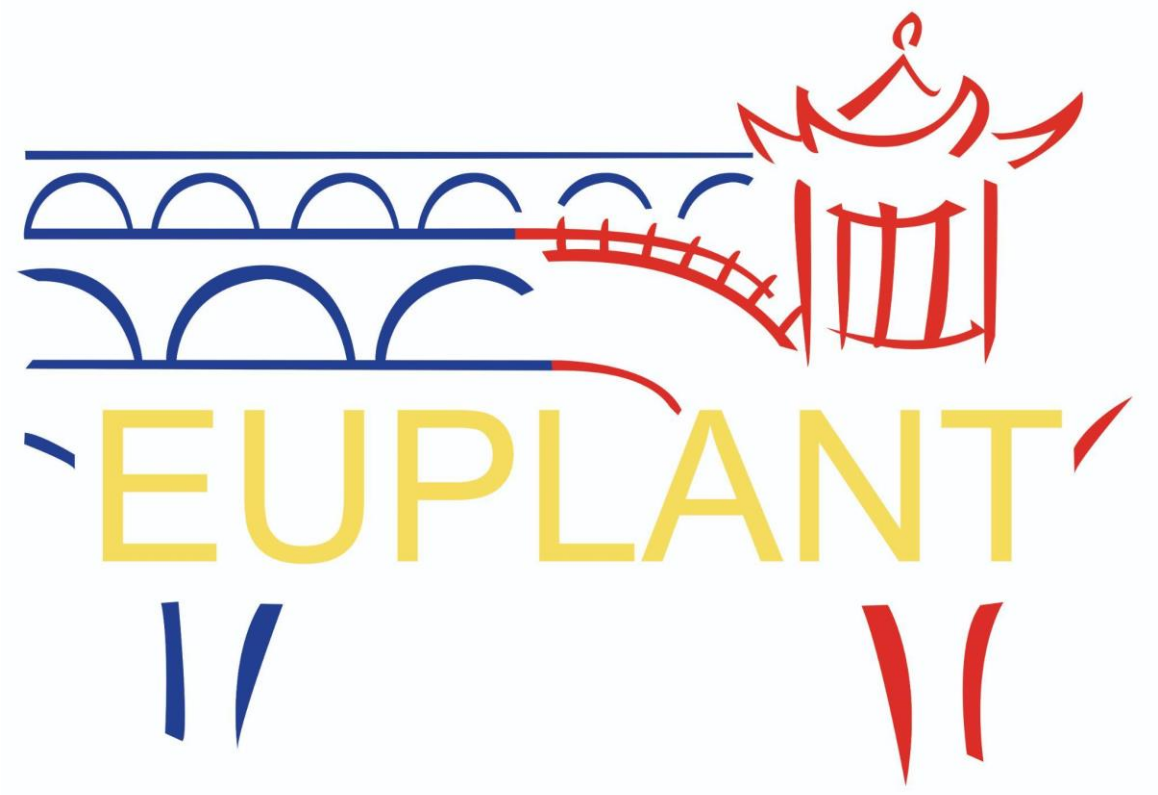
EUPLANT Final Report
February 2022



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Abstract

The Jean Monnet Network **'EU-China Legal and Judicial Cooperation' (EUPLANT)** investigates the interactions between the Chinese and the European Union (EU) legal and judicial systems and promotes excellence in teaching and research on EU-China legal and judicial cooperation. Through a set of research, policy and outreach activities, EUPLANT creates new avenues for enhanced academic and policy cooperation between the EU and China and engenders a better understanding of each other's legal systems. In this report, academic experts from the network and beyond look into some of the key overarching themes of the network relating to the prospects and challenges for the internationalisation of EU law in EU-China relations as well as EU-China judicial cooperation. It includes a set of policy recommendations targeting policy makers and other stakeholders that have an interest in the deepening of EU-China legal and judicial cooperation.

Keywords

European Union, China, legal and judicial cooperation, strategic partnership, legal transplants, rule of law

摘要

"欧盟-中国法律和司法合作研究"（The Jean Monnet Network **'EU-China Legal and Judicial Cooperation' (EUPLANT)**，以下简称 EUPLANT）旨在研究中国和欧盟法律和司法系统之间的互动，并促进欧盟和中国法律和司法合作方面的教学和研究。通过一系列的研究、政策和推广活动，EUPLANT 为加强欧盟和中国之间的学术和政策合作创造了新的路径，并促进了对彼此法律体系的更好理解。在这份报告中，来自项目内的和项目之外的学者专家们一起探讨了项目中的一些至关重要的专题。 这些专题涉及欧盟法律在欧盟-中国关系中的国际化前景和挑战，和欧盟与中国之间的司法合作。它包括一套针对决策者和其他感兴趣于深化欧盟和中国之间法律和司法合作的利益相关者的政策建议。

关键词

欧盟，中国，法律与司法合作，战略合作，法律移植，法治

Editor

This report has been edited by Dr Matthieu Burnay, Associate Professor in Global Law at Queen Mary University of London and Academic Coordinator of the Jean Monnet Network on EU-China Legal and Judicial Cooperation.

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Introduction

By Dr Matthieu Burnay (Queen Mary University of London)

Since the establishment of the EU-China Strategic Partnership in 2003, the bilateral relationship between the EU and China has become increasingly comprehensive covering a wide range of economic, political and people-to-people areas of cooperation. The Jean Monnet Network on EU-China Legal and Judicial cooperation focuses on an aspect of the relationship (i.e. the interactions between the Chinese and the European Union (EU) legal and judicial systems) which remains very much understudied even though it has arguably become a prominent area of cooperation in the EU-China Strategic Partnership and given rise to rule of law-based concerns.

More particularly, EUPLANT's goal is to assess the extent to which legal transplants and enhanced judicial cooperation can lead to an increased regulatory convergence between the Chinese and EU legal frameworks. Against the background of a deterioration of rule of law and increased pressures on civil society and the legal profession in China, EUPLANT aims to assess both the risks and opportunities of judicial and wider legal cooperation.

EUPLANT focuses on two overarching themes.

The internationalisation of EU Law and EU-China Relations:

- To uncover successes and failures of internationalisation of EU norms, standards, and procedures;
- To identify concrete cases of legal transplants in the interactions between the EU and the Chinese legal system;
- To assess the processes in which the EU has shaped the evolution of the Chinese legal system through natural diffusion, active values promotion, and voluntary borrowing; and
- To address the diffusion and defence of values central to the EU legal system in this context.

EU-China Judicial Cooperation:

- To map the existing judicial cooperation mechanisms between China and EU Member States;
- To analyse and compare the scope and limitations of judicial cooperation mechanisms between China and EU Member States;
- To analyse the extent to which judicial cooperation between EU Member States and China allows to address the incompatibilities between legal and administrative systems; and
- To identify the human rights and rule of law risks inherent to judicial cooperation with China and how those risks can be mitigated by the Member States and the EU

In this policy report, experts from EUPLANT and beyond look at some of the key dimensions of the project and propose some policy recommendations aimed to further deepen EU-China legal and judicial cooperation.

导语

Matthieu Burnay 博士（Queen Mary University of London）

自 2003 年建立欧盟-中国战略伙伴关系以来，欧盟和中国之间的双边关系已变得越来越全面，涵盖了经济、政治和人与人之间的广泛合作领域。EUPLANT 重点关注这一双边关系中的一个方面（即中国和欧盟之间的法律和司法系统之间的互动）。尽管这一领域可以说已经成为欧盟-中国战略伙伴关系中一个突出的合作领域，并引发了基于法治层面的关注，但对这一问题的相关研究仍然非常不足。

更具体地说，EUPLANT 的目标是评估法律移植和加强司法合作能在多大程度上导致中国和欧盟法律框架之间日益递增的规制趋同。在中国法治恶化、公民社会和法律界所受压力加大的背景下，EUPLANT 旨在评估司法和更广泛的法律合作的相关风险和机遇。

EUPLANT 重点关注如下两个关键专题：

1. 欧盟法律的国际化和欧盟-中国关系。

- 揭示欧盟规范、标准和程序国际化的成功和失败之处。

- 在欧盟和中国法律体系的互动中，找出法律移植的具体案例。

- 评估欧盟通过自然传播、积极的价值推广和自愿出借用来塑造中国法律体系的发展进程；以及

- 解决在此背景下欧盟法律体系的核心价值观的传播和维护问题。

2. 欧盟-中国司法合作。

- 摸清中国与欧盟成员国之间现有的司法合作机制。
- 分析和比较中国和欧盟成员国之间的司法合作机制的范围和局限性。
- 分析欧盟成员国和中国之间的司法合作在多大程度上能够解决法律和行政体系之间的不协调问题；以及

- 查明与中国的司法合作所固有的人权和法治风险，以及欧盟成员国和欧盟如何减少这些风险。

在这份政策报告中，来自 EUPLANT 和其余的专家审视了项目中的一些关键层面，并提出了一些旨在进一步深化中欧法律和司法合作的政策建议。

II. Rules-Based International Legal Order and EU-China Legal and Judicial Cooperation

By Li Bin (Beijing Normal University)

Foreword

As two independent subjects of international law, the European Union (EU) and China have led the legal and judicial cooperation following the general practices of international relations. From the trade agreement EEC-China signed in 1978 to the latest Comprehensive Agreement on Investment (CAI), bilateral agreements compose an essential legal aspect of the Europe-China relations, alongside those non-legal aspects of cooperation premised upon political summits, dialogues, etc. International law plays therefore an essential role in EU-China legal and judicial cooperation. China recently clarified its position on the role of international law in maintaining the global order by establishing 'a just and equitable international order based on international law'[1] in place of the more ambiguous idea of a 'rules-based international order'. The latter contains the risk of confusing international law with national legal rules thus provides the pretext for legal hegemony in the interest of some dominating powers in global affairs. The argument for distinguishing international law in the general sense from the abstract "rules" in international legal order highlights the importance of the international legal rules that are premised upon the general consent of the states and serve for the common interests of the international community. Both the EU and China insist on the governing role of a set of universal or unbiased international legal rules in keeping the international order in peace, security and prosperity. EU-China legal and judicial cooperation thus exemplifies the importance of the rules/international law-based international legal order. For the same reason, EU-China legal and judicial cooperation also contributes to consolidating the rules-based international legal order. Further policy and constructive steps could be taken to enhance the EU-China legal and judicial cooperation that will lead to expected outcome.

The importance of rules/international law-based international legal order

The international law-based international order connotates China's political commitment of maintaining the United Nations at the core of the current international system. United Nations are regarded as an inter-governmental institution that is universal, most representative and enjoys the highest authority, and therefore, the United Nations should exercise the key functions in global governance. While currently many uncertainties cumulate, the UN should be strengthened instead of being weakened. UN Charter lays the foundational principles governing international relations, and thus shall be strictly followed. The Five Principles of Peaceful Coexistence, initiated by the Chinese government in 1953, are firmly embedded in the UN Charter and contribute to implementing the UN Charter's objectives and principles.

Against the backdrop of US-China trade conflicts, China contends that the international law-based international order warrants multilateralism in dealing with political, economic and all other matters of global concern. Unilateral acts, in the diverse forms of sanctions or extra-territorial application of domestic law against the prevailing principles of international law, betray the spirit of UN Charter and may put the global peace and security in peril.
On the EU side, the policy orientations on EU-China relationship contain the commitment to engaging with China to uphold the rules-based international order. The EU is committed to

[1] See, The Declaration of the People's Republic of China and the Russian Federation on the Promotion of International Law, done at Beijing, on 25 June, 2016.

supporting effective multilateralism with the United Nations at its core. In addition, EU affirms that China has the responsibility to support all three pillars of the United Nations, namely Human Rights, Peace and Security, and Development, putting emphasis on the ability of EU and China to engage effectively on human rights will be an important measure of the quality of the bilateral relationship. EU has also underlined that China's approach to rules-based international order and to multilateralism is sometimes selective and not strictly consistent.[2]
In brief, on the understanding of rules-based international legal order, as well as on the importance of multilateralism, EU and China's common position overweighs the conceptual gaps.[3] That provides a favorable context to the development of EU-China legal and judicial cooperation.

The relevance of the rules/international law-based international order to EU-China legal and judicial cooperation

The economic and trading relations between the European Community and China are firstly governed by an agreement for economic and commercial cooperation dating from 1985.[4] Apart from the Agreement of 1985, the legal framework of relations is completed by a certain number of sector-based agreements. China was also a subject of the 'Development Policy' of the EU, in its unilateral aspect. Since 2003, the EU-China strategic partnership, as laid out in the orientation documents and developed in the course of annual summits, appears as an instrument of 'soft law'. 'Close analysis shows that the partnership has developed simultaneously as a para-legal instrument which adds dynamism to economic dialogues' and 'a pre-legal instrument which allows one to envisage the conclusion of a new framework agreement'. [5] The 'soft law' approach of engaging with legal and judicial cooperation showcases the flexibility and to certain degree the pragmatism to confront the political challenges in the EU-China relationship.

Human Rights has been one of the most contentious and vexed issues in the relationship between the EU and China, marked by deep differences and the lack of an agreed common framework. EU's human rights dialogue with China, described by some scholars as a sort of 'quite diplomacy', [6] shed light on the political dimension of EU-China legal and judicial cooperation's wide-ranging implications. China's Policy Paper on the European Union published in 2018, confirms China's intention to '[C]ontinue to conduct constructive exchanges on human rights on the basis of equality and mutual respect'; at the same time, China sets the bottom line that '[T]he European side should view China's human rights conditions in an objective and fair manner and refrain from interfering in China's internal affairs and judicial sovereignty in the name of human rights'.[7] The pragmatism in engaging with EU-China human rights dialogue thus reaches its limit, which could be explained by the fact that human rights are not formally a legal and political issue, but more substantially, as the Policy Paper implies that they are embedded in the 'social and people-to-people cooperation'.

[2] EU-China – A Strategic Outlook (12 March 2019).
[3] In terms of multilateralism, Jing Men once observed that China promotes multilateralism for purpose of counterbalancing US dominance, whereas EU remains a close ally of the US. See, Jing Men, 'The EU-China Strategic Partnership: Achievements and Challenges' (2007) Policy Paper 12, University Center for International Studies, p.18.
[4] Agreement on Commercial and Economic Cooperation between the European Economic Community and the People's Republic of China [1985] OJ L250/1.
[5] See, Antoine Sautenet, 'Europe and China: Cooperation with Complex Legal Dimensions' (May 2008) IFRI, p.13.
[6] See, Katrin Kinzelbach, *The EU's Human Rights Dialogue with China Quiet Diplomacy and its Limits* (Routledge, 2016).
[7] *China's Policy Paper on the European Union* (December 2018).

