ARTICLES

Enforcing a New National Security? China's National Security Law and International Law

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New national security (NNS) represents a twenty-first century's sociological paradigm on which the law is based on and is characterized by multiple actors, wide covering, low predictability, subjective perception, dual nature, and rampant diffusion. The emergence and expansion of the NNS prompts a highly advanced perspective to the rule of law at both the national and international levels, specifically, the relationship between international and domestic law. In this context, traditional approaches, 'international approach' or 'national approach,' are insufficient, so that a new 'managerial approach' is thus needed. The legal practice in relation to national security of China, a rising great power, attracts close attention in the international society. Furthermore, since Chinese conception of national security has its own 'Chinese characteristics,' how China will enforce its national security law in the context of international law remains to be seen. The NNS will lead profound sociological transformation upon which all legal orders are based.

Keywords

New National Security, National Security Law, International Law, China

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I. Introduction

On July 1, 2015, the National People's Congress ("NPC") of China passed the National Security Law ("NSL").[1] During the drafting process, several Western states raised serious concerns. They complained that, if national security were defined in such a broad manner, it would be readily susceptible to misuse and abuse. After its adoption, these States and non-State actors expressed their disappointment. Defending the law, however, China firmly maintained that many other countries has also adopt national security laws and that China's NSL is not substantially different from those of other countries.[2]

Legal practice in national security of great powers is of special prominence to international relations and the rule of law.[3] Compared to the US legal practice in this field which has been widely examined,[4] little has been done for China's stance. Therefore, a case study of China's newly adopted NSL will be of significant value to shed light on what national security law would bring, including the relationship between international law and domestic law.

The main argument presented in this paper can be summarized as follows. On the one hand, the New National Security ("NNS") represents a new and profound sociological transformation upon which all legal orders are based. Due to its inherent characteristics it is not easy to appropriately understand, identify, and respond to the NNS at both the national and international level. As a result, governments tend to claim more discretions for their actions, arguing that undue hurdles imposed on them would curtail their ability to effectively protect national security, putting it at peril. On the other hand, these characteristics also make NNS to be readily misaddressed, misused, or abused. As a result, the rule of law at a national and an international level might potentially be derogated. In this context, the relationship between international law and national law, which has perplexed many international lawyers and states for centuries, becomes more difficult to define.

This paper consists of five parts including a short Introduction and Conclusion. Part two will examine the evolution from the Old National Security ("ONS") to the

1 *See* The National Security Law of China 中华人民共和国国家安全法, *available at* http://www.npc.gov.cn/npc/xinwen/2015-07/07/content_1941161.htm (last visited on Apr. 20, 2016).

2 For details, *see* Ch. III (C) of this paper.

3 W. Nagan & C. Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 Berkeley J. Int'l L. 390 (2004).

4 *See generally* H. Meiertöns, The Doctrines of US Security Policy (2010).

NNS, and trends of recent legal practice in national security. The author will argue that the NNS emerges as a new social dynamic, leading to three general trends in national security law. Part three will review China's NSL. The author will argue that this law should be placed in the context of the new national security. Part four will survey recent Chinese international legal practice and analyze the future application of China's NSL under international law. Arguably, international law will play some role in the surveillance of Chinese national security law, but it is too early to draw a definite conclusion.

II. NNS and Changing Landscape of the National Security Law

A. NNS

National security may be introduced first as a concept in the US that grew after World War II. In 1947, the first national security legislation titled "national security law" was adopted in the US.[5]

Up until the 1980s, national security had maintained several conspicuous features. First, military attacks were regarded as the fundamental source of threats to national security. As a result, the armament race, the disarmament bargain, and other related matters (*e.g.*, military alliance) had long been the focus of national security. Accordingly, fundamental principles were enshrined in the United Nations Charter, such as the prohibition of, or threat to use of force and peaceful settlement of international disputes. However, although the UN Charter, in contrast with the Covenant of the League of Nations, contained economic, social, cultural and human rights as new agendas,[6] their relevance to national security appeared very limited. Second, national security was overwhelmingly, if not totally, state-centric. Conversely, private actors and factors were on the periphery. Their influences on national security, either positive or negative, are low. This sustains several other purposes and principles in the UN Charter, *e.g.*, equality of sovereign States and collective security mechanism. Third, threats to national security of a country were generally adhered to a specific territory. An event occurring within a State hardly produced damaging

5 National Security Law of 1947, *available at* https://global.oup.com/us/companion.websites/9780195385168/resources/chapter10/nsa/nsa.pdf (last visited on Apr. 22, 2017).

6 U.N. Charter, ch. 10.

spillover effect beyond its national border. Thus, these threats were relatively easy to locate. As a result, the principle of territorial jurisdiction was traditionally highly respected.[7] Last, it was relatively easy to identify threats to national security. Thus, highly reliable evidence was generally required to justify the responsive measures. In spite of some controversies the right of anticipatory self-defense is recognized under customary international law, the UN Charter, in Article 51, explicitly provides that a State could exercise self-defense only if an armed attack 'occurs.' The so-called 'anticipatory' self-defense was not supported in the UN practice for its past history.[8] Most of the aforementioned features of national security and their respective legal practice can be found in a survey of American national security doctrines before the 1980s.[9] The author would like to categorize this type of national security as ONS.

In the beginning with the 1990s, national security exhibited some new dimensions. People recognized it "dynamic and continually evolving"[10] so that they are required to redefine national security.[11] This is due to the blossoming of the NNS, which placed national security law in a new context. Of course, the NNS does not render the ONS obsolete. Rather, States have to deal with both of them.

Let's review what has been identified as the NNS. In 2004, a UN's High-Level Panel mentioned six categories of threats to security which "the world must be concerned now and in the decades ahead."[12] They include: (1) economic and social threats, including poverty, infectious disease, and environmental degradation; (2) inter-State conflict; (3) internal conflict, including civil war, genocide, and other large-scale atrocities; (4) nuclear, radiological, chemical, and biological weapons; (5) terrorism; and (6) transnational organized crime.[13] Apart from (2) and (4), all other categories had not been regarded as serious threats to national security.

A more recent survey toward nine countries indicates that the following should be generally considered as threats to national security: terrorism, weapons of mass destruction, attacks by foreign countries, global pandemics, natural disasters, and

7 *Id*. art. 2(7).

8 For details, *see* T. Ruys, "Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice 250-305 (2010).

9 Meiertöns, *supra* note 4, ch. 3.

10 OECD Security-Related Terms in International Investment Law and in National Security Strategies 11 (2009), *available at* https://www.oecd.org/daf/inv/investment-policy/42701587.pdf (last visited on Apr. 15, 2017).

