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▶ **To cite this version:**

Florian Couveinhes. Western State's policies towards international treaties, organizations, and tribunals: how should China react to the weakening of the "liberal global order"?. Western States policies towards international treaties,organizations, and tribunals: how should China react to the weakening of the liberal global order?, Nov 2019, Faculté de Droit de l'Institut de technologies de Pékin (Beijing), China. hal-03099781

HAL Id: hal-03099781
https://hal.science/hal-03099781

Submitted on 28 Jun 2021

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Western State's policies towards international treaties, organizations, and tribunals: how should China react to the weakening of the "liberal global order"?

Florian Couveinhes Matsumoto

18 June 2019, Beijing Institute of Technologies, Faculty of Law

On January 23, 2017, on the third day of his presidency, Donald Trump declared:

"Everyone knows what that means, right? We've been talking about this for a long time".

What was the newly elected President talking about?
The previous US administration, under President Obama expended significant resources and energy on achieving a deal, a major trade agreement between eleven countries in the Asia-Pacific region, representing 40% of global GDP: the Trans-Pacific Partnership.
It was evidently a means of maintaining US presence in Asia and Oceania and implementing US standards in regional economic relations, in order to *prevent* China from doing so. It was *one of the main* US projects aimed at opposing or limiting Chinese rise in the Asia-Pacific region.
However, as early as April 2015, **Donald Trump** asserted that the agreement was (I quote) *"an attack on America's business"*, that *"China has a backdoor into the Trans-Pacific Partnership" and that "China [was] laughing at [the United States]".* And, at the beginning of 2017, he **decided not to launch the ratification process of this very ambitious agreement on which the US had been working hard for years.**

How should China react to this rapid and drastic change in US foreign trade policy towards the Pacific region and China?
What was the previous US strategy and what is the current one?
Is this new strategy merely part of a global policy of withdrawal from multilateral institutions and multilateral rules of the "liberal global order"?
And finally, **how should China understand this situation and respond to the consequential weakening of the international legal order?**

Introduction

Distinguished Professors, Ladies and Gentlemen,

My name is Florian Couveinhes Matsumoto. I am an assistant professor at the Ecole normale supérieure in Paris, France, and I would like to offer some possible answers to these questions, and in particular shed light on the **very specific situation in which the international legal and institutional order has been plunged** for the past ten years, and to an even greater extent for the last two and a half years.
There has been a **sharp shift in the policy of many Western States – primarily the US and the UK – for the past ten to twelve years, and to an even greater extent for the last two or three years.** And **China's current policy** in relation to international Law, international treaties and tribunals **must be understood and assessed from this perspective**. It could be

understood as a reaction – a relatively rational reaction – to this massive change in relations between the West and international legal rules and institutions.
Of course, it is not only a reaction; it is also in a way a unilateral *project* conducted by China in a certain *context*; and of course, the breach of trust between international law and institutions and the West could be seen as a kind of *consequence of the rise in power of China*, India or Brazil. Both questions are interrelated, connected and I only *choose* to assess the recent Chinese policy on international rules and institutions in the light of the relation between these rules and institutions, on the one hand, and the West on the other, because I believe it is the most interesting analysis I can offer you.

My presentation will have **two main parts:**

- **first**, I will present the **recent evolution in the policies of Western States** towards international treaties, organizations and tribunals – and this will be my *main* point. The current situation is characterized by a *breach of trust* between the West on the one hand, and the multilateral system and (what is often called) the liberal global order on the other.
  This breach of trust directly weakened the liberal global order.

- **Second**, I will very briefly present **China's attitude towards international treaties and tribunals,** and international law and institutions in general, in order to determine whether it appears to be an adequate position.
  I will consider the position China should adopt if it wants to protect and promote its interests *in the long term*: how China could use and is already using the possibilities provided by the institutional system and by – what I call – "political" international law?

Clarification: the Structure of International Law and "political" International Law

Before I begin to develop my first point, you may wonder what I call "political" international law. I will therefore briefly clarify what I mean by this and my **general understanding of the structure of international law.**

Lawyers often distinguish between different kinds of international rules, or sources of these rules: we commonly talk about treaty-rules, customary rules, rules set out in a Security Council resolution, etc.
In my view, there is a **very big difference between two sets of rules: rules of *general* international law, and rules of *political or ideological* international law.**
At the basis of international (and all bodies of law) are general principles of law: principles such as, "Valid contracts must be respected", or "Anyone causing damage to a person must repair it", or "Every court must guarantee the rights of the defense", etc.
These principles are not always respected or applied. But it is impossible – for instance – to take contracts seriously if the rule, "Valid contracts (or treaties) must be respected" doesn't apply in principle. It is impossible to take liability seriously, if there is no principle of compulsory compensation or punishment. And it is impossible to describe an institution as a tribunal, if it doesn't allow one of the parties to a dispute to defend itself. These very *general* principles are mostly *logical or tautological*, they are *definitions or common sense*. This is the first level of general international Law or Law in general.
Then – on a second level – there is Customary international law and these strange General principles of Law recognized by "civilized" nations. These rules and principles are already a little more ideological and subjective.

They are sometimes the product of political projects and ideological choices of a few States, but generally, at least *today, their validity and content derive* from political projects and ideological choices of *almost all States over decades*. If you look for instance at the States' responses to the UN organ which has competence over customary international Law, the International Law Commission, you can see that States agree on all fundamental customary international rules. They are the legal basis – and also in part the practical basis – of inter-State relationships.
And the fact that most States decided to accept them, to recognize them, means that they *are ultimately the product of the necessities of decent inter-State life*, rather than the product of the *will* of *powerful* States.
On the third level, there are **treaties and unilateral undertakings and legislation**. This third **layer** is **very different because *the will of one or a few States can totally determine and change the content of the rules*. *Power* and *ideology* greatly determine what will be in a treaty or the undertakings of a State.**
Moreover, power determines in practice the kind of obligation that a powerful State will try to impose directly on its neighbors, for instance because it considers that fishermen of neighboring States need specific authorization to fish in its own territorial waters, or because it asserts that it is wrong to import oil from this or that State, which is considered a rogue State.
And at the top, there are the **texts produced by organizations and tribunals**, organizations and courts that are usually **established by treaty**. And as treaties largely mirror power relations, and mirror the ideology of dominant States, **resolutions of international organizations and rulings of international courts** are also political or ideological**.** And they ***are often* (not always but often) *even more ideologically biased* because these institutions are often established by powerful States *in order to maintain and develop their current domination, and the domination of their ideology.*** And the texts almost directly mirror the ideology of dominant States, because each State tries to implement its concepts, its language into jurisprudence and resolutions.

