

Global Governance and International Law

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Lecture Delivered in the Opening Session of

The 2012 Summer Program

Xiamen Academy of International Law

July 2, 2012

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H.E. Chairman Jiu-yong Shi of Xiamen Academy of International Law, President Chu of Xiamen University, President Pan of Soochow University, Members of the Curatorium of the Academy, Honored Guests and Participants to the 2012 Summer Program, Ladies and Gentlemen: I consider it a distinct honor to be invited to address the Opening Session of the Xiamen Academy of International Law's 2012 Summer Program. I must admit that I am merely a practitioner of international affairs and not a scholar of International Law. Thus, I have chosen "Global Governance and International Law" as the topic of my discourse. My presentation is divided into four sections, namely: (1) The Trend of Globalization, (2) The Need for Global Governance, (3) Transnational Issues

Arising from Globalization, and (4) The Development of International Law Relevant to these Issues.

I. The Trend of Globalization:

Globalization is generally defined as the closer integration of the political, economic, cultural, scientific and social activities of the entire globe. In addition to closer integration, there is also more mutual interdependence. Globalization is not just a phenomenon of the past two decades. In fact, globalization first appeared after the First World War. But it came to an abrupt end when the Great Depression occurred in 1930.

In the early 1990's, several factors helped bring about the emergence, or reemergence, of globalization. First, the end of

the cold war. Second, was the rapid development of technology, particularly in the fields of communications and transportation. And third, the spread of multi-national corporations (MNCs). The first factor enabled nations to deal with each other freely without any ideological boundaries. The second factor greatly reduced the distances between and among different nations, so much so that the world has become a global village. The third factor pushed nations to tear down their financial and trade barriers and turned the world into a global market for goods and services.

With regard to the many facets of globalization, I would like to mention two of the most important aspects, namely, the political and the economic. The political aspect of

globalization is generally associated with democratization and liberalization. It is commonly believed that along with economic development, democratization and liberalization would create a large middle-class population in any given country. As incomes grow, so do the opportunities of people to access television, foreign publications and travel abroad. Gradually, with the new knowledge acquired, the middle-class population would demand more political participation. We have witnessed such developments taken place in Southern Europe, East and Southeast Asia, Latin America and the former USSR. On the other hand, we have also heard people complain that under the democratic system, their life, instead of improving, actually is not as good as before. The reason is

that in a democracy, the most important thing is elections. In order to win an election, political parties and candidates need campaign funds. Thus, they have to bow to financial contributors—mostly leading entrepreneurs. These major contributors, therefore, often have the ability to dictate policies and affect changes that are to their advantage and detrimental to the common people. Furthermore, in a democracy, policy formation is often very slow, particularly when the executive branch and legislative branch are in the hands of different parties.

The economic aspect of globalization is, in fact, more important than the political aspect. Basically, globalization means freer movement of capital, labor and products. We

mentioned earlier the multinational corporations. They want the removal of restrictions and barriers of all kinds, so that they can maximize their profits. In front of most inter-governmental organizations (IGOs), they have advocated the reduction, and eventual elimination, of tariffs and other trade barriers. And some of the IGOs, such as the International Monetary Fund (IMF) and the World Trade Organization (WTO) have helped. Easier market access has in fact become possible in most countries across the globe.

The MNCs have been making substantial profits; but they have also been criticized for overlooking environmental issues as well as the well-being of their workers. However, judging from the economic performance of countries accepting foreign

direct investments (FDI) from MNCs and countries without FDI, the contrast has been stark. In Latin America, for instance, Mexico has accepted FDI from the MNCs, and the per capita income of Mexico increased from US\$2,000 in 1990 to US\$11,000 in 2005. In contrast, in Cuba where they did not accept FDI from MNCs, the per capita income in 1990 was also US\$2,000 and in 2005 it went up only to US\$3,200.