11 *See*, *e.g*., J. Mathews, *Redefining Security*, 68 Foreign Aff. 162-77 (1989); R. Ullman, *Redefining Security*, 8 Int'l Security 129-53 (1983).

12 A More Secure World: Our Shared Responsibility, Report of Secretary-General's High-Level Panel on Threats, Challenges and Change, U.N. Doc. A/59/565 (Dec. 2, 2004), at 23, *available at* http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (last visited on Apr. 15, 2017).

13 *Id*.

man-made emergencies; many states are including energy security, failed states and organized crime.[14] *E.g.*, the UK has expanded its conception of national security to include threats to individuals and their way of life. Beyond "just immediate threats and risks," it extends national security concerns to "the underlying drivers of security and insecurity," including climate change, competition for energy, poverty, inequality, poor governance, and global trend.[15] In the 1990s, the US began to recognize terrorism as a serious threat.[16]

The NNS is still "dynamic and continually evolving." In recent years, *e.g.*, cyber-security,[17] refugees, and religions have been included in the list of the NNS.[18] Moreover, in the aftermath of Snowden scandal in 2013, data protection has been also considered as national security.[19]

Furthermore, national security has been substantially influenced by globalization. First, as globalization continues to blur national boundaries, threats to national security could often transcend territories easily. Second, it significantly increased the say of private actors in public affairs including national security. They could not only enhance good governance, thereby helping protect national security, but also be new sources of threats to national security. *E.g.*, 9/11 attack significantly redefined the traditional conception of national security.[20] Third, as globalization involves nearly every aspect of human life, variables influencing national security increase and the relative weights among variables are reallocated. Military power remains prominent, but its relative weight decreases. By contrast, other variables, especially economic factor, increase their relative weights. Furthermore, different constituents of globalization interact with each other. This creates a phenomenon of 'related issues.'[21]

14 *Supra* note 10.

15 Cabinet Office, The National Security Strategy of the United Kingdom Security in An Interdependent World 3-4 & 18-22 (Mar. 2008), *available at* http://ccpic.mai.gov.ro/docs/UK_national_security_strategy.pdf (last visited on Apr. 15, 2017).

16 D. Keith, *In the Name of National Security or Insecurity?*, 16 Fla. J. Int'l L. 416 (2004), *available at* http://heinonline.org/HOL/LandingPage?handle=hein.journals/fjil16&div=34&id=&page= (last visited on Apr. 15, 2017).

17 *See*, *e.g.*, Austrian Cyber Security Strategy (2013); Canada's Cyber Security Strategy (2010); Cyber Security Strategy for Germany (2011); New Zealand's Cyber Security Strategy (2011); National Strategy for the Protection of Switzerland against Cyber Risks (2012).

18 S. Shetreet, *Contemporary Challenges of Law: Religion and National Security*, 15 Asia Pac. L. Rev. 137 (2007).

19 I. Tourkochoriti, *The Snowden Revelations, the Transnational Trade and Investment Partnership and the Divide between U.S.-EU in Data Privacy Protection*, 36 UALR L. Rev. 161 (2013-4), *available at* http://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1133&context=lawreview (last visited on Apr. 15, 2017).

20 D. MaGoldrick, *9/11: A Turning Point or a Tiping Point?*, *in* September 11, 2001: A Turning Point in International and Domestic Law? 822 (P. Edan & T. O'Donnell eds., 2004).

21 *See*, *e.g.*, G. Zagel, *The WTO and Trade-Related Human Rights Measures*, 9 Austrian Rev. Int'l & Eur. L. 119 (2004).

Nearly everyone and everything are potentially to be involved in national security. Thus, 9/11 Commission stressed that the US should take a balanced and coordinated approach to terrorism involving "all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense."[22]

Another factor substantially contributing to the NNS is the risk society, which emerged in the late 1970s. It represents a new sociological paradigm in the post-industrial society. Risk society has notably expanded as globalization sped up since the 1990s. Here, risks are easily produced, diffused, and function across national boundaries. As the result, they are often difficult to predict, calculate and control.[23] This means that risks are often identified based upon subjective perception rather than objective evidence. Thus, different actors could claim their own understanding of risks.[24] Since threats to national security in essence are often future-oriented risks,[25] this new context of risk society makes the NNS more difficult, or sometimes even impossible, to identify and evaluate accurately. Accordingly, divergent understandings emerge among governmental authorities, private actors, and between them, in regard to, *e.g.*, what and to what extent people should pay the 'bill' of security at the cost of individual rights. Beck even avowed that legal institutions in the risk society collapsed.[26] Naturally, public authorities are inclined to more interventions into private sectors in order to justify their activities.

In other words, the NNS, compared to the ONS, significantly reduces legal certainty and predictability. Conventional wisdom dictates that a good law provide clear and predictable norms for actors, specifying clear-cut rights and obligations. However, whether law could be well made and properly enforced heavily depend on the nature of social relations that it seeks to regulate and is based on. In short, the more stable and predictable social relations are, the more definite and predictable law could be. In an agricultural or an industrial society where social relations are still quite stable, legislators, especially those in Civil Law states, are thus confident in creating an "empire of law" based on rationality. Accordingly, law is enforced by the mechanical employment of syllogism. Risk society, specifically the NNS, shakes

22 The National Commission on Terrorist Attacks upon the United States, 9/11 Commission Report 363-4 (2004), *available at* http://govinfo.library.unt.edu/911/report/911Report.pdf (last visited on Apr. 15, 2017).

23 U. Beck, Risk Society 20-3, 29 & 36-7 (1992).

24 So, anyone in risk society is an expert and nobody is an expert at the same time. *See* U. Beck, A. Giddens & S. Lash, Reflexive Modernization 9 (1997); Beck, *id.* at. 29.

25 Dudziak held that 'future' should be a concept in national security law. *See* M. Dudziak, *The Future as a Concept in National Security Law*, 42 Pepp. L. Rev. 591 (2014-5). *See also* Beck, *supra* note 23, at 33.

26 Beck, *supra* note 23, at 22.

the sociological basis upon which law traditionally relies, placing law-making and enforcement in a context of uncertainty.

B. Changing Landscape of the National Security Law: Three General Trends

As mentioned above, the NNS emerged as early as the 1980s. Until 9/11 attack, however, the complexity of the NNS - its source, process, and effect - had been really recognized.[27] The more complex the NNS is, the more effective legal measures are needed. Soon after 9/11 attack, the UN Security Council adopted Resolution 1373, requiring that UN Member States criminalize terrorism.[28] Many countries began adopting or strengthening national security legislations,[29] including states that did not suffer horrific events like 9/11 attack.[30]

In this context, three trends of recent legal development have been discerned. First, national security affairs tend to be controlled by the rule of law. National security is traditionally referred to as 'high politics,' in which law played only a very limited role.[31] Sentelle raised a question: "Is national security law really law?"[32] He found that national security law was depreciated as "a collection of fig leaves to cover whatever the political branches decide to do in the name of national security or national defense."[33] Nevertheless, many countries recently adopt or modernize their national security laws. Furthermore, they are also involved in continually densed international legal regimes. As a result, national security affairs are more under the surveillance of law at both national level and international levels. In particular, international courts equip international law with 'teeth,' making actions of States based on national security more probable to be challenged.[34] A survey finds that international courts and tribunals may review matters in relation to national security,

27 September 11 attack was regarded as "a turning point in international law and domestic law." *See generally* Eden & O'Donnell, *supra* note 20.

