "Do you see the products before shopping?", more than 80% of consumers will read the evaluation of the product, and 90% of people think that the evaluation will affect his or her shopping decisions. Such a number is even lower than I imagined, in my opinion, (if in online shopping) 100% of the people will go to see this evaluation. Therefore, this evaluation has a very large impact on consumers' purchasing decisions. Then there are several effects, the first effect is that if you have false information, it can lead to consumers' wrong purchase decisions. From another point of view, for example, the praise of a product on Taobao is sometimes thousands of praises, without a bad review, so all the praise is actually an invalid information for consumers. This is the first impact on the purchase decision. The second is that consumers who do not want to praise, bear the unfair price. The third influence is affecting the praise of consumers after-sales rights, because once you praise even after the evaluation, you for the operator is not binding, is your evaluation has no binding on operators, so after-sales rights will certainly produce an impact, so this is the influence of consumers.

So, for other operators is also influential, praise cashback evaluation mostly probably not true, so it interferes with the market trading of a normal information feedback mechanism, make others unable to understand the real product information and market information, and the product market information, is determines the other operators of a very important decision of information. This is the second competitive impact analysis.

The third impact is that we often say that the Anti-unfair Competition Law of the People's Republic of China is not to protect competitors but to protect the market competition order, so what is the impact of this kind of common behavior on the market competition order? Of course, the first point is the vicious competition, which is not conducive to the healthy development of the industry. If the cost of such false evaluation, it is difficult for the industry to develop healthily. Secondly, this kind of behavior is contrary to the original intention of the establishment of the credit evaluation system in the online shopping market. Why do we need consumer evaluation? Market consumer evaluation is a balance mechanism for the information asymmetry between operators and consumers. A general framework of consumer purchasing behavior is that consumers form a black box after external stimulation, and then finally decide to produce a purchasing behavior reaction. So, the external stimulus has a lot of, for example we access to physical, see about the product of the appearance, merchants, including consumer comments, are external stimulus, and consumer black box is we see, it depends on consumers, including his or her character, his or her consumption habits, his or her consumption level, and so on, so eventually reflect is whether he or she is to buy, how to buy a behavior reaction. That in the network transactions, it is conceivable that consumer evaluation is the most effective external stimulus, and is a positive is praise, it will be a positive stimulus, resulting in purchase behavior, so, the consumption evaluation in the network trading market competition order influence is very big, it determines a network transaction is a basis of market competition. So, from this point of view, the high praise and cash back, its influence is very big.

So, in the law how do we to this praise cash back behavior qualitative? Of course,

some people say that it is a legal behavior. It is a reasonable gift, so you think about it, this praise cash back is it a reasonable bonus? We say that the gift contract receives and this subject it does not need to assume the obligation, but praise cash back in the gift, it is to give you a certain right, but you must assume the obligation, so it is a kind of right and obligation exchange contract, not a kind of simple gift. From the perspective of illegal, I think there are only two behaviors that can be used for the evaluation of the current behavior. The first is commercial bribery, and the second is false propaganda.

So, first of all, take a look at commercial bribery, Article 7 of the Anti-unfair Competition Law of the People's Republic of China is about the provisions of commercial bribery. The First Paragraph of Article 7, it is such provisions: operators shall not use property or other means to bribe the following units or individuals, in order to seek trading opportunities or competitive advantages. So, I want to return to Article 7. That is to say, the operator gives certain benefits to the consumers who buy the product. Then let the act on the product and thus influence future consumers, influence future transactions. It seems to be logical as such a pattern of behavior. But in my opinion, the biggest difference between commercial bribery and cash back on credit is that this effect of commercial bribery is a controlling influence. The reason why we have the Anti-unfair Competition Law of the People's Republic of China for commercial bribery is to make a deal. We may bribe the unit or subject that can control the transaction, and to seek this trading opportunity and competitive advantage. The reason why commercial bribery enters the view of the competition law anyway is because of an improper means to seek trading opportunities or competitive advantage. However, in the process of favorable comments, this influence is that the consumer makes a good comment because of some small profits. Its influence on future transactions is actually a negative impact, because the status of both sides is equal. Therefore, it is different from the control type, I think there is a great objection to this identification as commercial bribery.

So, is it a false propaganda? More people think that the praise of cash should be a false propaganda behavior, because the Anti-unfair Competition Law of the People's Republic of China clear shows: operators shall not on its commodity performance, function, quality, sales status, user evaluation, honor to make false or misleading commercial publicity, deceive, mislead consumers. But false advertising praise cashback behavior has two suspects, the first we can see from the literal, is stipulated in the first Paragraph of Article 8 that the user evaluation should be a kind of active publicity, because of false propaganda, in the Anti-unfair Competition Law of the People's Republic of China, it is more of a false propaganda with advertising, and advertising is a kind of business active publicity. And user evaluation, we currently use this behavior of legal regulation, but because it is not a kind of active publicity, so it is rarely included in the false publicity to identify. Another doubt is that it is difficult to judge the false and misleading praise, because it is difficult to distinguish the praise based on the cash back, so I think it is difficult to identify it as false propaganda behavior.

An important issue in the praise rebate is a comment issue of consumers, so the legislative tendency of consumer goods at home and abroad is mainly based on the protection of consumers right to comment. Such as the United States consumer goods evaluation fair rules specify the format contract limit or ban the consumption comment clause is invalid, then another example in Hangzhou City in 2015 of the interim measures for the administration of network trading is also stressed the network trading operators

which shall not stress or harass consumers force against will, modify the evaluation of goods or services. Therefore, the current legislative value orientation of consumer comment at home and abroad should still focus on protecting the right of consumer comment. From the favorable comments, I think the reaction out of the problem, in fact, more is a problem of unfair competition and the obligation of consumers, there is a question of obligation in the comments. This is a little thought about good reviews and cash back.

So, another listed behavior, I would like to talk about the invisible market behavior in the sports event sponsorship market, so the definition of the invisible market behavior is non-sports event sponsors hide, ambush, parasitic in the marketing behavior of the event sponsors, engage in related business behavior and profit from it. Invisible market behavior stems from sporting event sponsorship but is not limited to that.