All in all, under the influence of globalization, MNCs have assumed an ever growing role in the international community. They often take advantage of the inadequacy of the legal systems of the countries where they operate in employing workers with less favorable terms and in lowering the environmental standards with regard to their production

processes in order to generate greater profits for themselves.

In recent years, this has been an important reason for the civil societies to express their strong objection to globalization.

They have also advocated for more clear cut international legal regulations governing the operations of MNCs.

II. The Need for Global Governance:

Globalization has generated many new transnational issues, which I will discuss in the next section. These issues can not be solved by any one nation alone. Ideally they should be dealt with by a world government. But this does not seem likely, given the fact that most of nations are loathe to give up their sovereignty in favor of a world government.

Therefore, global governance has been suggested by scholars

and pundits of international affairs as another, more practical alternative.

Global governance means governing, without sovereign authority, and in a way that transcends national frontiers.

Global governance means doing internationally what governments do at home.

The main actors of global governance are international governmental organizations (IGOs), non-governmental organizations (NGOs) and civil society organizations. Of all the IGOs, of course, the United Nations is the most important one. The UN has held numerous high level international conferences dealing with key issues resulting from globalization. Some of the Conferences ended with a very

important convention aimed at the resolution of the issue. One of the most prominent is the UN Framework Convention on Climate Change (UNFCCC) adopted by the Rio de Janeiro UN Conference in 1992. The UN General Assembly and Security Council also adopted many resolutions which wield enormous influence over international transactions. The specialized agencies of the United Nations also play a very crucial role in global governance. In 2003, there was the spread of severe acute respiratory syndrome (SARS), and during this crisis the World Health Organization coordinated the international investigation with the help of health authorities in the affected countries and provided epidemiological, clinical and logistical support as required.

In the end, the WHO has emerged as one of the most successful institutions of global governance. Likewise the NGOs also have their influence over global governance. For instance, the UNFCCC has its origin in studies prepared by the International Union for Conservation of Nature (IUCN), the World Wildlife Fund (WWF) and the World Resource Institute (WRI), all very influential NGOs. The impact of civil society has mainly been concentrated on its ability to mobilize people to demonstrate or lobby at major international gatherings, such as the G8 and G20 Summits, WTO annual meetings, World Economic Forum meetings, etc. The UN has actively promoted cooperation with civil society in global governance, especially in relation to world summits which have provided a

forum for global civil encounters to occur. The European Union has followed a similar approach by integrating different types of civil society organizations within its governance mechanisms. Transnational civil society has also been very successful in their campaigns to create the International Criminal Court in 1998 and the signing of the Mine Ban Treaty in Ottawa in 1997.

The advent of communication networks has also contributed to the growth of global governance. Facilitated by the Internet, people now converge electronically as equals, or at least not as superiors and subordinates. It means that whoever masters the network stands to gain a major advantage in the new era. It is important to recognize that the process of

globalization is spreading widely to every corner of the world as a result of the rapid extension of communication networks.

People in all walks of life have begun to appreciate their interdependence with others as time and distances have shrunk.

III. Transnational Issues Arising from Globalization

As the trend towards globalization continues to develop, many transnational issues have arisen that require international cooperation. These issues include, but are not limited to, climate change and other environmental issues, epidemic diseases, transnational crimes, terrorism, drug trafficking, human trafficking, money laundering, trade issues, financial problems, human right violations, humanitarian issues, intellectual property rights, etc.

For the sake of time, I have only chosen to address four issues which are: climate change, epidemic diseases, terrorism and trade.

1. Climate Change: Since the industrial revolution, people have been using coal and oil for manufacturing and transportation purposes. The amount of both products consumed has been growing with each passing year. Carbon dioxide emissions resulting from the burning of coal and oil has reached such a high degree that it could seriously damage our planet. The most alarming threats posed by global warming are acute weather turbulence, melting of icebergs, rising sea levels, climate change and the spread of epidemic diseases. It is estimated by scientists that if no preventive actions are taken,

global temperature could increase by 1 to 3.5 ° C in 2100, sea levels could rise by 15 to 95 centimeters. Climate change can also adversely affect our food supply chains. It is a subject that no one can afford to overlook and prompt global collaboration is sorely needed.

