

How China approaches international law: Implications for Europe

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Time and again, China's compliance with international law is a contentious issue between the People's Republic of China and the European Union. Contrary to the widespread belief in the West, China does not treat law as unimportant but references it frequently. However, both sides have a very different approach to law. Where do these differences in perception stem from? What does it imply for European foreign policy-making? These are the questions that the author addresses in this paper.

In the paper at hand, I argue that China has a very different legal tradition that does not treat legality as carrying normative value in itself. Instead, China rather adopts a functionalist approach that impacts its approach to law until this day. Reviewing China's rhetorical reference to the law, its recent domestic reforms as well as three cases of Chinese treatment of international legal obligations I substantiate this claim and draw policy recommendations for the European Union.

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"A reliable partnership presupposes that you share fundamental principles and convictions. The rule of law is one of them. [...] The core of the rule of law is that what counts is the power of law and not the law of the powerful."² (Angela Merkel during a state visit to China)

"The system of distinctively Chinese socialist rule of law has been steadily improved. [...] The rule of law for the country, the government, and society is basically in place."³ (Xi Jinping at the Chinese Communist Party's National Congress)

Time and again, European and Chinese policy-makers disagree over issues related to China's approach to the law: Both the Chinese domestic rule of law and the country's compliance record with international law remain subject of contentious discussions. Many Europeans interpret China's reference to the rule of law as pure rhetoric. However, this perception leaves several questions unanswered:

Why do policy-makers of the People's Republic of China (PRC) constantly refer to law? Why is it so crucial for the Chinese leadership to emphasize what they perceive to be the country's functioning rule of law? Where do these differences in perception stem from? What does it imply for European foreign policy-making? These are the questions that I address in this paper.

In this context, we need to differentiate between the content of laws and the nature of law as such. With regard to the former, Europe needs to acknowledge the legitimate Chinese concern not just to follow existing international law that has been established under Western dominance but to reform it and establish new international legal norms. Regarding the latter, Europe should be aware that China has a very different legal tradition that may shape the current Chinese approach to law: While in Europe law and legal certainty are seen as carrying legitimacy being a value in itself, the Chinese traditionally follow a functionalist approach to law. There are signs that the PRC is perceiving law primarily as a means to achieve concrete benefits. These benefits include economic and reputational gains as well as positive governing effects of depolitization stemming from legalizing contentious issues. This implies that China has a less coherent approach to law depending on concrete contexts and the respective cost-benefit calculations: When legal certainty is beneficial for China, it is improved. In other cases, China prefers vague legal norms that are open to interpretation not constraining the exercise of political power.

I substantiate this argument by first reviewing China's rhetorical commitment to law and recent domestic legal reforms (part I). Next, I turn to three cases of international law and demonstrate how China's approach plays out in the international arena (part II). Finally, I draw conclusions and point out policy implications for the European Union (EU).

² Merkel, A. (2016). *Rede von Bundeskanzlerin Merkel zur Verleihung der Ehrendoktorwürde durch die Universität Nanjing am 12. Juni 2016*. Retrieved from <https://www.bundestkanzlerin.de/Content/DE/Rede/2016/06/2016-06-12-merkel-universitaet-pekking.html>; translation: T.R.

³ Xi, J. (2017). *Full Text of Xi Jinping's Report at 19th CPC National Congress*. Retrieved from http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm.

I. China's general approach to the rule of law

Historically, China and Europe do not share the same approach to governance in general and the rule of law in particular: Although the substance of Chinese and European normative governance principles is similar, their form is very different: Since ancient times, Europeans conceptualized "good governance" along the lines of law. These laws were first derived from a divine order (e.g. the Ten Commandments); in the wake of secularization the term "laws of nature" was introduced. Today, democratic law-making is treated as the standard for legitimate rule. Hence, the source of legitimation for laws changed over time but not the nature rules as a law itself.

Chinese rulers, in turn, based their legitimacy on Confucian family ethics that pay care most about the feeling of compassion and sensitiveness for particular situations. This starts from the conviction that the human nature is good and that any morality lies in the human feeling of compassion. Not abstract and fixed rules and laws are guiding but context sensitivity and compassion.⁴

This historical difference is not deterministic. Not least in a globalized world, China and Europe regularly interact and there is no doubt that "European" ideas have heavily influenced modern China. In fact, the rule of law plays a crucial role in the Chinese Communist Party's (CCP) rhetoric. One example is Chinese Prime Minister Li Keqiang's 2017 report on the work of government delivered to the Chinese National People's Congress. In this speech, Li referred to the phrases "in accordance with the law" or "law-based" in a wide range of issue areas including environmental protection, economics and finance, fight against crime and corruption, charity/social organizations, cyber governance, religious affairs, military and legal reforms, Hong Kong/Macao affairs or accessibility of the government.⁵

This is more than just a rhetorical emphasis: In 2014, the Central Committee of the CCP (CCP) made the rule of law the subject of its plenary meeting for the first time in the history.⁶ Largely unnoticed by Western media and observers, the CC CCP announced far-reaching reforms: Most crucial is the plan to establish circuit courts and deprive local party-state officials the right to appoint judges. Both initiatives seriously weaken local CCP officials' influence over the court system.⁷

