Pragmatism Rules Legal Foundation of China and European Union Relations

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Introduction

The external trade relations of the European Union have evolved with the powers of the common institutions. Initially limited to a narrow interpretation of trade, the competence of the Union has widened to encompass an ever wider interpretation of the term trade to include, first, aspects of development policy to the current day situation where the European Parliament contextualises the EU’s external trade policy in its wider value-driven view of the world. Human rights have become an integral part of the external policy of the Union and no trade agreement would be supported by the European Parliament without including the standard human rights clauses.

In EU trade negotiations, partners generally have little choice but to accept the standard clauses. Most standard trade and human rights clauses come in the form of hard and fast treaty rules. In the maturing relationship with China, however, a measure of mutual respect is demanded that ensures that the standard template cannot be put on the table with the expectation that it will be signed. China is as critical of the EU’s human rights views as the European Parliament is of China’s human rights record. A direct confrontation would therefore yield little result. The way ahead for this relationship is to seek a genuine partnership based on an open dialogue that is respectful and, where necessary, discreet. It requires also that the legal form given to such partnership is adapted to the relationship and relies on mutually agreed objectives that can be achieved by using the requisite legal tools and instruments. This article examines these procedures as well as the legal instruments consisting of both hard law and soft law as the legal foundation of China–EU relations as it has developed over the last 35 years.

From basic trade diplomacy to a maturing partnership

Economic concerns drove the instigation of diplomatic relations between China and the EU in 1975. A basic trade agreement quickly followed in 1978. As the exchanges increased and the EU’s competence was extended, an updated agreement followed. In 1985, the Agreement on Trade and Economic Cooperation was concluded. The 1985 Trade Agreement is still applicable as the main legal instrument to regulate bilateral trade and economic activities. Its content, however, is seriously outdated and neither reflects nor supports the current bilateral trade and economic relations. To remedy this situation, China and the EU entered into several agreements over the years covering specific aspects of their trade cooperation. After China’s accession to the WTO in 2001, the trade relationship was further developed with commitments under the WTO agreements.

These treaty rules cover a limited area of the cooperation and have been supplemented by soft law instruments. China and the EU established more than 20 sectoral dialogues at different levels to improve mutual understanding and co-operation in economic, trade and even political issues. They hold an annual summit in Europe or China in rotation, setting out agreed policy on a wide range of bilateral, regional and international issues. Both China and the EU publish policy papers that serve as orientation documents guiding their respective policies and activities in bilateral relations. These dialogues, joint statements in annual summits and unilateral policy documents constitute another important part of legal foundation of China–EU relations: the soft law component.

The legal basis of the China–EU relationship offers only a very partial view that hides the wider interest that the EU has for China as well as the interest that China holds for the European integration project. A stable multipolar world order is a shared interest that creates a permanent bond of shared interest and generates goodwill to develop the relationship despite the differences in outlook on often sensitive issues.

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2. The Trade Agreement between the European Economic Community and the People’s Republic of China was concluded in Brussels on April 3, 1978.

3. See contra Ronan Blaise, "China-Union européenne": des relations terriblement déséquilibrées ... Mais
That shared interest and view have driven forward the ongoing negotiations to replace the outdated 1985 Trade Agreement. Despite the occasional hiccups, China and the EU are moving ahead with the new framework agreement—the Partnership and Cooperation Agreement (PCA)—that will comprise all essential issues of their bilateral relationship.

Building treaty foundations for China–EU relations

Starting the relationship as it would continue, initial contacts between China and Europe after 1945 were steeped in pragmatism. Where the United States considered China an enemy, European countries continued trading with China. China conversely supported the move to integration in Europe, observing an opportunity for a coalition that could strengthen its position in a world with two superpowers. China and the EU thus established their diplomatic relations in the Cold War era mainly because the two parties desired to develop economic co-operation and anticipated mutual economic and political benefits.