28 S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), *available at* http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf (last visited on Apr. 15, 207).

29 For details on the development of the US in this regard, *see* A. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States*, 8 N.Y.U. J. L. & Liberty 420-50 & 520-50 (2013-4).

30 Keith, *supra* note 16, at 405.

31 Onuma Yasuaki, *International Law in and with International Politics*, 14 Eur. J. Int'l L. 114 (2003), *available at* http://www.ejil.org/pdfs/14/1/402.pdf (last visited on Apr. 15, 2017).

32 D. Sentelle, *National Security Law: More Question than Answers*, 31 Fla. St. U. L. Rev. 1 (2003-4).

33 *Id*.

34 S. Rose-Ackerman & B. Billa, *Treaties and National Security*, 40 Int'l L. & Politics 460-79 (2008).

not allowing States to interpret national security too broadly.[35] Thus, national security law is no longer "a collection of fig leaves." During the "War on Terror," *e.g.*, the Bush administration was fiercely criticized for taking measures like torture in breach of international law. At first, the US convinced to attempt compliance with international law, but finally abandoned (or reduced) those stances.[36]

Nevertheless, more should be done to enhance rule of law in national security. At the international level, *e.g.*, although the Security Council Resolution 1373 requires Member States to criminalize terrorism, it fails to define terrorism. Instead, some States expanded the definition of terrorism under the enforcement of Resolution 1373.[37] Domestic judges, at the national level, still often defer to the executive branch in regard to national security affairs.[38]

Second, national security affairs are at the risk of running out of the rule of law. There has been a consensus that governments should be granted more discretion in national security affairs than other matters.[39] The emergence of the NNS appears to further justify such kind of discretion. Governments are thus more inclined to claim that national security matters should not be governed rigidly. Instead, some political expediency is justified. A big problem, however, is that national security has not been well defined yet.[40] National security is largely referred to as a self-evident concept, or as "an ambiguous symbol."[41]

Indeed, it is arbitrary to accuse States that they do not have any will to provide a clear definition of national security. This is because, as explained above, national security, especially the NNS, is too "dynamic and continually evolving" to be defined. However, that national security is often misinterpreted, misused, or abused by public authorities to infringe private rights. This is because of the "careless use and abuse of the concept may have already rendered it useless for everyone but the politicians."[42]

35 *Id.* at 462-80. *See also* United States-Trade Measures Affecting Nicaragua (Nicaragua II): Report of the Panel, L/6053 (Oct. 13, 1986), ¶ 5.17, *available at* https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf (last visited on Apr. 15, 2017).

36 M. Nowak, M. Birk & T. Crittin, *The Obama Administration and Obligations under the Convention against Torture*, 20 Transnat'l L. & Contemp. Probs. 33 (2011-2).

37 K. Lane Scheppele, *The International Standardization of National Security Law*, 4 J. Nat'l Security L. & Pol'y 444-6 (2010).

38 D. Dyzenhaus, *Humpty Dumpty Rules or the Rule of Law*, 28 Austl. J. Leg. Phil. 6-7 (2003).

39 R. Jennings, Recent Cases on "Automatic" Reservations to the Optional Clause, 7 Int'l. Comp. L. Q. 362-3 (1958). *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 12, ¶ 221 (June 27), available at http://www.icj-cij.org/docket/files/70/6503.pdf (last visited on Apr. 15, 2017).

40 An example is the National Security Review (NSR) toward foreign investment in the US. *See* generally C. Tipler, *Defining "National Security":* Resolving Ambiguity in the CFIUS Regulations, 35 J. Int'l L. 1223 (2014).

41 A. Wolfers, *National Security as an Ambiguous Symbol*, Political Sci. Q. 67 (1952).

42 D. Baldwin, *The Concept of Security*, 23 Rev. Int'l Stud. 26 (1997).

In particular, since the executive branch is generally entrusted with wide-ranging authorities to enforce national security law, the NNS may aggravate the trend of 'administrative state,' making public authority more at risk of abuse.[43] If Edward Snowden had not uncovered the Prism Program, *e.g.*, American people might not be aware of the spying long conducted by their government, which infringed their private rights.[44] At the international level, it has been recognized that invocations of national security powers by hegemonic countries were often aimed to "limit the role of law in the exercise of those powers."[45] Take the security exception of GATT as an example. During the process of drafting, a serious issue of the potential abuse of nation security was raised. [46]

As more actors and matters are involved in the NNS, national security law is at a greater risk of being abused. Notably, national security law might be employed in a political or sociological manner rather than in a legal manner. It makes legal remedies difficult to avail or render them meaningless. A telling case is the failed bid by Chinese investor in the US. In 2005, China National Offshore Oil Corp. ("CNOOC") announced a bid of USD 18.5 billion to buy Unocal, a US oil company. CNOOC applied the Committee of Foreign Investment in the US ("CFIUS") to initiate national security review ("NSR"). CNOOC's offer was favorable for Unocal and the latter expressed its strong interest, but CNOOC finally withdrew its offer. This case demonstrates how national security law is implemented in a non-legal manner. The House of Representatives adopted a resolution asserting that American national security would be threatened,[47] and strongly opposed that deal. This resolution frustrated trading parties. Simultaneously, the CFIUS process was also ongoing at the time. Ironically, both organs were not legally liable: for the House of Representatives, its resolution was not legally binding; for the CFIUS, it did not make any determination.

In some circumstances, misuse or abuse is the means to protect legitimate national security interest. Torture,[48] spying[49] and other illegal means were reportedly used by American authorities in the garb of national security protection. In these cases, the

43 For details on the 'administrative state,' *see generally* Dyzenhaus, *supra* note 38, at 3.

44 Napolitano, *supra* note 29, at 538-40.

45 *See generally* Nagan & Hammer, *supra* note 3.

46 GATT, Analytical Index - Guide to GATT Law and Practice: Article XXI (Security Exceptions) 600 (6th ed. 1994), *available at* https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf (last visited on Apr. 15, 2017).

47 H. Res. 344, 109th Congress (June 29, 2005), *available at* https://www.congress.gov/bill/109th-congress/house-resolution/344 (last visited on Apr. 15, 2017).