Hence, China's recent judicial reforms have indeed strengthened the constitutional institutions against local political interference. However, this is not to say that China has established a rule of law regime similar to the European one. In fact, while the rule of law has been strengthened on the local level, the power of the central leadership over the judiciary has not decreased. Hence, the judicial reform is a means to strengthen top-down control of the CCP's national leadership over the local cadres. This finds its expression in the announcement of the 4th plenary session of the CC CCP highlighting that the Party remains above the law:

⁴ Jullien, F. (2003), *Dialog über die Moral*, Berlin: Merve.

⁵ Li, K. (2017). *Report on the Work of the Government. Delivered at the Fifth Session of the 12th National People's Congress of the People's Republic of China on March 5, 2017*. Retrieved from http://english.gov.cn/premier/news/2017/03/16/content_281475597911192.htm.

⁶ Li, C. (2018). *Chinese Politics, Economy, and Rule of Law*, "Brookings Institution". Retrieved from <https://www.brookings.edu/on-the-record/chinese-politics-economy-and-rule-of-law/>.

⁷ Tiezzi, S. (2014). *4 Things We Learned from China's 4th Plenum*. Retrieved from <https://thediplomat.com/2014/10/4-things-we-learned-from-chinas-4th-plenum/>.

"It was stressed at the session that the Party's leadership is the most essential feature of socialism with Chinese characteristics and the most fundamental guarantee for socialist rule of law in China [...] We need to strengthen Party rules and regulations, improve the systems and mechanisms for their formulation, and create a complete system of Party rules and regulations. We need to use these rules and regulations to fully implement the principle of the Party supervising its own conduct and practicing strict self-governance, and encourage Party members and officials to take the lead in abiding by state laws and regulations".⁸

A core element of power centralization against the local party-state is the country's anti-corruption campaign: Over the last five years, 1.3 million CCP cadres have been disciplined for violating laws and/or ethics of the Chinese Communist Party. Most of them were local officials. Most recently, at its annual gathering, China's parliament, the National People's Congress (NPC), in March 2018 adopted several changes to the anti-corruption campaign that exemplarily reflect the ambivalences inherent in China's approach to legal reforms:

The NPC established a new anti-corruption authority, the National Supervision Commission which holds even more powers than the Central Commission for Discipline Inspection (CCDI) that has been in charge of the anti-corruption campaign in recent years. The new commission may not only investigate cases of corruption against Party cadres as the CCDI but against any public official, including employees of state-owned enterprises. This reflects that while the CCDI was purely an institution of the Party outside of the state's law enforcement apparatus, the National Supervision Commission is a dual institution reporting both to the state and the party authorities. Although this closer interlinkage may appear to be a positive step in the first place, the control of the CCP over the new commission remains essentially undisputed: The National Supervision Commission is headed by Yang Xiaodu. At the same time, however, Yang is the deputy secretary of the CCDI. In this latter capacity Yang is accountable to Zhao Leji who is the head of the CCDI. In other words, this personal overlap allows the head of the CCDI to effectively instruct the head of the National Supervision Commission. In accordance with this finding that improvements are limited, defendants of anti-corruption charges will continue to be denied access to legal defense.⁹ Appealing the decisions of the commission is impossible; detainees can be held for six months without any legal charges.

At the same time, however, we should bear in mind that corruption is indeed a severe challenge for the whole country not being restricted to the CCP. Hence, the broadening of the campaign as such is a logical step. While Western observers tend to view it as a means in the hands of President Xi Jinping to consolidate his power, this perception overlooks that most cadres being charged for corruption have actually been corrupt and their removal is not linked to power struggles within the CCP at all. Furthermore, the

⁸ Central Committee of the Communist Party of China. (2014). *Communique of the 4th Plenary Session of the 18th Central Committee of CPC*. Retrieved from http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm.

⁹ Zhou, V., and Mai, J. (2017). *A Kinder, Gentler New Anti-corruption System for China?* Retrieved from <http://www.scmp.com/news/china/policies-politics/article/2116151/kinder-gentler-new-anti-graft-system-china>.

widespread system of extra-legal prisons (*shanggui*) will be abolished¹⁰ giving rise to hopes for less arbitrary and more transparent litigations.¹¹

Hence, while the policy initiatives respond to real challenges (e.g. corruption) and include some improvements (e.g. abolishment of extra-legal prisons) they do not genuinely strengthen China's rule of law. This became obvious not least in 2015 when the Chinese authorities cracked down on 248 human rights lawyers that had previously defended oppositionists.¹² In essence, legal reform is not about judicial independence as such but aims at functionally strengthening the central authorities vis-à-vis the local party-state. In 2016, a legal advisor to the Central People's Government (CPG) told me anonymously in an interview:

"When you translate the word "law" into Chinese, it is "method".¹³ For Chinese, law is rather a means to get things done and nothing natural. [...] This is a fundamental reason why the Chinese people don't respect the laws – regardless of the author of a specific law. [...] For Chinese, disobeying the law is normal; morality is detached from the concept of laws. [...] What China needs to worry about is not the question whether the laws itself are legitimate but law enforcement to compensate the missing communal morality. Chinese need to learn to respect the laws and not think that they will remain on paper forever."¹⁴

Hence, even though we see a partial strengthening of the rule of law in China significant differences compared to Europe remain in place. Conceptually, this divergence finds expression in the CCP's differentiation between "constitutionalism" and "following the constitution": According to a leaked CCP decision ("document 9"), constitutionalism is associated with Western approaches to the rule of law and is banned from public discourse and a forbidden research subject for social scientists in the PRC.¹⁵ The rationale behind this ban is that "constitutionalism" is associated with an independent judiciary that is not subject to the control of the CCP. The constitution, in turn, is praised and is to remain a core component of the CCP's reform agenda.¹⁶

If Chinese legal reforms are not intended to establish a rule of law in accordance with the European template the question appears what is behind China's approach to law. In this paper I argue that the answer is that China rather adopts a functional approach to law. Following the law, legal predictability and certainty are not treated as normative values in itself but perceived from the angle of their instrumental value in specific contexts. In fact, legality carries at least three direct benefits from the perspective of the CCP:

¹⁰ Human Rights Watch. (2017). *China: Abolish Secret Detention But Ensure Rights Protections*. Retrieved from <https://www.hrw.org/news/2017/10/18/china-abolish-secret-detention-ensure-rights-protections>.

¹¹ Another positive development is the constant decrease of death penalty executions in China. Official statistics are secret; however, experts' estimations show a clear downward trend over the years. See for example Cornell Law School. (2014). *Death Penalty Database. China*. Retrieved from <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=China>.

¹² Amnesty International. (2016). *A Year On: China's Crackdown On Human Rights Lawyers*. Retrieved from <https://www.amnesty.org/en/latest/campaigns/2016/07/one-year-since-chinas-crackdown-on-human-rights-lawyers/>.

¹³ The interviewee refers to the word "fa", "法". This character may adopt the meaning of "law" as in "falü" "法律" as well as "method" as in the term "banfa" "办法".

¹⁴ Author's interview

¹⁵ China Copyright and Media. (2013). *Communiqué on the Current State of the Ideological Sphere (Document No. 9). Report concerning the Present Situation in the Ideological Area*. Retrieved from <https://chinacopyrightandmedia.wordpress.com/2013/04/22/communique-on-the-current-state-of-the-ideological-sphere-document-no-9/>.

¹⁶ Ibid.

Firstly, legal certainty is crucial for any modern economy. The PRC has turned to rule by law to facilitate its economic development including foreign trade and investment.¹⁷ An advisor to the CPG explained anonymously in an interview:

*"If you want to promote a market economy you need the rule of law. This is at least what Westerners keep telling us for the last 30-40 years. [...] It is pure dogmatism. In previous times, the Communist Party has dogmatically followed the Soviet Union. Today, we follow the neo-liberal ideas of the West without questioning them. We believe that whatever works in the West will also be effective in China."*¹⁸

Secondly, the PRC aims to portray itself as a reliable status quo power in international affairs. In fact, international reputation is a significant source of the CCP's domestic legitimation:

*"In the West, observers tend to believe that Xi Jinping's recent emphasis on foreign affairs is indicating a more nationalist and aggressive foreign policy. What they miss is that we know very well that being a successful great power implies to gain a good reputation and build a relationship of trust. [...] When our leaders emphasize our international success, they are aware of the legitimacy benefits for the Party from it. But they also know that international prestige also depends on China's international reputation as a peace-loving state."*¹⁹

This goes along with the necessity to play by the rules widely accepted in the international arena. In this context, compliance with international law is most crucial and necessary to assure international partners that China will remain a status quo power, a reliable partner and a responsible great power.

Thirdly, China has carefully studied the European approach and identified the value of the law's depoliticization potential: When one accepts the normative value of following the law, compliance with decisions is turned from a contested political issue into a legal one. In other words, legal codification may help avoid contestation and transform politically issues into matters of compliance. In line with the European tradition, the latter may be perceived as a duty of any "good citizen":

*"China is a huge and diverse country. It is hard to control the whole nation, particularly if everyone wants to be engaged in decision-making. Law provides us an option to escape from such unproductive debates. [...] The Chinese people are not yet accepting the rule of law but the awareness of it is growing. After all, everybody has to understand: You need to follow the law and not discuss it all the time. This is how it works around the world. [...] Improvements of law consciousness will improve our governance. Therefore, it is really important to promote the rule of law."*²⁰

¹⁷ In 2011, China declared in a white paper on its legal system: "In 1992 the 14th National Congress of the CPC made an important strategic decision to establish a socialist market economy. It expressly stated that the establishment and improvement of this socialist market economy must be regulated and guaranteed by a complete legal regime. To meet the requirements for establishing a socialist market economy, the Chinese legislature accelerated the pace of enacting economic laws"; see: People's Republic of China. (2011). *White Paper: The Socialist System of Laws with Chinese Characteristics*. Retrieved from http://www.npc.gov.cn/englishnpc/news/2011-10/28/content_1677839.htm.