The China–EU relationship since 1945 has been centred on trade, and only trade has been organised in legal terms. The initial bilateral trade treaty of 1978 was followed by a more developed 1985 treaty. The 1985 Trade Agreement between the European Economic Community and the People’s Republic of China accords MFN treatment to this bilateral trade relationship. Article 10 provides for the seven fields in which the two parties shall endeavour to develop co-operation: industry and mining; agriculture, including agro-industry; science and technology; energy; transport and communication; environmental protection; and co-operation in third countries. It puts foreign investment in the scope of economic co-operation to ensure an improved investment climate and increased investment.

An important element of the 1985 Trade Agreement is the establishment of the Joint Committee, the tasks of which include reviewing co-operation schemes, examining questions and new opportunities in trade and economic co-operation, and monitoring and making recommendations for the implementation of the Trade Agreement.

However, the contents of the Trade Agreement are basic and limited to trade. It reflects neither the evolved economic relationship nor the ever more important political aspects of the relationship. In trade terms, China–EU bilateral trade grew from ECU 7.3 billion in 1985 to €303.3 billion in 2007, with the EU becoming the largest trade partner and the largest source of high-tech for China, and China becoming the second largest trade partner and the largest supplier for the EU. This development is recognised by both countries who seek to update their relations beyond the narrow confines of trade in goods the primary concern of the early trade treaties by concluding sectoral agreements.

China and the EU concluded several sectoral agreements, covering a wide range of bilateral relations. These include agreements in a particularly sensitive sector—trade in textiles. The agreement on trade in textile products (the MFA Agreement) was initiated in 1988. The agreement on trade in textile products not covered by the MFA bilateral agreement (the non-MFA Agreement or the Silk Agreement) was signed in 1995. Both agreements made a major contribution to the orderly and equitable development of trade in textiles between China and the EU for more than a decade. The order in textile trade was changed after the elimination of MFA quota restrictions on January 1, 2005. The surge of China-made textile and clothing to the European market in the first three months of 2005 caused panic to the textile manufacturers in some EU Member States. They put pressure into the European Commission to take urgent protective measures against the huge amount of Chinese textile and clothing entering the EU borders. After marathon closed-door discussions, the EU Trade Commissioner, Peter Mandelson, and the Chinese Commerce Minister, Bo Xilai, made the deal—reaching the agreement on textile in the form of Memorandum of Understanding. The 2005 textile agreement

limited the growth of Chinese textile and clothing exports in 10 categories to the EU for 2005, 2006 and 2007, securing a smooth transition before the complete opening of the European market to Chinese textile products in 2008.

To encourage and develop co-operative activities between China and the EU in the field of research and development activities in science and technology, the two parties concluded another sectoral agreement concerning scientific and technological co-operation in 1998.11 The S & T Agreement fosters all research and development activities and establishes a Steering Committee to promote the different co-operative activities. The Agreement also regulates the intellectual property rights created or furnished under the S & T Agreement. In the area of technical co-operation, China and the EU went even further in 2003 by signing a co-operation agreement on the Galileo programme.12 China thereby became the first country outside the EU that participates in the Galileo Joint Undertaking. The significance of China’s participation in Galileo goes far beyond the scientific or technical co-operation as Galileo was started to rival the US GPS system. Inviting China to join Galileo—described by some as a Euro-nationalist project—is thus a political signal more than a scientific or commercial operation. The European spokesperson described the Galileo project as a symbol of China–EU co-operation.13 It is doubted whether China’s involvement will make a significant difference and the commercial importance of China’s involvement has already been questioned as China has not ceased developing its own system for the Asian region, its own maritime trade routes and its own military purposes.14

Another sectoral agreement relates to bilateral maritime transport.15 This Agreement was signed by the EU and its Member States on the one hand and China on the other because the Union and its Member States share the competence in the area of transport. Although the Maritime Transport Agreement was signed in 2002, it entered into force only on March 1, 2008. Before the conclusion of this Agreement, the majority of the Member States had already concluded their own bilateral agreements with China. The Maritime Transport Agreement replaces those bilateral agreements to reflect the considerable improvement of China–EU maritime transport relations.16 As the EU is China’s largest trading partner and China is the EU’s second largest one, they each other become important providers of international maritime transport services. Considering further development in future, the two parties conclude the agreement to consolidate bilateral maritime relations.