For instance, we find references to the Responsibility to Protect in UN General Assembly documents and UN Security Council resolutions, because certain Western States (or agents of the Organization influenced by them) pushed for their inclusion in the text;
And we find references to the Belt and Road Initiative in UN Security Council resolutions (S/RES/2344 (2017)) because China pushed for it.

Since the basis of ***General* international Law** is the consensus of States / the recognition of certain rules over long periods by a plurality of States and a plurality of States' governments, it **globally protects equality, plurality, self-determination, territorial integrity, reciprocity, free will,** etc. Globally speaking, principles of *General* international Law are **strongly defended by small and middle-size States**, as these principles are **their best insurance policy**. Several decolonized States chose to challenge these rules in the 70s but very quickly, they understood this criticism was not in their interest, and started to invoke these principles again.
But **frequently, Great powers consider that these principles prevent them from carrying out their projects and promoting their short-term interests. Great powers need these principles in everyday life and the best way for them to maintain their powers, and to maintain the context in which they are strong and at peace is to respect these principles.**
I will return to this point later. But remember that **in practice, great powers (and almost only great powers) are often tempted to persistently contest or break these rules.**

They **sometimes simply *break* these rules, especially in their alleged *backyard*** – the US is tempted to do so in Central and South America, and China is tempted to do so in the South China Sea.
But they also frequently do so through *political* international law.

- For instance, they put pressure on smaller States to conclude bilateral unequal treaties. They call them *equal*, or *win-win*, but they are not, and they know it. Or they put pressure on smaller States (in which they invest) in order to gain support or silence in the United Nations.
- Or, they manage to conclude multilateral treaties, for instance trade or investment treaties, that set out principles that are opposed to principles of customary international law.
- They establish international organs or tribunals in which big States are preponderant, officially (for instance the UN Security Council or the International Monetary Fund), or simply in practice (for instance through the nationality of key policy makers and decision makers in international organization).

I do not have time to develop this point here, but please remember that **there is a fundamental tension between *General* international Law and *Political* international Law**, and that this tension **mirrors the tension between of *Great* powers' short-term interests and *other States*' short-term interests.**

The **point of departure** of my presentation today is not a crisis of *General* international Law – although General international Law has been attacked many times *by* and *in* the US over the last few decades –, but rather a **crisis of *political or ideological* international Law.**
That which has been affected by a severe crisis for a decade is *political* or *ideological* international Law. The breach of trust between the West and international Law **mainly concerns** (what is sometimes called) ***the liberal global order* or, simply, *multilateralism*,** namely the **normative and institutional system established after World War II and modified and reinforced during the 1990s.**

This is what I want to focus on **in my first point**.

I. Western States' policies: the weakening of the liberal global order…by the West itself

A. Is the loss of confidence by Western States in the system a result of its weakening? The WWII system and the evolution of power relations

On the crisis of multilateralism, the dominant narrative is that multilateral institutions and rules established after World War II have become inefficient or are no longer suited to the present time. "There is a rising consensus that the international liberal order is at least in transition, not to say in deep state of crisis."
And **the reasons** given usually **are**

- **a change in the balance of power,**
- **or the end of Western dominance**
- or the fact that such domination is increasingly challenged, or
- the novelty of the problems that derive from globalization or from the Internet.

This explanation seems to be inevitable, or obvious, but I think it is only half of the truth, or maybe no explanation at all.

At a fundamental level, **current political international Law has its roots in European culture and practice.**
After WWII, political IL mainly derived from compromises between the US and USSR, and was backed by their condominium, and by Western dominance in particular.

Until the mid-1980s, this Western domination was tempered by the power of the USSR; and the domination of Western ideology – liberalism and capitalism – was tempered by Marxism and Maoism. Western governments were self-confident and had faith in their ideology and in the superiority of their ideology over Marxism and over the Third Path of the Non-Aligned Movement. And they had faith in themselves and their ideology mostly because they were incomparably richer than communist and other countries.

Two major shifts *modified* this situation:

- **First, the collapse of the USSR and the end of the influence of communist ideology.**
  Between 1945 and the 1990s, political international law, legal rules and international institutions reflected the dominant ideology. But the efficiency of these principles and institutions was limited by the confrontation between the USSR and the West.
  Since the mid-80s, and even more since 1990 the US superpower became hegemonic and any counterweight to the West disappeared at the international level. Consequently, many ne**w treaties that enshrined Western ideology were signed in the 1990s** – in particular thousands of bilateral investment treaties –, **new and efficient organizations appeared** – the World Trade Organization in particular, in 1995 – and **established international organs that were "blocked" during the cold war extended their jurisdiction and efficiency**. For instance, the UN Security Council authorized the use of force against Iraq and in other States in the 90s, and it asserted jurisdiction over human rights, although the Council was originally established to preserve *international* peace.

- **The second radical change took place** – in my view – **between 2005 and 2010**. At that time, **both the efficiency and the legitimacy of international and European organs and experts – and consequently international and European rules – were challenged, both from inside and outside the West.**
  In 2005, several Member States of the European Union organized referendums on the project of a European Union constitution and States were surprised to discover that European people were very unhappy and dissatisfied with European policies and with the way the European Union functions. European States stopped referendums when they appeared to be negative, but the legitimacy crises of European and then international Laws really began at that time *in the West.*
  In 2008, the financial and then economic crisis proved that domestic but also European and international rules were not suited to the reality of the economy. The competence of economic experts, as well as the rules they favored, started to become controversial, both in the West and in the rest of the world.
  At the international level, **the armed attack of Iraq in 2003, which was based on lies, and the Guantanamo and Abou Graib scandals** have stripped the US of any legitimacy to try to lecture other States on ethics.