48 K. Greenberg & J. Dratel (eds.), Torture Papers (2005).

49 Napolitano, *supra* note 29, at 520-3 & 553.

point at issue is not the protection of national security itself, but of what measures could be used in the end.

The potentially negative legal implications brought about by the NNS have been recognized. *E.g.*, Hitoshi Nasu rightly suggested that the evolving conception of national security would pose challenges to the interpretation and application of international law.[50]

Third, the NNS urges States to reconsider - and thus reconstruct - the relationship between international and domestic law. At the time of ONS, national security was nearly tantamount to interstate military engagement. National security was discussed as either a military conflict or a political issue in international relations. While national security had been included in some international instruments such like Article 21 of the GATT,[51] it was narrowly interpreted. *E.g.*, Article 21 is mainly concerned with war or war-related matters (especially atomic technology) which were crucial concerns in the late 1940s. Further, national security rules were seldom invoked before international courts.[52] It thus had little value in explaining the relationship between international and domestic law as a whole, while the relationship between them in terms of national security was hardly taken seriously.

As the ONS gradually evolved into the NNS, national security affairs increased its value in the illustration of the relationship between international and national law, which has been important in refining states since the 1990s.[53] Further, the relationship between international and domestic law in national security has become a contentious issue which should be deliberately dealt with.

This is because, in terms of the relationship between international and domestic law, some recent noticeable legal developments in relation to national security can be discerned. It indicates an obvious departure from the general trend of international law in the twentieth century.

From a substantive perspective, more exceptions or discretions based on national security have recently been included in treaties. Accordingly, the weight of national law increases in the international legal order. In particular, some legal rules in relation to national security include the phrase, "it considers necessary."[54] Although it is open to debate whether this phrase could function as "self-judging clause" and

50 Hitoshi Nasu, *The Expanded Conception of Security and International Law*, 3 Amsterdam L. F. 20 (2011).

51 *See also* NAFTA art. 2102.

52 Rose-Ackerman & Billa, *supra* note 34, at 451-89.

53 *See generally* P.-H. Verdier & M. Versteeg, *International Law in National Legal Systems*, 109 Am. J. Int'l L. (2015).

54 *See* 2004 US BIT Model, art. 18 (essential security); 2012 US BIT Model, art. 18 (essential security).

if so, to what extent,[55] it is true that national law would enjoy more deference than before. As for the procedural aspects, some national security related disputes have been excluded from international jurisdiction. According to Article 1138 of the North American Free Trade Agreement ("NAFTA"), *e.g.*, a decision by a NAFTA Party out of national security considerations to prohibit or restrict the acquisition of an investment in its territory by a foreign investor shall not be challenged before the arbitral tribunal. Similarly, the Austria-Mexico Bilateral Investment Treaty ("BIT") provides that investor-state disputes settlement provisions shall not apply to resolutions adopted by a Party which, "for national security reasons" and "according to the legislation of each Contracting Party," prohibits or restrict the 'acquisition' of an investment in its territory by investors of the other Contracting Party.[56] There is a broader exception in the Netherlands-Mexico BIT. It provides that the dispute settlement provisions shall not apply to the resolutions adopted by a Contracting Party for national security reasons.[57] In other words, in addition to those measures concerning mergers and acquisitions, other measures are also within this exception.

Indeed, apart from the GATT Article 21, similar exceptions have been included into some other instruments like the International Covenant on Civil and Political Rights ("ICCPR").[58] However, none of those exceptions are so broad that they would use the words, "it considers necessary" or completely reject international jurisdiction. Of course, these developments are still at their early stages. Many treaties do not include national security provision and existing treaty provisions often differ substantially in their terms. The meaning of national security has never been defined explicitly in any treaty. Moreover, few international disputes have been decided in this regard.

Fourth the NNS might serve as a good catalyst that triggers reconsideration and reconstruction of the general relationship between international and domestic law. In the twentieth century, the general trend was that of international law continually intruded into domestic matters and required states to adopt, amend, or enforce laws in accordance with demanding international legal obligations. The author would like to regard this trend as the 'internationalist approach.'[59] If domestic laws deviate from international law, those States are often criticized as possessing a 'nationalist

55 *Supra* note 46, at 600. *See also* O. Schachter, *Self-judging Self-defense*, 19 Case W. Res. J. Int' l L. 121(1987).

56 Mexico-Sweden BIT (2000) art. 18 (exclusion).

57 Netherlands-Mexico BIT (1998) art. 12 (exclusion).

58 ICCPR arts. 4, 9, 12, 19, 21 & 22.

59 J. Ku & J. Yoo, Taming Globalization: International Law, The U.S. Constitution, and the New World Order 4-5 (2012).

approach' or, more seriously, 'unilateral approach.'[60]

This general trend was, however, challenged for the past two decades. This is mainly because today's international law is extensively involved in regulatory affairs, the enforcement of which is relies heavily upon national law. States are required to take actions to honor their international obligations.[61] Many countries would find it burdensome to comply with international law, which makes the (un)compliance a highly topical issue.[62] Recently, a number of States took radical actions including repudiating investment treaties.[63] However, they failed to prompt the international community to take a new pattern of relationship between international and domestic law seriously. Such actions are overwhelmingly discussed as 'negative events.'[64]

In the era of NNS, it seems that most, if not all, States have to reconsider the relationship between international and domestic law. There are two major reasons. On the one hand, it is difficult to delimit national security affairs and related matters, to strike a balance. Many questions are readily misinterpreted, misused, or abused as national security concerns. As a result, national security concern is a good pretext to justify States to deviate from its legal obligations at national or international level. Existing treaties and customary international law,[65] which were created mainly in the era of ONS, are not fully capable of handling the NNS. Thus, the NNS and related issues might place rule of law on both levels at stake. On the other hand, if international law goes too far, the government authority to protect legitimate national security interests would be unduly challenged.[66]

This implies that neither 'internationalist approach,' nor 'nationalist approach' is proper to define the relationship between international and domestic law. This is because 'internationalist approach' could easily lead to "international law first," while 'nationalist approach' is "national law first." As a result of either approach, two

60 *See geneally* H. Keller & D. Thurnherr, Taking International Law Seriously: A Europen Perspective on the U.S. Attitude towards International Law (2005).

61 A. Chayes & A. Chayes, The New Sovereignty 16 (1995).

62 *Id*.