2. Epidemic Diseases: In human history, there was the Black Death Plague epidemic in the 1340's that took the life of 30% of the population of Europe. Then in 1918, a global flu caused the death of between 25-50 million of the world's population. In the past century, major epidemic diseases have included flu, cholera, malaria, tuberculosis, typhoid fever, etc. But with globalization, germs, virus, and pathogens can spread across national borders with alarming

speed. Acute Immune Deficiency Syndrome (AIDS) has threatened mankind everywhere. During the past decade, the outbreak of Severe Acute Respiratory Syndrome (SARS) and Avian Influenza (commonly known as bird flu) have caused great concern to people around the globe.

Modern means of transportation has allowed more people and products to be transported around the world with great speed and convenience. Infectious diseases can easily reach every corner of the globe. The widespread use of air travel has also enabled people to catch a disease without evident symptoms until they get home and on the way expose other people to the disease.

Globalization has increased the spread of infectious

diseases to all parts of the globe. Therefore, global governance is required in order to reduce the threat brought about by the spread of epidemic diseases.

3. Terrorism: Entering into the 21st Century, the strong wave of international terrorism, which is being brought about by unpredictable and unprecedented threats from non-state actors, not only is a reaction to globalization but is also facilitated by it. In an era of global terrorism, traditional attitudes are anachronistic. The terrorists not only endanger lives of many innocent people, they really intend to engender fear, repulsion, intimidation, overreaction or radicalization among a much larger group of people. The terrorists always have a political motivation; they deliberately target

the innocent and they do not abide by international laws or norms.

Through the attacks on 9-11, the world has witnessed the maturation of a new phase of terrorist activities--the ruthless and merciless slaughter of a huge number of innocent people. The attacks shocked the entire world. People began to realize that no place could avoid the threat of terrorism. Terrorism is a crime against mankind. There must be joint efforts by the world community to deal with this very serious issue.

4. Trade and related issues: The world is becoming more globalized. The current forms of globalization, liberalization, free trade and open markets are targets of

much criticism. The interests of powerful nations and corporations are shaping the terms of world trade. Increasingly fewer people are prospering and many less privileged people are suffering.

The world as a whole had a total merchandise trade volume of US\$10.4 trillion in 1990. It grew to 12.9 trillion in 2000 and reached 30 trillion in 2010. In other words, world trade has almost tripled in two decades.

With the rapid increase in world trade, naturally there have been many trade disputes, such as protectionism, unfair practices like subsidies, discrimination and dumping. These disputes not only involve corporations, but also nations. Therefore, the World Trade Organization was set up in 1995

to address these disputes.

As we look at world trade figures year by year, we can see that they have ups and downs. For instance, total world trade figures in 2008 reached US\$32.2 trillion; but reduced to US\$24.8 trillion in 2009, a decline of 23%. This was due largely to the global financial crisis caused by the housing bubble in the United States and the impact of excessive financial derivative markets. The economies of most of the world were seriously damaged by the financial tsunami and world trade dropped significantly. Last year, the worsening debt conditions in the European nations of Portugal, Italy, Greece and Spain had a further adverse impact on world trade.

IV. Development of International Law Relevant to These Issues:

The issues I have described above are all transnational in nature. Their solutions require global collaboration and legal rulings. International law is not only pertinent but also crucial to the global governance of these transnational issues.

1. Development of International Law on Climate Change: In

1972, an NGO--Club of Rome published a book entitled

The Limits to Growth. It called to the attention of policy

makers that in the process of economic development, the

environment was adversely impacted by the depletion of

ozone in the stratosphere as a result of the use of

chlorofluorocarbon (CFC) as well as global warming

resulting from the emission of carbon dioxide.

