J. Ashley Roach

Regrettably.

Thomas Kellogg

—and the Chinese have repeatedly made the point that they are not interested in the United States' interpretation of a convention to which they are not a party. What is your response to that?

J. Ashley Roach

Two or three points. One, it is often forgotten that the United States is a party to the four 1958 Geneva Conventions. And in the context of navigation and overflight, that includes the Territorial Sea and the Contiguous Zone Convention and the Convention on the High Seas. The provisions, with some minor exceptions, on those subjects that matter in the two 1958 conventions were replicated in the 1982 convention and many of them have now been declared by international courts and tribunals as customary international law.

Even though we are regrettably not a party—I certainly would wish that we would be—the legal consequences, it seems to me, are the same in terms of rights. The political consequences of course are the same, and China's not the only one who casts stones at us for not being a party to the conference and the negotiations which we were a major player in. But that is the way the world is.

Thomas Kellogg

Steve, we were just talking about a very contentious issue between China and the United States. On climate change, on environmental law, there is a much more positive story to tell. Obviously we are meeting here just a few months after a major bilateral climate agreement between the United States and China. Now, before we get to that, we know of course that the engagement between the United States and China on climate change has not always been a happy story. Can you say a little bit about the background and the engagement between the United States and China pre-2014?

Remarks by Steve Wolfson[*]

Sure. I would be happy to. Thank you—pleasure to be here. Thanks, everybody, for coming. I go back, when you ask about climate, to an article that Bill Chandler at Carnegie wrote where he talked about what he described as a mutual suicide pact where each country refuses to act before the other. But of course, you know, that logjam was effectively broken last November when the United States and China announced a new set of ambitious commitments on climate and, we hope, really injecting some positive momentum to the UN negotiations. But it is also important, I think, to look at this from the perspective of how people in China are looking at this. You know, there is a very big increase in awareness of environmental issues in China.

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The folks here, I am sure, have seen either firsthand in China or the pictures in the newspapers about the terrible air pollution that a lot of people in Chinese cities are suffering from. And so these issues are looked at by the ordinary Chinese citizen, and, to an extent, the Chinese government, more through the lens of focusing on local air pollution than focusing on climate change.

Fortunately for them, and for all of us, a lot of the actions that they are now taking help address both local air pollution and greenhouse gas emissions. So there are co-benefits to a lot of what they are undertaking, and what we are seeing is what seems to us a very real, strong trend towards much more sophisticated and developed regulation to reduce and prevent pollution in China.

THOMAS KELLOGG

Now, I am going to push back a little bit on that to say I certainly agree with you in terms of the domestic picture and a recognition that the air pollution and other forms of pollution are reaching a critical stage.

Many of the Chinese colleagues that I have had the pleasure of working with on environmental law and justice in China have said that the Chinese Communist Party recognizes that pollution is so bad that it threatens their political legitimacy, and that is really driving a lot of their action. Now, having said that, having reviewed a lot of the academic literature on both U.S. and Chinese engagement at the international level in terms of the efforts to reach an accord on climate change, neither country has covered itself in glory in terms of their engagement on this issue.

You mentioned the group suicide pact that is going on. If some were to make the argument that China and the United States bear special responsibility to get something done, one because they are the leading historic contributor to greenhouse gases and the leading current contributor to greenhouse gases, respectively, and also because they are important players in the international community, much of the academic literature would say neither side has stepped up. What is your response on that?

STEVE WOLFSON

I think that it is true that the United States and China are the biggest economies and the biggest emitters of greenhouse gases, with China leading on the emissions but the United States second. And that is a very significant factor here. I think what we are seeing now is something fundamentally new. We are seeing China, for the first time, commit to peaking emissions. And a target that is, at the same time, both significant and also, we think, achievable. But maybe even more impressive than the target is the renewables plan to really get to 20 percent of their energy supply from renewables.

We are already seeing results around the world from the Chinese push on renewables. The Chinese, because they have the comparative advantage of scale in economic terms, are able to really drive the prices down now. So as they have been doubling their wind power and tripling their solar, they are pushing the prices down, which is then leading to lower prices not just in China but around the world. Now, there are some trade issues with that, with some of the ways that they have done that as well, but the price impact is very significant.

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THOMAS KELLOGG

I should have maybe interrupted you to add that you are talking about the climate accord that was reached between the United States and China where they have now agreed to a peak level which will decline after that. All of the milestones that you just mentioned—those are the key components of the November agreement, is that right?

STEVE WOLFSON

That is right. And it actually does tie in with the point about vagueness because the peak emission is around 2030, and best efforts to do it sooner. Of course the word ''around'' is a little bit jarring to American lawyers but I think even with that, it is a historic commitment and a very significant one. And so that was announced jointly by the United States and China, along with the U.S. target, at the Asia-Pacific Economic Cooperation (APEC) summit in November, and then that was rolled into the March announcement, the formalization in the UN process of national commitments under the Framework Convention on Climate Change. The impact of that, I think, on the international community is that now we are starting to see developing countries come out with their own targets, and we have seen Mexico and Gabon come out with their own targets. I think that the pressure that is generated by this joint announcement is having a positive effect.

One of the other really major emitters that is a big concern in the climate negotiations is India—another very large economy. After the U.S.-China announcement in November, we started seeing a lot of focus on: ''Okay, what is India going to do? When are they going to peak their emissions?'' So it is putting the pressure on around the world.

THOMAS KELLOGG

We talked a little bit initially about many of the domestic drivers on the Chinese side that were leading them to be an active participant and to sign the accord. What is driving the bus on the U.S. side? Why is the United States trying to cut a deal with China on this? Why have they cut a deal with China on this issue?