At the same time, **the power of Brazil, India as well as China** continuously and rapidly increased.
Chinese economic growth impressed everyone, while the **increase in its military budget and the hardening of its foreign policy**, especially in the South China Sea, started to worry everyone.

It could be feared, at that time, at least from a Western point of view, that Brazil, India and China might try to overthrow the multilateral system or to change it completely.
Nevertheless, maybe because they thought they wouldn't be able to do so, and *certainly* **because they were rightly convinced that the current rules and institutions – the WTO in particular – were a *decisive help to their growth and increase in power***, **they didn't challenge it**. On the contrary, they used it to develop their economies and to solve domestic problems – or they tried to solve these problems without directly damaging the whole system.

In other words, the last two big shifts in power are not the reasons – at least not the immediate reasons – for the global weakening of the normative and institutional system established after World War II.

On the contrary, it is evident that **the loss of the system's dynamism, legitimacy and efficiency derives from**

- **a loss of confidence in the system by Western States, and**
- **from the contempt of the United States for multilateralism**.

This loss of confidence in the system derives from a *popular reaction* to the capture of the system, not by the West, but by a (mostly Western) *small political and economic elite.*

Finally, as regards **recent US contempt for international treaties,** organizations and tribunals, it **seems to be, simply, a demagogic exploitation of the popular reaction to the capture of the system by transnational business and the political elite** (the paradox being that Donald Trump is evidently part of this elite).

In short, the system may partly have lost part of its objective efficiency and legitimacy because of shifts in power relationships. But the *main* source of its global weakening is Western States themselves, and the US in particular.

To be **more specific**, the **main sources** of this deep state of crisis are:

1. the **US's repeated expression of contempt** for customary Law, international treaties and international organizations and tribunals,
2. the **US and UK's explicit withdrawal from the multilateral game**, and
3. the **many disagreements of Western States in respect of all fundamental international fields.**

Let me **explain this latter point.**

B. Disagreements about international law and institutions and the Anglo-American withdrawal

There are in reality **three different disagreements:**

The first one is

1. **Western States' disagreement** on the role of **multilateral rules and institutions** in international relations, and on the role of **International Law** in domestic affairs;

The second is a set of:

2. **Western States' disagreements** on the rules and policies regarding **major themes of substantive international law**: HR, criminal law, environmental law, trade and investments, trade organizations and investment arbitration, etc.

And the **third disagreement** is:

3. A disagreement between the **Western elite and governments** and the **majority of western people** on **many** of these topics.

While I am interested in the last disagreement, I will **only address the two first disagreements** here.

1. First: Western States' disagreement on the **role of multilateral rules and institutions** in international relations

The disagreement on the role of multilateral institutions is massive and explicit: **since 2017 in particular** (but even before during the mandates of **George W. Bush Junior**) the US repeatedly **expressed criticism** about the **UN, the WTO, the UNESCO**, the **International Criminal Court**, etc. And these criticisms weren't specific and constructive but global and destructive.
In contrast, Japan as well as the European Union always have considered that multilateralism, international organizations and tribunals are something good, something enabling a combination of the protection of their interests and a peaceful and harmonious situation at the global level. They therefore always support these forums, organizations and courts, and the rule of law.
This is a fundamental divergence on the perception of international relations, the role of multilateralism and bilateralism, and the role of the rule of law.

Today, international organizations and tribunals know that they have lost American political support and in many cases that they have lost or that they risk losing its financial support as well. For instance, the Appellate Body of the WTO has lost US support in general. UNESCO and the Human Rights Council also have lost US political and financial support. More generally, the United States has implemented significant cuts to the US contribution (a reduction of $285 million) in the UN. In the words of the US representative to the UN, "the inefficiency and overspending of the United Nations are well known". The consequence is that "In practice, these budgetary cuts are likely to have a significant impact on an array of UN institutions and programmes including the UN Peacekeeping Organisation (UNPKO), UN Climate Change Regime, and the United Nations Children's Fund (UNICEF)." In fact, several UN Peacekeeping operations already are waiting for US contributions.

As you probably are aware, **the denunciation of bilateral and multilateral treaties has been more frequent during the 2000s and 2010s**. **In particular, the US has declared its**

withdrawal from many treaties since Donald Trump came to power, at the beginning of 2017:

- the transpacific partnership,
- the Paris Agreement on Climate disruption (or Climate change),
- the Universal Postal Union treaty,
- the Joint Comprehensive Plan of Action (commonly known as the Iran nuclear deal),
- the Optional Protocol to the Vienna Convention on Diplomatic Relations (of April 18, 1961), etc.

The US

- left UNESCO and the Human Rights council,
- threatened ICC judges, and
- blocked the launch of the selection process for members of the WTO Appellate body.
- It also decided to recognize Jerusalem as Israel's capital and to move the US embassy in Israel accordingly, although it is clearly and explicitly forbidden by IL,
- it claims to impose trade rules in relations between Iran and the rest of the world, and
- it deliberately violates WTO rules in relations with China, Canada and the European Union.

As is usual with great powers, the US is not very attentive to international rules. It does not hesitate much before violating them, when it thinks it won't be sanctioned immediately. What is new, however, is that it does not present these positions or practices as legal or as exceptions. It rather present them as the premises of a unilateral yet global transformation of the whole system, or even as the premises of complete breakdown of the whole system: **a normative and institutional system that it significantly participated in *building*, and for which it was the *guarantor at the end of the day.***

This change is very important, and it was predictable. Even before he was President, Donald Trump repeatedly affirmed "the utter weakness and incompetence of the United Nations". And he did not express this judgment because he intended to help the UN to entirely assume its functions, but because he is convinced – I quote again – that "The United Nations is not a friend of democracy, it's not a friend to freedom, it's not a friend even to the United States of America (…)".

More generally, **Donald Trump manifests explicit distrust in the "liberal international order" which the US itself promoted during decades**. He may be the first American President to be convinced that the "liberal global order" is *not* in favor of the US at all.

I think that he is wrong and that American decision-makers and people will rapidly understand that – in fact, they already have noticed it –, but it remains the President's current belief.

Not only have the European Union and Japan resisted the temptation to follow the US on this dangerous path, but they have been and remain worried about the weakening of the whole system.