63 On June 10, 2011, *e.g*., Bolivia delivered to the US a notice of termination for the US-Bolivia BIT, which was expected to take effect on June 10, 2012, *available at* https://www.federalregister.gov/documents/2012/05/23/2012-12494/notice-of-termination-of-united-states-bolivia-bilateral-investment-treaty. Similarly, South Africa gave notices to terminate BITs with Germany, Switzerland, the Netherlands, Belgium-Luxembourg, and Spain from 2012 to 2013. *See* U.S. Dept. of State, 2014 Investment Climate Statement - South Africa, *available at* https://www.state.gov/e/eb/rls/othr/ics/2014/229007.htm (all last visited on Apr. 15, 2017).

64 F. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 Santa Clara J. Int'l L. 335 (2013).

65 Rose-Ackerman & Billa, *supra* note 34, at 443-8.

66 P. Margulies, *Defining "Foreign Affairs" in Section 702 of the FISA Amendments Act*, 72 Wash. & Lee L. Rev. 1283 (2015).

legal orders tend to compete with each other. In the era of the NNS, a new approach is thus needed. The author refers to this as the 'managerial approach.'[67] First, both international and domestic law are not to compete with each other. Instead, they cooperate and coordinate to pursue desirable and sustainable rule of law. Second, the "division of labor" between international and domestic law varies in different circumstances. These circumstances include, among others, whether and to what extent subject matter is multi-faceted, because they are not only legal, but sociological, economic, technologic, psychological, and religious. Therefore, the relationship between international and domestic law may be dynamic and flexible. Although this would fragmentize such a relationship, we should not close eyes to the new world where we live in, but recognize that any uniform, one-way relationship no longer exists. Third, some delicate mechanism of communications between two legal orders should be established to manage such a relationship. This 'managerial approach' does not always emerge out of national security concern. *E.g.*, communication mechanisms are provided in some investment treaties between states and international tribunals for the purpose of resolving disputes arising from financial measures.[68]

It is too early to conclude definitively how these three trends will evolve in the end. However, the author believes that they could serve as a framework to evaluate national security law, including China's NSL 2015. More ambitiously, these trends would reconsider and restructure the relationship between international and domestic law.

III. China's NSL: Evolution, Content and Debates

Jacques deLisle observed that: "China faces, or at least claims to face, nontraditional security threats that are broadly similar to those that have prompted controversial legal changes in liberal constitutional democracies."[69] Thus, China's NSL 2015 should be evaluated in a larger context of the NNS.

It should be noted that there are some other laws concerning national security including the Law on Anti-terrorism (2015) and the Law on Cybersecurity (2017). However, they operate within the framework of the NSL 2015.

67 This is inspired by the 'managerial model' of compliance. *See* Chayes & Chayes, *supra* note 61, at 18.

68 2004 U.S. Model BIT art. 20.

69 J. deLisle, *Security First? Patterns and Lessons from China's Use of Law to Address National Security Threats,* 4 J. Nat'l Security L. & Pol'y 398 (2010).

A. Evolution

1. NSL 1993

Law played little role in national governance for about thirty years after the founding of People's Republic of China in 1949. At the end of the 1970s, China launched the Policy of Reform and Opening, which aimed to coordinate with rule-based international regimes. This is the basic background of law-making and enforcement in every societal field including national security in China.

In 1987, the Ministry of State Security ("MSS") established a panel to explore the national security legislation. In the early 1993, China adopted its first NSL ("NSL 1993"). In 1994, the State Council promulgated the Rules to Enforce NSL 1993 (hereinafter the Rules 1994). NSL 1993 tried to legalize national security affairs. It was a 'legal weapon' to protect national security.[70]

According to Article 4 of NSL 1993, acts damaging national security were those committed by "institutions, organizations and individuals *outside the territory*, or, by other persons under the instigation or with financial support of *the afore-mentioned* institutions, organizations and individuals, or, by organizations or individuals within the territory in collusion with institutions, organizations or individuals *outside the territory*." [Emphasis added] There were two features of China's conception of national security: (1) acts endangering national security conducted by non-state actors or involved with non-state actors, or by foreign States; (2) acts endangering national security through foreign-related factors. National security was limited to 'external' interference.[71] Thus, activities conducted by foreign States and by Chinese non-state actors without any involvement of foreign-related factors were beyond NSL 1993. The former belonged to interstate military relations, while the latter, once defined as 'counter-revolution,'[72] were governed by the Criminal Code (1997).[73] The Criminal Code (1997) did not define national security, but regarded it as "Chinese social, historical and cultural ideas as its main background."[74] Thus, the Code and the NSL 1993 took different approaches in defining national security.

70 Chunwang Jia, Introduction to the National Security Law of the People's Republic of China (Draft) 关于《中华人民共和国国家安全法（草案）》的说明 (Dec. 22, 1992), *available at* http://www.npc.gov.cn/npc/lfzt/rlys/2014-08/31/content_1876765.htm (last visited on Apr. 15, 2017).

71 H. Fu & R. Cullen, *National Security Law in China*, 34 Colum. J. Transnat'l L. 453 (1996).

72 Criminal Code of China (1979) art. 90.

73 Criminal Code of China (1997) arts. 103, 104 & 105. The Code, however, covered some crimes to national security with foreign involvement. *See id.* arts. 102, 106 & 107.

74 *Id.* arts. 102-13. *See generally* Shizhou Wang, *A Reflection of Crimes against National Security in Chinese Criminal Law*, 82 UMKC L. Rev. 1040 (2013-4).

Mr. Jia Chunwang, the then MSS Minister, explained the background of NSL 1993. According to Jia, Chinas' national security was exposed to three categories of threats: (a) sabotages committed by foreign intelligence agencies that were increasingly serious; (b) anti-social Chinese individuals who sought foreign support; and (c) some Chinese individuals who sold intelligence to foreigners for money.[75] Thus, the NSL 1993 narrowed national security to intelligence leak or espionage. As a matter of fact, most of provisions of NSL 1993 were merged into the Law of Espionage 2014.

Article 4 of NSL 1993 provided "any other acts of sabotage damaging national security." It was clarified in the Rules 1994.[76] Fu and Cullen argue that the Rules 1994 circumvented the more restrictive interpretation in the NSL 1993 and exceeded the authority entrusted to the MSS by the NSL 1993.[77] This comment is not totally sound because the Rules 1994 did not negate the 'nature' of national security defined in the NSL 1993, but only clarified the 'modalities' of threats to national security. Another proposition could be presented to explain the clarification in the Rules 1994. That is to say, the Chinese government, after the adoption of the NSL 1993, realized that the activities specified in Article 8 of the Rule (1994) were also threats to national security.