The United Nations responded to the warning. In December 1972, the General Assembly adopted a resolution establishing the UN Environment Programme (UNEP) located in Nairobi, Kenya. In 1987, the UN worked out the Montreal Protocol on Substances that Deplete the Ozone Layer. The Protocol now has more than a hundred signatories and provides that the use of CFC and related substances be phased out by the year 2000. This has proven to be the most successful case of international collaboration thus far.

In 1989, the World Meteorological Organization (WMO) and UNEP formed the Intergovernmental Panel on Climate Change. Then in 1992, the UN held an earth

summit in Rio de Janeiro and adopted the United Nations Framework Convention on Climate Change (UNFCCC).

The Convention urged the signatory nations to reduce their CO₂ emission. But this was merely a moral suasion with no legal binding force. The Convention requires the Parties be guided by the principles of equity, common but differentiated responsibilities, precautionary measures, and cost-effective and sustainable development in order to protect the climate system for the benefit of present and future generations of humankind. To date 192 nations have signed the UNFCCC. They have been holding annual conferences of parties (COP) since 1995 to contemplate issues

involving climate change.

COPIII was held in Kyoto in 1997. During the conference, the participating parties worked out the “Kyoto Protocol” which provided that the advanced industrialized nations should, by 2008-2012, reduce their carbon emission by at least 5% below the 1990 levels. It also provided that the advanced industrialized nations should provide the funds required to help less developed nations to reduce their emissions.

But, unfortunately, the largest emitting nation, the United States, has not ratified the Kyoto Protocol so far. Thus, the relevant provisions have not been implemented. Furthermore, with the financial crisis in 2008 and the

European debt crisis in 2011, many of the advanced nations realized that if they faithfully implemented the terms of the Kyoto Protocol, it would further damage their already weakened economies. Hence in the COPXV in Copenhagen, the COPXVI in Cancun and the COPXVII in Durban, the participants could not work out any viable plans to deal effectively with climate change issues before the Kyoto Protocol provisions expire this year.

In fact, since 1997 when the Kyoto Protocol, the world's only legally-binding climate change pact, was signed, global emissions have risen by over a quarter, mostly in developing countries. In order to safeguard

the global environment for our future generations, we all need to sacrifice some of our selfish interests to address squarely the issue of global warming.

The COPXVII in Durban held in early December 2011 did agree to launch a new round of negotiations known as the Durban Platform aimed at a new regime under the UNFCCC and involving all countries. Hopefully, this can bring about a new agreement with legal force under the Convention.

2. Development of International Law and Epidemic Diseases:

In view of the rapid globalization and faster movement of people and goods, international cooperation has become critical in controlling infectious diseases. To cope with

this and other public health problems, the United Nations set up a World Health Organization (WHO) in 1948. In 1969, during the 22nd World Health Assembly the International Health Regulations were adopted. The Regulations, which are legally binding, seek to assist countries to work together to save lives and livelihoods endangered by the spread of diseases and other health risks as well as to avoid unnecessary interference with international trade and travel. The IHR was subsequently revised several times with the latest being the IHR (2005). The IHR (2005) requires that all states should notify other countries about outbreaks of specific diseases in their territories and should maintain adequate

public health capabilities at points of disease exit and entry; and that disease-prevention measures which restrict international trade and travel should be based on scientific evidence and public health principles.

Thus considerations of health are closely associated with trade. In 1947, the UN worked out the General Agreement on Tariffs and Trade (GATT) which was aimed at trade liberalization but recognized that states may restrict trade to protect public health. The World Trade Organization (WTO) was set up in 1995 to replace the GATT. In 1994, during the Uruguay Round of negotiations, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was concluded

together with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

These two agreements plus the dispute settlement mechanism of the WTO make the WTO a more important

regime for epidemic disease control than the IHR. For

instance, in late 2001 there was the “TRIPS versus public

health” battle between the protection of patented

pharmaceutical products against access to essential

medicines. In the end, the WTO adopted the

Declaration on the TRIPS Agreement and Public Health.