They have warned the US that:

1. It is in its interest to support current international norms and institutions – because they favor its interests and spread its ideology, and
2. That if it does not support these rules and institutions, they will be shaped by other States – primarily Russia and China – which have other interests and other visions of the world.

As we will see later, China is perfectly aware that this removal of the US from the multilateral game, at least from the liberal one, creates an international momentum that allows China to significantly shape international rules and institutions, or to influence the global agenda.

But from a Chinese perspective, there is another important aspect of the US change in foreign policy. **In conjunction with its withdrawal from multilateral *institutions*, the US is currently trying to turn its longstanding *multilateral relations and agreements* into *bilateral* relations and agreements.**

The best illustration of this change of direction is the two – almost simultaneous – decisions taken by President Donald Trump in January and February 2017:

- the decision to withdraw from the transpacific partnership – a multilateral treaty on which the previous US administration had been working hard – and
- the decision to revise the North American Free Trade Agreement – NAFTA –, and in fact to extend its scope.

In addition, the negotiation of the new NAFTA – called the USMC agreement – was not a true trilateral negotiation between the US, Canada and Mexico. The US decided to conclude a kind of pre-agreement with Mexico, and then to force Canada to accede to it and to negotiate the modifications they wanted. In other words, the negotiation was split into two bilateral negotiations, in which the US tried to impose their point of view on each of their neighbors, instead of discussing with both of them at the same time.

The withdrawal from the transpacific partnership and its "replacement" by a new version of NAFTA are not only **symptomatic of the shift from multilateralism to regionalism and bilateralism**, but also of the **use of international agreements by the US** to limit the rise or the influence of **China**.

The transpacific partnership was an ambitious project: it aimed to build a big transpacific network dominated by the US and excluding China. The new NAFTA, namely the USMC agreement, includes a provision – article 32.10 – that allows a Party to the USMC agreement – in practice that allows the United States – to terminate this North American agreement and exclude Canada or Mexico from the regional free trade area, if one of this States concludes a free trade agreement with a State "*that on the date of signature of this Agreement, a Party has determined to be a non-market economy"*, in particular if Canada or Mexico decides to conclude **a free trade agreement with China.**

This reconfiguration of the US policy towards China is a **less ambitious one**; it **is the strategy of a regional power and no more of a global power.**

It proves that **the reconfiguration of the US's international strategy not only creates an international momentum that allows China to significantly shape the international political and legal order, but also directly impacts on US foreign policy towards China**.

This reconfiguration of US policy towards China is well understood, I think, in Europe and Japan. But while **Europe and Japan were at first reluctant to the recent hardening of US policy towards China**, Chinese dumping or Huawei, they now **tend to think that it may be more efficient than they previously thought**, especially in the area of trade. If you think about the main themes of the European and US trade agenda regarding China – things like State subsidies and dumping, forced technology transfers, intellectual property, the issue of 5G, etc. – you notice that they are the same. And the European Union looks with great interest at the more aggressive and confrontational tone of the Trump administration, in the Sino-US

trade negotiations, because they consider that this administration may obtain something that may benefit the US and Europe.

However, they are **worried about US withdrawal from multilateral institutions and treaties, and about the uncertainties of US support to military alliances, to the UN, to the WTO**, etc. **It may destroy the system because its efficiency and apparent legitimacy were based on the relative ideological unity of the West. The unanimity of all Western States** about the importance and the legitimacy of international rules and institutions, and more specifically of the rules and institutions established after WWI and developed during the 90s, **has given these rules remarkable efficiency over two decades, let's say between 1989 and 2009.** I do not claim this was for the best. It depends. But what is striking is that **the end of this unanimity weakened the system.**

These disagreements of the West on the role of multilateralism, of the rule of law, of international organizations and tribunals **mirror disagreements on geopolitics** (for instance concerning attitudes towards Russia, or the importance of military alliances), **but to an even greater extent it reflects disagreements on the core values and principles of this system, or on the proper way to interpret them.**

Consequently, **one of the main reasons for the progressive implosion of the system is simply that Western States no longer agree on these values, rules and institutions.**

And this **brings us to the second disagreement.**

2. Disagreements on the structural elements of the Liberal global order (or more simply) of positive International Law

The fundamental form of the current legal and institutional order mainly derives from

- **European culture and from**
- **the official ideology of the United States, namely liberalism.**

The main characteristics of liberalism – at least the main characteristics of this version of liberalism – are:

1. First, distrust of the State and especially of a State's rules – their existence is only tolerated because they appear necessary to maintain *social or public* peace and coexistence, mainly seen as the *individual* rights to life and not to be attacked or assaulted;
2. Second, the principle that all collective rules and institutions must be seen as exceptions to individual freedom, or private powers, and simply based on the consent of individuals or private companies;
3. Third, areas other than business must be seen as derived from business. Law and politics in particular must be seen through the prism of individual egoism and the maximization of private interests.

The two branches of liberalism are

- ***political* liberalism**, that is to say human rights, representative regimes and the "rule of law"
- **and *economic* liberalism**, that is to say capitalism, the market economy, free trade and foreign investment protection.

How is **this *ideology* reflected in international rules, organizations and tribunals?**

First by the under-regulation of certain sectors and by the absence of certain organizations and tribunals:

- several organizations and tribunals are curiously missing in important areas. For instance, there is no organization devoted to ecology,
- and no international tribunal aims to protect health or nature or to ensure decent working conditions.

From a liberal perspective, these issues are – so to say – "too collective" and "too ambitious" to be addressed by international Law and tribunals.
On the contrary, any *domestic* legislation concerning health, ecology or good working conditions could *easily* be challenged in an international court, for instance before the WTO dispute settlement system or before an investment arbitral tribunal.
Thousands of treaties are *specifically* concluded in order to *contest* such legislation, while only a few international texts seek to allow or develop such legislation. Overall, there are many more treaties and rules regarding the interests of transnational corporations, investors, taxpayers, etc. than texts and rules concerning domestic or world public interest or global commons.