In any event, Fu and Cullen agreed that the NSL 1993 began to legalize national security affairs. They said, nevertheless, that this positive development "was seriously undermined" due to the following three factors. First, governmental power excessively expanded by the Rules 1994. As stated above, this point was not totally sound. Second, the MSS was entrusted with broad powers, ranging from intelligence gathering to law-enforcement. National security provided in the NSL 1993 narrowed to espionage. However, agencies like the MSS and its branches were better positioned than others to deal with such cases. Third, parliamentary bodies and courts could have no say in the enforcement of national security law.[78] As said above, it is common that the executive branch dominates in enforcing national security law. The risk of potential derogation to the rule of law which arises from the absence of a meaningful check from parliamentary bodies or courts is huge for China, where no real effective checks and balances in national governance exist; specially, the executive branch often exercises authority arbitrarily. The risk arguably remains in the enforcement of NSL 2015.

75 Jia, *supra* note 70.

76 The Rules art. 8.

77 Fu & Cullen, *supra* note 71, at 456-7.

78 *Id*. at 467-8.

2. NSL 2015

In January 2014, China established the National Security Commission ("NSC") headed by President Xi Jinping.[79] In April, the NSC started to consider a new national security law. Four considerations were proposed in support of a new NSL.[80] First, China is exposed to increasing challenges to national security. Especially, the NNS is constituting serious threats to China's national security. Against this new context, existing national security law was thought to be outdated. Second, a new national security law is needed to define the content and scope of national security, establishing and streamlining national security regime. Third, various resources were not mobilized effectively or coordinated to protect national security. With the establishment of the NSC, it is time to streamline various mechanisms. Finally, as the NSL 1993 ceased to apply, a new legislation was needed to fill the legal vacuum, proving a framework for further law-making.

In preparing this new law, China conducted a thorough comparative law survey on the national security laws of various countries including the US and Russia. Nevertheless, China stresses that the NSL 2015 has its own Chinese characteristics.[81]

B. Content

According to Article 2 of NSL 2015, national security refers to "a status where the national regime, sovereignty, unity and territory integrity, people's welfare, sustainable economic and social development, and other fundamental national interests are immune from danger and external and internal threats, and the capability to maintain this status of security." At least eleven national security concerns are laid down in the following fields: politics, territory, military, economy, culture, society, technique, information, ecology, resource, and nuclear.[82] Those political security, economic security, cultural security, and social security concerns are obviously with 'Chinese characteristics.' In the eyes of some critics, the 'Chinese characteristics' obviously make Chinese authorities misinterpret, misuse, or abuse this new law. The NSL 2015 provides the following fundamental principles.

79 Kejin Zhao, China's National Security Commission, Carnegie-Tsinghua Center for Global Policy, July 14, 2015, *available at* http://carnegietsinghua.org/2015/07/14/china-s-national-security-commission/iu7x (last visited on Apr. 15, 2017).

80 Shishi Li, Introduction of National Security Law of the People's Republic of China (Draft) before Twelfth Meeting of the Standing Committee of the Twelfth National People's Congress (Dec. 22, 2014), *available at* http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content_1945964.htm (last visited on Mar. 20, 2017) .

81 *Id*. *See also* NSL 2015 art. 3.

82 *Id*. arts. 15-31.

1. Comprehensive Conception of National Security ("CCNS"): Originally proposed by President Xi Jinping in 2012, it refers to "establishing people's security as the goal, political security as the core, economic security as the footstone, military, cultural and social security as guarantee, and coordinating to enhance international security."[83] Thus, national security is wide- ranging.

2. Rule of Law: Public authorities shall "abide by the Constitution and law," "respect and protect human rights," and "protect the rights and liberty of citizens."[84]

3. Harmonization: The protection of national security should be "coordinated with economic and social development."[85]

4. The precautionary principle:[86] Both actual threats and sources of national security shall be addressed.

5. Balancing approach: It: (a) coordinates the protection of national security with economic and social development;[87] (b) addresses both internal security and external security, both territory security and security of citizens, both traditional security and non-traditional security, and both China's security and common or international security;[88] and (c) coordinates among numerous public authorities, and between public authorities and private actors.

6. Proportionality principle:[89] Measures taken by relevant authorities are required to be proportional to the nature, extent and scope of potential harm to national security; if multiple measures available, the one most conducive to protect rights and interests of individuals should be taken. In particular, those measures derogating the civil rights and freedom shall be limited to extent necessary to protect the national security.

Various supportive arrangements are provided to operate this new law well. The first group refers to institutions. Many public authorities are involved under the leadership of the NSC, ranging from central government to local governments, from legislative branch to executive branch and to judicial branch, from specific national

83 *Id*. art. 3.
84 *Id*.
85 *Id*.
86 *Id*.
87 *Id*.
88 *Id*.
89 *Id*.

security agencies to other governmental agencies.[90] The second group refers to mechanisms. It includes the NSR on foreign investment in particular.[91]

Article 82 of NSL 2015 merits special mention. It provides that citizens and organizations shall have the right to submit "criticism and suggestions" to state authorities, and have the right to file "complaints, accusations, and reports" against state authorities and their staff for their wrongdoings in relation to national security. These procedures are not proper judicial remedies which are directly available to those negatively affected. Eventually, they cannot bring a claim against state authorities or their staff before courts directly. From the perspective of relationship between international and domestic law, it means that international law cannot judicially prevail over the NSL 2015. This raises a serious concern as to whether a potential abuse of power can be effectively readdressed.

C. Debates

In the drafting of the NSL 2015 or in the wake of its adoption, serious concerns were raised. These concerns focused on two aspects: human rights and commercial interest. Zeid Ra'ad Al Hussein, the UN High Commissioner for Human Rights, *e.g.*, expressed his concern about the human rights implications of the law. In his view, the scope of national security is too broad and the terminology, too vague.[92] As a result, that law "leaves the door wide open to further restrictions of the rights and freedoms of Chinese citizens, and to even tighter control of civil society by the Chinese authorities than there is already."[93] Mr. Zeid suggested that the NSL 2015 "should clearly and narrowly define what constitutes a threat to national security, and identify proper mechanisms to address such threats in a proportionate manner."[94]

A more eye-catching event was that four ambassadors of the US, Canada, Germany, and Japan, together co-signed a letter in Beijing addressed to China's government, expressing their unease. They said that, while each country needs to address its security concerns, "we believe the new legislative measures have the potential to impede commerce, stifle innovation, and infringe on China's obligation to protect human rights in accordance with international law."[95]

90 *Id*. arts. 35-42, 42, 60-63, 75.

91 *Id*. ch. 4, §4.

92 *See* UN human rights chief says China's new security law is too broad and vague, *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16210&LangID=E (last visited on Apr. 15, 2017).

93 *Id*.

94 *Id*.