Besides human rights dialogue, the EU-China Legal Affairs Dialogue may contribute to 'legal policy exchange, mutual learning and cooperation to better understand each other's legal systems and promote China-EU cooperation'.[8] At the 17th EU-China Summit in June 2015, Premier Li Keqiang and Presidents Juncker and Tusk agreed 'that it is necessary to deepen understanding of each other's legal systems, and establish an EU-China Legal Affairs Dialogue for policy exchanges, mutual learning and cooperation in legal affairs'. Accordingly, the first Legal Affairs Dialogue meeting was jointly launched on 20 June 2016. In the Joint statement of the 20th EU-China Summit in July 2018, EU and China expressed satisfaction with the outcomes of the EU-China Legal Affairs Dialogue and its role as an important platform for promoting mutual understanding and mutually beneficial cooperation.

The recent release by EU of the draft text of Comprehensive Agreement on Investment (CAI) implies that EU-China legal and judicial cooperation may enter a new stage where legal rules will play an ever more essential in EU-China's trade and investment relationships, and consequently, the rules/international law-based international order will be consolidated by the CAI. The latter's scope extends well beyond the traditionally perceived trade and investment sectors and may have more profound effect on political, social and cultural aspects of the two partners relationship, notably through the integration of the sustainable development goals into the agreement. In other words, CAI may represent 'a deeper water zone' into which enters the EU-China's legal and judicial cooperation that has to overcome mores complex challenges of legal, political and social natures.

Recommendation to improving EU-China legal and judicial cooperation

After nearly 40 year's engaging with China, EU increasingly regards China as a negotiating partner, an economic competitor and 'a systemic rival promoting alternative models of governance'.[9] A long-term sustainable EU-China relationship, which benefit to the peace, security and prosperity of the international community, must overcome the challenges arising from the abovementioned systemic rivalry. For that purpose, the EU-China legal and judicial cooperation, which is part of the 'a flexible and pragmatic whole-of-EU approach', shall give priority to take concrete steps to

1. **Enlarge the basis of consensus between EU and China on the meaning and requirements of the rule/international law-based international legal ord**er;
2. **Substantialize the joint efforts in enhancing law-compliance and law-enforcement in diverse sectors of EU-China relationship**;
3. **Further constructive dialogue on the approach and methods to achieve the sustainable development goals in EU-China trade and investment relationship**;
4. **Share experiences and enhance cooperation to engage with the current global governance reform towards a more just and humanitarian global order**.

[8] *Ibid*.
[9] *EU-China – A strategic outlook* (12 March 2019).

III. From 'Ancilla Legislatoris' to 'Ancilla Iuris': The Role of Comparative Law in EU-China Legal and Judicial Cooperation

By Philipp Renninger (Lund University)

It is beyond doubt that comparative law has a major significance for EU-China legal and judicial cooperation. But what role does, and should, it play in detail? Both in China and Europe, legal academics as well as legal practitioners often understand comparative law as an *ancilla legislatoris*, that is, a subordinate 'servant of the *legislator*':[10] First, they claim that comparative research must serve legislation by producing findings useful for the process of amending old and creating new regulations *de lege ferenda* [1.]. Second, they subjugate comparative studies to the existing legislation regulating science and research *de lege lata* [2.]. My essay, in contrast, will recommend both legislators and researchers to treat comparative law as an *ancilla iuris*, that is, a 'servant of the *law*' itself [3.].

Importance of comparative law in the bilateral relationship between the EU and China

At first sight, it seems highly desirable for legislators to have comparative lawyers doing their legwork or even spadework. By researching the legal solutions in other countries and, ideally, their real-world implications, comparatists shall provide inspiration and insights to legislators. Indeed, comparative law can offer 'useful lessons of how to [or not to] circumscribe claims to particular times and places, and how to study institutions that may [either complementarily] interact with one another or serve as substitutes'.[11] For domestic legislators in China and the EU Member States, such comparative advice merely offers an option of what they might consider when drafting new or reforming old laws. For international and multinational legislation, in contrast, it appears necessary and even 'natural' to compare the law – at least the law of the nations concerned. Harmonising national laws or drafting conventions that bind different nations requires mutually acceptable solutions and thus common ground between the countries involved. Therefore, the EU resorts to comparative investigations – mostly of the laws of its 27 Member States – when creating supranational secondary legislation such as regulations and directives. Similarly, EU-China cooperation should listen to comparative law, e.g., when drafting bi- or multilateral treaties between China and the EU: [R]elevance to policymakers and practitioners" thus constitutes a 'key goal for much of international [and comparative] legal research'.[12]

Consequently, so-called 'legislative comparative law' oriented towards the *lex ferenda* traditionally accounts for a large share of legal comparisons in Europe.[13] A similar phenomenon prevails in China, whose official 'leading thought' of Sino-Marxism promotes the transfer of foreign experiences.[14] Chinese law and legal studies shall 'adopt the others' strengths to compensate their own [supposed] weaknesses' (取长补短). In this understanding, making foreign law and legal doctrine fruitful (or, some might say, exploitable) for the further

[10] See, Stefan Grundmann and Jan Thiessen (eds.), *Law in the Context of Disciplines: Interdisciplinary Approaches in Legal Academia and Practice* (Mohr Siebeck, 2015) 6.

[11] Katerina Linos, 'Methodological Guidance: How to Select and Develop Comparative International Law Case Studies' in Anthea Roberts et al. (eds.) *Comparative International Law* (Oxford University Press, 2018) 51.

[12] Ibid, p. 50.

[13] Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung: Auf dem Gebiete des Privatrechts*, 3rd ed. (Mohr Siebeck, 1996), p. 49; David C. Donald, 'Approaching Comparative Company Law' (2008) 14 Fordham J. Corp. & Fin. L. 83, p. 85.

[14] Harro von Senger, *Einführung in das chinesische Recht* (C.H.Beck, 1994) 285 et seq.

development of China's legal system becomes the ultimate purpose of comparing the law. However, legislative comparative law should be considered as only one possible variety of legal comparatism, most importantly besides 'scientific-theoretical comparative law' concerned with the *lex lata*.[15] Moreover, legislative (and even more scientific-theoretical) comparative law should be interpreted as serving not the legislator but rather the law as such.

This role as an *ancilla iuris* emanates from two considerations: First, serving the *law* means that (even literally 'legislative') comparative law yields relevance for much more areas, tasks, and institutions than legislation. Comparative insights might be consulted not only when enacting and amending the law but also when interpreting or applying it. Put differently, they might be utilised not only by the legislative branch but also by the judicial branch, the executive branch (be it gubernative or administrative organs), the 'legal profession' (i.a., advocates), the parties to a lawsuit, and many more. Second, *serving* the law signifies that (even legislative) comparative law is not in servitude to those entities but rather provides services to the law itself. Serving thus only describes the role of comparative investigations in knowledge production: they shall serve to better understand the law. For this cognitive purpose, (legislative) comparative law can and should resort to 'extrinsic' aspects going beyond the horizon of positive legal stipulations well as to theoretical considerations going above the imminent concerns of supposed practical 'necessities'.

Key issues at stake relating to comparative law and how do they affect EU-China legal and judicial cooperation

When acting as *ancilla iuris*, there are many issues at stake for comparative legal studies as a discipline as well as for comparative lawyers as individual researchers. Two issues of 'serving the law' particularly affect EU-China legal and judicial cooperation and beyond:

On the one hand, comparative lawyers might feel forced to understate their own position and (academic) freedom. As supposed 'servants of the law', their comparative investigation process would be bound to the national law it researches, particularly to the national regulations of scientific research. This would result in legislators being able to tell comparative lawyers how to compare their law. Needless to say, legal researchers located *in* a specific country and jurisdiction are – from a normative perspective[16] – bound to respect that country's laws and regulations. Therefore, legal studies in Germany are demanded to adhere to the Basic Law (*Grundgesetz*, the German constitution)[17] or at least its basic principles of (liberal and constitutional) democracy, rule of law, and human rights.[18] In China, then, legal academics have been actively and passively demanded to observe the censorship system (审查制度). This observance has also been requested from foreign science and scientists operating inside of China.[19]

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15 Zweigert and Kötz , fn. 13, p. 49.

16 This does not necessarily coincide with a factual perspective. Indeed, if one concluded from this normative command that all legal research(ers) factually respected the relevant domestic laws, and thus derived 'is' from 'ought', one would commit a normative fallacy.

17 E.g., in Germany, Ernst-Wolfgang Böckenförde, 'Grundrechtstheorie und Grundrechtsinterpretation' (1974) 27 NJW 1529; Andreas von Arnauld, 'Die Wissenschaft vom Öffentlichen Recht nach der Öffnung für sozialwissenschaftliche Theorien' in Andreas Funke and Jörn Lüdemann (eds.), *Öffentliches Recht und Wissenschaftstheorie* (Mohr Siebeck, 2009) 92.

18 E.g., in Germany, Florian Becker, 'The Development of German Administrative Law' (2017) 24 Geo. Mason L. Rev. 453, p. 475.

19 See, Nicholas Loubere and Ivan Franceschini, 'How the Chinese Censors Highlight Fundamental Flaws in Academic Publishing' (2018) 3 Made in China Journal 22.

However, Chinese authorities increasingly try to apply their censorship rules also toward science and scientists that performs research *about* China but *in* other countries.[20] At least for comparative (legal) studies, such extraterritorial claims should be rejected as they would bring researchers in a dilemma situation: Per definition, comparative law compares at least two legal orders. If one accepted the extraterritorial bindingness of national science regulations, comparative law would thus have to comply with the detailed rules of at least two jurisdictions. In many constellations, the details (!) of these domestic stipulations on science vary heavily and even appear incompatible. E.g., in EU-China legal and judicial cooperation, comparative investigations subjugated to both national systems would have to comply with constitutionalist and liberal European regulations and explicitly anti-constitutionalist and illiberal Sino-Marxism[21] at the same time – which is nothing less than an impossibility. The only solution to such a dilemma is abandoning the claims to extraterritoriality (in details) and instead seeking a compromise (on basics). Such a basic 'least common denominator' between Chinese and European legal studies remains possible in theory and practice because even between Sino-Marxism and Euro-Liberalism, certain juristic methods and substantive concepts coincide or overlap.[22]

On the other hand, comparative lawyers might be tempted to overstate their own power (understood as politico-legal power and not as scientific 'knowledge-power'[23]). However, legislative comparative investigations should not try and change the law by themselves but only support the institutions legally competent to do so, for various reasons: From a legal theoretical perspective, law (as a research object, i.e., *obiectum materiale*) and legal studies (as a discipline and research method, i.e., *obiectum formale*[24]) are distinct from (legal) politics, including so-called legal politics (*Rechtspolitik*).[25] And from a rule of law (and potentially democratic) standpoint, legal academics must leave the task of changing the *lex lata* and enacting a new *lex ferenda* to the entities that the constitution has designated (and, ideally, the constituency has democratically elected) for this task.

Under these premises, a phenomenon in legal studies which *prima vista* seems uncontroversial turns out to be problematic: tacitly blurring the boundaries between truly comparative research (typically between one's own and a foreign legal system) and purely domestic analyses (either of one's own or of a foreign legal system). For example, Chinese scholars have noted that 'most legal scholarship in the post-Mao [era] is substantively comparative in some way, but very few scholars would consider themselves 'comparative law

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20 See, e.g., Pierre Marsone, '« Censure » de l'expo « Gengis Khan » à Nantes : comment les dynasties « barbares » ont façonné l'empire chinois' (Interview) (12.10.2020) L'Obs on the intended censoring of an exhibition in France about Genghis Khan and the Mongol Empire (which, for some time, also encompassed nowadays China).

21 E.g., Wang Tingyou (汪亭友), 西方"宪政民主"怎么了？——对"黑夜站立""民主之春"运动的分析 ['Western "Constitutionalism", What Is Wrong [with You]? Analysis of the "Nuit debout" and the "Democracy Spring" Movements'] (2016) 求是 [Qiushi] no. 13; Gao Quanxi (高全喜), 政治宪法学的兴起与嬗变 ['The Inception and Evolution of Political Constitutionalism'] (2012) 交大法学 [SJTU L. Rev.] 22, 33.

22 Ewan Smith, 'Socialist Law in Socialist East Asia' (2019) (Book Review) 14 AsJCL 373, p.378.

23 See, Michel Foucault, 'Vérité et pouvoir' (Interview) (1977) 70 L'arc 16.

24 See, Matthias Jestaedt, '„Öffentliches Recht" als wissenschaftliche Disziplin' in Christoph Engel and Wolfgang Schön (eds.), *Das Proprium der Rechtswissenschaft* (Mohr Siebeck, 2007) 267–268, applying these two scholastic categories to legal studies.

25 Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik: Studienausgabe der 1. Aufl. 1934*, first published 1934, Matthias Jestaedt ed., (Mohr Siebeck, 2008) 15–16.

scholars' […], even as a secondary field. Much of this is simply due to neglect: few Chinese scholars would consider the use of foreign law as a reference point to be something that automatically falls under the methodological umbrella of 'comparative law'—instead, it is how legal research is generally done'.[26] Such hidden comparisons becomes a problem in various cases: for instance, when they lead to interpreting domestic (*in casu*, Chinese) legal norms in a certain manner that does not reflect their actual content, or when they 'smuggle' doctrinal ideas and concepts or legal institutions and principles into Chinese law that the latter does not recognise. In these constellations, comparative lawyers (often unconsciously) circumvent, or even silently replace, the legislators. Put differently: instead of serving the law, they ignore, or even tacitly try to bend and alter, it.

What would be your three policy recommendations concerning the issues at stake?
Taken together, we have identified three challenges and aims for comparative law in EU-China legal and judicial cooperation. Both legislators and comparatists might master each of those issues outlined hereinbefore through one science policy recommended hereinafter:

First, **comparative law must (be allowed to) serve the law and its better and deeper understanding. For this purpose, comparative studies need sufficient *attention*.** The numerous above-mentioned 'legal practitioners' (legislators, courts, advocates, etc.) shall thus listen to 'legal theoreticians' (i.e., comparative legal researchers), and *vice versa*. This will enable both types of actors to refute the claims of 'insurmountable rifts'– between legal academia and legal practice as well as between China's legal system, featuring supposed 'Chinese characteristics' (中国特色), and the law of the EU and its Member States. For example, both the politico-legal decision-makers and the comparative lawyers involved in EU-China legal and judicial cooperation should strive to develop and employ 'practice theories'. Such theories combine scientific aspirations and practical needs because, in a dialectical process, 'practice must become the foundation of theory'[27] – and *vice versa*.

