

Chinese-European Co-operation in Developing the International Legal Order

By Marc Perrin de Brichambaut

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The topic of this brief stands in direct continuity with the inspiration and work of the distinguished Chinese international lawyer, Judge LI Haopei of the International Criminal Tribunal for the Former Yugoslavia: how can China and Europe work together to build a global legal order? The concept of an 'International Legal Order' is one that resonates in a positive way in a French mind as well as in a Chinese one. Both cultural traditions tend to aspire to a neat and rational organization of things, even more so when the affairs of the State are involved. This brief seeks to identify the components of such an order in the light of the unique legal experiment Europe has been developing over the past seventy years, and of the process of multidimensional globalization that both China and Europe are actively involved in.

I will start by describing what I see as the European approach to law as an *avant-garde* in today's international law. I will then try to briefly indicate what the requirements and consequences of globalization are in the legal domain. On this basis, I intend to review five areas of globalization and, in each of them, the potential for Chinese-European legal co-operation. This will allow me to draw some concluding remarks on the type of order China and Europe can strive for jointly in the international legal field.

1. The EU Legal Experiment

The reconstruction and reconciliation of a divided Europe after a devastating World War relied to a large extent on creating several regional frameworks of co-operation over a period of time: the Council of Europe, the North Atlantic Treaty Organization, the European Coal and Steel Community, and the Conference on Security and Cooperation in Europe ('CSCE'). By and large, these frameworks (and the new forms they have assumed) have been very successful in ensuring peace and prosperity over 70 years all over greater Europe and in opening borders between States.

These organizations are treaty-based. They allow substantial transfers of responsibility and sovereignty to independent secretariats, while the principle of subsidiarity is retained. Problems should be handled at the level where they can be addressed in the most effective way, either at the national or regional level. The provisions of the treaties themselves facilitate such transfers by States acting fully within their sovereignty. The States consent to these transfers because ultimately it allows them to do things that they would not be able to do otherwise. As an example, the European Union ('EU') Commission benefits from full delegation of

jurisdiction from all EU States in the field of foreign trade and can thus negotiate on an equal footing with the US and China, which individual States would not be able to do. The States that participate in a common currency, the Euro, have entrusted important aspects of their monetary sovereignty to the European Central Bank.

Those organizations (chiefly the EU) develop their own soft and hard law; they adopt it in a collective way, involving both the European Council, where States sit, and the elected European Parliament. These common legal norms are mostly directly applicable in the national legal orders. The border between international and national law blurs when between 30–50% of all legally binding norms originate from the European collective process. These laws create rights for individual citizens. EU law has thus developed into a distinct legal order whose interpretation is regulated by the European Court of Justice ('ECJ').

Although the aims of these organizations were initially focused on security and economic co-operation, they have progressively broadened their scope well beyond those initial domains, addressing question of competition, labour regulations, consumer protection, human rights, and the environment. This has led to the production of large amounts of legislation over time, a common body of tens of thousands of pages.

The two main courts attached to these institutions, the ECJ and the European Court of Human Rights ('ECtHR'), have acquired a considerable authority in interpreting the legal framework and the derived law of these organizations. They have generated an extensive body of case law that directly impacts the individuals within Europe and which is implemented by national courts. This has, however, created a delicate pattern of complementing national and supranational juridical orders and frameworks that national courts must address. A so-called 'dialogue of judges' becomes necessary to ensure uniform application and interpretation of the law within the relevant group of States.

Over the last half century, these multi-layered processes have developed a culture of multilateral co-operation and rule of law that pervades the European space. Businesses and citizens refer to the common legal framework and invoke it actively in the courts. This is still an experiment. But it is also the most advanced form of regional governance that exists, and a template for possible other experiments in global governance.

Europe has become the foremost proponent of multilateralism

and of the development of conventional legal tools on the world stage, reflecting its own achievements and this culture. Thus, it is a strong advocate of global governance through co-operation and common norms. Because the EU legal experiment is such a comprehensive one, the legal dialogue between Europe and China cannot escape the question of whether some parts of it may serve as a source of inspiration for global developments with all the possible implications of such developments on the national legal order and judicial system. The European experiment is substantially different from the legal judicial practice of the United States ('US') with which it competes on the global stage.

2. Globalisation and Law

There are differing perspectives on the contents and desirability of globalization but, in Europe, it is viewed as a dynamic process of intensification of exchange and interdependence that involves many dimensions: security, trade, finance, technology, communications, regimes, culture, environment, and global commons. It has brought huge benefits around the world, but it also carries the risk of systemic crises and multiple costs within societies.