The first example of sports invisible market behavior was the "I Love Los Angeles" marketing campaign of Nike in 1984. Although Nike was not a sponsor of the 23rd Olympic Games, it connected itself with the Games. At the 26th Olympics, Nike repeated the trick, renting a used parking lot near the Olympic stadium and set up a venue called Nike Camp to promote its products off the stadium. According to statistics, 70 percent of Americans think Nike is the sponsor of the Olympic Games. This is a very typical kind of invisible market behavior. So, in China, before 2008 Olympic Games, there is also a lot of this hidden market behavior. Such as Mengniu in the second anniversary of the Olympic Games. The Beijing Olympic organizing committee market development department sent a letter, in this letter, clearly stated this behavior constitutes the invisible market behavior and interfere with the international Olympic committee and the market development work and Olympic sponsors marketing rights and interests. Then this invisible market behavior may be rarely seen in practice, such as judicial practice and law enforcement practice.

So, let's take a look, if you want to be qualitative in the law, how to be qualitative. Of course, it is a kind of false propaganda, but for this kind of false propaganda, the difficulty of legal regulation is that it is difficult to judge the judgment criteria of consumer confusion. So, for this kind of behavior, we can say that it can be from the time of the event, the time, the openness, the audience, the audience, the commercialization of environmental conditions, the media of the way of communication, and so on. However, we also see that although these plots are specific details, it is still difficult to make a specific analysis and judgment in practice, which is difficult to quantify.

So, from the praise cashback and hidden market behavior of unfair competition legal regulation, we can see, the unfair competition law to regulate business promotion is the same business promotion, especially belongs to the commercial promotion of the illegal gray area, to regulate, is a certain difficulty. So, in addition to the above two kinds of behavior, I also noticed such as electricity malicious oversale, free experience promotion of false advertising, oppressive sales (such as cosmetics sales give you half of the face, then you must buy to all), false time preferential (this in double 11 we see more), and then like now more popular attention forward lottery behavior, like these behavior, we are in the practice of we think fair against voluntary equal competition some of the unfair business promotion behavior. But how to determine whether it is an unfair competition behavior and what kind of unfair competition, in fact, it is very difficult.

Next, I will summarize, through the above analysis to summarize the difficulties of

the legal regulation of commercial promotion behavior and unfair competition behavior. The first one is that the individual damage is relatively small or even no damage. For example, individual damage is difficult to measure in the favorable credit rebates; The second one is the difficulty of providing proof, for example, in the case of personnel marketing activities. Especially in the more common promotion of this nutrition for the elderly, it's a one-to-many approach, or a human sales pitch. It has no actual evidence to prove the existence of false propaganda; And then the third one is that being false and misleading is very difficult to judge. This can also be seen from the above two behaviors is the invisible market behavior of favorable cash back and sports event sponsorship. So, this is because of these regulatory difficulties at point 1, 2 and 3. We see that this judicial case about commercial promotion is relatively rare. Fourth, from a legislative point of view, because there are many types of commercial promotional behaviors in marketing. So, the legislator, as a main body of the distance from the market, it is not the type of unfair promotion. And under the premise of legal certainty, this kind of unfair competition behavior in the commercial promotion is very difficult to be exhausted in the legislation. The fifth difficulty is that I think administrative law enforcement is also hard to do, why? Because the law is more limited about this. Then in the administrative law enforcement and cannot be used to directly enforce the general provisions. Therefore, it can only regulate some specific commercial promotion behavior by establishing laws, regulations, rules and normative behavior documents. But it is back to the dilemma that legislation could not exhaust the types of improper promotion. Therefore, for this improper behavior of commercial promotion, I found it difficult to talk about this topic when I received it, because there are so many incidents, but there are so few cases, so this legal regulation is really difficult.

At the end of this speech, I would like to use Professor Xiangjun Kong's words: the positioning of the Anti-unfair Competition Law of the People's Republic of China is an outline, which is an axis connecting the concept and system, legislation and application. So, what is this axis? Is the second Anti-unfair Competition Law of the People's Republic of China establishing a ternary interest, another is the third order observation system, so that is to say we in a behavior of unfair competition, the first thing to consider the ternary interests, is the market competition order, operators, consumers, and is from voluntary, equality, fairness, integrity principle and relevant laws and business ethics to observe a behavior whether he has the unfair competition law.

In business promotion behavior in the general terms of the guidance, precision against commercial promotion behavior, behavior of unfair competition at the same time, and keep the business promotion market vitality, I think is the future is our academic, legislative or practice department, the future to consider a very important problem, thank you.

Topic: Potential Liabilities of Fashion Resale Platforms and Enforcement Strategies for Brand Owners

Speaker: Ginger Mimier (Consultant Lawyer, Kilpatrick Townsend & Stockton LLP)

This presentation will cover topics in intellectual property law and how they apply in the context of fashion resale platforms.

Nominative Fair Use

Trademark infringement can be found when there is use of another's trademark without authorization in a commercial context. However, it's recognized that there are circumstances where reference to a trademark may be needed in a way that should not constitute trademark infringement. This is commonly referred to as fair use or nominative use. These terms are often used interchangeably, but there is a distinction. Fair use refers to use of a trademarked term that is being used for its dictionary meaning. For example, imagine that a fashion brand is named after a common household object, and of course, people in the public need to be able to refer to that object without necessarily running afoul of the brand's rights. Nominative use, on the other hand, is more relevant to the topic of this article. This is use of a mark to refer to the brand itself, but in an acceptable way. The U.S. Law has recognized that, for example, if you are reselling a Chanel bag, you may need to use the trademark Chanel. This often comes up in case law in the United States in the context of repair services. For example, a watch repair company may want to identify the specific brands of watches it can repair. In both of these examples, the use is commercial, but can be acceptable.

In the United States, there are typically three factors that a court will consider in determining whether a use qualifies as nominative use.[1] First, the product or service must not be "readily identifiable" without use of the trademark. In the examples provided, there would be no other way to describe what is being sold or what can be repaired without referring to the brand. For purposes of fashion resale platforms, this factor will typically be less important.