Second, **comparative law must not be subjugated (nor subjugate itself) to competing or contrarian legal requirements. Therefore, comparative studies need sufficient (academic) *freedom*.** Research institutions and individual researchers should hence be allowed to perform research without burdening them with (too many) previously and centrally set aims. Although (or, some might say, precisely because) scientists analyse and compare the law without such concrete predetermined aims and thus 'open-ended', they do so with an overall purpose:[28] Their research is purposeful and meaningful as it produces and enhances knowledge about both the other and the own legal order.[29]

Third, **comparative law must not (be forced to) 'disguise' as purely domestic legal research. As one among many solutions, comparative studies need sufficient *funding*.** This recommendation does not exclusively target universities because (academic) comparative research can also be performed in other institutions: be it in independent centres

[26] Taisu Zhang, 'The Development of Comparative Law in Modern China' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford University Press, 2019) 249.
[27] Mao Zedong (毛泽东) 实践论 (*On Practice*) (Jul. 1937).
[28] See, Albin Eser, 'Funktionen, Methoden und Grenzen der Strafrechtsvergleichung' in Hans-Jörg Albrecht et al. (eds.), *Internationale Perspektiven in Kriminologie und Strafrecht* (Duncker & Humblot, 1998) 1519.
[29] See, Marilyn Strathern, *The Gender of the Gift: Problems With Women and Problems With Society in Melanesia* (UC Press ,1988) 16.

like the ten law-related Max Planck Institutes in Germany and Luxembourg[30] or in national state agencies such as the Swiss Institute of Comparative Law.[31] For China, it might be a feasible idea to follow the latter approach attached to the state administration and thus to increase the importance and status of comparative law within the CASS's Institute of Law (中国社会科学院法学研究所).[32]

30 See: https://law.mpg.de.
31 See: https://www.isdc.ch/en/.
32 See: http://iolaw.cssn.cn/xxsz/201807/t20180706_4660639.shtml.

IV. The Environment and EU-China Legal and Judicial Cooperation

by Marina Timoteo (Bologna University)

From the viewpoint of environmental protection, if we look at the bilateral and multilateral relations between EU and China in the last decades, we see that climate change is one of the most important sectors of EU-China environmental cooperation. Indeed, starting from the 1990s under the drive of the United Nations Framework Convention on Climate Change, dialogue and cooperation regarding the climate issue experienced a significant acceleration.[33]

After a first stage in which the bilateral dialogue focused mainly on energy cooperation, in 2005, the EU and China engaged more actively in the fight against climate change by establishing the EU-China partnership on climate change[34] and the EU–China Dialogue on Energy and Transport Strategies Memorandum of Understanding.[35] In 2009 the EU-China Summit improved the framework on climate cooperation by setting up the China-EU Institute for Clean and Renewable Energy.[36] The following year the Joint Statement on Dialogue and Cooperation on Climate Change[37] aimed at fostering the dialogue on climate change, and introduced a Climate Change Hotline to rapidly exchange information between the parties. Then the EU-China 2020 Strategic Agenda for Cooperation issued in 2013,[38] in which a specific section was dedicated to the cooperation in climate change and environmental protection, paved the way for the Carbon Emissions Trading (CET) cooperation project that was launched the next year. In 2015 the EU-China Joint Statement on Climate Change[39] focused on the collaboration to 'reach an ambitious and legally binding agreement' that was eventually achieved at the Paris Climate Conference. Two years later a Ministerial for Climate Action was created in order to organise annual Ministerial meetings to discuss actions to reach the Paris Agreement's goals. As a conclusion of the 2018 EU-China Summit, it was issued the Joint Statement on Climate Action and Clean Energy[40] in which it was reaffirmed the commitments to promote the multilateral and bilateral cooperation in the field of climate change. Recently, in 2020 the EU and China have established the High-Level Environment and Climate Dialogue which aims at improving actions and cooperation on environment and in the fight against climate change.

Key issues in EU-China legal and judicial cooperation and the environment

Given the growing importance of climate change cooperation in EU-China relations, an important key issue in this field is the development of emission trading systems (ETS). Indeed, several cooperation projects implemented by the EU – but also by individual Member States – have focused on this aspect. For example, in 2014, in the framework of the EU-China 2020 Strategic Agenda for Cooperation, it was launched the Carbon Emission Trading (CET)

[33] For a reconstruction of this dialogue see Margherita Locatelli, 'The EU, China and Climate Action: Time to "Turn Up the Heat" on Climate Cooperation' (2020), available at https://www.eias.org/wp-content/uploads/2019/07/BriefingPaper_The-EU-China-and-Climate-Action-Time-to-"turn-up-the-heat"-on-Climate-Cooperation.pdf.
[34] See: https://ec.europa.eu/clima/system/files/2016-11/joint_declaration_ch_eu_en.pdf.
[35] See: https://ec.europa.eu/energy/sites/ener/files/documents/2005_mou_eu_china_energy_transport_strategies.pdf.
[36] See: http://icare.hust.edu.cn/English/Home.htm.
[37] See: https://ec.europa.eu/clima/system/files/2016-11/joint_statement_dialogue_en.pdf.
[38] See: https://eeas.europa.eu/archives/docs/china/docs/eu-china_2020_strategic_agenda_en.pdf.
[39] See: https://www.consilium.europa.eu/media/23733/150629-eu-china-climate-statement-doc.pdf.
[40] See: https://ec.europa.eu/clima/system/files/2018-07/20180713_statement_en.pdf.

cooperation project whose goal was to guide China's development of a national ETS. When the CET project started, China was still in an initial stage of her ETS pilot schemes, as the system had been introduced in seven cities and provinces (with the support of the cooperation partnership with Norway). The system has eventually been fully established with the recent enactment of the Administrative Measures for the Trading of Carbon Emission Permits.[41]

Another key issue, also related to the climate change issue, is the improvement of the environmental governance. To this regard, the European contribution falls within the framework of the EU-China Legal Affairs Dialogue for policy exchanges, mutual learning and cooperation in legal affairs. In this context a new program was launched: the EU-China Environmental Governance Programme, which is one of the most ambitious EU legal cooperation programmes in the environmental field. This programme has represented a big step forward since it has not only provided technical assistance to legislative drafting, but it has also supported many 'institutional reforms' to foster the construction of an environmental governance system and offer a response to the enforcement problems of Chinese environmental law, especially in the environmental litigation field.[42] An example of this is the 2014 revision of the Chinese Environmental Protection Law (EPL)[43] which represents a crossing of legal models (such as American, European, French and German) since several actors were involved in its drafting. The revised EPL addresses many of the shortcomings of the Chinese legal framework in the attempt to improve the environmental governance framework. Among the novelties of the 2014 EPL, we can mention, for example: the imposition of stricter obligations on enterprises regarding pollution prevention and control by expanding the scope of liability and providing for more severe penalties; the establishment of an accountability and performance evaluation system for local administrations responsible for the enforcement of environmental laws; and the introduction of public interest litigation, which was also reinforced by the Chinese Civil Procedure Law as revised in 2017.[44]

Three policy recommendations on EU-China legal and judicial cooperation and the environment

The EU-China legal cooperation programmes have represented initiatives of legal transplants promoting in China both national and international legal models of environmental governance and protection. A comparative law analysis of these initiatives allows to identify the following three policy recommendations for future actions: improve the capacity building of lawyer-linguistics who work in multilingual setting such as in the field of legal cooperation; enhance the analysis of the legal process factors that may affect the efficacy of the legal transplants and the legal cooperation; improve the knowledge and understanding of the climate change litigation and its possible implication in the development of the global environmental law.

Regarding the first policy recommendation, **in legal transplant practices a greater attention should be devoted to the linguistic aspects (and in particular the problem of legal**

[41] The Administrative Measures for the Trading of Carbon Emission Permits (for Trial Implementation) were issued by the Ministry of Ecological Environment on 31 December 2020 and that came into force on 1 February 2021.
[42] On this aspect see Rachel Stern, 'From Dispute to Decision: Suing Polluters in China' (2011) The China Quarterly 294.
[43] On this law see Bo Zhang – Cong Cao – Junzhan Gu – Ting Liu, 'A New Environmental Protection Law, Many Old Problems? Challenges to Environmental Governance in China' (2016) 28 Journal of Environmental Law 325.
[44] Article 55 of this law allows legally designated institutions and relevant organizations to "initiate proceedings at the people's court against acts jeopardizing public interest such as causing pollution to the environment or damaging the legitimate rights" (Article 55).

translations). This issue – if not adequately addressed – can lead to unforeseen results regarding the real applicative scope of the "imported" norms or institutes. In fact, the circulation deals with concepts which are the product of a specific legal culture that do not easily find a lexical (and cultural) translation in the system of arrival. This is particularly true in the case of China, where legal discourses are enriched by the huge circulation of legal models and the increasingly complex amalgam of patterns coming from other systems, where original traits of the borrowed models are mixed through a selective activity led by legal scholars. This situation blurs the distinctions between concepts and categories and renders the issue of legal translation more difficult, as it could be challenging to find exact correspondences between legal terminology belonging to different legal system.[45] Consequently, specific training programmes should be provided to improve language and translation skills of those — law drafters, scholars, lawyers — who work with foreign laws.

With reference to the second policy recommendation, **an aspect to consider is that, even if environmental protection regulations are characterised by a high technical content, rules and institutions borrowed in the environmental law also have to deal with the particular legal process and the particular path dependence of the target system.** Thus, a deep analysis of the factors – eg the institutional framework into which operative rules take shape or the legal culture of the interpreters - that could affect the efficacy of the transplanted rule or instrument in the Chinese legal system should be made.[46] In this regard cooperation programmes should be fostered in order to conduct thorough investigations of the specific legal process that identifies the Chinese legal system.

As far as the third policy recommendation, among the new topics that deserve more attention in EU-China legal cooperation there is the climate change litigation. The spreading out of climate change litigation, which has taken its first steps in the US legal system and only recently is developing in other jurisdictions such as in in Europe,[47] is considered one of the emerging factors of the legal framework of environmental law at a supranational level. In this perspective, **the EU should support comparative law research as well as training programmes to enhance the understanding of legal transplants in this field and provide a strategy to foster the development of climate change litigation in China, as a new approach to the development of global environmental law.**

[45] See Marina Timoteo, 'Law and Language: Issues related to legal translation and interpretation of Chinese rules of tortious liability of environmental pollution' (2015) 4 China – EU Law Journal 121.
[46] See Marina Timoteo, Barbara Verri, 'Legal cooperation and legal transplants between Europe and China in environmental: exploring paths through the looking glass of comparative law' (2022) *forthcoming*.
[47] See Barbara Pozzo, 'Climate change litigation in a comparative law perspective' in Francesco Sindico, Makane Moïse Mbengue (eds.), *Comparative climate change: beyond the usual suspects* (Springer 2021).

V. Human Rights and EU-China Relations: From Dialogue and Cooperation to Confrontation

By Christelle Genoud and Eva Pils (King's College London)

Even though the European Union's external relations were hardly in focus at its inception, it has, in its interaction with autocracies, generally pursued a stated goal of supporting the rule of law and related human rights principles. Following the brutal suppression of a popular movement for human rights and democracy in the night to June 4, 1989, by the Chinese party state, the member states of the EU, along with the United States, started paying more attention to human rights in China, and since 1997, the EU and China have maintained an institutionalised human rights dialogue.[48]

Today, engagement with human rights beyond the EU's borders is enshrined in its foundational normative framework. Article 21 TEU stipulates that 'The Union's action on the international scene shall be guided by the principles [of] democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms….[and it] shall define and pursue common policies and actions… in order to (a) safeguard its values, fundamental interests, security, independence and integrity; [and] (b) consolidate and support democracy, the rule of law, human rights and the principles of international law.' Somewhat ironically, this provision echoes the broader principles of Article 3, now a topic of much discussion in the context of internal democratic retrogression within some of EU member states.

Article 21 testifies to the Zeitgeist that, at the time, shaped expectations on how still existing autocracies, including that of the People's Republic of China, would evolve. Even though the system had shown its determination to crush demands for democratisation more than once, the EU and many of its member states invested heavily in the notion that the Chinese party state could be assisted in constructing and strengthening the rule of law, promoting civil society work, and eventually, transition to a system that would at least approximate rule of law and human rights standards, even though the question of whether democratisation was hardly ever openly contemplated.

The collaborative approach generated numerous initiatives and programmes, including not only the official human rights dialogue but also an EU- China legal and judicial cooperation programme of which – full disclosure! – the author was a grateful beneficiary in 2003, when she attended a nine-month diploma programme in Beijing. 'Legal and judicial cooperation' culminated in the establishment of the EU China Law School in Beijing.[49] Undoubtedly, the cooperation programmes that fostered and enabled exchange and collaboration between different academic and civil society actors in China and EU member states contributed many opportunities to engage and deepen mutual understanding of each other's systems. (They also represented an important complement to a field of transnational civil society exchanges that received very significant support from established U.S.-based institutions such as, for example, the Ford Foundation.)

For example, one of the co-authors, Pils, during her programme in Beijing in 2003, was exposed to an impressive array of instructors from Beijing's many stellar universities, accomplished academics working comparatively on issues such as constitutional adjudication,

[48] Katrin Kinzelbach and Hatla Thelle, 'Taking Human Rights to China: An Assessment of the EU's Approach' (2011) 205 The China Quarterly 60.
[49] See: http://en.cesl.edu.cn/About_us.htm.

criminal procedure, and anticorruption work, as well as officials in many departments of the sprawling party state. Although the system at times seemed bafflingly intransigent – for example, it took many months of negotiation between the EU and the Chinese Ministry of Justice before course participants were allowed to attend three (largely unremarkable) routine court hearings, not in Beijing but in the provinces – many interlocutors on the cooperation programme came across as open-minded, eager to engage in exchange, and genuinely committed to broader goals of promoting rule of law principles. On the side-lines of official teaching and visits, teachers, especially, shared many fascinating insights into the pervasive human rights violations that beset Chinese governance practices. At times, they did so by drawing attention to the excellent work of an emerging class of investigative journalists publishing in China's then gradually opening news media, as for example when the news of what later came to be known as the Sun Zhigang incident broke.[50]

Yet, even as collaboration and exchange continued, leading to many other vibrant training programmes; fine translated textbooks and bilingual conference volumes; and important personal interactions, it was also very clear that the party state remained determined to suppress domestic human rights advocacy, control public discourses, and avoid ceding power to actors in the judicial process, both as judges and as legal professionals, were seeking a degree of autonomy that was not compatible with party leadership. Within a few short years from the inception of the EU China human rights dialogue, human rights defenders faced increasingly severe persecution, also increasingly drawing the attention of actors within the EU and its member states.