95 *See US, Japan, EU team up to warn China of concerns over new security laws*, Guardian, Mar. 1, 2016, *available at*

Commercial interest is another major concern. *E.g.*, Hogan Lovells predicted that the broad definition of national scrutiny would have significant negative implications for providers of IT products and services operating in China or selling in China and would further complicate the merger control review in China.[96]

China's government rebutted these accusations firmly. *E.g.*, A spokesperson of the Ministry of Foreign Affairs ("MOF") said that China was "strongly dissatisfied with and opposed to the so-called statement of the UN High Commissioner which makes groundless accusations against China's normal legislative action."[97] The aforesaid concerns are sound in part, however. What happened in the US after 9/11 Attack warns us that national security law could be abused in any country. China, where the rule of law is still developing, is not an exception. As far as the NSL 2015 itself, there are numerous ambiguities. *E.g.*, Article 1 of the law stipulates that the aim and purpose of that Law is "to defend people's democratically centered regime and the social system with Chinese characteristics, to protect the people's fundamental interest, to ensure the smooth implementation of opening and reform and socialist modernization, to pursue Chinese great revival."[98] What implications such a broad aim and purpose could have on the application, remains to be seen.

As a matter of fact, it has been realized that the national security law might be maneuvered by China's government in order to disguise its illegitimate activities. Jacques deLisle warned that new threats, such as terrorism, would "have undermined the force of foreign condemnations of China's illiberal or repressive laws and actions. China thus has more room to claim that its laws and actions are justified by exigencies comparable to those faced in the post-9/11 West and elsewhere."[99]

On the other hand, there are some encouraging developments which are conducive to the rule of law. *E.g.*, the NSL 2015 provides principles of proportionality and rule of law in particular. According to the MOF's spokesperson, enabling laws will follow, as well.[100] International law will keep, more or less, the application of NSL 2015 under surveillance.

http://www.theguardian.com/world/2016/mar/01/us-japan-eu-team-up-to-warn-china-of-concerns-over-new-security-laws (last visited on Apr. 15, 2017).

96 H. Lovells, China's New National Security Law Creates More Insecurity for Foreign Business (July 2015), *available at* http://language.hoganlovells.com/files/Publication/d04af04d-a99d-46b8-9366-41d3d08501b5/Presentation/PublicationAttachment/3e7ca694-4138-48e7-910c-526dd88421cf/2015.7.13.-%2379660-v2-Client_Alert_-_China_s_new_national_security_law_creates_more_.pdf (last visited on Apr. 15, 2017).

97 *See* Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on July 9, 2015, *available at* http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1280102.shtml (last visited on Apr. 15, 2017).

98 NSL 2015 art. 1.

99 DeLisle, *supra* note 69, at 431.

100 *Supra* note 97.

IV. China's NSL 2015 and International Law

A. National Security Issue in Chinese International Legal Practice

Since 2010 the NNS has begun to be seriously considered as a highly topical issue in Chinese international legal practice. There are four main reasons. First, since China has to update its national security legal regimes in the era of NNS, whether these regimes are respected or challenged by international law, become an important concern for China. On the other hand, some other countries are concerned with whether China could misinterpret, misuse or abuse its national security law to derogate international legal obligations. Second, disagreements and confrontations on the NNS between China and other countries emerge on an international level. Several countries, especially the US, accused China for threatening their national security through non-traditional means such as hacker attacks.[101] In 2013, the cyber security was listed as a separate agenda and a Cyber Working Group was established under the China-US Strategic and Economic Dialogue ("CED").[102] In May 2014, the US Department of Justice charged five military personnel of the People's Liberation Army for cyber espionage. It was the first criminal charges filed against state actors for hacking.[103] Third, China purports to handle NNS through international cooperation.[104] Finally, the NNS, especially cybersecurity, has become a new subject matter of international law.[105]

Actually, China seeks to play some role in making international rules on the NNS. In September 2011, *e.g.*, China, with Russia, Tajikistan and Uzbekistan, presented to the UN Secretary-General, a draft of International Code of Conduct for information security.[106] In January 2015, those countries presented the updated draft.[107]

101 Jyh-An Lee, *The Red Storm in Uncharted Waters: China and International Cyber Security*, 82 UMKCC L. Rev. 951 (2013-4).

102 *See* U.S.-China Strategic and Economic Dialogue Outcomes of the Strategic Track, July 12, 2013, *available at* http://www.china-embassy.org/eng/zmgxss/t1058593.htm (last visited on May 10, 2016).

103 *See* U.S. Charge Five Chinese Military Hackers for Cyber Espionage against U.S. Corporation and a Labor Organization for Commercial Advantage, *available at* https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor (last visited on Apr. 15, 2017).

104 NSL 2015, art. 3.

105 *See*, *e.g.*, M. Roscini, Cyber Operations and the Use of Force in International Law (2014).

106 Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/359 (Sept. 14, 2011), *available at* https://ccdcoe.org/sites/default/files/documents/UN-110912-CodeOfConduct_0.pdf (last visited on Apr. 15, 2017).

107 Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, U.N. Doc. A/69/723

Three treaties to which China is a Contracting Party, are worth mentioning, namely, China-New Zealand FTA (2008), China-Canada BIT (2012), and China-Korea-Japan Investment Treaty (2012). The China-New Zealand FTA includes the phrase 'it considers' in Article 201 dealing with security exception. Article 201 provides that each Contracting Party shall not be prevented from taking any actions which '*it considers*' necessary for the protection of its essential security interests.[108] For the first time, the phrase 'it considers' is included in a Chinese investment treaty. The inclusion of that phrase makes the NSR provision a 'self- judging' one.[109] Thus, China can argue a greater margin of appreciation before international tribunals in the settlement of investment disputes involving national security. In other words, China's national law could enjoy respect and deference, even though it would still be reviewed against the FTA by international tribunals. It should be noted that essential security interests here are narrowed to three exhaustive modalities.[110]

The China-Canada BIT is very unique. It provides that if following a review under its foreign investment laws with respect to whether or not to "(a) initially approve an investment that is subject to review, or (b) permit an investment that is subject to national security review," a decision by China should not be subject to the investor-state and state-state dispute settlement mechanism.[111] This provision goes far beyond the 'self-judging' one. As a result, it seems that Chinese national law is totally immune from BIT surveillance before international tribunals.

The China-Korea-Japan Investment Treaty has two important developments. First, in addition to those happening "in international relations," emergencies happening "in that Contracting Party" are included in national security,[112] in contrast with the counterpart provision in the China-Canada BIT (2012).[113] This shows that China updates its conception of national security in this BIT. Second, and more importantly, this treaty provides that measures are to be taken, for the sake of national security, by a Contracting Party, and shall not be used "as a means of avoiding its obligations.[114] It recognizes that national security law might be abused to derogate international obligations. This no-avoiding obligations phrase serves to balance against the phrase

(Jan. 13, 2015), *available at* https://ccdcoe.org/sites/default/files/documents/UN-150113-CodeOfConduct.pdf (last visited on Apr. 15, 2017).