China and the EU concluded several sectoral agreements in 2004. One of them concerns approved destination status (ADS).17 Europe is one of Chinese tourists’ favourite destinations. To benefit from considerable inflow of Chinese tourists and to facilitate personal contact and business exchange, the European Union opened its tourism market. Important as revenue from tourism may be, more important is that this agreement was reached at all. Achieving a single agreement with the EU, rather than separate agreements via the Member States, is both an achievement for the EU and a recognition by China of its respect for the incomplete construction. Herein lies an oft repeated lesson for the EU. When China addressed its request to conclude such an agreement to the European Commission and was dissatisfied with the result, it addressed the same request to Member States, several of which were eager to engage with China on this issue to reap economic advantages to the detriment of other Member States.18 A strong and strategic partner should not allow itself to be played like this. If the EU and its Member States cannot take themselves seriously, why would anybody else?

Another agreement concerns trade facilitation.19 The agreement organises administrative co-operation between the authorities responsible

11. Agreement for scientific and technological cooperation between the European Community and the Government of the People’s Republic of China [2000] OJ L64/60. The duration of this Agreement was five years. It was renewed in 2004.
16. According to art.15 of this Agreement, if this Agreement is less favourable on certain issues than existing bilateral agreements, the more favourable provisions shall prevail. Provisions of existing bilateral agreements not covered by this Agreement shall continue to apply.
17. Memorandum of Understanding between the European Community and the National Tourism Administration of the People’s Republic of China, on visa and related issues concerning tourist groups from the People’s Republic of China (ADS) [2004] OJ L83/14.
for the application of customs legislation. China and the EU take joint action against operations in breach of customs legislation, including infringements of intellectual property rights. The two parties, under the Administrative Assistance Agreement, establish channels of communication, assist each other by providing information and expertise to ensure the proper application of customs legislation and facilitate effective co-ordination between administrative authorities.

In the area of energy, China and the EU signed the agreement for R & D co-operation in the peaceful uses of nuclear energy. 20 In the following year, the two parties concluded the Memorandum of Understanding on China–EU Dialogue on Energy and Transport Strategies. 21 Pushed by the MOU, the first plenary meeting of China–EU Strategic Dialogue on Energy and Transport Strategies was held in March 2006.

In sum, the treaties concluded between China and the EU have been largely trade, trade-related or trade-support treaties. The few exceptions include the Galileo project and possibly the energy dialogue. Prime Minister Wen Jiabao has described these agreements as milestones in a more mature, stable and strategic relationship. 22 This diplomatic flourish is an overstatement of the relationship. The relationship that can be gleaned through the bilateral treaties that bind the two partners certainly does not reveal such a mature, stable and strategic relationship. On the contrary, the relationship is better qualified as uncertain and searching. China as well as the European Union are trying to find their position on the world stage and their voice in the world community. 23 The scope, depth and intensity of the relationship are yet to be determined.

This tentative process of testing the boundaries is best served by an ongoing dialogue, ideally behind closed doors, or even better, largely in secret. A transparent process involving the media and played out as part of the public discourse has and will continue to prove counterproductive and even destructive. The EU cannot speak openly and frankly with one voice as the internal pressures of keeping the Member States on message as well as maintaining the confidence of the European Parliament requires a fine balancing act. China is not best served by the glare of publicity during sensitive negotiations. On the contrary, finding a sound footing and a shared outlook requires an openness of discussion that takes time and discretion. Hard legal instruments such as treaty rules are ill adapted to the facilitation of such processes. It is therefore unsurprising that most progress in the China–EU relationship has been achieved through soft law instruments. Such instruments allow for the flexibility needed to explore sensitive issues on the basis of mutual respect.