This included not only the European Parliament, awarding the prestigious Sakharov Prize 2007 to the Chinese human rights defender Hu Jia.[51] It also included diplomatic officials of the EU delegation in Beijing. Like some of their nation-state counterparts, these diplomats found themselves confronted on a daily basis with the ugly and – at a personal level –often very distressing systematic human rights violations and severe repression of citizens trying to raise these issues and cases with the authorities.

As the continued systematic violation of human rights and rising repression of human rights defenders darkened prospects for China's legal reform process, institutionalised mechanisms such as, especially, the EU China human dialogue, attracted more and more attention, research, and criticism. Kinzelbach and other scholars argued that the ambition to facilitate academic and civil society dialogues in the context of an official programme, particular, were misplaced.[52] Eventually, human rights organisations such as HRW would explicitly call for the abolition of such dialogues, as they increasingly helped the Chinese party state maintain a façade of commitment to the original goals of this process, and as it became obvious that the EU, much like liberal democratic nationstates, was not effectively able to withstand Chinese government pressure to curtail the topics and participants of the dialogues.[53] And, although the critical insights gained into the official dialogue were distinctive to this process, it was unmistakable that also within the wider context of the EU China legal and judicial cooperation

[50] See: https://repository.uchastings.edu/faculty_scholarship/228/.
[51] European Parliament, 'Sakharov Prize 2008 awarded to Hu Jia' (2008), available at https://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20081020STO39964.
[52] Katrin Kinzelbach, *The EU's Human Rights Dialogue with China Quiet Diplomacy and its Limits* (Routledge, 2015).
[53] Human Rights Watch, 'EU: Suspend China Human Rights Dialogue' (2017), available at https://www.hrw.org/news/2017/06/19/eu-suspend-china-human-rights-dialogue.

programmes, the spaces for open and unhindered exchange and collaboration were gradually closing.

Thus when in 2019, the official position of the EU on its relations with China shifted in that it was conceded that at least partially, the relationship was one of 'systemic rivalry,' this merely put into words what, from a human rights perspective, had long been an insufficiently acknowledged reality.

In recent years, the EU has increasingly itself become the target of efforts to censor and suppress, as for example on those occasions when Chinese citizens were prevented by the police from attending the annual, 10 December Human Rights Day reception for Chinese human rights defenders at the EU delegation in Beijing,[54] and when the PRC imposed 'sanctions' on, inter alia, serving MEPs in retaliation for their work (including advocacy of Magnitsky style sanctions) on the Party-State's violations in Xinjang,[55] subsequently also adopting an Anti-Foreign Sanctions Law.[56]

Despite the evidently intensified tensions around human rights issues, however, 'on the ground' human rights work currently undertaken by diplomats in the delegations of the EU and its member states, as well as like-minded states, remains meaningful. True, diplomats working on human rights in China do observe a shrinking space to engage on the issue, as one of the co-authors, Genoud, experienced in this capacity at the embassy of Switzerland in Beijing from 2019 to 2021. The repression of civil society means that it has become increasingly difficult to ensure the security of contacts. The enactment of the 2017 Foreign NGO law has further reduced and impacted the presence and capacity to work of human rights advocates.[57] The number of foreign correspondents in Beijing has plummeted following the government's expulsion of many of them, and those still there face growing harassment.[58] Without mentioning the threat of hostage diplomacy that can arbitrarily affect nationals, especially from countries experiencing tensions with Beijing.

The space to work on human rights has then become very volatile: what Beijing seems to tolerate today might not be the case anymore tomorrow. Nevertheless, on the ground, it is still possible to visit sensitive regions such as Xinjiang and Tibet outside of orchestrated official tours, even despite growing surveillance and intimidation. Meeting human rights defenders, while potentially putting them at risk, also shows international attention and awareness that can serve as a protection. And while exchanges with Chinese representatives on human rights remain largely predictable as they strictly follow the official discourse available in all state media, the resources invested by the government to convey its human rights narrative implies that it still cares about what the international community thinks about its human rights record.

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[54] AFP, 'Chinese activists blocked from leaving homes on Human Rights Day' (2021), SCMP, available at https://www.scmp.com/news/china/politics/article/3159287/chinese-activists-blocked-leaving-homes-human-rights-day.
[55] Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel (2021), available at https://www.mfa.gov.cn/ce/cebe//eng/fyrjh/t1863128.htm.
[56] Katja Drinhausen and Helena Lagarda, 'China's Anti-Foreign Sanctions Law: A warning to the world' (2021), MERICS Short Analysis, available at https://merics.org/en/short-analysis/chinas-anti-foreign-sanctions-law-warning-world.
[57] The China NGO Project, 'Fact Sheet on China's Foreign NGO Law' (2017), available at https://www.chinafile.com/ngo/latest/fact-sheet-chinas-foreign-ngo-law.
[58] The Foreign Correspondents' Club of China, Report on Media Freedom in 2021 (2022), available at https://fccchina.org/wp-content/uploads/2022/01/2021-FCCC-final.pdf?x49355.

Specifically, liberal democracies should continue to engage with Chinese civil society and human rights defenders, so far as possible, and continue to seek independent knowledge of human rights issues on the ground; this should include but not be limited to unofficial field visits in and interaction with independent experts on areas such as Tibet and Xinjiang.

They should adopt strategies to resist instrumentalization of official human rights diplomacy, be it through high-level official visits (communicate resulting observations transparently and broadly) or human rights dialogues as a tool of 'silent diplomacy' (reassess the appropriateness of dialogues).

They should systematically, consistently, and publicly raise human rights issues, including at high-level meetings, and of course also engage sincerely with any criticism of their own human rights violations while resisting the flawed logic of *tu quoque* arguments to deflect justified criticism of China's human rights violations, and be prepared to defend transnational human rights advocacy as an integral part of a functioning system of international human rights law.

VI. The Official Translation of the Chinese Civil Code

By Prof. Dr. Em. Jacques-Henri Herbots (KU Leuven)

'Words are very rascals. The flavour of a sentence is apt to change or disappear in a translation; and just this flavour may change the aspect of the case.'

William Shakespeare, Twelfth night.

My contribution to the project on legal cooperation and the Chinese Civil Code concerns the English translation of the Code. It contains some recommendations to my academic colleagues and policy makers in both China and the European Union. We have, however, first to clarify the concepts of the authentic version e.g. of a statute or of a treaty, and of the official or private translation of it.

The Legal Value of the Translation of a Legal Text

A. An Authentic Version

The mandarin linguistic version of the Chinese Civil Code is the only authentic version of it, which means that, if later a difference with the official translation should appear, only the authentic version is binding for the Courts. From a comparative point of view it can be said that this is not the same in all countries, the statutes of which are published in plurilingual versions. In Belgium as in China there was besides the authentic French linguistic version of the Napoleonic Civil Code until 1961 only an official Dutch translation. However, since 1961, contrary to Chinese law, in Belgium the two linguistic versions are authentic, as is the case also in other legal systems, like in Switzerland, Quebec, Canada, South Africa or the European Union. That is also the case in the autonomous administrative region of Hong Kong.

A seminal case of the Hong Kong High Court, R. v. Tam Yuk Ha (1996),[59] illustrates the problem of interpretation of a multilingual normative text in case of divergence between the authentic versions. The lady, appellant, a licensee of a store selling fresh meat and fish, was convicted of placing metal trays outside the designated area of the shop without written permission from the Urban Council. She was found by the magistrate court to be in breach of a by-law, according to which no licensee shall cause or permit to be made in respect of the premises to which the license relates: (a) any alteration or addition, which would result in a material deviation from the plan (…).

One of the key issues the case turned on was whether the phrase 'any alteration or addition' was in conflict with the corresponding phrase '*genggai huo zengjian gong héng*' in the Chinese version of the by-law. As the presiding judge argued this phrase clearly means 'building additional construction or building works'. No one who understands the Chinese language would come to the conclusion that the placing of metal trays would be a '*zeng Jian gong Cheng*'. In his view the English language term of 'addition to the plan' is ambiguous and the Chinese language term is clear and plain. The only reasonable step for the Court is to give effect to the text which favors the appellant.

The problem when different authentic linguistic versions exist appears when a divergence is discovered between the different versions of the applicable Act. Facing such a difficulty, the

[59] *R v Tam Yuk Ha* [1996] 3 HKC 606.

better solution is given e.g. by the Belgian law of 30 December 1961: 'Controversial topics based on a divergence between the Dutch and the French texts are decided according to the will of the legislator which is determined according to the usual rules of interpretation.' In other words, the version should prevail which is the closest to the legislature as ascertained by regular rules of interpretation of deeds and statutes.

For the analogous problem of divergence between authentic versions not of a legislative Act, but of a contract, the Chinese Civil Code says the same in Article 466, 2: 'Where a contract is made in two or more languages which are agreed to be equally authentic, the words and sentences used in each text shall be presumed to have the same meaning. Where the words and sentences used in each text are inconsistent, interpretation thereof shall be made in accordance with the related clauses, nature, and purpose of the contract, and the principle of good faith, and the like.'

Moreover, it is interesting to note in this context that the English version of the Vienna Convention on the international sale of goods which was ratified by the PRC and, as a uniform law, became part of the domestic law of China, is not only an official version. It is, more than that, an authentic version (among the five authentic versions of the CISG). So, that is a case in Chinese law of an authentic English version besides the Chinese authentic one. There is more than one authentic text, like in the European Union or in the domestic multilingual laws of Belgium, Switzerland, Canada, Quebec etc.

B. An Official Translation

An official translation, as opposed to a private translation, is made after the enactment of the authentic text under the exclusive responsibility of the legislator. It should be an elegant and correct text rendering exactly the will of the legislator, as is required for the imago of the Chinese legislature in foreign countries and in foreign courts and arbitral tribunals which do not master the Mandarin language. But one cannot base the interpretation of a normative text on its official translation. For the interpretation of the original text, however, it may have a value similar to that of an authoritative scholarly writing, as is also explained below for private translations.

C. A Private Translation

A private translation is made by a scholar or by a private institution, like for instance the Max Planck Institute for comparative law and international private law. For the interpretation of the original text a private translation can be considered as having the same value as the scholarly writings.

It is true that translations can be sources of errors. But it cannot be denied that a good and nuanced translation which is not limited by a word-by-word rendering, may clarify the original text, and can even be more precise. To obtain such a first-rate translation the translator of a legal text should be a lawyer. That is necessary. The exact rendering of the text in another language requires that the translator has understood fully the significance of the original text. If the text which has to be translated is a legal one, a full understanding requires indeed the eye of a lawyer.

Moreover, the process of translation requires a broad and profound understanding. The problems of translation are closely connected to semantic analysis and the theory of the significance-in-context. This is well explained in an English court decision, *Dies v. British and*

International Mining Corporation ltd[60]: 'The precise mental process of translating a word or sentence spoken or written in one language into another language is or may be somewhat complex. In fact, to say that you translate one word by another seems to me to be a summary method of stating a process, the exact nature of which is a little obscure. A substantive word is merely a symbol which unless it be part of a tale told by an idiot signifies something. If that something is a concrete object such as an apple or a particular picture, the process of translation from one language to another is easy enough for any one well acquainted with both languages. Where the words used signify not a concrete object, but a conception of the mind, the process of the translation seems to be to ascertain the conception or thought which the words used in the language to be translated conjure up in his own mind, and then, having got that conception or thought clear, to re-symbolise it in words selected from the language into which it is to be translated. A possible danger, when the document to be translated is one on which legal rights depend, is apparent, inasmuch as the witness who is in theory a mere translator may construe the document in the original language and then impose on the court the construction at which he has arrived by the medium of the translation which he has selected.'

A famous example of a translation imposing a legal construction and introducing a Common Law doctrine into a Civil Law system is to be found in South Africa in the late nineteen century. As comparative law specialists know, the concepts of 'cause" and 'consideration' are totally distinct from each other. Chief Justice De Villiers, who like all the South African judges had received his legal education in the English inns of court in London, had to translate in a case of 1885 the term 'causa' ["oorzaak used in the Roman-Dutch law of contracts. He translated it wrongly by "consideration". So, the doctrine of consideration was imposed into the Roman-Dutch law. De Villiers plucked the English doctrine from its surroundings and from a system of which it forms a well understood part, and grafted it upon a legal system, to which it is wholly foreign. It lasted unfortunately till 1919, when in the case *Conradie v. Rossouw* the doctrine of consideration was rejected.[61]

I am afraid that, on a less dramatic scale, similar mistakes threaten to happen when Chinese lawyers who got their legal education in the Common Law in Hong Kong, write commentaries on the Chinese Civil Code which belongs to the Civil Law tradition.

It is true that translations can be a source of errors, and often is. But one may also stress that an official translation, which is made at the same time as the drafting of the original text and which is made known to the drafting commission, can be beneficial for the clarity of the definitive text. It happened for instance in Genève that the English version expressed more exactly the intention of the conference than the original text. The fact that the Swiss drafters had to make a French translation of the Civil Code lead to modifications of the German original text to make it correspond to the French expressions. A greater clarity of the German version was the result.[62]

[60] (1939) I, K.B. 724, p. 733, per Stable, J.
[61] Conradie v Rossouw 1919 AD 279.
[62] Harold Cooke Gutteridge, *Le Droit Comparé* (1953) 147.

Examples of Incorrect Translation of Articles in the Chinese Civil Code in English

The danger of a translation should be stressed. Let us give two examples of legal errors in the translation of the Chinese Civil Code. A supervision of the translation process by a comparative lawyer's team would have prevented these errors.

A. The Right of Subrogation

An example of misleading translation is to be found in article 535 of the Chinese Civil Code concerning the '*daiweiquan*', a claim 'by right of subrogation' according to the English translation. Article 535 is inspired by the French law on the 'oblique action'. It is a remedy which enables a creditor of an insolvent debtor to exercise the indolent debtor's claim, except those which are purely personal to him. The creditor is allowed by law to act as representative of the debtor, but he is not 'subrogated' in the rights of that inert debtor.