Consequently, **the second way the current set of international rules and institutions mirrors liberal ideology is the *overriding importance* given in international texts, to values** such as:

- **peace** and security,
- **intellectual and physical property protection**, and
- to a lesser extent **individual freedom.**

It is shown in the *dominant position given to organizations and tribunals* aimed at protecting or promoting those values: alongside the UN, **the *two dominant and most dynamic sets* of international rules and tribunals are clearly those devoted to**

- **human rights protection and**
- **investor and business person protection.**

After the collapse of the Soviet Union and Marxism, at the end of the 80s, the *second* set of these rules and tribunals began to clearly *dominate*, sometimes *overriding the first.*
For the last thirty years, economic liberal institutions took precedence over political liberal institutions – even in Europe and the US.
For instance,

- there is mostly regional protection of human rights, but there is regional and universal protection of investors and business people.
- Investors and business people have direct or indirect access to justice almost anywhere in the world, while this is not the case for human rights victims.
- And above all, **the international tribunals which decide on the right balance between the rights of transnational economic actors and other interests or values – between investors' rights and ecology or health for instance – are tribunals which were originally established exclusively in order to protect foreign investors and business people.**
  And because this is the normative structure of the agreements they are asked to apply, **these tribunals consider domestic rules as obstacles or barriers to freedom, as interferences or limited exceptions to internationally guaranteed rights of foreign business companies and investors.**

This is the most important political significance of the current normative and institutional structure of the international legal order.
The origins of this ideological orientation of the current international legal order, and its radically new efficiency over the last three decades lie in the specific situation of the West in the 90s:

- the power of the United States,
- Western unanimity about this ideological orientation, and
- the absence of any real challenger to the US.

But today,

- US power has declined,
- Western unanimity has largely disappeared and
- China came and challenged this vision of the international order.

The West's disagreement concerns both political and economic liberalism, and thus both

- **the human rights part and**
- **the free trade and investment part of the international system.**

But even *before* these two disagreements, there is another disagreement on the most fundamental principle of liberalism, which is the primacy of one value, namely peace, and therefore on the Law on the use of force.

The Law on the use of force

Indeed, liberalism and even capitalism in principle exclude the use of force, especially in order to win contracts or to exploit natural resources – this would be market distortion – although in practice, economic development or the establishment of a market economy have frequently served as a justification to use force. In any case, **the great divergence between the US on the one hand, and Europe on the other hand, was presaged by their disagreement on the use of force in Iraq in 2003. More generally, their disagreement on the role of international Law and institutions was prefigured by their disagreement on the legality of the use of force in preventive self-defense** (or rather *so-called* "preventive self-defense").

Human Rights

The same could be said about the persistent defense and support of "sites of exception" such as Guantanamo by the US, or the judicial and academic statement that customary humanitarian law should not be applied by US courts. From a European point of view, such practices – in the US or anywhere in the world – are simply indefensible and contrary to the principles which lie at the heart of liberalism and moreover of Western civilization.

Maybe because its defense of human rights lost much of its legitimacy as a result of these practices, **Donald Trump's United States largely abandoned foreign policy in this field. And they repeatedly attack the UN in this respect.**
Donald Trump declared, as I said earlier, that
"The United Nations is (…) not a friend to freedom (…)". (Incidentally, I consider this way of considering political questions and State relations through the conflict of friends and enemies to be childish. There is a big difference between fellow citizens and non-nationals,

and between allies and enemies. But many States objectively are neither allies nor enemies, and the relationship between two friends has very little to do with the relationship between fellow citizens.)
The change in US policy doesn't really affect Japanese foreign policy.
In fact, Japan never had a very active human rights foreign policy, both for cultural reasons and because of its attitude during World War II.
In contrast, European States and the European Union are attached to such a policy. But because Europe is weakened, because it has lost the support of the US and because China and certain States are more reluctant than ever to listen to criticism on domestic affairs, European human rights policy has been greatly eroded.
Nevertheless, Europe is disappointed and worried about the abandonment of human rights policy by the US. But Europe is still committed to it.

International criminal Law

This evolution and disagreement with regards to human rights could be compared to the evolution and disagreement of Western States with regards to international criminal Law.
More clearly than China, and even more than Russia, **the US refuses to recognize the jurisdiction and even the relevance of an International Criminal Court.**

Especially during the George Bush Jr and Donald Trump mandates, the US has been very aggressive towards the Court. In September 2018 the US national security adviser John Bolton even threatened to ban ICC judges and prosecutor from entering the US, to impose sanctions on funds they had in the country and even to prosecute them (we don't know exactly on which legal basis…) in American courts.
The International Criminal Court, which is backed by approximately two third of UN member States, has in contrast received longstanding support from almost all European countries and Japan. Several European States have recently criticized the Court's efficiency (UK) or governance (France); and Japan, Canada and significant European States (like France, Germany, Italy and Spain) refused to increase the budget of the Court in 2018. But they still clearly support the ICC.

These disagreements between the US and other Western States are important. But because the current legal and institutional order is dominated by rules and institutions promoting free trade, foreign investment and global capitalism, the *most* important disagreements relate to international economic Law.
International economic Law has three branches: money and finance, trade, and foreign investments. **At least with regards to rules and institutions in the areas of trade and investments, Western States have significant disagreements, while they more or less agree on the right attitude to adopt on these matters regarding China.**

Trade

With regard to trade, **European Union and Japan**'s policies are very clear: they **are in favor of free trade development, multilateral governance and the observance of the rule of law in trade relations. They strongly support the WTO while, as I said, the US expresses much more criticism towards the organization.**
Of course, **the recent trade war with China proves that the current US administration considers it should have room for unilateralism and conflicting relationships**, although the WTO was established to avoid such conflicts and unilateral practices.

The attitude of the US towards free trade and open markets is now less clear-cut and predictable. The President has repeatedly criticized free trade agreements and trade organizations and prefers to affirm US commitment to *fair* trade. I think it is a much better focus, but it is a sharp departure from decades of US trade policy and it has significant impacts. For instance, the Declarations of the last three G20 Finance Ministers and Central Bank Governors Meetings did not make any reference to 'open' trade and markets, breaking a decade of a tradition.
However, it should be noted that Donald Trump transformed criticism of NAFTA into the signature of a broader agreement and he re-launched the negotiating process of a Tran-Atlantic Partnership with the European Union, insisting that it must be broader than the previous draft agreement – which is a big problem for Europe. As a result, although Donald Trump appears not to hesitate to use protectionism, his only clear-cut strategy is to prefer *bilateral* to *multilateral* agreements and to use his *capacity to put pressure* on his partners to gain maximum *short-term* benefits.