¹⁸ Author's interview

¹⁹ Author's interview

²⁰ Author's interview

Ironically, though, the depoliticization potential of law stems from the European tradition and its attribution of normative value to law. China's leaders do not subscribe to this understanding. Nevertheless, they have carefully studied the European approach and aim to utilize it for their own political purposes.

In sum, China is strengthening the role of the law but is rather following a functional approach to law not accepting its inherent normative value. This may be rooted in the Chinese tradition that does not know laws derived from a divine order. Hence, the Chinese leaders rather aim to govern the country by means of the "rule by law" or – as they put it – in accordance with law. Despite all improvements, this should not be confused with the European understanding of the rule of law.

II. China's approach to international law – examining exemplary cases

What are the implications for China's handling of international law? I turn to this question in the following examining three examples from three different area fields of international affairs:

II.1 Trade: WTO law

Upon its accession to the World Trade Organization (WTO) in 2001, China accepted far-reaching legally binding trade rules. Then-U.S. President Bill Clinton proudly claimed that it was the "most one-sided trade deal in history"²¹. Many experts agreed with the assessment but doubted whether the PRC would be both willing and capable of complying with the WTO's comprehensive set of rules and regulations.²² However, since China's economic development is benefiting from legal certainty, the PRC has decided to largely comply with its WTO obligations.

In the context of China's WTO accession, reformers succeeded to push through economic reforms against the will of more conservative factions of the CCP utilizing the above mentioned depoliticization effect: They argued that it was a legal requirement for China under WTO law. In the early 2000s, this strategy proved to be highly effective.²³

An outstanding example of China's general good compliance with WTO is its handling of WTO Dispute Settlement Body (DSB) rulings against the PRC. China has a far better compliance record with DSB rulings against it than any other major trading power: Historically, developed countries consisting out of the United States, the European Union, Canada, Japan and Australia have only a compliance rate of 50%. Developing countries

²¹ Quoted in: Wu, X. (2011). No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization, *Chinese Journal of International Law*, 10(1), p. 237.

²² Hilpert, H. et al. (2005). *China 2020. Perspektiven für das internationale Auftreten der Volksrepublik*, SWP Studie S 2005/32. Berlin:SWP, p. 15. Sally, R. (2005). China's Trade Policies in Wider Asian Perspective, *LSE/CCER Conference*. Beijing, p 12.

²³ Wang, Q. (1999). The Rise of the Neoclassical Economics and China's WTO Agreement with the United States in 1999, *Journal of Contemporary China*, 20(1). Long, Y. (2007). China's WTO Accession. Implications and Key Lessons Learned. In I. Gill, Y. Huang and H. Kharas (Eds.), *East Asian Visions. Perspectives on Economic Development*. Washington D.C.: World Bank. Bacchus, J. (2011). China's Continuing Need for the WTO, *China Businessreview*, 38(1).

score considerably better complying with 80%.²⁴ Out of the 33 concluded cases, the PRC has a compliance record of 85.7% of all completed original cases.²⁵

The reason for this extraordinary high compliance rate is China's concern for its international reputation: DSB rulings are comparatively clear in naming violations of WTO law and rather precise by outlining what countries have to do to bring their policies in compliance with WTO law. Hence, if China wants to avoid being clearly named a violator of WTO law, it has hardly any choice but compliance.

At the same time, however, when assessing China's compliance with WTO law the devil is in the details: The PRC has done everything to uphold state permeation of its economy and did not convert into a full market economy.²⁶ However, to achieve this goal, China has aimed to avoid openly violating WTO law but has carefully studied its legal obligations for loopholes.²⁷ For example, China has interpreted the term "prudential regulations" very broadly when applying it to key sectors such as finance and banking:

Upon its WTO accession, the PRC had committed itself to lift all regulations for foreign financial firms after a phase-in period of five years except for "prudential regulations".²⁸ This obligation seemed to indicate that China's financial market would turn into one of the most liberal ones on the globe outperformed only by exceptionally free territories such as the Cayman Islands.²⁹ This was a noteworthy commitment because the financial sector is crucial for the allocation of resources in any country but in a state-permeated one with a high market share of state-owned banks like in the PRC in particular. In addition, in absence of a functioning capital market, apart from their savings Chinese firms mostly finance their investments through bank loans.³⁰

When implementing its commitments under WTO law, however, China carefully studied the term "prudential regulations" and noticed that there is no internationally accepted definition of the phrase. Hence, it adopted a very broad definition of it that allowed the PRC to effectively keep full control over its financial sector not endangering the dominance of state-owned banks. Hence, China is complying with the letter of its WTO

²⁴ Davey, W. (2009). Compliance Problems in WTO Dispute Settlement, *Cornell International Law Journal*, 42(1), p. 121.