The term 'subrogation' in a civil law system points to a concept, which is related to the payment of a debt. This is not the case in the hypothesis of Article 535 of the Chinese Civil Code. The term 'subrogation' indicates that if another person than the debtor, for instance a surety pays the creditor, that person is 'subrogated' into the place of the paid creditor. The claim of the paid creditor is not discharged, but passes to the person who paid, together with possible other securities held by the paid creditor.

In the different hypothesis of Article 535 of the Chinese Civil Code, namely the indolence of the insolvent debtor to exercise his claim against his own debtor, the creditor of the inert debtor is not 'subrogated' in the rights of his inert debtor. It is misleading to use the translation 'by subrogation' instead of 'by way of an oblique legal claim'. For a translator who is only a linguist, however, a correct legal translation is an impossible task. Indeed, the legal term 'oblique legal claim' does not exist in the English language, for the good reason that the 'oblique legal claim' is unknown in the Common Law.

This may make us think of the difficulties of the drafting commission of the Chinese Civil Code of 1930, which had to translate into Mandarin German legal terms like '*Treu und Glauben*' (good faith) which did not exist in Mandarin.

Let us note that the cited German private translation follows the lead of the English translation and uses the term '*Subrogationsrecht*', adding however prudently in footnote *'Wörtlich: Recht zur [Ausübung eines Rechts]anstelle [des Schuldners]'*. The blind leading the blind…

B. The Commission Contract

A second example can be found in the nominate contracts related to agency; this is the legal representation of a person, a general concept which is treated in the general part of the Chinese Civil Code (Articles 161 and following). The two discussed nominal contracts are the '*wei tuo hétóng*' (Article 919) and the '*hang ji hetong*' (Article 951). A third nominate contract, called in the official translation of the Code the intermediary contract, has no relation to the concept of representation. The Chinese intermediary - unlike the English broker - does not conclude a contract and does not represent his client. His services consist only in bringing the two (future) contracting parties together. In the German private translation that particular

nominate contract is rendered literally by 'Vermittlungsvertrag'. 'Maklervertrag' would be more adequate.

The '*wei tuo hetong*' is translated by a neologism, 'entrustment contract'. In the German translation of the Chinese Civil Code it is translated by '*Geschäftsbesorgungsvertrag*', [although it is said in footnote '*wörtlich: Auftragsvertrag*']. This neologism is not wrong, but for clarity's sake it would be preferable to choose 'mandate contract' (or agency contract, agency being used already in the official translation of Book I of the Code).

The '*hang ji hetong*' is translated by 'brokerage contract'. This is clearly a wrong translation. The cited German private translation renders it by '*Kommissionsvertrag*'. This makes sense. Indeed, the German commercial code regulates a contract, called like that, and which is unknown in the English Common Law, by which a person desirous of purchasing or selling goods or securities gives a mandate to an intermediary versed in this type of business (*Kommissionär*). The customer giving the mandate is known as the '*Kommitent*'. The '*Kommissionär*' dealing with a third party, acts in his own name, but for the account of the '*Kommitent*', receiving a commission (a percentage of the sales price) for his services. This contract is the model for the Chinese nominate contract '*hang ji hetong*', which should be translated by "commission contract" for lack of a better word. The German private translation says correctly '*Kommissionsvertrag*'. In the Common Law a brokerage contract is not precisely defined. It is not advised to translate a well-defined concept by a vague concept of another law system.

These two examples may prompt us to start scanning the English translation of the whole Chinese Civil Code. Here lies a task for the Europe-China legal cooperation.

Conclusion: Some Policy Recommendations

With regard to Europe-China legal cooperation, it is proposed that an ad hoc working group would be set up, composed of specialists of comparative law belonging to different faculties of law, with as mission to report critically about the actual English official translation of the Civil Code.

A working group could be created in order to examine the proposal that in the future the translation of legal texts should be effectuated not only by linguists, but in cooperation with specialised comparative lawyers. A correct legal translation will benefit the imago of the Chinese legislature and also the later interpretation of the text. The toolbox of the Court will be enriched.

The said commission should also study a second proposal that a legal text should not be translated after the enactment of it, but rather before the enactment, so that the drafting commission would be able to ameliorate the original Chinese text before the enactment (taking into account what the difficulties of the translation reveals about the original text which has to be translated). Hence the redaction of the definitive authentic text will become clearer.

VII. CAI and EU-China Legal and Judicial Cooperation

By Cheng Bian and Yuwen Li (Erasmus University Rotterdam)

After seven years of negotiation, the EU and China has come to an agreement 'in principle' on a bilateral investment treaty (BIT), namely the Comprehensive Agreement on Investment (CAI) in December 2020.[63] The conclusion of the CAI was initially regarded as a landmark achievement on both sides, but has quickly encountered major obstacles as the European Parliament froze the ratification process in May 2021. This contribution discusses the importance and key issues of the CAI, and proposes policy recommendations in an attempt to settle the current stagnation in the treaty ratification process.

The importance of the CAI in the EU-China bilateral relationship

The CAI is of significant economic, legal and political importance to the EU-China bilateral relationship. From an economic perspective, the CAI will promote the EU-China bilateral investment flow that remains underdeveloped compared to trade. China is the EU's second-biggest trading partner, and the EU is China's biggest trading partner.[64] In drastic contrast, EU-China investment flow is rather marginal though it is expected to have a great potential for growth. For European investors in China, the CAI expands market access by providing the pre-establishment national treatment with a negative list. This will open up sectors that European investors have a competitive advantage but were once prohibited or restricted to enter in China, such as manufacturing, automotive, and financial services. The CAI also promotes a fair and level playing field by, *inter alia*, curtailing state-owned enterprise behaviour, enhancing the transparency of domestic regulation, and providing clearer rules on subsidies. These provisions in the CAI will improve the business environment and stimulate more European investment in China.

From a legal perspective, the CAI ends the fragmentation of 25 BITs China has signed with EU Member States, which all follow a traditional and succinct European BIT model and are largely outdated and problematic.[65] Existing BITs China has concluded since early 1980s with EU Member States vary greatly in terms of their level of substantive protection, as well as access to investor-state dispute settlement (ISDS), resulting in divergent treatment to investors. Moreover, these BITs are simple in content and narrow in coverage, and only deal with investment protection post-establishment. They also barely incorporate provisions on the preservation of the host state's regulatory space on which new generation of international investment agreements (IIAs) has increasingly emphasised. Therefore, the CAI will resolve these problems when it replaces the existing BITs China has signed with EU Member States, unifies the substantive and procedural treatment between EU and Chinese investors, and most importantly, sets a paradigm for a global new generation of IIAs.

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[63] European Commission, 'EU - China Comprehensive Agreement on Investment (CAI), Agreement in Principle' (22 January 2021) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> accessed 7 December 2021.

[64] European Commission, 'Trade Policy, China' <https://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> accessed 7 December 2021.

[65] Axel Berger, 'The China-EU investment agreement negotiations: Rationale, motivations, and contentious issues' in Yuwen Li, Tong Qi and Cheng Bian (eds), *China, the EU and International Investment Law Reforming Investor-State Dispute Settlement* (Routledge 2019) 11-25.

From a political perspective, the CAI could set a prominent example of globalisation and cooperation between the two largest economies in the world, in particular in the global trend of decoupling and deglobalisation amid the Covid-19 pandemic. EU-China economic cooperation, such as the conclusion of the CAI, may be one of the very few topics left that the two parties have managed to reach at least some agreement and come to partial fruition. A successful conclusion of the CAI could serve as a silver lining in EU-China cooperation and a template of economic cooperation and liberalization for other states.

The key issues at stake relating to CAI and how they affect EU-China legal and judicial cooperation

First, the sustainable development chapter still leaves much to be desired, although China has made concessions on labour and environment that are unprecedented in its investment agreements. The CAI falls short of stipulating a binding human rights clause, other than a reference to the Universal Declaration of Human Rights in the Preamble. Furthermore, commitments made on labour and environment are adopted as open-ended and best-effort terms, lacking obligation of result and legal ramifications in non-compliance. For example, the CAI stipulates that 'each Party shall *make continued and sustained efforts on its own initiative* (emphasis added) to pursue ratification of the fundamental ILO Conventions No 29 and 105'.[66] In the case of EU-South Korea Free Trade Agreement (FTA), the Panel of Experts confirmed that 'continued and sustained efforts' require 'ongoing and substantial efforts' and 'commitments at issue are legally binding and have to be respected', regarding Korea's insufficient effort to ratify four ILO fundamental conventions.[67]

Furthermore, the ratification process of the CAI is in a deadlock with no signs of turns for the better. The European Parliament has frozen the ratification process for China's 'baseless and arbitrary sanctions' on European individuals and entities since May 2021,[68] which was China's response on the EU's sanctions over Chinese officials on the alleged human rights violations in Xinjiang in March 2021.[69] As the European Parliament in a Resolution demanded China lift all sanctions before it may resume any deliberation on the ratification of the CAI, it is ultimately the disagreement between the EU and China on China's human rights records, rather than trade and investment topics thereof, that ultimately thwarted the progression of the CAI. If the EU and China fail to reach at least some conciliation on human rights issues first, it is unlikely that the two parties will engage in any meaningful conversation regarding the CAI and also other legal and judicial cooperation in the near future.

Lastly, the lack of an ISDS mechanism is another major concern obstructing the success of the CAI. The two parties agreed to negotiate an ISDS chapter, 'taking into account progress on structural reform of investment dispute settlement in the context of the United Nations Commission for International Trade Law', and an investment protection chapter, within 2 years

[66] CAI, Section IV, Sub-section 3, Article 4.
[67] European Commission, 'Panel of experts confirms Republic of Korea is in breach of labour commitments under our trade agreement' (25 January 2021) < https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238> accessed 25 January 2022.
[68] European Parliament, 'MEPs refuse any agreement with China whilst sanctions are in place' (20 May 2021) <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-whilst-sanctions-are-in-place> accessed 7 December 2021.
[69] Council of the EU, 'Council Implementing Regulation (EU) 2021/478 of 22 March 2021: Implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses' [2021] OJ L99 I/1.

of the signature of the CAI.[70] Now that the ratification of the CAI in its current form is on hold indefinitely and therefore highly uncertain, a prospective ISDS chapter is even more remote and the architecture of it remains unpredictable. Without an ISDS mechanism in place in the CAI, investor-state disputes have to be resolved according to existing BITs between China and individual EU Member States, which brings about many shortcomings the traditional ISDS system suffers from, such as inconsistency, unpredictability, and imbalance of rights and obligations between the claimant and the respondent.

Policy recommendations concerning the issues at stake

The sustainable investment chapter should be promoted, monitored and implemented by a mixture of bilateral and unilateral instruments. Akin to the EU-South Korea FTA, the sustainable chapter of the CAI contains mechanisms to address differences and non-compliance, including the establishment of an *ad hoc* Panel of Experts to assess the issue at hand, and deliver a report which the Parties shall mutually decide on certain measures to address and implement.[71] While this mechanism is regarded as a step in the right direction, its success or failure depends on if the report of the Panel is respected and implemented effectively and in good faith, and not falling victim of dormant or merely window-dressing provisions on paper. Further, some unilateral instruments outside of the CAI are also important to promote sustainable development in the EU-China trade and investment. For example, the European Parliament adopted a Resolution on corporate due diligence and corporate accountability in March 2021, proposing the adoption of a draft Directive imposing mandatory obligations on human rights and environmental supply chain due diligence for EU-based companies and also non-EU companies doing business with the EU.[72] Once adopted, the Directive on corporate due diligence and corporate accountability will require Chinese companies to review and adapt their business operations accordingly and update their compliance programs, when doing business with the EU or in the EU. In this way, Chinese companies will have to address adverse human rights and environmental implications in order to avoid sanctions and penalties by the EU or Member States.

The deadlock of the ratification of the CAI can only be resolved by the two parties resuming a meaningful human rights dialogue first. The European Parliament in its Resolution adopted in November 2020 emphasised that 'respect for human rights is a pre-requisite for engaging in trade and investment relations with the EU'.[73] This means that the European Parliament is unlikely to ratify an investment agreement with China which it deems having a problematic human rights record, as opposed to positioning the CAI as a business-first agreement and compartmentalizing investment and human rights negotiations with China. Therefore, human rights issues must be addressed first and the EU's and China's sanctions on each other need to be lifted before any substantial progression of the CAI ratification may take place. There are a number of forums where the EU and China can resume formal or

[70] CAI, Section VI, Sub-section 2, Article 3.
[71] CAI, Section VI, Sub-section 4.
[72] European Parliament, 'Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' P9_TA(2021)0073.
[73] European Parliament, 'EU/China Agreement: cooperation on and protection of geographical indications (Resolution)' P9_TA(2020)0298, para 2.

informal dialogues on human right issues in Xinjiang and on Hong Kong autonomy, for example, the EU-China Human Rights Dialogue commenced since 1995.

The missing chapters in the CAI on investor's protection and ISDS should be negotiated as soon as possible. Residing at the core of any investment treaty, these two chapters are the most crucial and the absence of which would defeat the fundamental purpose of concluding the CAI at all. The investor's protection chapter should represent the best practice of the new generation of IIA-making, which strikes the right balance between the investor and the state. Elaborate provisions on investor's protection should achieve greater precision and eliminate potential interpretative ambiguity and inconsistency, *inter alia*, the fair and equitable treatment and the expropriation clauses. The ISDS chapter should reflect the latest development and endeavour of the international society on ISDS reform, especially the continuous progress made under the UNCITRAL Working Group III. The EU's proposal of a two-tiered Investment Court System and its practice in a number of EU investment agreements such as CETA, EU-Vietnam IPA and EU-Singapore IPA should be prioritized as a negotiating template in designing the structure of ISDS in the CAI.

VIII. Adjudicating Disputes in the BRI in the Context of EU-China Relationship

By Julien Chaisse (City University of Hong Kong)

What is the importance of the BRI adjudication in the bilateral relationship between the EU and China?