Overall, **this US trade strategy is the exact opposite of the official policies of the European Union, Canada and Japan.**

However, their trade problems with China are – as I said earlier – roughly the same. Therefore, they manage to adopt similar strategies. A good illustration of this unanimous Western foreign policy could be the Ministerial Conference of the WTO in Buenos Aires in December 2017. On the one hand, the conference ended up without a Ministerial Declaration. The EU Commissioner Malmström argued, "*[A]ll WTO Members have to face a simple fact: we failed to achieve all our objectives and did not achieve any multilateral outcome (...)*". On the other hand, however, the EU, the US and Japan showed unity by adopting a declaration in which they criticize Chinese economic practices without mentioning China explicitly. They expressed the "*view that severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises, forced technology transfer, and local content requirements and preferences are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy".*
In the same way, a recent EU commission report presents China as a "cooperation" and "negotiating partner", as an "economic competitor in the pursuit of technological leadership" but also as a "systemic rival promoting alternative models of governance"[1].
I will return to this point later, but it is worth noting that the EU report, whose language is stronger than previously, uses words like "competitor" and "rival" to label China, as did a previous US report on China in December 2017. This US report even used tougher words, describing China as a "revisionist power"[2].

[1] European Commission and HR/VP contribution to the European Council*, EU-China – A strategic outlook*, 12 March 2019, https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf, p. 1.
[2] National Security Agency of the United States of America, December 2017, https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf, p. 25.

Foreign investment

In terms of investment protection, the main disagreement concerns the much debated issue of arbitral tribunals. In 2015, the European Commission was forced by the European Parliament to drastically review the provisions concerning arbitral tribunals included in trade and investment agreements negotiated with Canada and the US. **The EU came back to negotiations promoting a very different kind of tribunal (more in favor of the States receiving the investment) and while the new Canadian administration accepted the proposed tribunal, the US completely overturned it. Later, Japan also refused this proposal of an investment tribunal of a judicial rather than arbitral nature.**
Later, in 2017, the EU decided to pursue its review and to try to convince other States to establish a Multilateral investment court – which is a *good* project from my point of view. But **although many States are interested** (for instance, Canada, Australia, South Africa, Vietnam, etc.), **the US and Japan do not appear to be** – and neither does China by the way. The US says that it is skeptical about the European proposition, but it also radically limits the possibility for investors to challenge US legislation under the USMC agreement – which is step in a similar direction. Therefore, there is probably room for compromise but currently, the US, the EU and Japan have their own model of investment treaty and investment tribunals.

Here too, however, **Western States disagree on general rules and institutions** but mostly **agree on the attitude to adopt towards China**.
The EU is concerned by the fact that 70% of Chinese direct investments in Europe come from State owned companies, and that most of Chinese private companies receive aid from Chinese banks or sovereign funds. This is considered as unfair competition on the European market, which is very open to foreign investment but also very strict with the rule of Law. EU Member States – including Germany – are also worried about the buyout of critical infrastructures (airports and ports in particular) and companies (especially robotics) by Chinese companies. **The US has similar concerns and both the US (in 2018) and the EU (in 2019) have established a framework for the screening – and possibly the monitoring – of foreign investments.**

In the same way, although the US adopted a stronger tone, the core Members of the EU are reluctant to allow Huawei access to 5G infrastructure networks in Europe, especially in the area of construction of *State* buildings. Member States of the EU have divergent views, as always, and Italy and Germany have not really decided yet, but most are worried about the risks posed by Huawei technologies in Europe, given relations with the Chinese State.

Ecology

Last but not least, there is a huge gap between the US government and the EU and Canada in the field of ecology (an important field for the future).
While I think European and Canadian policies are very disappointing in this area, European and Canadian governments do not go as far as saying, as President Trump did, that "climate change is a Chinese hoax", or withdrawing from the Paris Agreement on Climate disruption. On the domestic as well as the regional and universal level, the US attitude is completely irresponsible. On the global level, for instance, the present administration declared that the US will cease to participate to the budget of the Green climate fund and that they will adjust downward the US-Canada agreement aimed at limiting methane emissions. I believe that this

gap between the US and Canada or Europe may widen, given the rise of green or environmental parties in the last European elections.

The consequences of all **these disagreements between Western States** – not on China but on international law, multilateralism, international institutions and all significant fields of multilateral cooperation – are numerous. These disagreements **weaken Western policy regarding China and more importantly, they weaken the global international rules and institutions.**
This also means…

C. …The progressive loss of global control of the system by Western States and the use of international institutions against them

Before I begin to illustrate this relative and progressive loss of control, it is worth recalling that the global control of the West over international rules, institutions and agenda is very broad. And it is very broad, and in part illegitimate, because it has been very longstanding and continuous: 90% of international organizations and tribunals have their headquarters in Europe and in the US; white people are overrepresented in both international organizations and international tribunals; their working language is English or English and French – that is to say Western languages; they apply international customary Law that was largely shaped by Western States (admittedly accepted thereafter by other States, but still…); they apply multilateral treaties that were in fact mainly written by Western experts and diplomats, or the UN Security Council in which Europe is still overrepresented, etc.

Perhaps because this broad Western control is starting to crumble, it is also highly criticized by non-Western States and by academics, even Western academics. For the reasons I mentioned, such **Western domination is receding**. And this is visible in – at least – three different areas.

The election or appointment of figures to key positions in international organizations, organs and tribunals

The first area is the election or appointment of figures to key positions in international organizations, organs and tribunals. There are unwritten rules regarding the composition of these organizations, organs and tribunals, and composition generally favors Western States and permanent members of the UN Security Council – which are China, the US, Russia, France and the United Kingdom. For instance, the director of the World Bank is always from the US, the managing director of the IMF is from Europe – most of the time from France –, the president of the Asian Development Bank is always Japanese, etc. And in the same way, five members of the International Court of Justice and the International Law Commission are nationals of the five Permanent Members of the UN Security Council.