108 PRC-New Zealand FTA art. 201(1) [Emphasis added]

109 K. Vandevelde, U.S. International Investment Agreements 202-3 & 205 (2009).

110 China-New Zealand FTA art. 201.1(b).

111 China-Canada BIT (2012) art. 34 & Annex D.34.

112 China-Korea-Japan Investment Treaty (2012) art. 18(1)(a)(i).

113 China-Canada BIT (2012) art. 33 (general exceptions).

114 China-Korea-Japan Investment Treaty (2012) art. 18(2). *See also* China-Korea FTA art. 12.14.2.

"it considers."

In toto, security exception provisions in these three investment treaties - two of which were concluded both in 2012 - are divergent. This implies that China has to establish a definite relationship between international and domestic law in this regard.

B. Enforcement of NSL 2015 in the Context of International Law

As mentioned above, China, through the NSL 2015 and other relevant legislations, has updated its national security law, significantly expanding the content and scope of national security concerns and creating relevant regimes, institutions and mechanisms. It is expected that the NSL 2015 is not intended to be "law on paper" only. Rather, Chinese authorities are to routinely invoke the NSL 2015 to justify their activities. Furthermore, China has been consistently involved in various international legal regimes such as investment treaties, the WTO regime, human rights treaties, and anti-terrorism treaties. Whether the legitimate exercise of China's national security law would be duly respected or unduly chilled by international law? Whether China's misuse or abuse of national security law would be effectively addressed by, or escape the scrutiny of international law? Those questions are expected to increase relevance to China, other countries and international dispute settlement bodies.

This trend is found in the 2013 Trade Barrier Report by the United States Trade Representative ("USTR"). The USTR, in this Report, presumed that if a WTO member brings before the WTO Dispute Settlement Body ("DSB") a case against the encryption standard China adopts because it appears crucial to China's national security after the Snowden scandal, China is very likely to invoke Article 21 of GATT to defend itself.[115]

How the NSL 2015 will be enforced in the context of international law might have three potential scenarios. First, a dedicated relationship between international law that China embraces and Chinese national law, could be designed. Thus, China, in applying its national security law, takes international legal obligations it has entered into seriously. On the other hand, international law, especially international dispute settlement bodies, could give due regard to China's legitimate exercise of public authorities in relation to national security. This scenario may be less likely for the critics of the NSL 2015. However, some encouraging developments in Chinese national law and international treaties might strike a good balance between the due

[115] USTR, *2013 Report on Technical Barriers to Trade*, at 55, *available at* https://ustr.gov/sites/default/files/2013%20TBT.pdf (last visited on Apr. 15, 2017).

regard of China's national security concerns and the honor of China's international legal obligations in good faith. As mentioned above, China-Korea-Japan Investment Treaty (2012), while including the phrase "it considers necessary," stresses that China should not disguise the national security measures as a means to derogate its international obligations. This balancing approach could help both China (in applying its national security law, and take seriously its international obligations), and international tribunals (in enforcing international law, pay due regard to China's national security concerns) to harmonize national security with international law.

Second, international law is not capable of effectively addressing China's potential misuse or abuse of NSL 2015. The NSR provision in China-Canada BIT (2012) is an example. An international tribunal is explicitly prevented from reviewing the relevant decision by China on foreign investment out of national security consideration. As explained above, individuals have no right to bring a claim against public authorities under the NSL 2015. Likewise, international law could do little, if not nothing, in monitoring China's potential misuse or abuse of its national security law.

Third, the enforcement of NSL 2015 would be placed under rigid surveillance of international law. *E.g.*, Article 21 of the GATT, which reflected the conception of national security in the 1940s, is obviously outdated now. Under Article 21, 'national' emergency cannot be interpreted as a national security concern. Partly due to the deficiency of Article 21, China had to rely on Article 20 of the GATT, which deals with 'general exceptions' like public moral protection in two far-reaching WTO disputes to defend measures it took in relation to publications and audiovisual products and the exportation of rare earth resource.[116] Under the NSL 2015, these are concerned with China's national security. Further, Article 20, unlike Article 21, does not include "it considers necessary." The author does not assert a defense of Chinese measures under the WTO rules. However, he would like to state that rigid or outdated international law might unduly prevent States from protecting their legitimate national security interests, thereby damaging the credibility of international law itself.

[116] Panel Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R (adopted Aug. 12, 2009); Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009), *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited on Apr. 15, 2017).

V. Conclusion

While "naming and shaming" China's NSL 2015, Zeid further made a general comment: "I regret that more and more Governments around the world are using national security measures to restrict the rights to freedom of expression, association and peaceful assembly, and also as a tool to target human rights defenders and silence critics."[117]

Zeid's comment is a good prism through which we can see how the legal order at both national and international level have been reshaped by national security concerns. Especially, the NNS, in contrast with the ONS, represents a new sociological paradigm characterized by multiple actors, wide covering, low predictability, subjective perception, dual nature, and rampant diffusion, etc.

Traditionally, national security belongs to 'high politics' where law played a limited role while political expediency was highly respected. National security was regarded as the Achilles' heel of international law.[118] Obviously, the emergence of the NNS expands the realm of "high politics." This would derogate the rule of law at both national and international level. At the same time, however, the trend conducive to the rule of law at both national and international level is also clear. This implies that national security affairs could be put under legal surveillance, which might even go so far as to unduly preclude States from protecting their legitimate national security interests. In one word, the new context prompts us to rethink the future of the rule of law or the law we really need.

Since rule of law at national and international levels is inalienable, the relationship between international and domestic law thus is a unique perspective to evaluate what has been happening in national and international law in relation to national security and determine the next course of action. In short, it appears that traditional approaches, either nationalist or internationalist, are insufficient in the era of NNS. Rather, a new 'managerial approach' is needed. Thus, the relationship between international and domestic law would be more flexible, flow together, and cooperative.

Legal practice of great powers is, in most cases, more influential than those of other countries. Thus, it should not come as surprise that the legal practice in national security affairs of China, a rising great power, attracts close examination at both

[117] *Supra* note 92.

[118] H. Schloemann & S. Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO*, 93 Am. J. Int'l L. 426 (1999).

levels. At the national level, China's NSL 2015 has provoked serious concerns because national security is defined in a very broad manner and, in particular, individuals' access to judicial remedies is under threat. Nevertheless, the NSL 2015 should still be regarded as an important instrument because national security affairs in China might be brought within the rule of law. At the international level, meanwhile, national security has become a key issue in Chinese legal practice including an impact on investment treaties. Since Chinese conception of national security has its own 'Chinese characteristics,' the interaction between domestic and international law in China may be more complicated than in many other countries. Thus, the enforcement of Chinese national security law in the context of international law remains to be seen.