The second factor, however, is likely the most important. This factor is that only so much of the mark may be used as is reasonably necessary to identify the product or service. This framework recognizes that people may need to use trademarks, but still limits that use.

This factor also correlates strongly with the third factor, which is that the user must do nothing that suggests sponsorship or endorsement by the trademark owner. This is similar to a trademark infringement analysis of whether the mark is acting as a source identifier.

In terms of best practices, the focus for a fashion resale platform should be on the second and third factors. A fashion resale platform will want to promote the brands that it sells. Where the platform could risk using more than is necessary, under the second factor, is for example if the platform uses a brand logo or a stylized version of the brand name. Using a logo or a stylized version, rather than a plain text version, may be more than is necessary. Such use could also be problematic under the third factor, because use of the

[1] See, e.g., *New Kids on the Block v. News America Publishing*, Inc., 971 F.2d. 302 (9th Cir. 1992).

logo could be interpreted as the fashion resale platform trying to suggest an affiliation, sponsorship, or endorsement where one does not exist. Other examples of actions that could falsely suggest an affiliation or endorsement include misleading statements about being an authorized reseller or claiming that the fashion resale platform is an expert on a particular brand.

First Sale Doctrine and Limitations

The first sale doctrine is essentially what allows fashion resale platforms to exist. It is an exception to trademark infringement in which resale of a trademarked product without the mark owner's permission is allowed. For example, if you purchase a handbag,[2] you are allowed to resell that handbag without the trademark owner's permission, presuming of course that other conditions are met.

What is particularly interesting in the context of fashion resale platforms is when the goods themselves have been altered. As discussed above, generally subsequent sale of a product does not constitute infringement, even though those sales are not specifically authorized by the trademark owner. However, an exception to this general rule is that the unauthorized resale of a materially different product can constitute infringement. For example, imagine that a consumer purchases an item of clothing from a brand, but then has the garment altered by a tailor. Would that constitute a material difference? What if the garment had distinctive buttons bearing a logo that the consumer removes and replaces? Or what if the consumer upcycles the garment into a completely different kind of garment? Could that consumer then resell the garment referring to the brand name?

In the United States, courts have found that a material difference is one that consumers would consider relevant to a decision about whether or not to purchase a product. The analysis will be largely fact dependent, but there is some case law that can be used for guidance. For example, there are cases involving watch repair. In one case, a court found that a pre-owned watch that was marketed as a "genuine Rolex" but which contained both Rolex and non-Rolex brand parts because the watch had been repaired and refurbished, was an infringing use. Relatedly, another example of something a court has found to be a material difference is the lack of a warranty.

In the related area of luxury goods, there are cases involving resale of perfumes or colognes where batch codes or barcodes were scratched off of the bottles, but the actual perfume or cologne within the bottles was not altered. At least one court noted that consumers value packaging such that it is relevant to the consumer's purchase decision. So, alterations, even when limited to the exterior or the packaging of a product, may be considered material.

Digital Millennium Copyright Act (DMCA)

The Digital Millennium Copyright Act can be a very useful tool for brand enforcement in the context of fashion resale platforms. The DMCA is a U.S. Law enacted in 1998, whose purpose was to address copyright infringement happening on the internet. At that time, the internet was relatively new and largely unregulated. The goal of the DMCA was to create policies and procedures that would make it easier for copyright

[2] Another interesting situation to consider would be where there is no traditional "sale" in the first place. Consider, for example, situations involving an employee of a brand being given a uniform bearing the brand's name or logo, or a consumer receiving a promotional item or sample from a brand. Arguably, the first sale doctrine might not apply to those because there is literally no sale in the first place. A fashion brand may mark those goods or consider those goods not authorized for resale. Fashion resale platforms should consider whether to accept such products onto their platforms.

owners to enforce their copyrights without the expense and difficulty of filing a lawsuit. The DMCA enabled copyright owners to have infringing online content removed without the need for litigation, and it also facilitated development of the internet by providing a certainty to online service providers by limiting their potential liability for copyright infringement if they cooperate with taking down requests to remove infringing content.

The DMCA has different subparts, but this article focuses on the safe harbor provision. This section of the DMCA creates a safe harbor for online service providers, shielding them from liability for copyright infringement if they meet certain conditions. This is a way to incentivize those online service providers to participate in this process so they can avoid being sued.

The DMCA establishes a notice and takedown procedure which is often promoted on websites. The procedure is intentionally straightforward, and intended to be something a copyright owner can use without need for an attorney. Online service providers are encouraged to set up a way to handle these notices and act on them in an expeditious way, so that they can be shielded from any liability involved in the alleged infringement. For example, websites can list a designated agent for DMCA notices with the U.S. Copyright Office, who maintains a designated agent registry. Another provision to get the benefits of the safe harbor provision is a repeat infringer policy. An online service provider is incentivized to create a policy where it outlines what it will do, what actions it will take, against an entity that is accused of infringement multiple times.

In the context of fashion resale platforms, the DMCA can be used to address situations where a reseller wants to use photos that he or she does not own in order to promote the product, for example, photos depicting the product as it was originally offered by the brand owner or a photo from a runway show. Copying or displaying such photos without authorization could violate the copyright owner's rights.[3] This may be especially prevalent on fashion resale platforms where the resellers retain possession of the products and create their own listings. For fashion resale platforms that take possession of the products to be sold, a best practice is to only use photos that it has taken and thus for which it owns the copyright.

Another best practice for fashion resale platforms is to make it clear in the terms that users should not post any photos that they themselves did not take or that they do not have the rights to use. Of course, another best practice for fashion resale platforms is to comply with the safe harbor provisions of the DMCA by identifying a designated agent, establishing a repeat infringer policy and handling processing takedown requests expeditiously.

The other side of this review of the DMCA demonstrates that it can also be an effective tool on the brand owner side. In other words, a brand owner may be able to use the DMCA to stop objectionable use of its intellectual property on fashion resale platforms.