STEVE WOLFSON

I think there are a couple of things. One is when you look at the dynamics in the UN negotiations, there is a need—and you do see the system now evolving towards this—towards broader participation. It is important to have ambitious targets, but it is also important to have broader participation in the regime in order to address the numbers. And I think the U.S. negotiators have talked about the unforgiving math of cumulative emissions, that you need the big emitters to be inside the regime in order to have that effect.

I think also that there is a very odd dynamic now. If you had told me five years ago that this was going to happen, I would have been surprised that the environment is now a bright spot in the U.S.-China relationship.

I think that builds on the engagement that we have had—first under the Strategic Economic Dialogue that started late in the previous administration and now under the strategic and economic dialogue—a deepening of the engagement in the current administration, where we are working very closely with China across a whole range of issues in the U.S. government, with the environment being a really significant part of that.

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There are a few reasons why we do that. Part of it is to address global issues like climate change. Part of it is that there are transboundary impacts where pollution from China is affecting countries close to it and even countries far away, like the United States Some of the air pollution measured in the Western United States in particular is seen as likely having come from Asia, and particularly some of it from China.

There are also economic reasons, right? There is the issue of leveling the playing field—U.S. companies that are either doing business in China and competing with other companies in China or that may not be operating in China but are competing with companies in China. Thus there is an economic benefit to try and level that playing field.

THOMAS KELLOGG

I am going to break my own rule and ask you one question about the U.S. domestic context before I turn to Zhu Dan on the international criminal law piece.

There has been a lot of press coverage, even this past week, in terms of the Clean Power Plan. And a lot of the commentary on the U.S.-China Climate Accord made the point that if the Clean Power Plan does not move forward, the United States simply cannot meet its targets. Are you worried that before the ink is dry on this U.S.-China deal, the United States will be in trouble in terms of its own domestic engagement on these issues?

STEVE WOLFSON

No, we are not. And this is actually one of the opportunities that this bilateral relationship with China on environmental issues afforded us. I went over to China in July with the general counsel of EPA, and one of the points that he was most anxious to make to the Chinese public as well as the government was that the Clean Power Plan is going to be a legally durable commitment. The short explanation is that we have a proposed rule, which would result, we think, in about 30 percent lower emissions from the power sector by 2030 from 2005 levels. It is just a proposal now, but it is going to be finalized this summer.

It will be a regulation—an enforceable law on the books. Should somebody take power in the government later who does not agree with that, it will be hard to reverse. Or maybe a better way to put it is that you cannot just eliminate a rule for no reason or by citing some kind of nonscientific rationale. You need to actually have a reason that will be defensible and will stand up in court. Of course there is the prospect of legal challenges to the rule itself, but this is one of the most carefully vetted—as you might imagine—regulations the EPA has ever issued. We think this is going to be legally durable.

Also, it is important to remind folks that the president's Climate Action Plan does include other elements in addition to the Clean Power Plan. It may be the biggest one in terms of the numbers but there are some very significant things coming out of the Department of Energy in terms of appliance efficiency standards and building efficiency standards. There are vehicle standards. There are efforts on hydrofluorocarbons. There are efforts on reducing methane emissions from oil and gas systems, and other sources as well. So there is an all-of-the-above approach to trying to reduce climate pollution.

THOMAS KELLOGG

Zhu Dan—here we have a situation in terms of China and international criminal law in which neither the United States nor China have become members of the ICC. You have

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worked there. We have many American lawyers working there at different points in time but China itself is not a member of the ICC. Why is that?

Remarks by Zhu Dan*

Okay. First, thanks, Tom, for the introduction. And thanks, everyone, for coming. I am really delighted to be among these distinguished panelists.

To your question why China is a nonmember state to the ICC, I will just first give you a brief introduction about the background of China's relationship with the International Criminal Court. Actually, China has been supportive of the establishment of international criminal tribunals. It played a constructive role in the establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. And they also participated actively in the negotiation process of the Rome Statute.

But due to several concerns, which the Chinese government articulated in legal terms in 1998, it voted against the Rome Statute alongside the United States and Russia. But afterwards, China's approach towards the ICC differed from the United States. Where the United States has a shifting policy towards the ICC, China has a consistent approach towards the ICC. The United States initially had a hostile attitude, then moved to disengagement, and then moved to principled engagement. But after voting against the Rome Statute, China engaged itself in the negotiation process of the crime of aggression, whereas the United States was absent.

Even though China is not a member state, China actively participated or played a constructive role in the operation of the court through the Security Council. It abstained in the Security Council resolution which referred the Darfur situation to the ICC and also voted in favor of the Libya situation to the ICC.

When it comes to the concerns of the Chinese government towards the ICC, there are two kinds of concerns: legal and policy concerns. As for China's legal concerns, as a permanent member of the Security Council, China shared some concerns with the United States, such as ICC jurisdiction over non-party nationals—that is clearly understood here that the United States has been concerned about its peacekeepers all over the world. The other legal concern China shared with the United States is ICC jurisdiction over the crime of aggression. Both with regard to its definition and the conditions under which the ICC could exercise jurisdiction.

When it comes to the definition—because the crime of aggression is essentially so close to *jus ad bellum*—there are so many uncertainties around this area of law. So being the biggest victim of the Japanese aggression during World War II, China has very good reason to see the criminalization of aggression under the jurisdiction of the ICC, but due to the uncertainty of the definition of ''aggression,'' China has reluctance to accept that definition as it currently stands, because it can be recalled to 1951 when the General Assembly adopted a resolution condemning China as an aggressor in the North Korea War, where China considered itself as having exercised collective self-defense.

So just an example, to see how this uncertainty surrounding the definition of aggression would have an impact on China's determination of accepting the definition of aggression as it currently stands.

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