²⁵ While China's remarkably good compliance record is widely acknowledged, European critics point to the increase application of "dirty tactics": They argue that the PRC aims to delay the implementation of DSB rulings wherever possible. This criticism is, however, hypocritical because the EU (and the U.S.) is following the very same tactics for years making use of the legal loopholes of WTO law. Hence, China's change in policy is rather an expression of the PRC's familiarization with WTO law and the Western practices of trying to circumvent it. After all, it needs to be noted that rather than criticizing China for its tactics, Europe needs to acknowledge that the PRC's compliance record with WTO DSB rulings against it is far better than that of the EU.

²⁶ ten Brink, T. (2011). *Institutional Change in Market-Liberal State Capitalism: An Integrative Perspective on the Development of the Private Business Sector in China*, MPIfG Discussion Paper 11/2. Köln:Max-Planck-Institut für Gesellschaftsforschung.

²⁷ Kobayashi, Y. (2013). "Creative Compliance?" China's Compliance with the WTO - a Case Study of Telecommunications Services. In K. Zeng and L. Wei (Eds.), *China and Global Trade Governance*. London: Routledge. Webster, T. (2014). Paper Compliance: How China Implements WTO Decisions, *Michigan Journal of International Law*, 35(1). Oh, S. (2015). *Convenient Compliance. China's Industrial Policy Staying One Step Ahead of WTO Enforcement*, EAI Working Paper. Seoul: East Asia Institute.

²⁸ World Trade Organization. (2001). *Report of the Working Party on the Accession of China. Addendum. Schedule CLII - The People's Republic of China. Part II - Schedule of Specific Commitments on Services. List of Article II MFN Exemptions. WT/ACC/CHN/49/Add.2*. Geneva: WTO, p. 35.

²⁹ Whalley, J. (2003). *Liberalization in China's Key Service Sectors Following WTO Accession. Some Scenarios and Issues of Measurement*, NBER Working Paper Series 10143, Cambridge, National Bureau of Economic Research, p. 11.

³⁰ Nölke, A. et al. (2014). Domestic Structures, Foreign Economic Policies and Global Economic Order. Implications from the Rise of Large Emerging Economies, *European Journal of International Relations*, Online First, p. 12.

obligations but violates the spirit of it. In a turn to “creative compliance”, China has effectively made use of the legal loopholes inherent in WTO law.

In sum, China has a comparatively good compliance record reflecting its economic benefits from international trade law. Depoliticization and reputational considerations also play a role. Nevertheless, the PRC prefers vague legal norms that provide room for interpretation and “creative compliance”.

II.2 Security: Law and the South China Sea conflict

In contrast to trade law, China has less incentive to comply with international law in the field of international security. In fact, China is hesitant to follow international law when it touches upon the country’s core security interests. In an anonymous interview with an advisor to the CPG, I was openly told that

“when national security is at risk, no country follows its national laws. Just look what the NSA [National Security Agency, T.R.] in the US does: they spy and they collect data. Every country in the world does it.”³¹

While this statement does not directly relate to international law it is reasonable to assume that China would not follow international legal obligations if it does not even feel bound by national laws.

This does, however, not imply that the PRC ignores international law in the area field of security altogether. Instead, China’s approach is rather characterized by inconsistency stemming from its functionalist understanding of law. One crucial example is China’s behavior in the South China Sea dispute:

In the South China Sea, several Southeast Asian countries as well as the PRC and the Taiwanese government raise competing sovereignty claims. The PRC argues that around 90 percent of the South China Sea belong to its territory. China has put forward sea maps that include the so-called “nine-dash line” demarcating what China believes to be its own territory. This is particularly important because some of the most important international maritime trade routes cross the South China Sea. In addition, it is rich in natural resources and fish stock.

Accordingly, influential economic interests in China, including powerful state-owned enterprises of the energy sector, rather have an interest in the exploitation of the PRC’s military advantage over its regional neighbors than following international law.³²

At the same time, China is concerned about its international reputation if it ignores international law altogether. Accordingly, China reacted concerned when the Philippines legalized the issue bringing it to the Permanent Arbitration Tribunal in The Hague. In anticipation of its loss, the PRC did not participate in the proceeding. The former top official Dai Bingguo even said days before the tribunal published its decision that this

³¹ Author’s interview

³² Hameiri, S., and Jones, L. (2016). Rising Powers and State Transformation: The Case of China, *European Journal of International Relations*, 22(1), pp. 86-89.

would be no more than “waste paper”.³³ However, while this may appear like China would not care about international law at all, the PRC’s justification for its stance draws on a legal line of argument:

Firstly, China challenged the legal jurisdiction of the tribunal. In China’s view, the dispute in the South China Sea is a matter of competing sovereignty claims and not the law of the seas. Only the latter lies in the jurisdiction of the Court.