Case Study: Chanel v. The RealReal

The Chanel v. The RealReal Litigation a useful case study.[4] The case was filed in November 2018, and is still ongoing at the federal district court level in New York.[5]

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[3] In addition to copyright, using unauthorized photographs could also present a false advertising issue, for example, if the product is not being represented accurately.

[4] See *Chanel, Inc. v. The RealReal, Inc.*, Case No. 1:18-cv-10626 (S.D.N.Y. 2020).

[5] Based on the current schedule, discovery should be finalized later this year; no trial date has been set, but

The RealReal is a luxury consignment e-commerce platform. It has a few brick-and-mortar locations, but it is primarily an online platform. One of the issues that comes up with customers in the context of luxury consignment is trust. For example, customers spending a significant amount of money will want assurances that the products they are buying are authentic and in the same condition as advertised.

The key issues in this case, as asserted by Chanel, relate to The RealReal's authentication process. Chanel in its complaint alleged that it found seven counterfeit Chanel bags that were sold by The RealReal.[6] Because of that, Chanel argued that statements made by The RealReal regarding its authentication process, and specifically its authentication process for Chanel products, are false and misleading.

The complaint alleges claims of trademark infringement, counterfeiting, false advertising, unfair competition, false endorsement. Some of these claims have been trimmed in the litigation process, but the focus remains on The RealReal's authentication process. Chanel argues that The RealReal made statements that it does not accept counterfeits and that its products are 100% authentic; it is Chanel's position that such statements are false because it identified counterfeits on the platform. Chanel also argues that The RealReal made misleading statements about having trained brand experts which could suggest to a consumer that Chanel endorsed or approved The RealReal's authentication process, which is not true.[7] Chanel said in its complaint that only Chanel can authenticate Chanel and noted that none of the employees at The RealReal involved in the authentication process were, for example, former employees of Chanel, such that they would be knowledgeable regarding the authentication process.

The main takeaway from this case is that fashion resale platforms should be very clear about their authentication processes to ensure they are accurate and not misleading, specifically with regard to being approved of or endorsed by a brand owner.

Thank you.

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it will likely be in 2024, assuming the case does not settle. Chanel has another similar case against another resale platform, What Goes Around Comes Around.

[6] In its complaint, Chanel stated that the seven bags alleged to be counterfeit were identified by reviewing the serial numbers, noting that certain serial numbers are known to be used by counterfeiters. Chanel also said it links certain serial numbers to product types, so a mismatch, such as a shoe serial number being used on a bag, would show that the product is not authentic.

[7] Another interesting claim relates to improper use of the term "vintage" for products that are less than 50 years old.

Unit 4: Design Freedom, Marketing and Brand Cultural Values

Moderator: Cihong Hu (Vice Professor, Law and Politics School, Zhejiang Sci-Tech University)

Topic: Historical Experience of National Design Policy Enabling Fashion Industry and Brand Development[1]

Speaker: Lixian Liu (Professor, Law and Politics School, Zhejiang Sci-Tech University)

Looking back at the history of western fashion, regional fashion culture was formed in a specific space and time background, and gave rise to a matching fashion system, and fashion industries with their own characteristics contributed to the development of regional fashion industry and national politics and economy. During the period of Louis XIV (1638-1715), the French modern fashion culture sprouted and developed. Decree of the second year of the French Republic provided for the protection of art forms and artistic talents on French territory. The relatively complete protection policy of art and culture has made the fashion industry one of the pillar industries in France, contributing to the political, economic, and cultural development. In 1851, the Second French Empire was formally established. Although the imperial system was implemented, Napoleon III made efforts to combine the fashion industry with capitalism, especially the promotion of haute couture by Queen Eugenie, which strongly promoted the development of the fashion industry characterized by haute couture. In 1868, the son of Charles Voss founded the French Haute Couture union in Paris, and Haute Couture officially kicked off. With the arrival of haute couture designers such as Doucet, Voss and Boscher on the historical stage and the establishment and development of haute couture houses, the French fashion shape tends to take shape and provides an institutionalized constitution for the subsequent development of the French fashion industry. In the 19th century, Paris was the only fashion center in Europe and even the world at that time. The construction and development of its fashion culture and fashion system provided a relatively complete reference sample for the fashion development of all countries in the world. The French fashion development process is as follows. In the seventeenth century, during the Louis XIV period, fashion trends prevailed under the influence of the French court culture. In the 19th century, the emerging bourgeoisie rose, the change of discourse power on fashion, the idle class dominated the French social fashion, and France became the absolute fashion center of Europe. In 1838, the world's first department store was opened

[1] Recommended reading by the Deputy Editor-in-chief: Patrik Aspers, *Using Design for Upgrading in the Fashion Industry*, 10(2) Journal of Economic Geography 189, 189-207 (2010); Rosita Binti Mohd Tajuddin, Siti Fatimah Binti Hashim & Amer Shakir Binti Zainol, *The Role of Brand Identity in Creating Resilient Small Enterprises (SMEs) in Fashion Industry*, 6(2) International Journal of Supply Chain Management 140, 140-145 (2017).

in Paris, first transforming the tailor-style business model into a public department store. The French High Fashion Union was established, which was the main driving force of the development of French fashion in 1868. In 1911, Paul Polet pioneered the international campaign, which became the predecessor of the modern fashion show. Under the influence of the Second Industrial Revolution and World War II, the industrialization level of European countries increased rapidly, and the absolute authority of French fashion was challenged. From the end of the 19th century to the beginning of the 20th century, the old bourgeoisie gradually withdrew from the stage of history, replaced by the new bourgeois group with different values and aesthetic tastes. During this period, French haute couture designers such as Charles Voss, Jacques Doucet and Jeanne Paquin participated in the Paris World Expo 1900 in response to the call of the French government. Since then, French haute couture houses have adopted a design and operation mode that integrates art and commerce and take the Expo as an opportunity to expand the overseas market of haute couture houses.