Business actors trade and transact in the shadow of the law and depend upon the legal systems to uphold deals as well as to ensure both the smooth movement of goods, capital, technology and workers, and the protection of property rights. Thus, globalization relies on the effectiveness of norms and standards that make its cogs run properly. Its legal toolbox is constantly evolving in response to its new needs and to the development of exchanges in order to ensure a safe, predictable, and open legal environment that protects the interests of business and resolution of disputes. Regulating the webs and networks of non-State created norms has become increasingly demanding and needs to be watched by States.

Indeed, despite the wide array of actors involved in global norm-setting today, States remain the basic building blocks, sources of legitimacy, and implementers of legal norms across all dimensions. They do so according to their traditions: China as a major unified State, and the EU as a quasi-confederal entity, but they are both heavily dependent on continued successful globalization for their prosperity, and therefore dependent on the proper functioning of all these legal tools. The State entity that facilitated the process of globalization and invented many of its tools, the US, may now be less ready to take the burden of ensuring its future development. This brings a new challenge to the EU and China to shoulder their full share in managing a multipolar world.

3. Operating the Norms that Make Globalization Work

The regulations of different States are often inconsistent and national courts are not always aware of each other's decisions. There is a need for convergence of business laws and judicial practices, adoption of common codes such as those provided by UNCITRAL.¹ Individual States are therefore striving to promote recognition and enforcement of national court judgments, and create special arrangements to address commercial disputes, including through specialized commercial courts. The EU experience incorporates most of these tools in a harmonized framework on the basis of its major multilateral treaties, derived law, and case law.

Between States, the implementation of norms and regulations requires strict regimes to ensure fairness and effectiveness. The

¹ The United Nations Commission on International Trade Law.

most elaborate example lies in the trade field. Norms adopted as part of the World Trade Organization ('WTO') agreements² are protected by the most demanding of all international law systems through an arbitration mechanism activated by States, but mandatory in its decisions: the dispute settlement mechanism that yields exceptional authority through the fact that it has the capacity to sanction any violation of commitments taken by States parties. The WTO is a genuinely global institution where China and the EU participate actively and have developed mutual trust.

Bilateral investment treaties and free trade agreements ('FTAs') make up another key element of globalized business. Both China and the EU have developed an extensive network of them, with potential recourse to ICSID³ in case of disputes frequently provided for. Elsewhere, dispute resolution relies on private arbitration, which has become commonplace and has acquired a great deal of authority, thanks to the wide acceptance of the New York Convention. Emerging regional trade arrangements⁴ envisage arbitration clauses and courts that are proving controversial with public opinion. New institutions such as the New Development Bank and the Asian Infrastructure Investment Bank are considering the possibility of adopting similar arbitration clauses.

Chinese and EU producers, exporters, traders, investors and lawyers have a lot to gain from encouraging a fluid, effective and balanced system of creating and protecting norms. Their interests coincide in ensuring that norm-setting and -implementation proceed in a transparent, inclusive and rigorous way. That will involve a greater oversight by national and regional institutions such as the ECJ. Domestic judicial institutions have to be capable to take into account these international domains and be ready to integrate them in their own decisions. In other words, international legal credibility is rooted in a strong, adaptable domestic judiciary tuned to global trends.

4. Managing Global Markets

Globalized markets in commodities, trade, and finance are vulnerable to crises and instability if they are not regulated by entities that set and enforce certain rules and good practices. But most of these markets are beyond the reach of any single government and their regulation requires active co-operation among governments and solid international organizations.

Groups of important States such as the G20 and the IMF managing board serve as the main venue for providing policy directives to international organizations and for the co-ordination of national actions. In the financial field, they rely on a network of organizations that involve government agencies, central banks, independent regulators and the key corporate actors. China and the EU already work closely together in running these groups in order to deal with major crises and adapt to coming challenges.

Particularly, the enforcement of fair competition practices is a key area that needs close co-operation between the big three ac-

² Such as the Marrakesh Agreement Establishing the World Trade Organization, the Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS'), and the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS').

³ The International Centre for Settlement of Investment Disputes.

⁴ Such as the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'), Transatlantic Trade and Investment Partnership ('TTIP') and Regional Comprehensive Economic Partnership ('RCEP').

tors – the US, China, and the EU – in the absence of any global regulatory body. It also requires that the legally binding texts of each entity be compatible. In the EU, the ECJ controls closely the activities of the EU competition authorities.