The Declaration addresses public health considerations,

especially the access to medicines, prior to the

trade-related goal of increasing pharmaceutical patent

protection.

The IHR (2005) is considered much more effective in combating epidemic diseases than earlier versions.

First, in the earlier versions, Members of the WHO were only required to report the occurrences of three diseases, namely, cholera, plague and yellow fever to the WHO.

The revised version includes all public health emergencies of international concern. This was a direct

response to the outbreak of Severe Acute Respiratory

Syndrome (SARS) in 2002-2003. Second, the revised

version provides the maximum protection against the

spread of international disease by requiring members of

the WHO to have national surveillance systems that meet

the minimum requirements, including the ability to identify public health emergencies of international concern. Third, the establishment of communication channels 24 hours a day, seven days a week between members and the WHO. Fourth, the revised version authorizes the WHO to take into consideration unofficial reports of public health events and to obtain verification from members concerning such events.

The IHR (2005) was ratified by the majority of members and became effective in 2009. All members have two years to assess their capacity and develop their national action plans for implementing the provisions of IHR (2005). They have three years to fulfill the

requirements with regard to national surveillance as well as to strengthen health capacities at designated airports, ports and ground crossings. By June 15 this year, these procedures should be completed by all members. On the basis of a justifiable need, an extension of two years may be granted.

3. Development of International Law in Combating

Terrorism: Terrorism has existed for a very long period of time. Globalization makes CBNR (chemical, biological, nuclear and radiological) weapons increasingly available to terrorist groups. This is the reason why the United Nations, between 1963 and 2010, has adopted 14 conventions or protocols in dealing with terrorism.

These legal instruments cover terrorism on board aircraft, taking of hostages, crimes against important political personalities, unlawful possession of nuclear material, unlawful acts against safety of maritime navigation, making of plastic explosives and financing of terrorism.

The two most important events concerning terrorism during the past decade undoubtedly were first, the brutal attack on the Twin Towers in New York and the concerted air hijacking and attack elsewhere in eastern part of the United States on September 11, 2001 and, second, the killing of al Qaida's leader Osama bin Laden on May 2, 2011. There have been legal arguments on the legality regarding the handling of these two incidents.

The U. S. government considered the attacks of September 11 by the al Qaida network as placing the United States in a state of armed conflict and that it could apply the laws of war in dealing with the terrorists. The al Qaida members were also regarded as illegal combatants under the laws of war, and thus they could not claim the legal protections and benefits that accrue to legal belligerents under the Third Geneva Convention of 1949.

On the other hand, critics of the U. S. position claimed that the war on terrorism was no different than the war on drugs, and that the terrorists should be treated by the same rules as the latter, i. e., applying domestic and international criminal law. Furthermore, they argued that if the laws of

war apply to the conflict with al Qaida, then they must be given the legal status of lawful belligerents, with all of the rights and privileges under the Geneva Convention. Also, all captured terrorists could invoke Miranda rights to remain silent and demand a lawyer.

But the United States position is that it was engaged in a state of armed conflict with al Qaida, a multinational terrorist organization whose leadership declared war on the United States as early as 1996. The state of armed conflict justifies the use of military force by the U.S. to subdue and defeat the enemy. Moreover, if terrorists can wield the military power of a nation state, but are exempted from the laws of war, other groups with similar aims will be encouraged to follow

the example of al Qaida. International law does not and should not create such a perverse incentive.

It seems that this view has been widely accepted by most national governments around the world.

Then there was the killing of Osama bin Laden. This was a more controversial case. The United States justified its action on the Resolution passed by the Congress, immediately after 9-11, authorizing the Government to the “Use of Military Forces Against Terrorists”. It contended that the killing was a military action in the ongoing U.S. armed conflict with al Qaida and that it was not prohibited to kill specific leaders of an opposing force.