However, **for the first time since the establishment of the International Court of Justice in 1946 and even its predecessor the Permanent Court of international Justice in 1922, there is no British judge in the Court.** And it is so although the UK is the only permanent member of the UN Security Council to maintain its permanent declaration recognizing the jurisdiction of the Court as compulsory. **In November 2017**, the General Assembly managed to impose its preference for a candidate from India, on the Security Council which more traditionally defended the British candidate. Some commentators have considered the replacement of a British judge by a judge coming from a former British colony as "reflective of the new global order".

Almost exactly a year earlier, in November 2016, the French candidate for membership of the International Law Commission was not elected. He certainly was one of the best lawyers in the Commission. Thus it is clearly not because he was not qualified for this position. **It was the first time ever, and also the first time that the candidate supported by a Permanent Member of the UN Security Council was not elected.**

The General Assembly, which represents all UN Member States, and which elects the members of the ILC and participates in the election of the members of the ICJ, is clearly evolving. This evolution **shows resentment against the privileges of the Permanent Representatives**, especially against **relatively weak Western Permanent members**. Although this directly goes against the interests of my home country, France, I must say it is **nothing but fair**, both in terms of **legitimacy** and from an **efficiency perspective** (from the perspective of the need for an efficient institutional system).

The use of permanent tribunals by small or middle-sized States against great powers

The second area in which it is apparent that Western domination is receding concerns the use of international permanent tribunals by non-Western States. Historically, it has been very rare that a great power should lose a case against a weak State. And today, the only example that really goes against that observation is the WTO dispute mechanism. Other examples exist but they are rather isolated and, in most cases, condemnation of the great power was not very effective. Usually, *ad hoc* tribunals are established by great powers to convict and condemn weak States and their citizens.

However, it is striking that the **four main permanent international tribunals** are **frequently used by small or medium-sized States**, and that they are increasingly **used against great powers** – or more specifically against **Russia** and **Western great powers** because China refuses to recognize the jurisdiction of almost all non-economic international tribunals. The International Tribunal for the Law of the Sea is frequently used by small or middle-sized States against the United Kingdom and Russia. And as you know, another arbitration tribunal based on an annex to the Montego Bay Convention was used by the Philippines against China.

The International Criminal Court has dealt with situations concerning Russia, the UK and the US. And the International Court of Justice was very recently used by the Marshall Islands, Iran, Palestine, Ukraine and Equatorial Guinea against the US, the UK, France, Australia, Russia, Pakistan and India[3]. In addition, while the US, the UK and France have long been defendants ***and applicants*** before the Court, they were **only *defendants*** in the **most recent cases concerning them** (the last seven cases involving the US or France, and the last four cases involving the UK). This situation is certainly fairer than a situation in which no great powers are condemned. But it also signifies that great powers do not consider these institutions to be very useful, with the exception of the WTO mechanism.

[3] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* ; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* ; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* ; *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* ; *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* ; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK, Marshall Islands v. India, Marshall Islands v. Pakistan).*

The third area in which the decline of Western control over international rules, institutions and agenda is apparent is the way in which China manages to change certain institutions, to establish competing international organizations, and even to repeatedly exclude compliance with international rules and arbitral decisions in its backyard.

How does China react to this weakening of the international legal order and to the progressive loss of global control of the system by Western States?

II. The Attitude of China: how to use the possibilities provided by the "liberal global order" and by "political" international law?

Bearing in mind the global weakening of the post WWII and post Cold War system, I want to make **six points** about the **current attitude** of China regarding international law and institutions.

First of all, it is striking that **China largely supports a very orthodox version of international Law and the main international organizations**. While the US administration is convinced that the current international system disadvantages the US, the Chinese government seems to consider the main international general rules to be precious, the main international organizations to be useful, and most of all the global orientation of international Law towards free trade promotion and investor protection to be in favor of Chinese interests. And China has good reasons to think so. Unlike the "Third World Approach to International Law", China no longer considers that the current legal and institutional system is directed against it. China defends the system even when it is inconsistent and even when **China** itself is inconsistent by defending it. For instance, one of its mottos is States equality, but it **is one of the most conservative member States concerning its permanent seat at the UN Security Council – which is a privileged position**. It refuses almost every proposition aimed at changing its composition, and especially with respect to the desire of Japan, India or Brazil to have a permanent seat.
Since China entered the WTO in December 2001, it has defended the organization tooth and nail, because it understands that the WTO is the best way to destroy domestic trade legislation in foreign countries, and thus to gain markets. In the same way, **in sharp contrast with many Western and non-Western States** which have reconsidered their investment treaty model and their investment arbitration model, **China has a very traditional approach on this matter.** It simply adopts various practices depending on its partners.

Second, China is asking for more power in several international organizations. Globally, **China is well represented in international tribunals** – there is usually a Chinese member in permanent international tribunals although China does not recognize their jurisdiction, except in the economic field –; and China is now properly represented in certain organizations or organs, but it was underrepresented in the International Monetary Fund (or IMF). In the IMF, each Member State "is allocated a quota that determines both its financial commitment as well as voting share in the IMF (Article 3 Section 1)". China asked for a greater commitment and voting share, but "For a quota change to become effective, the reform must in fact be approved by an 85 percent majority of the voting power (Article 3, Section 2c)". After a decade of fighting against the US Congress, China succeeded in enhancing its voting rights, in 2010 on paper, and in 2015 in reality. As a result of this change, China is now one of the

ten largest financial contributors and an important member of the IMF.
This evolution shows the way in which international institutions could be changed in favor of China, without threatening the overall legitimacy or functioning of the system.

However, and this is my **third point**, **China does not hesitate to establish competing institutions, circumventing current international economic organizations**. This is particularly the case of the creation of the New Development Banks of the BRICS in 2014, and of the Asian Infrastructure and Investment Bank (AIIB), which is headquartered in Beijing and began operations in January 2016. Of course, the new Asian Bank is a challenge to the Asian Development Bank in which the United States and Japan are the main shareholders". **Although it is not an international institution or set of rules, the Belt and Road Initiative (or BRI) is a big economic and political Chinese strategy that aims to provide an alternative to the liberal project defended by the current normative and institutional system**.