Soft law instruments: discretion and flexibility

Evaluating the China–EU relationship from a strict hard law perspective shows an intensive trade relationship and hints at other ties that the treaty rules do not capture. This qualification is typical for the EU and suits the current China–EU relationship to a T. The development of the EU external relations competency has similarly been built on trade rules that were broadened over time to gradually include a wide variety of foreign policy issues. It is an EU competence built slowly over decades through judgments of the European Court of Justice, activism by an ambitious Commission and occasional moments of courage by Member States.

It is therefore a familiar path for the EU to slowly and surreptitiously build a comprehensive relationship on a hard law treaty relationship. For China, this methodology offers a combination of intermediate trade results without the burden of conditionalities that a comprehensive treaty partnership brings. It is clear that PCA negotiations are difficult because the pressure from the European Parliament to anchor the treaty rules to Europe's mission civilatrice, an objective experienced by China as objectionable and frankly insulting. To be clear, the authors do not argue that the EU should disconnect its human rights commitment from its trade policy but rather that the objective of a comprehensive partnership agreement should be to engage its partners in an open and constructive dialogue based on respect and committed to real results. Self-congratulatory complacency on the basis of vacuous human rights clauses inserted in trade treaties is cynical and destructive.

In practice, China and the EU have developed a different instrument that allows for the flexibility needed to reach common ground. The instruments are called dialogues. These political dialogues offer a platform to the parties to discuss sensitive topics without committing themselves to legal clauses in international agreements. These political dialogues are an instrument of trust.
that allows for non-binding, largely confidential exchanges.  

The framework of the China-EU political dialogue includes annual summits at the level of the heads of states or government, meetings when needed between the EU Troika foreign ministers and their Chinese counterpart, annual meetings of the EU Troika political directors with their Chinese counterpart, annual meetings between EU Troika Asia Pacific directors and their Chinese counterpart, meetings at least once a year between EU Troika and Chinese experts on international security, arms control, non-proliferation and export controls issues, meetings every six months between the Minister of Foreign Affairs of China and the ambassadors from the EU posted in Beijing, meetings every six months between the minister of foreign affairs of the country holding the EU presidency and the ambassador of China posted in the presidency's capital.  

China and the EU first established the framework of the political dialogue in 1994 and upgraded it in 1998 with the agreement to hold regular China-EU annual summits. In 2002, China and the EU decided to formally update the framework of the political dialogue through an exchange of letters, which constitutes the legal basis for the dialogue. The scope of the China-EU political dialogue has gradually broadened to cover issues from arms embargo to non-proliferation, from human rights to international peace and security, from climate change to the fight against illegal migration. After progressing for more than a decade, the two parties share great appreciation for this process of development of China-EU political relations:

"... [T]he full and effective political dialogue mechanism established between the two sides had played a positive role in enhancing mutual understanding and trust, and expanding common ground and cooperation, and serves as an important foundation for stronger China-EU political mutual trust."  

There is considerable potential to further expand this political dialogue since, on the one hand, China shows more and more interest in the reinforcement of the EU common foreign and security policy as well as the consequences of EU enlargement, and, on the other hand, the EU regards China as a growing economic and political power in the international community that can have a significant influence on global concerns.  

China and the EU also structure trade and economic dialogue in the form of annual China-EU joint trade ministerial meetings, senior officials meetings, and director-general level economic and trade working group meetings. At the 10th China-EU Summit in 2007, a high level economic and trade dialogue (HED) was established, as well as high level dialogues on exchange rate issues and on macro-economic issues. The HED focuses on the "strategic, forward-looking and plan-setting" issues. It will not "duplicate, replace or weaken" the existing China-EU trade and economic dialogues. In the first HED held in April 2008, it was the first time that some of the issues, such as energy, were a part of the discussions on bilateral trade and economic relations. The second HED was held on May 7-8, 2009. The meeting provided a platform for top-level leaders to discuss bilateral trade and economic co-operation in the context of global financial and economic crisis and continuous China-EU trade disputes but it failed to make substantive progress on market access and especially on the PCA.