Secondly, China reemphasized that the country has not accepted the tribunal’s jurisdiction issuing an opt-out in 2006. In fact, the PRC declared its reservation against Section 2 of Part XV, paragraphs 1 (a) (b) and (c) of Article 298 of the law of the seas convention (UNCLOS).³⁴ This addresses the legally binding decisions by four venues, including the Permanent Arbitration Tribunal. This rejection of the tribunal is not surprising because its rulings are legally binding and automatically turn into international law. This stands against the PRC’s interest in vague international legal norms that are ready for a broad interpretation along the lines of China’s interests.

In addition to questioning the tribunal’s jurisdiction, China has aimed to boost its international reputation by demonstrating more willingness to negotiate a long-awaited code of conduct with its Southeast Asian neighbors. Hence, reputation costs inherent in international law most likely remain significant in the eyes of the Chinese leaders.

In terms of the (de-)politicization effects of legalization, the PRC has no interest in it: China’s public debate and societal voices are mainly driven by nationalist arguments. The Permanent Arbitration Tribunal’s 2016 ruling demonstrates that legalizing the issue weakens China’s position; if the PRC fully complied with international law, the leaders would risk being perceived as weak and undermining the national cause.³⁵

In addition to these considerations, the South China Sea dispute is yet another example where the PRC aims to utilize vagueness to its own negotiation advantage: While its claim of sovereignty over the nine-dash line may appear to be precise in the first place, it is anything but clear. In general, two interpretations of China’s claim are possible:³⁶

The first interpretation goes that China claims all major land features within the nine-dash line. This may include natural islands, reefs and rocks. Under international law, islands grant the claimant a 200-nautical-mile exclusive economic zone (EEZ) around it while reefs and rocks provide for 12 nautical miles of territorial waters but no EEZ. While it remains open whether the PRC’s sovereignty claims are valid or not, this interpretation is generally in line with UNCLOS. In other words, this first interpretation restricts the dispute to overlapping sovereignty claims.

³³ Wong, C. (2016). *Veteran Chinese Diplomat Warns on South China Sea Ruling*. Retrieved from <https://blogs.wsj.com/chinarealtime/2016/07/06/veteran-chinese-diplomat-warns-on-south-china-sea-ruling/>.

³⁴ United Nations. *Declarations or Statements upon UNCLOS Ratification*. Retrieved from http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification.

³⁵ Storey, I. (2012). China’s Bilateral and Multilateral Diplomacy in the South China Sea. In P. Cronin (Ed.) *Cooperation from Strength. The United States, China and the South China Sea*. Washington D.C.: Center for a New American Security.

³⁶ International Crisis Group. (2012). *Stirring Up the South China Sea (I)*. , *Asia Report N°223 – 23 April 2012*, Brussels, International Crisis Group.

The second interpretation, in contrast, contravenes UNCLOS: Following this line of argument, China claims not just the major land features but sovereignty over all the waters within the nine-dash line. While the PRC has never officially adopted this interpretation its actual behavior in the waters of the South China Sea indicate that it is applying the second reading of the nine-dash line.³⁷ Time and again, China emphasizes its historical rights in the region pointing to the discovery, longstanding historical use and administrative control of the area under dispute stretching back to the Han Dynasty. The PRC references old maps and archeological findings.³⁸ This line of argument lies outside the justifications under UNCLOS which rather highlights proximity and continuous and effective administration. In wake of its weakness in the 19th and 20th century, though, China was not able to administer the atolls in the South China Sea.

In short, the PRC has not adopted a strategy that openly rejects UNCLOS but leaves open whether it aims to reinterpret the international laws of the sea or goes along with the existing definition of it. It is this vagueness that plays into China's negotiation position.

All this demonstrates that China has rather little interest in international law in the South China Sea dispute from a functionalist point of view. At the same time, the PRC aims to protect its international reputation adopting legal justification for its stance and showing willingness to negotiate a code of conduct.

II.3 Rule: International law and the status of the Hong Kong Special Administrative Region

Another though internationally less well-known example for China's functionalist approach to international law is the country's Hong Kong policy. In 1997, the exercise of sovereignty over Hong Kong was handed back from the United Kingdom to China. Economically, the PRC had long profited from the existence of Hong Kong: Serving as a trade hub, the British Crown Colony facilitated the China's reform and opening up policy.³⁹ Great Britain had made Hong Kong one of the freest and most liberal economic entities in the world. In fact, while China opened its socialist planned economy step-by-step, Hong Kong had already a fully convertible currency, a functioning rule of law, civil liberty rights guaranteed and a full-fledged capitalist economic system.

Already in 1979, when the question of a possible handover of Hong Kong sovereignty emerged for the first time, late leader Deng Xiaoping said that investors should "put their hearts at ease".⁴⁰ Hence, when the British and the Chinese negotiated a treaty prescribing the handover, it was one of China's main interests to preserve the economic prosperity in Hong Kong and utilize it for its own economic development. Accordingly, the PRC and the United Kingdom signed the Sino-British Joint Declaration in 1984 prescribing that Hong Kong would remain a Special Administrative Region for 50 years until 2047 enjoying a "high degree of autonomy". This "high degree of autonomy" guarantees the preservation of civil liberty rights, judicial independence, capitalism, market economy, the free convertible currency and a largely autonomous political system among other issues. In short, the Sino-British Joint Declaration limits China's exercise of sovereign

³⁷ Ibid.