BRI projects carried out by Chinese Companies are based on flexible legal instruments and the BRI dispute settlement mechanism has at least seven kinds of dispute settlement options. These many options and overlapping jurisdictions could result in forum shopping. Disputes arising from the BRI may generally be handled by the China International Commercial Court (CICC), arbitration centers and other dispute resolution mechanisms.[74] It has been predicted that BRI disputes would rely on neutral and renowned institutions with credible judicial systems such as the Singapore arbitration, the Hong Kong International Arbitration Center. Such methods of dispute resolution can lead to plethora of problems for BRI related investments as they are left without any regulatory systems and enforcement mechanism, they could seriously undermine the future of BRI if a more comprehensive system is not put into place.[75] Furthermore, the questions regarding the capability of these mechanisms to handle such a large-scale project still exist. It is also unclear whether the variety of options available for dispute settlement are beneficial or would cause problems for BRI and BRI related investments. China, so far has hardly initiated any investment arbitration or WTO disputes so far in relation to the silk road projects and seemingly prefers political ways to resolve disputes. The EU too, when it comes to external trade relies on resolving dispute through bilateral treaty committees and treaty provisions for legal dispute settlement are rarely invoked.[76]

Key issues at stake relating to the BRI adjudication mechanisms and their impact on EU-China legal/judicial cooperation/interaction

With the plethora of options available as per the BRI framework for e.g., the International Commercial Courts (ICCs), arbitration centers etc. there has been an ever-increasing competition over the choices of forum at which a BRI related investment dispute can be taken. Many international commercial courts offer dispute resolution services for BRI related investments. The most prominent of them being the Singapore international commercial court and the China International Commercial Court. With the two ICCS being of stark contrast to each other in terms of their establishments.[77] With the CICC being more rigid as compared to the more flexible and robust SICC. The CICC also has various other procedural weaknesses even though the main motive of its establishment is centered around BRI adjudication. Therefore, it is highly probable that the SICC would be preferred for many disputes with regard to BRI which could promote fragmentation. ADR centers too have been marketing themselves relentlessly as the most suitable place for resolution of disputes related to BRI for arbitration and mediations. With launching dedicated services and creating commissions specifically for BRI disputes. With these centers competing for BRI disputes it is evident that they can lead to

[74] See Xu Qian 'The legal legitimacy of the China International Commercial Court: history, geopolitics, and law' (2020) 28 Asia Pacific Law Review 360. See also Julien Chaisse and Xu Qian 'Conservative Innovation: The Ambiguities of the China International Commercial Court' (2021) 115 AJIL Unbound 17.
[75] Olga Boltenko 'Resolving Disputes Along the Belt and Road: Are the. Battle Lines Drawn?' (2017) Asian Dispute Review 190.
[76] Ernst-Ulrich Petersmann and Giuseppe Martinico 'Can China's Belt and Road Initiative Be Reconciled with the EU's Multilateral Approaches to International Law?' (2020) 6 China and WTO Review 269.
[77] Zhengship Huo and Man Yip 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 International and Comparative Law Quarterly 903.

exploitation of the ambiguities of the BRI dispute settlement mechanism and for fathering their own revenues as they are ultimately businesses. This growing competition is not entirely positive and can lead to 'fragmentation' in the context of the BRI causing grave uncertainty. The fundamental contradictions between Chinese state-capitalism, Anglo-Saxon neoliberalism, and European ordo-liberal, multilevel constitutionalism indicate that bilateral and regional challenges to the WTO legal and dispute settlement system are rising.[78] This EU China bilateral treaty is not of much help either due to a lack of dispute resolution provisions with regard to investments. [79] This further highlights the need of an integrated and comprehensive judicial adjudication system for the solution of these disputes.

Policy recommendations on BRI dispute resolution and EU-China legal and judicial cooperation

The BRI dispute settlement mechanism is so diverse and flexible because the BRI extends to countries with varying cultures and laws. This has a chance of creating hurdles in the path of proper and comprehensive development of the BRI and enhance the ambiguities of the BRI dispute resolution system in the context of EU-China economic relationship. In this respect, one can suggest four areas of importance for the future of EU-China legal relationship within the fast evolving BRI.

The first and foremost issue which presents itself as a hurdle is China's reluctance in enforcing and recognising foreign arbitral awards. Though China has made some progress in this area over the last two decades, there still exist many underlying weaknesses in its policies.

With the lack of a substantive law with regard to the belt road initiative **it is necessary that China makes efforts in the direction of recognising foreign arbitral awards.** With the establishment of the CICC China has taken a step towards preventing fragmentation as a result of the flexible nature of the BRI dispute settlement mechanism. Even though the CICC operates as an international court, it is too early to know whether it can work harmoniously with other ICCs by the way of establishing procedural nexus and thereby prevent any fragmentation.

The harmonisation of substantive laws is also necessary to ensure that there is minimal to no fragmentation of international law. **Initiatives need to be taken to harmonize private international laws in the BRI nations and due consideration should be given to legal instruments which can facilitate and promote and facilitate consistency.**

An integrated and institutionalised mechanism will help in responding to the present challenges that the BRI system faces.

[78] Julien Chaisse and Matteo Vaccaro-Incesa 'The EU Investment Court: Challenges on the Path Ahead' [Chinese Version] (2018) 219 Columbia FDI Perspectives 1-4. See also Julien Chaisse and Jamieson Kirkwood, Adjudicating Disputes Along China's New Silk Road: Towards Unity, Diversity or Fragmentation of International Law? (2021) 68 Netherlands International Law Review 219.

[79] Peter Egger 'Putting the China-EU Comprehensive Agreement on Investment in Context' (2021) China Economic Journal 1.

IX. Harmonising the Legal Framework for Copyright Filtering

By Guobin Cui (Tsinghua University)

Introduction

The past two decades has witnessed the advent of the Internet, which provides an inexpensive and powerful tool for communicating and disseminating copyrighted information. It helps copyright owners to reach a larger audience at a lower cost, thereby increasing the potential value of their works. At the same time, it also makes copyright protection in cyberspace much more difficult. In response, copyright owners have pushed for reforms on the Internet service providers (ISPs)' liability rules and resort to more technological measures to prevent piracy, with content filtering technologies being the focus.

A typical copyright filtering system based on content recognition usually consists of two core parts: the first is a database containing essential information about protected works; the second is a computer program that scans contents uploaded by Internet users and determines whether they match any copyrighted work registered in the database, and then take actions accordingly.[80] With an appropriate algorithm, the filtering system could identify some infringing contents accurately and reliably.[81] Compared with traditional 'notice-and-takedown' procedure, the copyright filtering is all done automatically by computer servers with much higher efficiency. It saves cost not only for copyright owners who otherwise have to repeatedly prepare and send notices of infringement but also for ISPs who otherwise have to respond to these notices manually.

Currently, many ISPs have already voluntarily implemented this technology to fight piracy. The Content ID system launched by Youtube since 2007 is a good example.[82] When a newly uploaded video matches a copyrighted video registered in its database, the system would automatically alert the copyright owner, who then can choose to track, monetize or block the video. [83] In China, some leading ISPs also have introduced similar content filtering systems to protect copyrights. For example, Baidu company launched its 'DNA Identification Anti-piracy' system in 2011[84] and Tencent company established its 'Original Works Declaration' system for Wechat in 2015.[85]

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[80] For an easy-to-understand introduction to copyright filtering technologies, see Youtube, *How Content ID works,* available at https://support.google.com/youtube/answer/2797370?hl=en（last visit February 4, 2022).

[81] According to Audible Magic, a leading filtering service provider in the United States, its filtering system can check uploaded media for copyrighted content in seconds and achieve an identification rate of 99 percent or higher for registered content with almost zero false positive. Audible Magic, *Copyright Compliance Service*, available at https://www.audiblemagic.com/tag/copyright-compliance/ (last visit February 4, 2022).

[82] Fred von Lohmann, *YouTube's Copyright Filter: New Hurdle for Fair Use?* available at https://www.eff.org/deeplinks/2007/10/youtubes-copyright-filter-new-hurdle-fair-use (last visit February 4, 2022).

[83] Ibid.

[84] For a brief introduction to the anti-piracy system of Baidu company, see *Han Hang v. Beijing Baidu Netcom Science and Technology Co., Ltd*., the No. 5558 Decision of the People's District Court of Haidian, Beijing (2012); *Beijing China Youth Book Inc. v. Beijing Baidu Netcom Science and Technology Co., Ltd.,* the No. 2045 Decision of the People's High Court of Beijing (2014).

[85] Tencent Sci-Tech: *The WeChat Public Platform Launches the Original Work Declaration System to Protect Authors' Rights,* January 22, 2015, available at http://tech.qq.com/a/20150122/081739.htm（last visit February 4, 2022）.

Different approaches to copyright filtering in EU and China

Before the EU adopted the EU Directive on Copyright for the Digital Single Market (DSM) of 2019, its ISP liability rules were quite similar to those in the US and China. Content-sharing sites as an ISP would not be directly liable for its users' infringing activities, unless they knew or should have known their users were infringing copyrights. And they had no duty to monitor their users' activities to find infringing contents. So, it is not surprising to see the ECJ repeatedly held that EU law did not impose a duty of copyright filtering on ISPs and filtering measures could threaten their users' freedom of speech or privacy.[86]

Surprisingly, as mentioned above, the DSM Directive overhauls the ISP liability rules for hosting service providers or content-sharing sites. It requires them to obtain copyright licenses with best efforts for its users' content-sharing activities. Additionally, they are required to take effective technical measures, including copyright filtering, to prevent their users' infringing activities. Clearly, it abolishes the existing framework of indirect liabilities, representing a sharp break from the legal tradition in this area. The DSM Directive is the first legislation in the world to do so.

Just like the EU lawmakers, Chinese policymakers feel the need to reform the US-style safe harbor rules, especially the outdated notice-take down procedure. The National Copyright Administration (NCA) and judicial courts have gone ahead of the legislature to embrace copyright filtering technologies, although Chinese Copyright Law is silent on this. In 2015, the NCA issued a notice requiring content-sharing sites to take effective technical measures to prevent their users form uploading, storing, sharing or disseminating infringing contents through their platforms.[87] The same requirement was reiterated in 2016.[88] It is widely believed that the "effective technical measures" here include content filtering technologies.[89] In judicial practice, many Chinese courts also hold that the general torts rules mandate that a content-sharing ISP, after having received a notice of infringement, has a duty to take filtering measures to prevent disputed copyrighted audiovisual works from being re-posted by its users.[90]

Apparently, compared with the DSM Directive, Chinese law has chosen a middle path. On the one hand, it still retains the safe harbor rules and treats content-sharing sites as potential indirect infringers, which is quite similar to the US law; on the other hand, it requires the ISPs to bear more duty of care than that under the US law, including the duty of copyright filtering. In this respect, Chinese law is closer to the DSM Directive.

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[86] See *SABAM v. Netlog NV*, Case C-360/10(2012); *Scarlet Extended SA v. SABAM*, Case C-70/10 (2011).
[87] Article 2 of the National Copyright Administration's Notice on Regulating the Copyright Order of Online Disk Services (2015).
[88] Article 10 of the National Copyright Administration's Notice on Strengthening the Copyright Management of Online Literary Works (2016).
[89] Cui Guobin, *'On Internet Service Providers' Duty of Copyright Filtering'* (2017) 2 China Law Journal.
[90] Typical cases include *Beijing China Youth Book Inc. v. Beijing Baidu Netcom Science and Technology Co., Ltd.,* the No. 2045 decision of the People's High Court of Beijing (2014); *Beijing Ciwen Film & TV Production Co., Ltd. v. Guangzhou Shulian Software Technology Co., Ltd.,* the No. 355 decision of the People's High Court of Fujian Province (2006); *Guangdong Zoke Culture Development Co., Ltd. v. Guangzhou Shulian Software Technology Co., Ltd.,* the No.7 decision of the People's High Court of Shanghai (2007); and *Shenyang Shameng Culture Development Co., Ltd. v. Shanghai All-Tudou Network Technology Co., Ltd.*, the No. 789 decision of the People's Court of the District of Pudong New Area, Shanghai (2010).

Key Issues at Stake relating to Copyright Filtering

Reforming existing safe harbor rules and enacting specific rules on copyright filtering, EU member states and China will face enormous challenges，such as to what extent the copyright law should still allow the safe harbor rules to function, what ISPs are obligated to carry out copyright filtering; whether ISPs should proactively filter infringing contents or only upon request of copyright owners; how to allocate the cost of filtering measures; how to choose the technical standards for filtering and how to correct the errors caused by filtering systems.

To answer all these complicated questions in national legislation is indeed a difficult task. Not surprisingly, while the DSM Directive has been in place for more than three years, legislative progress within member states is still limited. Some member states remain skeptical of its rationale. For instance, the Polish government has filed a complaint with the CJEU, claiming that Article 17 of the Directive violates the public's freedom of expression.[91] Of course, neither would it be easy for China to formulate specific rules for copyright filtering in its Copyright Law. As we know, China has a thriving Internet industry, giving birth to many world-class Internet companies, such as Tencent, Alibaba, Tik Tok, JD.com, and Baidu. When enacting rules for copyright filtering, China has to be very cautiously to strike a balance of interests between Internet industry and copyright owners, while also safeguarding the freedom of the public. Although as mentioned earlier, the NCA and judicial courts have already embraced the duty of copyright filtering, these efforts remain in the experimental stage, and it is not yet possible to predict what specific rules would be enacted by Chinese legislature.

In this context, legal and judicial cooperation between EU and China in understanding and shaping ISP liability rules would be highly desirable. Both sides have their own legislative or judicial experiences to share, which is beneficial to both sides.

Policy Recommendations on Legal or Judicial Cooperation

For the possible legal and judicial cooperation， EU and China can gradually move forward with the following three plans: promoting the understanding of each side's legal framework of ISP liability rules, identifying guiding principles for copyright filtering, and exploring the possibility of harmonizing ISP liability regime at international level.

Promoting the understanding of Each Side's ISP Liability Rules. EU and China can organise some joint exchange activities to promote mutual understanding of the latest development in their respective ISP liability rules. As mentioned above, the EU and China previously had the US-style safe harbor rules for content-sharing sites, so the ISP liability rules on both sides are quite similar in many ways. Currently, both sides are diverging from the safe harbor rules in different ways and in different directions. The EU does so through revolutionary legislation, moving closer to a direct liability regime for content-sharing ISPs, while China retains an indirect liability regime and adopts the duty of copyright filtering through evolutionary judicial interpretations. Currently, the differences between Chinese and EU law on ISP liability rules have become significant. Understanding these legal differences is very important for Internet companies and copyright owners with commercial interests in both the EU and Chinese markets. For example, some Chinese Internet companies may suddenly encounter

[91] See Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union. In China, the academic community is also very interested in this case and relevant theoretical debates. No matter whether the ECJ would upholds Article 17 or not, it would deepen our understanding of the relationship between copyright filtering and the freedom of speech.

the same difficulties Google faced in Spain in complying with new EU copyright law.[92]

The EU-China legal and judicial cooperation will provide a great opportunity for the policy makers on both sides to better understand the challenges facing the Internet and copyright industries, which may help them to improve the EU and Chinese laws in the future.