American fashion culture characterized by the popular culture and mass market. In the 19th century, the textile industry in the eastern part of the United States underwent a transition from manual manufacturing to industrial production, and two mainstream textile production models, Rhode Island System and Waltham System, were developed. With the help of the Rhode Island System and the Waltham System, the American textile industry developed rapidly. The Rhode Island System was concentrated in the northeastern coastal region of the United States, while the Waltham System was scattered in eastern Massachusetts, New Hampshire, Vermont, Maine and other regions. These two coexisting systems of production reflected the collision, translation and reconciliation of traditional manual production and machine production in the process of agricultural development to industrialization, as well as the inevitable historical track of industrialization development. By the 1870s, the textile industry in the United States had experienced more than half a century of development, and Philadelphia became the largest industrial city in the United States because of the development of the textile industry. After that, textile merchants gradually realized the importance of textile education, and established the first formal textile project in the history of the United States in 1880, which was initiated by the Philadelphia Manufacturers' Alliance. Later in the 19th century, in Massachusetts, Rhode Island, Pennsylvania, North Carolina, South Carolina and George Virginia on the east coast of the United States textile merchants for breakthrough innovation, gradually realized the importance of textile education, then opened the textile project, in succession to strengthen textile industry personnel training. The fashion transformation of the United States is not completely dependent on the mass market, nor is it completely separated from the mass market. While it is marketized, it has developed a way of auditing and innovation based on its own characteristics. With the development of economy and politics, people gradually began to pay attention to the aesthetic and symbolic nature of commodities, so as to re-evaluate the relationship between urban culture and regional economy, and further promote the fashion transformation of the textile industry in New York. After the outbreak of WW II as the turning point, the New York fashion industry provides unlimited inspiration and possibilities for the rise of contemporary art and urban culture. Fashion education reserves the necessary talent resources for the development of the fashion industry in New York. Fashion media and fashion institutions have promoted the commercial

development of the fashion industry, repositioning New York from the manufacturing center to a fashion city and constructing a New York fashion system that supports the survival and development of the fashion industry. At this time, the fashion center moved from Paris to New York, its fashion style for the contemporary art and fashion interwoven. Here is a summary of American fashion development. In the 1870s, the eastern coastal cities of the United States textile education project layout. In the beginning of the 20th century, the industry gathered in New York, and the superposition of many factors led to the continuous expansion of the American mass clothing market. In the 1930s, the Manhattan Garment District was established and formed an industrial chain covering various mitigation areas, from design to sales. During World War II, the local American fashion design and urban culture industry rose, and the fashion center gradually moved to New York. In the 1960s, the phenomenon of strengthening the image of the clothing brand in the United States to promote the transformation of the fashion industry appeared, thus establishing the fashion culture of pop culture and mass market in the United States. Since the 21st century, American fashion has focused on creativity and marketing, and the downstream enterprises of the fashion production industry chain have gradually developed into a global layout.

The Italian fashion culture is characterized by the Renaissance and Haute Couture. Tracing the history, the development of contemporary Italian fashion culture can be roughly divided into four stages. In the 1950s, with the second Industrial Revolution as the historical background, the booming Italian industry was combined with its fashion industry and developed into the Italian fashion industry centered on industrial manufacturing. In the 1970s, the innovation of global cultural concepts impacted the Italian fashion industry, and the Italian fashion culture was transformed and upgraded in the challenge, giving birth to the Made in Italy. In the 1980s, Italian fashion gradually established the development path of fashion industry combining advanced fashion manufacturing and design. From the 1970s to the 1990s, the Made in Italy bred by the Italian fashion culture gradually entered the global market and fashion consumers. In the process of the inheritance and development of Italian fashion, the Italian fashion system with the Italian fashion power field composed of the Italian government, the national fashion chamber and clothing industry association as the core has gradually formed and improved.

The British fashion culture is characterized by aristocratic culture and creative industries. After the 1990s, the United Kingdom has further increased and regulated the pace of industrial development. It began in 1997 to implement the new culture policy, which promoted the free opening of famous British museums to enhance the status and role of art in national life. The British creative industry has emerged in this context. The creative industry is a significant symbol of the development of knowledge economy in the post-industrial era of Britain. The creative city supported by the creative industry is the development direction of modern cities. Therefore, the British government put forward the New Britain Plan in 1997 to change the face of Britain completely. In 2003, the Draft of London: Cultural Capital: Mayor's Cultural Strategy more clearly proposed to build London into a world-class cultural center. With the promotion of this draft, London's fashion industry ushered in its peak development with the improvement of industrial construction and promotion efficiency. From Savile Row in London in the 18th century to the new fashion brands, from Anderson & Sheppard, Henry Poole, Morris,

from Maurice Sedwell to Burberry, Vivienne Westwood and Mulberry, British fashion is both high-end and mass-market. Under the guidance of the government, the British fashion industry, with creative industry and financial services as its twin engines, takes London as its fashion center and takes aristocratic culture and creative industry as its fashion culture characteristics, actively seeks to inherit and innovate. With the support of such regional fashion culture, British fashion designers contribute to the political, economic and cultural development of the British fashion industry and the country.

By drawing lessons from the historical samples of western fashion, the historical experience and value can be condensed to inspire the development of China's fashion industry. Combined with digital multi-product display methods and fashionable 3D virtual software, fashion diversity and plasticity can be displayed by means of fashion trend release, dynamic display, fabric direct display and digital implantation. Open the trend storm of digital fashion plus virtual fashion, redefine the brand communication mode, face the dilemma of the epidemic, expand the meta-universe to carry out fashion festival, digital trade fair and other innovative marketing models.

Thank you.