³⁸ Storey, China's Bilateral and Multilateral Diplomacy in the South China Sea.

³⁹ See e.g. Fung, D. (1998). Hong Kong's Unique Constitutional Odyssey and Its Implications for China, *Asian Affairs*, 24(1), p. 201. Buckley, R. (1997). *Hong Kong: The Road to 1997*. Cambridge: Cambridge University Press, p. 41.

⁴⁰ Quoted in: Roberti, M. (1994). *The Fall of Hong Kong*. New York: John Wiley & Sons, pp. 22-23.

control over Hong Kong until 2047 by means of a bilateral treaty that was registered as such with the United Nations.⁴¹ Both for economic reasons as well as being concerned for the country's international reputation, China has committed itself to these far-reaching limitations of its governance over Hong Kong. To this day, China has not explicitly violated the Sino-British Joint Declaration and has claimed that it is in full compliance with it.

More recently, however, disputes regarding the governance of Hong Kong have emerged. The most prominent example of this are the protests in 2014 known as the "Umbrella Movement" when around 1.3 out of 7.5 million Hong Kong citizens occupied three neighborhoods of Hong Kong for more than three months demanding real democratization. In reaction to these protests, China has adopted a legalization and depoliticization strategy: The PRC argues that Hong Kong affairs are exclusively under domestic jurisdiction (see below). From China's perspective, the only legal source that matters is Hong Kong's Basic Law that has been adopted by the NPC. In fact, the Sino-British Joint Declaration prescribed the necessity of the Basic Law to be adopted as a domestic law by the NPC.

This status of the Basic Law as a domestic Chinese law carries important legal implications: In China, the Standing Committee of the NPC (which consists of Chinese parliamentarians) enjoys the right to final interpretation of any domestic law including Hong Kong's Basic Law. Hence, the final interpretation of the Basic Law is carried out by a Chinese political organ not Hong Kong's independent judiciary.

Strikingly, in its official narrative the PRC ignores the fact that the interpretation of the Basic Law is ultimately a political and not a legal matter. To the contrary, China highlights the legal and not the political aspects of dispute around its Hong Kong policy: For example, the PRC has ruled out certain democratic reforms in Hong Kong emphasizing that they are not compatible with Basic Law interpretations issued by the Standing Committee of the NPC. Hence, China does not base its rejection on political considerations but argues that it is illegal to do so because the Basic Law interpretations are treated as a legal source not a political decision. In essence, the PRC aims to legalize and depoliticize contentious issues of its Hong Kong policy.

Apart from this, China is also reinterpreting the status of the Sino-British Joint Declaration more generally: Most fundamentally, China argues that "unequal" international treaties are null and void. This is a reasonable point that resonates with international law. In line with this argumentation, China has never accepted the understanding that the UK returned the sovereignty over Hong Kong to its motherland but only the administration of its sovereign territory in 1997. From this, one may conclude that there was never a need to conclude the Sino-British Joint Declaration. However, the problem with this argument lies in the details:

Firstly, if there was no need for the Sino-British Joint Declaration why did China accept to register it as an international treaty with the United Nations? When it did so it accepted its legal validity and that the Sino-British Joint Declaration should be treated equal to any other bilateral treaty according to international law.

⁴¹ Wong, Y. (2006). *The Protection of Fundamental Rights in the Hong Kong Special Administrative Region. An Analysis of Transition*. Frankfurt: Goethe University, ch. 2.

Secondly, China may argue that it is not bound by the Sino-British Joint Declaration because its historical-legal basis is lacking. However, the Chinese do not clearly state the requirements for an international treaty to be considered "unequal" and thus "invalid". Instead, the Chinese understanding comprises both the substance of treaties as well as the negotiating position of the parties to a given treaty as decisive for its "unequal" status without naming clear criteria. Given China's treaty law's ambiguity,⁴² one may consider almost every international treaty "unequal" in some respect which leads Corwin⁴³ to argue that the Chinese compliance with international law is not the result of legality but political goodwill.

Furthermore, the PRC argues that the Sino-British Joint Declaration has expired in 1997. Hence, for the Chinese, the country is no longer bound by any international legal obligations in its Hong Kong policy.⁴⁴ China bases this line of argument referring to the Sino-British Joint Declaration's stipulation that its content has to be transposed and detailed in Hong Kong's Basic Law. The problem with China's argument is that international law does not provide for the expiry of a bilateral treaty unless one of the contracting parties formally retracts from it.

In sum, China again has adopted an incoherent approach to law that is best explained by reference to a functionalist understanding of it: The PRC does anything to secure the economic status of Hong Kong and the county's international reputation. It further aims to utilize the depolitization effects of legalization wherever possible. This, however, does not go along with an acceptance of international law altogether but includes a "creative reinterpretation" of the Sino-British Joint Declaration as having already expired. This argument serves the goal of maximizing China's control over Hong Kong by negating that the PRC is bound by international law.