Identifying Guiding Principles for Copyright Filtering. The EU and China can work together to identify some guiding principles for designing copyright filtering regimes. As we know, at the legislative level, the EU is ahead of China. The DSM Directive has been in place for more than three years， and some member states, such as Germany， have already passed a comprehensive legislation on copyright filtering.[93] But in many other member states, it remains unclear how the DSM Directive will be implemented. China will amend its regulations on Internet copyright protection in the next few years, and as mentioned above, it may impose similar duty of copyright filtering on content-sharing sites.

The DSM Directive and member states' implementation are very good legislative experiments. Through the dialogue between EU and China, policymakers on both sides will better understand the complexities of copyright filtering issues and identify some guiding principles for national legislation on copyright filtering.

Exploring the possibility of harmonising ISP liability rules at international level. The EU and China can jointly play a leading role in harmonizing the international ISP liability rules. The DSM Directive adopted new rules that move EU law away from the US-style safe harbor rules, especially as to stiffer ISP liability rules and the duty of copyright filtering. From China's perspective, the new EU law relatively favors the copyright industry and the US law remains in favor of the Internet Industry. Chinese law may be somewhere in between. This kind of divergences between major jurisdictions will make it more difficult for multinational companies to conduct cross-border online business.

Through legal and judicial cooperation, the EU and China might explore the possibility of cooperating to re-harmonise global ISP liability rules, including content-sharing ISPs' duty of copyright filtering. Although it is unlikely for the EU, China and the US are unlikely to develop uniform rules on copyright filtering in the future, they can work together to adopt some common principles in setting such technical or legal standards. This harmonisation of ISP liability rules will benefit the global business community.

Conclusion

The rapid development of content filtering technologies has revolutionized the method of preventing copyright infringement. It's time for every country to reform the ISP liability rules under its copyright law. The EU and China are no exception. However, when designing the new rules, EU and China has significant divergences in their choices. Through possible legal and judicial cooperation, the EU and China can jointly improve the international Internet

[92] Google has already closed its Google news services in Spain and repeatedly refused to pay license fee for such services in other European countries. See Laura Kayali, 'Google Refuses to Pay Publishers in France' (29 September 2019), Politico, https://www.politico.eu/article/licensing-agreements-with-press-publishers-france-google/ (last visit April 4, 2022).
[93] The German Act on the Copyright Liability of Online Content Sharing Service (2021).

copyright system in the future.

X. The Crowded Race for AI Regulation - Is There Space for an EU-China Collaboration?

By Alexandru Circiumaru (Queen Mary University of London)

The race to develop Artificial Intelligence ('AI') is now doubled by the race to regulate it. While the European Union's ('EU') efforts in this sense have received a lot of attention, they are not singular. Indeed, 2021 has brought numerous developments in the regulation of AI from all over the world, with China, the United States and Brazil all making substantial progress. That being said however, with the publishing of its Artificial Intelligence Act proposal,[94] by the European Commission in April 2021, the EU has taken the most important step of 2021 towards the comprehensive regulation of AI.

The purpose of this piece is to present the main developments that took place in 2021 in the race to regulate AI in both China and the European Union. After doing so, questions will be raised about whether a collaboration in this pursuit is possible between the two, in light of the EU's approach to regulating AI, its relation with the United States of America, as well as China's use of AI and approach to regulating it.

A year to remember for EU digital policy

In April 2021 the European Commission published the long-awaited proposal for the EU's Artificial Intelligence Act, the result of several years of work based on documents released during this period, such as the Ethics Guidelines[95] or the AI White Paper.[96] Putting forward this proposal the EU has reaffirmed its leadership in regulating AI, being the first major player to offer some potential answers for the difficult questions this pursuit raises, such as defining AI for the purposes of a legislative act or striking the right balance between regulation and innovation.

Without going into the specifics of each of the provisions, two things are notable for the purposes of this piece. First, the proposal aims to ensure the development and deployment of 'trustworthy AI' - that is, the proposal explains, AI which respects European fundamental rights and values. Secondly, like the General Data Protection Regulation ('GDPR'),[97] the future AI Act is to apply extraterritorially. Article 2 makes it clear that the act will apply to providers that put their AI systems on the EU market regardless of where they are located, and to providers and users of AI systems in third countries, as long as 'the output produced is used in the Union' (Article 2(1)(c)). As the GDPR is widely seen as an example of the success of the Brussels effect,[98] this provision could spell a similar future for the AI Act, with commentators already

[94] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 final.
[95] High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines For Trustworthy AI' (8 April 2019) available at: https://ec.europa.eu/futurium/en/ai-alliance-consultation
[96] European Commission, 'White Paper - On Artificial Intelligence - A European approach to excellence and trust', COM(2020) 65 final, available at: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf
[97] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ L 119, 4.5.2016, pp. 1–88.
[98] Simon Gunst, Ferdi De Ville 'The Brussels Effect: How the GDPR Conquered Silicon Valley' (2021) 26 European Foreign Affairs Review 437.

considering this perspective.[99] Should that be the case, the European Union would be in the privileged position of being able to export its vision of 'trustworthy AI' globally.

As the proposal moves through the legislative process modifications will certainly be made. Despite the good start made by the European Commission, there are still a number of issues which will require serious consideration from the European Parliament and the Council of the European Union, such as the extent of the prohibitions provided by the proposal. Regardless of how the final act will look like, it seems clear that it will have an important impact globally, not only because those who want to have access to the European market will have to comply with it, but also because it will serve as a blueprint of regulating Artificial Intelligence.

There is no agreed timeline for how long the legislative process will last. The last month of 2021 saw a progress report published by the Slovenian Presidency of the Council[100] as well as the official start of the work in the European Parliament on the file, with two committees, the Internal Market and the Civil Liberties committees, as co-leaders on the file. The French Presidency, which started in January 2022 did not list AI as one of its priorities,[101] so, at the earliest, the AI Act could only be adopted in the second half of 2022, although a longer time frame would be more realistic.

The EU took another important step in establishing its global influence in regulating AI, by discussing this issue with the United States of America ('US') during the newly established Trade and Technology Council. This new summit, officially launched in June 2021, aims, among others, to allow the two parties to cooperate on key policies on technology, digital issues and supply chains.[102] The issue of AI regulation has been discussed during the very first meeting of the Trade and Technology Council, which took place in October 2021 in Pittsburgh. The discussion resulted in a 'Statement on AI' being published, outlining the common vision of the two parties on this issue and potential ways for future collaboration.[103]

Although it is unclear to what extent these discussions will influence the current regulatory efforts of the US, if at all, what is clear is the intention of the EU and US to collaborate on AI. The extent of their collaboration will only become clear once both adopt their own regulation. Nevertheless, it is significant for the global race to regulate AI that two of the three biggest players involved intend to collaborate closely.

[99] Graham Greenleaf 'The 'Brussels Effect' of the EU's 'AI Act' on Data Privacy Outside Europe' (2021) 171 Privacy Laws & Business International Report 1, pp. 3-7.
[100] Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts - Presidency compromise text, available at: https://www.statewatch.org/media/2962/eu-council-ai-act-compromise-text-14278-21.pdf
[101] French Presidency Official Website, Priorities, available at: https://presidence-francaise.consilium.europa.eu/en/programme/priorities/
[102] European Commission, 'EU-US launch Trade and Technology Council to lead values-based global digital transformation' (15 June 2021), Press Release, Brussels, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2990
[103] European Commission, 'EU-US Trade and Technology Council: Commission launches consultation platform for stakeholder's involvement to shape transatlantic cooperation' (18 October 2021), Press Release, Brussels, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5308

China joins the regulatory race

So how about the third global player, China? It too had made significant progress in the regulation of AI in 2021. In the second half of the year the Chinese government has published a number of policy documents which give indications about how their approach to regulating AI will look like.[104]

First, on the 9th of July, the China Academy of Information and Communications Technology published a 'White Paper on Trustworthy Artificial Intelligence'.[105] The paper takes note of the EU's and US' focus on the notion of 'trustworthy AI', adopting it too. Here, trustworthy has, of course, a different meaning than respecting European fundamental rights and values. This is indicative of one of the problems of AI global governance, broad, lofty goals, which translate, in practice, very differently for different players. There are, however, at least on the surface, similarities, the document recognising transparency, explainability and reliability as essential elements of 'trustworthy AI'.

The following month, the Cyberspace Administration of China released a draft set of thirty rules for regulating internet recommendation algorithms,[106] while finally, in September, the Ministry of Science and Technology published a document titled 'Ethical Norms for New Generation Artificial Intelligence'.[107] All these documents make it clear that China is seriously pondering the question of AI regulation and that it does not plan to be left behind in the race to regulate. They also show a deep awareness of the regulatory framework around the world and the fact that one of the documents talks about the EU's approach is very telling in this sense.

For those who have followed the regulatory process in the EU, China's approach will seem familiar, both having released a list of ethical principles and a white paper. The next step would then be a concrete proposal to comprehensively regulate AI. It remains to be seen whether China will take this approach or not and when it is going to put forward its own comprehensive proposal to regulate AI.

EU-China cooperation

Both the EU and China are thinking about 'trustworthy AI' and have released ethical principles for it. While this seems a good start for a potential collaboration, going beyond the surface and the buzzwords associated with AI regulation, the situation becomes more complicated. Two examples are telling of the difficulties ahead. The first is the approach to social scoring, a practice which China has famously implemented in some of its regions, while the EU AI Act seeks to prohibit. The second is even more recent, coming from December 2021 when it was

[104] Matt Sheehan, 'China's New AI Governance Initiatives Shouldn't Be Ignored' (4 January 2022) Carnegie Endowment for International Peace, available at: https://carnegieendowment.org/2022/01/04/china-s-new-ai-governance-initiatives-shouldn-t-be-ignored-pub-86127

[105] China Academy of Information and Communications Technology, 'White Paper on Trustworthy Artificial Intelligence', available at: https://cset.georgetown.edu/publication/white-paper-on-trustworthy-artificial-intelligence/

[106] Cyberspace Administration of China, 'Internet Information Service Algorithmic Recommendation Management Provisions (Draft for Comment)', available at: https://digichina.stanford.edu/work/translation-internet-information-service-algorithmic-recommendation-management-provisions-opinon-seeking-draft/

[107] PRC Ministry of Science and Technology, The National New Generation Artificial Intelligence Governance Specialist Committee, 'Ethical Norms for New Generation Artificial Intelligence Released', available at: https://cset.georgetown.edu/publication/ethical-norms-for-new-generation-artificial-intelligence-released/

reported that China developed an 'AI prosecutor' which can press its own charges.[108] These two examples show the existing gaps in the pursuit of a common, global, set of AI rules - they are large and obvious, but sometimes they are hidden behind broad terms which everybody involved interprets differently.

Nevertheless, for a common set of global AI principles, cooperation is needed between the EU and China. **To make it possible, both parties should first establish a basis for it and be open to engage with each other. Secondly, both parties should be, at the same time, clear as to what they want but flexible enough to understand that priorities are naturally going to be different. Thirdly and finally, they should take steps to ensure that the discussion is truly global, rather than fragmented in various bilateral meetings.**

[108] Stephen Chen, 'Chinese scientists develop AI 'prosecutor' that can press its own charges' (26 December 2021), South China Morning Post, available at: https://www.scmp.com/news/china/science/article/3160997/chinese-scientists-develop-ai-prosecutor-can-press-its-own?module=perpetual_scroll_0&pgtype=article&campaign=3160997

XI. Extraditions and EU-China Legal and Judicial Cooperation

by Alexandra Kaiser (FAU Erlangen)

In light of the prevalence of transnational crime, law enforcement cooperation is an important part of bilateral criminal justice cooperation between the EU and China. Xi Jinping has stressed China's ambitions to partake in transnational law enforcement.[109] Yet, the legal framework governing EU-China criminal justice cooperation remains scattered.[110] The PRC and EU Member States have concluded a number of legal assistance and extradition treaties in criminal matters.[111] While China's law enforcement drive, i.e., the operations 'Foxhunt' (2014) and 'Skynet' (2015), primarily aims to hunt down fugitives that are sought for economic crimes.[112] EU member states do expect China to respond to crimes that are seen as originating from China such as cybercrime or drug trafficking and have established cooperation in various areas.[113]

To ensure the repatriation of economic fugitives, China relies on the willingness of EU member states to cooperate. There are different channels through which mutual police and judicial assistance can be requested. At the EU level, a strategic agreement between the PRC and Europol enables the exchange of police information, for instance, relating to organised crime.[114] At the international level, the International Criminal Police Organisation (INTERPOL) plays an important role in suppressing cross-border crime. As of December 2021, INTERPOL has 195 member countries, including EU member states as well as China.[115] In 2015, INTERPOL's National Central Bureau of China issued a 100 most wanted list that targets fugitives wanted for economic crimes – some of which were thereupon arrested in EU member

[109] 'President Xi Jinping opens INTERPOL General Assembly' (INTERPOL, 26 September 2017) <https://www.interpol.int/News-and-Events/News/2017/President-Xi-Jinping-opens-INTERPOL-General-Assembly> accessed 1 December 2021.

[110] Saskia Hufnagel, 'European Union Judicial Cooperation in Criminal Matters: Law and Practice' (EUPLANT Blog, 15 April 2020) <https://www.qmul.ac.uk/euplant/blog/items/european-union-judicial-cooperation-in-criminal-matters-law-and-practice.html#> accessed 1 December 2021.

[111] China has concluded bilateral legal assistance treaties in criminal matters with a number of EU member states, including Italy, Spain, and Portugal, see <http://treaty.mfa.gov.cn/web/list.jsp> accessed 1 December 2021. China has concluded bilateral extradition treaties with almost 60 countries, including Belgium, Bulgaria, Cyprus, Greece, Romania, Lithuania, Spain, Portugal, Greece, Romania, Lithuania, Spain, Portugal, France, and Italy, see <http://treaty.mfa.gov.cn/web/list.jsp> accessed 1 December 2021.

[112] 'Ministry of Public Security: Operation "Foxhunt" has already caught 680 economic fugitives that had fled abroad, an unprecedented number' (公安部: "狐抓"行动已抓获外逃经济犯 680 人, 数量空前) (The Paper (澎湃), 8 January 2015) <http://m.thepaper.cn/kuaibao_detail.jsp?contid=1292442&from=kuaibao> accessed 1 December 2021. 'In the past 6 years of operation 'Skynet' the level of deterrence has been raised and the precision of the goal of hunting fugitives and returning stolen goods has continuingly been strengthened' (6 年来"天网"行动打法不断升级震慑持续强化追逃追赃目标愈加精准) (CCDINSC web (中央纪委国家监察网站), 1 March 2021) <https://www.ccdi.gov.cn/yaowen/202103/t20210301_236665.html> accessed 1 December 2021.