Topic: Exploration on the Protection of Fashion Design Works by Industry Organizations[1]

Speaker: Linfang Fu (President, Zhejiang Institution of the Protection of Cultural and Artistic Creation; Professor, Tourism College of Zhejiang; Director of Beijing ZhongLun W&D (Hangzhou) Law Firm)

First of all, I would like to introduce the work of Zhejiang Institution of the Protection of Cultural and Artistic Creation. Zhejiang Institution of the Protection of Cultural and Artistic Creation is currently developing a system for the management and registration of works' right confirmation, including the registration of works' right confirmation at the bottom and the management at the top. The application scenario of the system is Zhejiang Cultural Center, and the main work objectives are as follows. First, provide a set of contract system behind the system to solve the copyright authorization problem of all kinds of works in cultural centers, ensure that cultural centers have clear rights to the works, and eliminate the legal risks of the subsequent use, distribution and authorization of cultural centers. Second, confirm the works and use the unique database of the rights list to solve the problem. Third, the system is used to classify and manage the works to facilitate the search of target users. Fourth, based on the platform built by the system, a professional team of lawyers is set up to respond to the needs at any time to help the cultural center to solve the complaints and disputes caused by the infringement of the works. The system will be applied to various scenarios of the cultural tourism system in the future, including the protection of intangible cultural heritage works, the protection of works based on cultural gene decoding, and the protection of works that may be generated in the process of the Asian Games.

Besides, Zhejiang Cultural and Artistic Works Rights and Interests Protection Association provides a full set of services for the fashion industry. The exploration includes the following aspects. First, let designers' traditional design works and digital design works enter the right confirmation and registration system at the very beginning to reduce the cost of copyright registration. Second, establish the docking channels between designers and industries through more industry organizations. After designing products, designers can establish contact with manufacturers through very low negotiation and transaction costs, and quickly reach cooperation with manufacturers, improve the economic benefits of designers' design results and encourage design innovation. Third, the lawyer team will quickly follow up, responding to the infringement problems in the process of right confirmation at any time. Fourth, establish the social appraisal organization or group of works, its appraisal conclusion can provide certain help for the identification of infringement.

Thank you.

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[1] Recommended reading by the Deputy Editor-in-chief: Ginanna Cresto, *A Design of Its Own: How to Protect the Fashion Industry*, 46 (4) AIPLA Quarterly Journal 571, 571-601 (2018); Denisse Garcia, *Fashion 2.0: It's Time for the Fashion Industry to Get Better-Suited, Custom-Tailored Legal Protection*, 11(1) Drexel Law Review 337, 337-373 (2018-2019).

Topic: Be Wise and Take the Steps Necessary to Protect Designs under the U.S. Fashion Law

Speaker: Joan Davis (Partner, Schroder Brooks)

Hi. Thank you for letting me be a part of this symposium. My name is Joan Davis. I'm with Schroder Brooks located in the United States. I'm licensed in the states of Virginia and New York. Schroder Brooks is a nationally recognized entertainment, media, advertising, and fashion law firm providing legal services to clients in the creative industries and endeavors. I've been involved in the fashion industry for many years. Actually I have a daughter who is a child model, who faced the Child Model Law that was brought into New York in 2013. I represented emerging designers and establish designers and others in fashion industries. I have a certificate from Fordham Fashion Law Boot Camp and an LL.M. in fashion law from School of law of Luiss University in Rome, Italy.

The most important point that I want to stress under the U.S. law is you must protect your intellectual property. That means make sure necessary steps are taken to protect designs, brands, packaging etc. If you're going to sell your designs in the United States, you need to protect your trademarks, your copyrights, and your patents. You also need to be familiar with labor law. There was an earlier presentation about using AI-generated models instead of real models including children. That's very interesting because, in the United States, you also need to be familiar with the state-specific labor laws that regulate child models and other models in the industry. Another area of law where you will find legal issues in the fashion arena law is criminal law. You need to be familiar with counterfeits and the laws regulating selling online on platforms such as Amazon, eBay and others. There are regulations for take down procedures and combatting counterfeits that platforms such as Amazon and other online retailers must follow.

Today, I'm going to discuss primarily intellectual property (hereinafter referred to as IP) in the United States. IP plays a huge role in what has been defined as fashion law over the past decade. IP rights allow designers to gain financial benefits and recognition for their creations. IP protection is used to protect a designer's brand. Branding in the fashion world is the act of creating a name, symbol, color, or style that differentiates one design collection from another. A designer's brand is the most important piece of IP they own. It is worth the expense to take time to create a brand and protect it by registering the logos and brand names with the United States Patent and Trademark Office (hereinafter referred to as the USPTO) and protecting your original prints under copyright registration. Attorneys file hundreds of trademark and copyright applications. They work both counseling clients who have their marks infringed and defending those who are accused of trademark and copyright infringement.

1. Trademark

You want to make sure that when you're protecting your IP, you're not only protecting your main logo, but you also want to make sure you're protecting the collection name, that tagline or phrase, and content for any ad campaigns, your prints on fabrics, and packaging. Some examples of this are your main logo could be like the logo for Chanel. You see the interlocking C's and you know that's a Chanel brand. The

collection name is the name of the collection. Here in the United States, we are familiar with the retail stores Victoria's Secret. There is a collection called Pink. The collection also needs to be protected under trademark law. You also need to protect your tagline or phrase. For example, with Gucci, one of the taglines is "quality is remembered long after price is forgotten." This is a trademarked phrase. You also need to protect any content for your ad campaigns under copyright protection in the United States. I'm going to talk more about copyright protection. Prints on fabrics should also be protected under copyright. And packaging such as if you're familiar with Tiffany's brand, that blue color of Tiffany's box is also protected under trademark registration.

Communication between the designers and legal counsel is very important in order to protect a brand's intellectual property. Every creative work requires a diligent clearance and proper protection. An attorney knowledgeable of IP is needed in order to protect your designs and your other creative works.

In my opinion, in the United States, the trademark is probably the most important form of IP protection. As we spoke about previously, a trademark is a stylized logo, a name or standard character mark, or both that identifies the source of goods or services. When consumers hear the brand name such as Coco Chanel or they see the interlocking C's, they immediately identify that product associated with Chanel as a luxury product. Trademark law grew out of a need to protect the public from less-than-honorable merchants who learned to put someone else's name on a brand, such as inferior knock-off products. Many designers will waste time attempting to register their own trademark when they do not understand the trademark process which often leads to additional fees paid to try to save the mark once an attorney is involved.