My **fourth point** is that the creation of new institutions and the development of multilateral projects such as the BRI **are contemporaneous with the enormous increase in the Chinese financial, diplomatic and military contribution to the UN.** And this increase goes along with a desire to **exploit the momentum** created by US withdrawal and by the decline of Western power, **to shape the international order and redirect and refocus UN policies.**
For instance, in 2015, China established a UN peace and development Trust Fund; the number of Chinese representatives in the 5th Commission of the General Assembly (in charge of the UN budget) has recently doubled; its participation in UN peacekeeping operations is very high – the highest of all permanent members of the Security Council.
This great contribution gives exponential influence to China in the UN. For instance, two UNSC resolutions of 2017 and 2018 (UNSC Resolution 2344 (2017) and Resolution 2405 (2018)) make reference to the Belt and Road Initiative in a positive manner. In the same way, in 2017, the Human Rights Council adopted for the first time a resolution proposed by China. This resolution, on the "Contribution of Development to the Enjoyment of All Human Rights", contains many elements of the public discourse of the Chinese government.
According to a member of the staff of the Human Rights Council, no other State uses resources to such an extent to influence the texts adopted by the Council, as well as to silence criticisms from NGOs in the Council. Another UN official is even more explicit: "China tries with great energy to fill the gap left by the US national fold".
Globally, you may recall **China is against the traditional way of understanding human rights and human rights procedures, as well as representative and elected regimes.** According to an intra-party communiqué dated 22 April 2013, China rejects political "perils" ("attempt to undermine the current leadership and the socialism with Chinese characteristics system of governance") that include Western Constitutionalism, elected regimes, civil society, and the West view of media[4]. According to most foreign observers, I quote, "The rejection of these values has become even more prominent since Xi Jinping came to power and 'intensified' the repression against all kinds of human rights advocacy". **China also opposes the main innovations of the UN Security Council in the 90s** (such as its jurisdiction on massive human rights violations, second and third generation peacekeeping operations, UN Security Council sanctions, etc.)[5] **and it refuses the authority of international tribunals**

[4] See the Communiqué on the Current State of the Ideological Sphere sur : http://www.chinafile.com/document-9-chinafile-translation.
[5] See F. Couveinhes Matsumoto, « La critique des principales orientations du Conseil de sécurité par la République populaire de Chine – Éléments pour une évaluation des effets de la fin de l'hégémonie occidentale

outside of the economic area. In this last respect, China *follows* the American path.

China also **mimics the US on another matter, and this is my fifth point: very often, China prefers bilateralism rather than multilateralism. Like the US, China seems to choose multilateralism only when it is *directly* in its interest, only in order to achieve *short-term* goals.**
From a "great power" point of view, bilateral relations and bilateral agreements are interesting because they lead to quickly gaining a lot; they generally allow great powers to rapidly obtain from a partner all that it can give.
In the long run, however, establishing multilateral relations is much more fruitful, even for a great power and in fact especially for a great power, because it enables the establishment of general and sustainable rules and institutions with which it is comfortable.
In the short term, these multilateral rules and institutions are less favorable to the interests of great powers because these rules and institutions are based on compromise and not on naked power. They need to be established with the consent of many States, and these States have various interests. In the long run however, it is the best way to win general acceptance of a situation in which the current great power or great powers are dominant. It is the best way to maintain and stabilize a peaceful situation in which they are dominant.
My impression however is that China is tempted to apply the US practice (with respect to the review of NAFTA or to other cases) to the South China Sea disputes: **China is tempted to *unilaterally* impose its view, or to do it through *bilateral* negotiations instead of *bringing together all interested parties*.**

However, **this attitude is questionable, and this leads me to my sixth and final point.**
Both at the regional and universal level, a totally new order could only be imposed with violence and is inevitably a conflicting and fragile situation. This is why **great powers should respect longstanding customs and procedures, and the rules established by multilateral treaties such as the Montego Bay Convention or the UN Charter.**
From time to time, the US seems to forget this point, whereas China seems to understand this, but to be tempted to act in more unilateral or bilateral ways, or to put significant pressure on its partners in multilateral institutions, in order to impose its views or silence criticism.
It is difficult to tell a new great power not to act in this way. But it is rational to say that it is neither to the benefit of other States nor to its own benefit in the long run. **China** should not mimic the US in forgetting the importance of free and multilateral negotiations and institutions. It **should take more inspiration from the US after World War II, when it decided to compromise to reinvent the international legal order. If it were to do so, it would not be cheated by the US as it may fear, but would instead be backed by Europe, Canada, Australia and almost all States worldwide.**
As pointed out the Bandung Message 2015 – celebrating the 60th anniversary of the 1955 Bandung Conference –, we all "need to respect the right of people of every country to choose their own political systems, their leaderships and development paths suitable to their own national conditions'". This principle does not however signify that it is appropriate to refuse to listen to remarks or criticisms. It simply means that each people is equally entitled to freely find what is true and what is false in such remarks and criticisms. **It is pointless to work on giving a perfect but false image of ourselves. It is much more fruitful to work on improving ourselves.**

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sur le Droit de la paix et de la sécurité internationales », *Revue Générale de Droit international Public*, 2013, vol. 117, n°2, pp. 232-280.

Great powers or decision makers tend to spontaneously move away from principles of equality, reciprocity, plurality and free discussions, while claiming emphatically to observe them. But of course, it is important to observe these principles and not to say that we do so while at the same time violating them. It is important for global harmony but it is even more important for great powers at the international level, and for decision makers at domestic level, if they want to stay in power, or if they want to maintain the peace and stability of the society, in order to hold on to their authority.

On this point, I want to make a **final comment**, which is decisive in my view.
A **great power or a** dec**ision maker does not manage to observe (or even to keep in mind) general principles of equality and plurality, simply because it wants to**, or because of its intelligence or its wisdom. It manages to do so **because it is able to listen** to the small, poor and weak people or States, **to discuss frankly, consider and decide *with them***;
And it only manages to listen to them, to discuss and *decide* with them, **when it has *established principles and institutions* that** really **allow past and even recent decisions taken by the great power or the decision maker *to be questioned. It is the only way to secure a true win-win and peaceful situation.***

Thank you for your attention.