Apart from the political dialogue and trade and economic dialogue, China and the EU cooperate in 24 different sectoral dialogues, from social affairs to environment, from regional policy to education and culture, to meet the shared interests, solve problems and promote exchanges. These dialogues are held at various levels such as ministerial level and working level, and in the forms of conferences, formal annual meetings, working groups, informal exchanges, etc. The participants include officials, politicians, organisations, enterprises and so on. Through the sectoral dialogues, the two parties exchange information and experiences in a variety of areas. For example, China is trying to establish the legal regime of competition in the Chinese

29. The EU-China Joint Economic and Trade Committee was established in 1985 through the Trade and Economic Cooperation Agreement between the EU and China.  
market. The EU has had a developed competition policy for a long time. Through dialogue and exchanges of information in the last few years, China has learned from the EU’s experiences on this subject. It is currently updating its comprehensive competition law system bearing many similarities to the EU model. Owing to the width and activity of sectoral dialogues, they have helped to develop a solid foundation for the China-EU relations in many areas. Sectoral dialogues and agreements are expected to play an increasingly important role in building China-EU relations with mutual benefits.

Nonetheless, it can be questioned whether these sectoral dialogues go beyond piecemeal, insular and non-strategic advances. There is a distinct lack in coherence and interaction between these various dialogues.

Dealing with China-EU relations, the two parties respectively issue policy documents in which they set down their own guidelines and express their own concerns and expectations. The EU’s most significant unilateral policy documents are the communications and policy papers from the Commission. The first communication towards China was published in 1995: “A Long Term Policy for China-Europe Relations”, charting a long-run course for bilateral relations into the 21st century. The EU recognised the rise of China in both the military-political and the economic spheres and expressed its aim to develop a long-term relationship with China. The communication set down the Commission’s policies in political relations, and economic and trade relations, and co-operation strategy. In 1998, the Commission issued a second communication to build a comprehensive partnership with China. The EU indicated its prime objectives were “to see China integrated rapidly and fully into the international community, both politically and economically, and to support its transition towards an open society based upon the rule of law”, to improve the efficiency of EU-funded programmes and to raise the profile of the EU in China. In order to fully and efficiently implement the 1998 Communication, the Commission issued a report in 2000 and a communication in 2001. The report reviewed the implementation of the recommendations of the 1998 Communication and demonstrated that although China-EU relations had developed very significantly over the past two years, there was much scope to expand the relationship further. The latter document reviewed the developments in each EU objective defined in 1998 and made concrete and practical short- and medium-term action points for EU policy to progress towards the long-term aims in the 1998 Communication. In 2002, the Commission issued the China Country Strategy Paper covering the period of 2002-2006, analysing the political, economic and social situations in China, making overview of past and ongoing China-EC co-operation, defining the EC response strategy and listing work programmes that were underway to implement its strategy.

In 2003, the Commission published a policy paper updating the 1998 and 2001 Communications on China-EU relations. It set out a framework guiding EU’s policy and action towards China in the subsequent three years. The policy paper identified six priorities for bilateral relations, including sharing responsibilities in promoting global governance, supporting China’s transition to an open society, and the respect for human rights and promoting China’s economic opening domestically and externally. The paper also contained a number of concrete proposals to enhance China-EU relations in key areas, such as economic and trade relations and China’s internal reform process. With the Commission President Romano Prodi’s visit to China for the annual summit in the same year, a comprehensive strategic partnership was established between China and the EU. In 2003, China also made a historical move: it released its first EU policy paper. The paper aimed to:

- highlight the objectives of China’s EU policy and outline the areas and plans of cooperation and related measures in the next five years so as to enhance China-EU all-round cooperation and promote a long-term and stable development of China-EU relations.

The intensive issue of policy documents reflected that the development of China-EU political and economic relations reached a peak in history.
The comprehensive strategic partnership brought China and the EU to the honeymoon period in 2003–2004.