However, critics have argued that terrorists are humans

and, as such, they have human rights, including the right to life, the right to humane treatment and the right to a fair trial.

A killing in the absence of a fair trial constitutes an extra-judicial, extra-legal execution. Moreover, if a targeted killing occurred in a foreign territory, the territorial state must consent to the operation; otherwise the action amounted to a violation of state sovereignty. Indeed, the Prime Minister of Pakistan, Yusof Raza Gilani declared that:

“Our people are rightly incensed on the issue of violation of sovereignty as typified by the covert U.S. air and ground assault on the Osama hideout in Abbottabad.” But the

Attorney General of the United States, Eric Holder, contended that the action was justified as an act of national

self-defense. It was lawful to target an enemy commander in the field.

Thus, we can discern the divergent positions taken by different sides. It is quite evident that on the issue of the killing of Osama bin Laden there has not been much consensus between those believing in the right to kill and those advocating for international humanitarian law. Some further research in this respect is sorely needed.

4. Development of International Law in Trade and Related

Issues: The most comprehensive legal documents governing world trade were worked out by the Uruguay Round of negotiations during the period of 1986-1994 conducted within the framework of General Agreement on

Tariffs and Trade (GATT). First, it established the World Trade Organization (WTO). Second, it concluded several agreements on trade in goods and services. The more important ones included the Multilateral Agreement on Trade in Goods, the Trade Related Investment Measures (TRIMS), General Agreement on Trade in Services (GATS), and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Third, the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The last document, the DSU, set up a singular and exclusive procedure for the settlement of disputes. This mechanism is unique among many of the international governmental organizations and makes the

WTO more effective in global governance than other IGOs.

Under the DSU of the WTO, there are two levels of handling trade disputes. The first level is the Dispute Settlement Body (DSB). The DSB handles trade quarrels between one member government against another government with regards to violating an agreement or a commitment that has been made under the WTO. The decisions of the DSB, unless objected to by all members of the WTO, are final. This is termed as “negative consensus”. If a party to the dispute disagree with the decision made by the DSB, it can appeal to the WTO Appellate Body (AB) which is a permanent organ of the WTO. AB is the court of last resort for trade disputes. Like all courts of last resort,

the AB can only review the legal aspects of any decision made by the DSU and cannot touch upon the factual parts.

As mentioned earlier global financial volatility has had a major impact on the progress of world trade. The last several years witnessed two major financial crises which had serious adverse consequences on global trade. They are the financial tsunami of 2008 and the European debt crisis of 2011. How did these crises come about? In my view, it was due largely to the lack of financial discipline and the greediness on the part of some financial managers. The most important legal instruments are the Articles of Agreement of the International Monetary Fund and the Articles of Agreement of the World Bank Group. There is

also the International Financial Standards (IFSs) which has been developed over the last four decades. The IFSs are soft law and do not have strong legal binding force. In response to the financial tsunami of 2008, the Basel Committee on Banking Supervision has devised a reform programme to address the lessons learned, which delivers on the mandates for banking sector reforms established by the G20 at the 2009 Pittsburgh Summit. Collectively, the new global standards to address both firm-specific and broader, systemic risks have been known as “Basel III”. Under the IFS, beginning in 2013, banks across the world will have to use a common format for disclosing the size and quality of their capital safety buffer to help reassure investors they are

safe.

In conclusion, I would like to suggest that effective global governance depends heavily on a comprehensive and enforceable group of international laws. But from the brief description I have offered, we are far from that goal. It is my earnest hope that those of you who are in the audience today would do your best in collaborating in an effort to bring about that goal. On the other hand, the more powerful nations of the globe as well as the IGOs need to cooperate on the codification of the required laws needed to help improving global governance, so that we can have a more peaceful and pleasant world in which to live.