Here in the United States, if you're a foreign-domiciled company, you will need to find an attorney in the United States who can file your trademark for you. That requirement has been in effect since, I believe, 2019. Trademark applicants, registrants, and parties to the Trademark Trial and Appeal Board proceedings must appoint and be represented before the USPTO. There is a form on the USPTO website that allows you to appoint an American attorney to help and assist with your application.

Who is considered foreign domiciled? A foreign-domiciled trademark applicant, registrant, or party is one who does not have a domicile in the United States or its territories. An individual's domicile is the place the person resides and intends to be the person's principal home. If you live in the United States and this is your permanent home, and there are some criteria that establish that, then you are considered domiciled in the United States. If you have a business that is considered domiciled in the United States and it's your principal place of business or your headquarters, where the entity's senior executives or officers ordinarily direct and control the entity's activities. That is also considered a foreign-domiciled address.

I've put up one case here, Christian Louboutin case.[1] I have the site for you to jot down. This has become a very famous case in driving home the premise that color can be protected as a trademark. For example, in this case, the bottom of the shoe, which was a red lacquer, with a contrasting shoe color was found to be trademark protected while the monochromatic shoe with the red sole in the United States was allowed. I understand that there's been a recent case in China where Christian Louboutin was also allowed to have the red bottom sole trademarked. If you're interested in reading the American opinion,

[1] See *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc*., 696 F.3d 206 (2d Cir. N.Y. 2012).

this is the site on my slide here.[2]

2. Copyright

Another form of IP protection in the United States is copyright protection. Copyright protects original works of authorship that are fixed in a tangible medium. A designer often registers prints that are displayed on their fabric, but in most circumstances, in the United States, designers cannot register actual designs. What this means is that prints, such as the prints on these shirts, could be registered. However, the actual style of the shirt in most cases cannot be registered. Copyright registration and protection is another form of IP that you want to make sure you examine when you're deciding your strategy for protecting your IP.

Foreigners can register works under the U.S. Copyright Law in the United States. Any work that is protected by the U.S. Copyright Law can be registered. This includes many works of foreign origin. All works that are unpublished, regardless of the nationality of the author, are protected in the United States. Works that are first published in the United States or in a country with which the United States has a copyright treaty or that are created by a citizen or domiciliary of a country with which United States has a copyright treaty are also protected and may therefore be registered with the U.S. Copyright Office. Again, these are examples in the fashion arena of what you can register your copyright under. See Circular 38a, International Copyright Relations of the United States, for the status of specific countries.[3] And Circular 38b, Copyright Restoration Under the URAA.[4]

There is also a famous case that I wanted to mention and give you the site. This is *Varsity Brands, Inc. v. Star Athletica*, LLC.[5] You can look this case up later. This was a case decided by the Supreme Court of the United States. Basically, the decision was that if a design is created in such a manner that it could be used anywhere, it's not just a part of the material product, meaning it doesn't have a utilitarian purpose or useful purpose, then the actual copyright can be registered. For example, if you have a print, as in these cheerleading uniforms, the print and the design were actually created off of the uniform. One of the things that Justices of the Supreme Court of the United States stated was that if you can take the design and place it in a different place, then it is protectable. For example, here in the United States, we have a designer, Lilly Pulitzer. Many of those prints are registered and used on many different products such as clothing, games, and laptop covers.

3. Teade Secrets

Trade secrets are protected in a different way. Trade secrets in the United States are not registered. Registration is not required for the protection of trade or commercial secrets. This area of protection is more concerned with confidentiality. You will protect those with non-compete and non-disclosure agreements, which are signed by those

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[2] See *Wall Street Fab*, https://wallstreetfab.wordpress.com/category/fashion/shoes (accessed on October 10, 2022).

[3] See *International and Copyright Relations of the United States (Circular 38A)*, https://www.copyright.gov/circs/circ38a.pdf (accessed on October 10, 2022).

[4] See *Copyright Restoration Under the URAA*, https://www.copyright.gov/circs/circ38b.pdf (accessed on October 10, 2022).

[5] See *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468 (6th Cir. Tenn. 2015).

exposed to the secrets in an effort to keep confidential any information that is not available in the public domain. Companies that do not want their employees or anyone else who comes in contact with particular designs may also use employee handbooks and contracts of employment to protect their intellectual property from being stolen or taken elsewhere when that employee leaves. See Nike, Inc v Denis Dekovic, Marc Dolce, and Mark Miner, in the Circuit Court of the State of Oregon for the County of Multnomah, No. 14-cv-18876.[6]

4. Design Patent

The design patent according to the USPTO, "a design consists of visual ornamental characteristics embodied in, or applied to, an article of manufacture. Since a design is manifested in appearance, the subject matter of a design patent application may relate to the configuration or shape of an article, to the surface ornamentation applied to the article, or to the combination of configuration and surface ornamentation." In the last few years design patents have become more popular as a method for protecting fashion designs. In the United States, the patent is more costly than other copyright registration or trademark registration, but it is used for items such as belt buckles and shoes. You can also go to the USPTO and view design patents for fashion to get a better idea of how that is handled. In the United States, in order to practice before the USPTO as a patent attorney, you need to pass a patent bar, and there are some special requirements for that.

Lululemon Athletica Canada v. Calvin Klein, Inc. addressed the design of a waistband on yoga pants. This case was actually settled so there were no decisions or bright-line rules that came out of this case. However, if you can find the patent drawings on the USPTO and if you Google this case, you will see a very good example of a complaint that was filed for a design patent infringement.

Here are some design patent useful sources. I am not registered as a patent attorney in the United States. But these are very good resources if you want to get information about registering design patents.

5. Brain Licensing

The last area of fashion law that I want to speak about is brand licensing. Brand licensing in the United States and in other countries has grown over the past decades.