The situation changed in 2005, triggered by the textile dispute. After the honeymoon period, bilateral relations cooled down and the two parties started to rethink, from a realistic point of view, the common interests and different aspects between the EU and China. In this context, the EU issued another communication and a working document in 2006. The 2006 Communication aimed to leverage the potential of a dynamic relationship with China based on the EU’s values. Although the EU recognised differences from China, it considered that they could be managed effectively. China–EU relations should be increasingly mature and realistic. The rising problems in trade relations spurred the Commission to publish a separate policy paper on China–EU trade and investment, which analysed bilateral economic and trade relations, including the benefits of openness, the impact of competition and obstacles of market access, and defined the EU’s response and priorities for action. In 2007, the Commission published a China Strategy Paper for the period 2007–2013, defining its response strategies and budgets in trade, transport, financial services, social protection, sectoral dialogues, environment, energy and climate change, human resources development and high education.

Since 2007, the Commission has not issued a new communication specialising in China–EU relations. However, it does not mean that the bilateral relationship is going smoothly. As a matter of fact, the China–EU relationship has been going up and down in the past three years because of certain matters happening at intervals, for instance, the cancellation of the China-EU summit in 2008 caused by the meeting of French President Sarkozy and Dalai Lama, the EU’s antidumping measures against China-made fasteners in early 2009, the Copenhagen summit negotiation in 2009, global economic and financial crisis, etc. In this context, we could anticipate that a new Commission communication towards China might come out in the near future.

Although the sectoral dialogues and unilateral policy documents do not have legal binding force for China and the EU, they express the two parties’ aims, strategies and the ways to implement the objectives. These policies guide the two parties to further develop bilateral relations, solve disputes and problems and draw a blueprint for the future.

**Conclusion**

Hard law and soft law constitute a parallel basis of the current legal framework of China–EU relations. Hard law sets down the solid legal foundation governing the two parties’ activities in bilateral relations while soft law reflects policies and dynamic issues in the development of bilateral relations and supplement hard law in the legal framework. It is noticeable that the contents provided for in hard law and soft law have different emphases. Hard law mainly regulates bilateral relations and co-operation in the areas of trade and economic co-operation, science and technology, energy, administrative assistance, etc. Conversely, soft law relates to a wider range of fields, such as political dialogue, social reform, intellectual property rights, regional security, etc.

One of the reasons behind the parallel and the differences is that some areas and subjects covered by soft law are too sensitive to be regulated by treaties, like human rights. Although human rights feature highly in the EU’s external relations discourse, the enforcement practice is typified by pragmatism. This attitude accommodates China’s position that insists on a dialogue on the basis of equality. The consequence is a dialogue that allows for mutual flexibility. As such, China’s EU Policy Paper stressed that China would maintain close contacts and timely communication with the EU at high levels through various means to strengthen the exchange of high-level visits and political dialogue, and provided that the Chinese side:

“... stands ready to continue dialogue, exchange and cooperation on human rights with the EU on the basis of equality and mutual respect so as to share information, enhance mutual understanding and deepen cooperation in protecting, inter alia, citizens’ social and cultural rights and the rights of the disadvantaged”.

Despite intense criticism in the EU of this flexibility, it has contributed to piecemeal improvements in China’s human rights record, thus adding to the EU commitment to the process.

Another reason for the parallel relates to the Community’s competence. The Community has exclusive competence in common commercial policy, including external trade, so that it can conclude itself bilateral agreements with China.

concerning trade and economic co-operation, customs assistance, etc. However, in respect to political and social aspects and human rights, Member States share competence with the Community on these areas. It is not easy for the Community and different Member States to speak one voice on these sensitive issues considering their different interests and relations with China.

The parallel system of legal framework plays an effective and efficient role in regulating China–EU bilateral relations. Economic and trade co-operation between the two parties grow at a significant pace despite the problems that occur constantly between the two parties. In light of the ups and downs in the past 35 years and inevitable overlaps and conflicts in future, China and the EU need to build up stable bilateral relations based on a comprehensive legal foundation and reinforce the legal basis of bilateral relations. The two parties need a comprehensive agreement to set down the principles and common objectives according to mutual benefits, make long-term strategies to further development and co-operation in different areas, and define various ways to implement a wide range of programmes and projects.