The OECD has been proposing conventions which ensure predictable and transparent norms and respect the jurisdiction of the national judiciary to implement them. It is in the common interest of China and the EU to promote treaty-based multilateral tools that protect their interest according to fair and predictable rules. It is vitally important that regulatory tools are prepared for the management of global markets in case of crises (such as those in 1998 and 2007), and to ensure the preservation of the conditions of globalization which are under threat.

5. Ensuring Global Peace and Security

The avoidance of armed conflict is a precondition for globalization without disruption. This has traditionally been the job of international law and multilateral institutions, chiefly the UN which is meant to provide a framework for collective security. But the Westphalian tradition is very strong in the security field, and powerful States tend to bend the legal rules according to their interests. They address major issues such as arms control outside of the multilateral framework. The UN Security Council ('UNSC') has nevertheless asserted its role at the centre of global security with respect to regional crises and new threats such as terrorism and proliferation. Chapter VII of the Charter has been used more and more frequently in support of a variety of tasks.

Contemporary international law seeks to combine the States' promotion of their national interests and sovereignty with the emergence of an international community based on values and on the rule of law. China and the EU may differ on how this combination works in each set of circumstances, but they have co-operated closely in the UN over the past two decades. They occasionally disagree on how to address regional crises. Recent examples of this can be seen in Syria and Ukraine.

In this context, the EU members are probably the regional group most committed to legal mechanisms and multilateral tools to maintain and restore global peace and security. They are the most advanced in a post-Westphalian posture that allows the complementary role of international organizations and supranational law-making to national policies. They support dispute resolution through international courts (such as the International Court of Justice) and arbitration. They are the biggest contributors and supporters of the UN system. They are in the forefront of seeking to limit national sovereignty in order to protect civilian populations and promote the fight against impunity for major crimes. A few of them are willing to use their forces to address crisis situations, particularly in Africa with the support of UNSC mandates. EU member countries have been instrumental in linking security with the human dimension since the Helsinki Declaration of 1975 in the context of the CSCE. They have promoted an integrated concept of security that is reflected in many regional and global texts. In these endeavours, they have been seeking to expand the reach of international law in many directions, in particular international humanitarian and criminal laws.

As a major actor on the global scene with broad interests and a key role in the UNSC, China can afford to act in a sovereign mode and deal directly with major partners, chiefly the US. On the South China Sea question, it has chosen its own route which is wary of

any multilateral dimension. But it has also chosen to participate actively in the work of the UNSC, in the peace-keeping efforts of the UN, and in development funding. It has also accepted a multilateral approach in combatting terrorism, piracy, dealing with many regional crises, proliferation, and global crime. The trend is towards convergence and complementarity between China and Europe on the legal dimensions of peace and security and in making the UN work to its full potential.

6. Human Dimension of Globalization

The EU pays significant attention to international norms in the human dimension that are in harmony with its own internal practices and are applicable by its courts to its citizens. Some of the international institutions recently created reflect the aspiration to justice and the fight against impunity for major crimes; they are the international criminal courts. There are currently five of them in The Hague. They reverberate strongly in public opinion and are slowly building, in an experimental way, core case law. But national or regional jurisdictions are expected to continue to carry the heaviest burden of going after the major criminals of this century.

Although China is a party to most of the core conventions, it has significant differences with the EU and the US (which themselves disagree on many points) on how the human dimension of globalization should be interpreted and implemented. The expectations of citizens are voiced largely in the national context and are addressed in this framework by national authorities according to their priorities. This dimension of globalization thus raises delicate issues because it interacts with internal development in States. Chinese and European views currently do not coincide on these issues. The differences will have to be resolved over a prolonged period of time.

7. Managing Global Commons

There are a number of domains which lay beyond the reach of individual State entities, even the most powerful. They are transnational in scope and require the active co-operation of all stakeholders to be addressed successfully. International law has developed so-called regimes in some areas⁵ which can serve as templates. Some of these have full-fledged dispute settlement mechanisms with courts (for example, the UN Convention on the Law of the Sea).

Environmental issues and climate change are the newest global challenges that have emerged largely as a result of the dynamics unleashed by globalization. Preventing fateful developments that would affect all States implies prompt and strong action by all. The UN Framework Convention on Climate Change has served as a root for the development of these policies, most recently in the COP⁶ 21 and 22. Implementing the 2015 Paris Agreement has far-reaching implications not only for domestic legal norms, but also in terms of international arrangements (for example carbon pricing) over a prolonged period of time.