III. Conclusion and implications for Europe

In this paper, I argue that China has a very different approach to law: While in Europe, law has long been seen as carrying normative value in itself, this is not the case in China where more attention is paid to family ethics, compassion and context sensitivity. These historical differences are not deterministic but may help explain divergences in the current European and Chinese approaches to law.

No doubt, the rule of law is a crucial element of Chinese recent domestic reform; the independence of the judiciary from local party-state cadres' interference has been strengthened. At the same time, China's approach to law remains functional paying careful attention to the concrete benefits of law for policy-making. In particular, economic and reputational gains play a crucial role for the Chinese calculus as well as the depolitizing potential of legalization. This functional approach goes along with a preference for vague legal norms that allow very different interpretation and do not

⁴² According to Chinese treaty law, even a change of government is regarded as a legal justification for non-compliance with a state's international legal obligations. See Corwin, D. (1987). *China's Choices: The 1984 Sino-British Joint Declaration and its Aftermath*, *Law & Policy in International Business*, 19(1).

⁴³ Ibid.

⁴⁴ Cheung, A. (2014). *Burying the Joint Declaration*. Beijing's International Law Reaction to the Umbrella Movement. New York: US-Asia Law Institute. Cheung, A. (2015). *Road to Nowhere: Hong Kong's Democratization and China's Obligations under Public International Law*, *Brooklyn Journal of International Law*, 40(1). Wong, *The Protection of Fundamental Rights in the Hong Kong Special Administrative Region*, p. ch. 2.

constrain political decision-making all too much. Europe has to be aware that compliance with international law is not a value in itself for China. It is all about the concrete benefit for the PRC.

Crucially, we need to differentiate whether China disagrees with the content of existing international law or the *nature of legal norms as such*. With regard to the former, Europeans need to acknowledge that the existing international law has been written under Western dominance and that China has a legitimate claim to call for legal change and/or new legal norms internationally. With regard to the latter, however, Europe should rather insist on the preservation of legal certainty and the value of international law as such.

In order to promote legal certainty, rule of law and the preservation of a reformed version of the existing international law regime, Europe should adopt six policy guidelines. The first three of them are to strengthen the positive incentives for China to follow international law; the latter three are rather meant to contain some negative effects from Chinese policy-making:

Positive incentives: Firstly, Europe should emphasize the economic necessities of legal predictability and legal certainty. In this context, the value of reciprocity may serve as a fundamental guideline for EU-Chinese economic policy-making. This implies Europe's acknowledgment that it cannot demand anything that it does not comply with itself. In this context, WTO law is a case in point where China has a better compliance record with DSB rulings than the EU.

Secondly, Europe should be well aware of its leverage vis-à-vis China. The PRC is very concerned with its international image and reputation. This is interlinked with the Chinese intention to portray itself as complying with international law and being a reliable partner in international affairs. This is to promote China's international influence but also serves as a domestic narrative emphasizing that China is a well-respected great power. This is to contrast with the "century of humiliation" before the Chinese Communist Party took over the power in 1949. This concern for China's international reputation and its interlinkage with the country's compliance record provides Europe significant leverage. Accordingly, Europe should not just complain about existing weaknesses of the Chinese legal system but also highlight positive developments strengthening the incentive to improve the Chinese reputation by means of legal reform.

Thirdly, Europe should clearly distinguish between legal and political decisions internationally. This transparency helps to commit China to international legal norms where necessary.

Containment: Fourthly, since China is eager not to violate international law but aims to exploit legal vagueness and loopholes, one strategy to adopt for Europe would be to insist on more precise international legal rules. This may minimize legal disputes and differences in interpretation. In addition, it makes it more difficult for China to shirk from its international legal obligations by means of interpreting legal norms as broadly as to violate the spirit of it.

Fifthly, Europe should insist on the institutionalization of independent international judiciaries to settle legal disputes and come up with final and binding legal

interpretations. This is another way to increase the costs for Chinese non-compliance with international law. Opt-out options from international tribunals should be avoided. Finally, since clarity and precision are not always a viable option for international law, Europe should promote prescribed and inclusive procedures of law interpretation and implementation. Recent social scientific research has convincingly demonstrated that such mechanisms increase the perception of procedural justice and the acceptance of international norms and institutions globally.⁴⁵ In particular, developing countries are receptive to such inclusive mechanisms of law interpretation. This is of particular importance for China that claims to head the developing countries and not work against their interests.

In sum, if Europe succeeds to increase legal precision, institutionalized and independent international judiciaries and inclusive procedures of law interpretation that are accepted as being fair and procedurally just, the costs for Chinese non-compliance with international law will be enormous. This would most likely promote the PRC's compliance record.

⁴⁵ Matthias Dembinski, "Procedural Justice and Global Order. Explaining African Reaction to the Application of Global Protection Norms," *European Journal of International Relations*, Vol., No. 1, forthcoming.

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