[113] Thomas Eder, Bertram Lang, Moritz Rudolf, 'China's Global Law Enforcement Drive: The need for a European response' (MERICS, 18 January 2017) <https://merics.org/en/report/chinas-global-law-enforcement-drive>, 4-5, accessed 1 December 2021.

[114] On 13 October 2016, the PRC and Europol signed an 'Agreement on Strategic Co-operation between the European Police Office and the Ministry of Public Security of the PRC, <https://www.europol.europa.eu/media-press/newsroom/news/europol-and-people%E2%80%99s-republic-of-china-join-forces-to-fight-transnational-crime > accessed 1 December 2021.

[115] See <https://www.interpol.int/Who-we-are/Member-countries>.

states that acted upon a Red Notice (RN).[116] INTERPOL thus plays a key role in hunting down China's most wanted fugitives.

A key issue at stake relating to EU-China criminal justice cooperation is the protection of fundamental human rights with respect to extraditions, as potentially divergent national criminal justice systems interact.[117] While the fight against crime is a legitimate goal, and whereas national police authorities tend to view human rights as an impediment to efficient crime control,[118] the protection of human rights in this regard has sparked debates amongst practitioners, civil society organisations, as well as academics, also in the context of extradition requests made by China.[119] The question is whether EU member states should assist China in applying its law that does not recognise international human rights standards. Yet, states that are parties to the European Convention of Human Rights (ECHR) have shown an inconsistent approach to Chinese extradition requests. Recent cases suggest growing scepticism towards the reliability of diplomatic assurances made by the PRC. However, EU Member States still do approve extraditions to China, especially where political interests appear to trump human rights concerns.[120]

In Chinese extradition cases, problems do not predominately arise relating to the alleged offence in question (i.e., in the context of the *principle of dual criminality*) but rather regarding the political-legal system that is behind such requests. Minimum fair trial guarantees are absent or not fully protected under Chinese law, let alone the actual implementation of such statutory provisions;[121] torture remains common in the criminal process. The difficulty of monitoring the implementation of diplomatic assurances relating to torture has been recognised as posing another risk to rights violations.[122] In the Polish case (2021) and the Czech case (2020), the courts pointed to these difficulties and refused extraditions to China on the basis of substantial grounds for believing that the extraditions could constitute a violation of Article 3 ECHR (*principle of non-refoulement*).[123] In the case of Qiao Jianjun (RN subject), who was facing corruption charges, the Swedish court did not approve his extradition to China due to human rights concerns relating to the right to a fair trial (Art. 6 ECHR) and torture, which were heightened by the fact that Qiao would have been investigated under the new anti-corruption mechanism that severely deviates from the right to a fair trial.[124] The risk of additional charges seems to be hanging over extradition subjects like a Damocles sword

[116] 'China releases wanted list for worldwide fugitive hunt' (China Daily, 22 April 2015) <https://www.chinadaily.com.cn/china/2015-04/22/content_20510959.htm> accessed 1 December 2021.
[117] Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) 16.
[118] Edward Lemon, 'Weaponizing Interpol' (2019) 30 Journal of Democracy 15, 21-22.
[119] Jerome A. Cohen, 'Should Murder Go Unpunished? China and Extradition, Part 1' (The Diplomat, 23 June 2021) <https://thediplomat.com/2021/06/should-murder-go-unpunished-china-and-extradition-part-1/> accessed 1 December 2021.
[120] '"Operation Great Wall" 121 Taiwanese Criminal Suspects Extradited to China – Western Court: Taiwan is Part of China' ("Wall 行动"121 名台湾籍犯罪嫌疑人将被引渡回中国 西国家法院:台湾人是中国人的一部分) (Sohu, 18 December 2017) <https://www.sohu.com/a/211164782_100020627> accessed 1 December 2021..
[121] PRC Criminal Procedure Law (中华人民共和国刑事诉讼法) (2018).
[122] Office of the United Nations High Commissioner for Human Rights, Note on Diplomatic Assurances and International Refugee Protection, August 2006.
[123] Court of Appeal Warsaw, Decision, 4 March 2021 (Ref. No. II AKz 127/21). Czech Republic Ruling Constitutional Court, *Judgment II. ÚS 2299/19*, 2 April 2020.
[124] Elin Hofverberg, 'Sweden: Supreme Court Refuses Extradition Request' (Global Monitor, 23 July 2019) <https://www.loc.gov/law/foreign-news/article/sweden-supreme-court-refuses-chinese-extradition-request/> accessed 1 December 2021. PRC Supervision Law (中华人民共和国监察法) (2018).

and in light of China's legal-political system drawing a clear line between 'ordinary' and 'political' offences can be difficult in individual cases. In the Polish case (2021), Li Zhihui (RN subject) was originally sought for economic crimes. His extradition to China was also denied due to his Falun Gong involvement.[125] Fugitives are being sent back to a legal system in which arbitrariness and flagrant rights violations remain common, and because even supposedly 'ordinary' offences are dealt with in a system that does not operate on the basis of the rule of law and that does not protect fundamental human rights, scepticism is warranted.

A careful reading of diplomatic assurances, that is, reading between the lines, reveals that the Chinese side is willing to comply with its *domestic* legal framework ('*in accordance with Chinese legislation*').[126] China is not willing to fulfil a 'fair' trial in accordance with internationally recognised standards of fairness, or supposedly 'Western' values.[127] This raises the question whether such diplomatic assurances are indeed made in good faith, as universal human rights are rejected in the abstract and not recognised and institutionalised in domestic legislation; and whether diplomatic assurances made by the PRC – for instance, relating to fair trial – can be activated in individual cases on an ad hoc basis, or can hence indeed '*eliminate the danger to the individual concerned*' and can be considered '*reliable*'.[128]

The EU should follow three policy recommendations:

Awareness: There should be a greater awareness amongst national police authorities with respect to human rights. National police authorities tend to view human rights as an impediment to efficient suppression of crime, and they may even regard the absence of human rights protection under Chinese law as favourable in the suppression of transnational crime – or indeed condone such human rights violations. There should hence be greater awareness for risks arising from democratic-autocratic cooperation.

Regulation: EU Member States should act as defenders of universal human rights. **Police and judicial criminal justice cooperation must be based on the European framework for human rights protection.** EU Member States must avoid becoming accomplices of autocratic systems, such as China. Even though transnational law enforcement is important, and even if no country wants to become a safe haven for criminal fugitives, political interests should not override human rights protection concerns. The EU should establish a consistent legal framework within the spirit of the ECHR to enable and regulate criminal justice cooperation with China.

Consistency: The EU should establish a consistent practice *vis-à-vis* the PRC regarding judicial cooperation in criminal matters. Mutual criminal justice cooperation is based on the principles of equality and reciprocity, but EU Member States must nevertheless ensure human rights protection in order to prevent becoming accomplices of autocratic systems. In the absence of fundamental human rights protection in the Chinese criminal justice system,

[125] See fn 123.
[126] *Minister of Justice v Kyung Yup Kim* (2021) NZSC 57 (4 June 2021).
[127] Xu Yao (徐瑶), 'Study Q&A 68. Why should we take a clear-cut stand on the so-called Western "universal values"?' (学习问答 68.为什么要旗帜鲜明反对西方所谓的"普世价值"?), (People's Daily (人民日报), 2 September 2021) <https://www.12371.cn/2021/09/02/ARTI1630538734440951.shtml> accessed 1 December 2021.
[128] Office of the United Nations High Commissioner for Human Rights, 'Note on Diplomatic Assurances and International Refugee Protection' (August 2006).

national courts should no longer approve extraditions of criminal suspects to China.[129] Recent extradition cases suggest a rising awareness with respect to human rights protection issues, as national courts have engaged more critically with diplomatic assurances and have refused extraditions even under the conditions of diplomatic assurances. These cases provide a fertile ground for the development of a more coherent approach to criminal justice cooperation with the PRC.

[129] As recommended by the new EU-China strategy, see European Parliament, 'A new EU-China strategy', resolution of 16 September 2021 (2021/203(INI)) para 19.

XII. Anti-Extradition Movement in HK, the National Security Law, and the Future of Extradition Arrangement between the EU Member States and Hong Kong

By Lin Feng (City University of Hong Kong)

The research project has given scholars from Hong Kong, particularly the School of Law of City University of Hong Kong, opportunities to have meaningful exchange and collaboration with partner institutions from the EU and China on various legal issues existing in EU-China legal and judicial cooperation. Among various interesting legal issues, this contribution chooses to highlight three which are closely related to Hong Kong and EU-China legal and judicial cooperation and make some recommendations.

The most important social event which happened in Hong Kong, a special administrative region of the People's Republic of China, in the past several years must be the anti-extradition (to mainland China) movement in 2019. The direct cause which triggered the anti-extradition movement was the Hong Kong Government's decision to amend its extradition legislation to make extradition on a case-by-case basis to Taiwan, and also any country/jurisdiction (including mainland China) with which Hong Kong has not signed a bilateral extradition agreement. The movement in turn increased China's concern over foreign interference in Hong Kong and collusion between local activists with foreign countries and led China to enact and implement a special National Security Law (NSL) in Hong Kong in June 2000. Some Western countries responded by suspending and/or terminating bilateral extradition agreements with Hong Kong.

There exists legitimate concern for the implementation of the NSL in Hong Kong because of possible infringement of human rights. However, the necessity to terminate and/or suspend existing bilateral extradition agreements is questionable. It is because there is a need for judicial cooperation in criminal matters, particularly extradition of fugitives, between EU member states and Hong Kong. Furthermore, it is unrealistic to expect that the countries/ jurisdictions with which EU member states will sign bilateral extradition treaties must have the same level of human rights/rule of law standards. If that were the requirement, no bilateral extradition agreement could be signed between many EU member states with those countries with poor human rights/rule of law standards. In addition, Hong Kong has a good track record of rule of law and human rights protection prior to the implementation of the NSL. Even after the implementation of the NSL, Hong Kong is still very much a rule of law jurisdiction with an independent judiciary with distinguished judges from the Supreme Court of the UK and several other common law jurisdictions sitting at its Court of Final Appeal.

Purely from legal (not political) perspective, it's more rational not to suspend/terminate bilateral extradition agreements. Instead, EU and its member states can address human rights concerns in actual cases. For example, if the concern is about a particular crime such as subversion of state power, that concern can be addressed through the application of the principle of double criminality. If the concern is about extradition of a former LegCo member who is now a refugee in the UK, that can be addressed through application of the principle of non-extradition for political offence. It is fair to say that various concerns about human rights protection after the implementation of the NSL can be addressed adequately under the framework of existing bilateral extradition agreements. Moreover, to maintain existing extradition agreements have some other obvious advantages such as smooth cooperation in

cases where there is a genuine need for extradition by either an EU member state or Hong Kong.

Accordingly, the first policy recommendation is that **the EU and its member states should not suspend/terminate bilateral extradition agreement. Instead, they should deal with any issue within the framework of existing bilateral extradition agreement.** Should the existing extradition agreement contain no provision to deal with a novel situation, additional conditions can always be imposed before extradition is actually made in a particular case. In so doing, normal legal and judicial cooperation between EU member states and Hong Kong in criminal matters will not be improperly affected.

Protection of human rights in HK after the implementation of the NSL

In addition to the anti-extradition movement, the enforcement of the NSL in Hong Kong has also attracted a lot of attention after its application since 30 June 2000. The high-profile cases include prosecution against the boss of Apple Daily and the organisers and participants in the pan-democratic primary.

It is a political decision for China to decide to enact and implement the NSL in Hong Kong according to the authority under Chinese Constitution and there is not much other countries can do about it. One major issue arising from the enforcement of the NSL in Hong Kong is proper protection of fundamental rights in the enforcement process. In fact, concern over infringement of human rights due to the implementation of the NSL has been raised repeatedly by media. That is an area which is worthy of more legal and judicial cooperation between the EU member states and Hong Kong.

The NSL states clearly in Article 4 that human rights will be protected and the ICCPR as applied in Hong Kong will continue to apply. Hong Kong courts have made reference to judgments from the European Court of Human Rights and applied European jurisprudence of human rights to Hong Kong in many cases in the past. We are of the view that the EU and its member states can make a contribution to the protection of human rights in the implementation of the NSL by maintaining regular dialogue with the Hong Kong Government, legal academics and legal professionals in the region. In so doing, European jurisprudence on how to balance human rights protection and national security can be shared with Hong Kong so that Hong Kong judiciary can, if necessary, make reference to European theory and case law in this area. There is a good chance that Hong Kong judiciary may make such a reference if appropriate because of its past practice of relying on European jurisprudence in human rights protection. The concern over too much deference to the executive branch's claim of national security concern is not an issue unique to Hong Kong today. It has been an issue encountered in the US and some other countries and has been discussed by legal academics and dealt with by judiciaries in various jurisdictions. Sharing of lessons and experiences between the EU member states and Hong Kong will benefit both sides.

So the second policy recommendation is: **the EU and its member states and Hong Kong should maintain regular dialogue on best practice concerning how to balance human rights concerns and national security concerns.**

Improvement of Case Guidance System in Mainland China

Under the research project, a conference was held on the topic of judicial cooperation between EU countries and China. Several judges from Mainland China and scholars from the EU and

Hong Kong have attended and presented their papers at the conference. One particular policy initiative by Chinese judiciary in recent years is to implement a case guidance system through selection and publication of guiding cases by the Supreme People's Court. It is a very positive and correct policy initiative to be commended because many civil law jurisdictions within the EU also have case law which either has legal or de facto binding force.

However, because the case guidance system is so new in mainland China, various issues have appeared so far from selection of proper guiding cases, to the actual legal effect of such guiding cases, to what courts should have authority to select guiding cases and so on. It's clear that establishment of a sound guiding case system in mainland China will contribute enormously to predictability of judgments in future cases, legal certainty and eventually rule of law in China. In this aspect, many EU member states have sound experience to share with China and can influence the latter to develop a proper case guidance system.

Hence **the third policy recommendation** is: **the EU and its member states should conduct more regular dialogue with mainland China concerning establishment and operation of case guidance system in different jurisdictions, particularly in those countries practising continental legal system.**