What are brand licensing agreements? License agreements allow one party, a licensor, to license its brand to another party, the licensee, so that party can profit off the good will and the IP the brand owner has built around the brand. These agreements will set forth the payment structure, the specific use of logos, brand names, and limitations on the use of the brand. For example, brand owners may not want their brand sold in certain places so they can restrict that in the contract. Attorneys can advise about brand licensing in the unique cycles in the fashion industry. Licensing can create substantial revenues. That is the reason if you are a designer, you want to make sure you are familiar with licensing. Royalties from fashion-related license agreements generated $700 million in sales, and this is an old figure in 2012. I'm sure that has increased considerably. There's a

[6] See full text of the report of Nike Case, Jackson Lewis P.C., *Nike Lawsuit Against Former Designers Will Test Company Security Initiative*, http://www.noncompetereport.com/2014/12/just-sue-it/ (accessed on June 30, 2023).

useful source for brand licensing and that's under this New York Times article.[7]

Thank you for letting me speak today. This has been a great symposium, and I am honored to be here. I hope everybody has a great day.

[7] See Stephanie Rosenbloom, *The Licensing Agreement between Liz Claiborne and J.C. Penney*, New York Times, http://www.nytimes.com/2009/10/09/business/09liz.html?_r=1 (accessed on June 30, 2023).

Topic: Chinese Fashion Law Teaching Design Plan[1]

Speaker: Cihong Hu (Associate Professor of the School of Law and Politics, Zhejiang Sci-Tech University)

The topic I share is the research on the training of legal talents in the fashion industry - the course setting of fashion Law for university law masters. Related articles have been published in our journal of Zhejiang Sci-Tech University. The main content of this article is the construction of the curriculum of fashion law for master of Law. Based on the design of fashion law courses in some foreign universities, this paper proposes to make fashion law a compulsory, optional and practical course for master of Law in Chinese universities. This idea combines theoretical study and practical professional practice, which meets the professional needs of our current law master training and the demand of the fashion industry for the training of legal talents in colleges and universities. It provides a new idea for the implementation and promotion of the training of fashion law talents in domestic colleges and universities, and fills the gap in China.

The concept of fashion law course mainly includes four aspects, one is the outline of the course, the other is the study of fashion law education and curriculum. The third part is the suggestions on the course setting of fashion law for law masters in Chinese universities. Because of the time, I will mainly share the third point - our university law master fashion law course.

First of all, fashion law course training direction and objectives, divided into ability requirements and knowledge requirements. Ability requirements specifically refer to the ability to cultivate relevant legal thinking through fashion law courses, and to form a relatively solid and complete professional quality in daily affairs; Master the necessary skills of "fashion law" talents, and be able to draft, review and standardize various contract texts; Able to provide legal risk analysis of various activities in the fashion industry; Master the ability to review and compile the legality of fashion projects and major decisions of fashion companies. Knowledge requirements are as follows: master the professional knowledge of the core course of "Fashion Law"; Good knowledge of fashion industry; To study the various legal issues arising in the fashion industry under the new format; Improve the ability of data retrieval, the ability of writing papers and judicial documents, the ability of judicial practice, and the ability to innovate legal theory; Have profound legal literacy, excellent ideological and moral qualities, and a wide range of cultural interests.

We have set training goals and personnel training needs. Under the guidance of this goal, the preliminary suggestions on the legal quality fashion law curriculum setup in Chinese colleges and universities are divided into the following aspects: The first is a theoretical course, which is divided into disciplines and non-degree courses, that is, compulsory courses and elective courses. I further divided the compulsory courses into

[1] Recommended reading by the Deputy Editor-in-chief: Christine Tsui, *The Evolution of the Concept of "Design" in PRC Chinese Academic Discourse: A Case of Fashion Design*, 29(4) Journal of Design History 405, 405-426 (2016); Christine Tsui, *The Identity of the Emerging Young Chinese Fashion Designers and the Role of Fashion Design Education*, https://link.springer.com/chapter/10.1007/978-981-16-2926-6_6, (accessed on October 4, 2023).

nine aspects, nine compulsory courses. Elective courses are some successful experiences or projects for the cultivation of fashion law talents. Through this embedded practice teaching, we will integrate our industry standard concepts and methods and post professional standards into the professional training process to improve students' professional quality and practice level. Embedded practical teaching will be a focus of fashion talent training.

At last, it also involves the design of the course method and the course assessment method, etc. Due to the time, it will not be introduced. The above is my brief introduction to the fashion law legal talent training ideas of Zhejiang Sci-Tech University.

Closing Remarks of the 4th China Fashion Law Symposium

Speaker: Longyan Ni

Thank you for all the guests for watching the whole process of the 4th China Fashion Law Forum hosted by our Zhejiang Sci-Tech University and co-sponsored by Kilpatrick Townsend & Stockton LLP. After a day of brainstorming, I believe that both the guests and the audience are full of gains, and many of the cutting-edge legal issues of the fashion industry mentioned by the guests have given us a lot of inspiration. Although the speaking time of the guests has been increased from 15 minutes per person in the previous session to 20-25 minutes per person this time, there is still a feeling of not being able to finish the session due to the time limit. Then let's continue to digest and absorb after the conference, and also continue to exchange and discuss. I must admit that there are some minor flaws in today's session due to technical reasons. Once again, I thank everyone for your tolerance and understanding. I believe it is just like what was discussed today, when entering a new field like meta-verse, there may be a lot of discomfort and confusion during the transition period, but I believe that after active mapping, we will definitely sail forward and leap forward with a more exciting attitude. Finally, thank you again for your participation and I wish you all a good weekend. We will see you next year.

The honored guests in this forum have fully discussed the cutting-edge legal issues of the fashion industry, and in the context of the era of entering the new field of meta-verse, despite some discomfort and confusion during the transition period, I believe that after active groping, fashion and art law will definitely sail forward and leap forward with a more agitated posture.

The conference agenda was compact and full, the topics were rich and diverse, and the views of the guests were innovative and unique. With the theme of Building Strength and Co-creation, legal elites and industry experts from across borders and professions came together to exchange ideas, which is quite relevant and inspiring for the research and development of fashion law. At the same time, we are looking forward to more exchanges and discussions after the conference. Finally, I would like to express my heartfelt thanks to all the participants. The 4th China Fashion Law Forum came to a successful conclusion.

Thank you.

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