The EU – because of the sensitivity of its societies to such issues, with the benefit of its own multilateral practices – has been the key promoter of new regimes in these areas. Its courts will increasingly get involved in issues such as the environment and

⁵ Such as the Treaty on the Non-Proliferation of Nuclear Weapons ('NPT'), the UN Convention on the Law of the Sea ('UNCLOS'), Ozone Layer, Antarctica, and Peaceful Uses of Space.

⁶ The Conference of the Parties.

climate change, making use of international treaties. China is now in the forefront among the States that support and implement the Paris Agreement. This is remarkable convergence that allows for intensified co-operation between the EU and China and with other partners in a major area. It should also open the way for co-operation in other domains.

Ultimately, other challenges will require a similar degree of enhanced co-ordination at the global level. Among them are the development of Africa, global migrations, and pandemics. In all of them, the interests of China and Europe are likely to coincide. China and Europe can lead the development of the legal tools and the institutions needed to manage the global commons. This should be a priority area.

8. China-Europe Co-operation in Shaping a Global Legal Order

China and Europe share many interests in the successful management and development of globalization in all its dimensions. Their businesses need a stable and predictable environment based on respect for norms and law as well as effective courts, while their citizens aspire to share practical freedoms in an interconnected world. The challenge is therefore to combine variety, adaptability and stability in a world that is becoming increasingly legalistic. Law has become a key dimension of the soft power of nations even if it is rarely acknowledged as such.

There is, at present, no comprehensive legal global framework around a set of principles or institutions beyond the UN system. What exists and functions is a highly decentralized and fragmented collection of legal frameworks and practices reflecting the specific needs of each area. A plurality of global actors are active in the norm-defining and -implementing fields, yet all these legal tools need the legitimacy, stability and order that only States can currently provide. There is constant interaction between all those domains through broad principles that are gaining global acceptance and through the global aspiration to justice and individual dignity. The legal profession, of course, plays a key role in all of this.

Entities open to the world, like China and the EU, stand to gain from the progressive consolidation of these legal instruments. They have a particular role in preserving common global legal instruments with effective enforcement mechanisms such as the WTO, FTAs, and Investment Protection Treaties. In the context of the Belt and Road Initiative, China may have to promote a network of legal regimes to support its investments in infrastructure and productive facilities. The EU and China will have to co-operate actively to preserve what exists and to make sure it is constantly updated and properly implemented.

The overall trend is clear: China and the EU have considerable common interest in strengthening jointly the legal underpinnings of the norms and markets that make globalization possible.

Globalization has unleashed powerful dynamics in international relations and in the domestic politics of all States which are proving difficult to apprehend and to regulate. China and the EU can co-operate in making existing international organizations more balanced and effective, and in providing appropriate public oversight of the diversified fields of norm-setting and -implementation. They can co-operate in building strong domestic rule of law institutions which remain the indispensable foundation of any global legal order. In the field of the global commons, they are now in the lead with considerable responsibilities to consolidate what exists and prepare the next steps.

Similarly, in the field of peace and security, both China and the EU have much to gain in helping to consolidate the UN system. They may not always converge on some difficult topics, with China more attached to a traditional vision of sovereignty and Europe willing to support intrusive tools and institutions.

The EU legal experiment provides a remarkable precedent for what enhanced legal co-operation tools can achieve in a regional framework. Parts of the EU toolbox are shared with some of the international organizations and regimes in which China actively participates. The EU can serve as a reservoir of templates that can be used in addressing the complex challenges of globalization and global commons, both in terms of the legal experience and in terms of the institutions that interpret and implement the norms. This is a long-term perspective, but one that ought to be prepared on the basis of an in-depth dialogue between China and the EU. China is in a position to retain what it believes can be useful to the common endeavors from this, so far successful, experiment.

In other areas, China and the EU have separate perspectives, like on the centrality of the State and on the human dimension of globalization. There are also problems in some regional domains. Some practical accommodations need to be reached to avoid open friction while preserving possibilities for future co-operation. In sum, a full international legal order may be a target hard to reach. But it is a desirable objective, a fundamental work in progress, and one that cannot be sought or achieved without the effective co-operation between China and the EU.

Marc Perrin de Brichambaut is a Judge at the International Criminal Court. He was previously the Legal Director of the French Ministry of Foreign Affairs, and the Secretary-General of the Organization for Security and Co-operation in Europe. The views expressed in this brief are personal and do not represent those of the Court. This text is an abridged version of the 2017 LI Haopei Lecture presented at Peking University Law School on 19 May 2017.

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