

## Articles

# Global “Harmonious Society” and the Law: China’s Legal Vision in Perspective

By Leïla Choukroune\*

“和諧社会，需要一个更强大的、更权威的法治”<sup>1</sup>

“A harmonious society needs a stronger legal system that wields greater authority.”

和 “He,” the Chinese character for harmony, is now in everyone’s mind when thinking about contemporary China. Harmony and other ‘Confucian values’ seem to have penetrated all spheres of Chinese society, from the Communist Party’s elite to business leaders and academics. But Confucius is both used and abused: quoting the philosopher at the start of the Olympic Games Opening Ceremony in a kitsch historical extravaganza featuring 3,000 men dressed up as his disciples does not clarify the true political meaning of an increasingly ideologically eclectic regime. On the contrary, it leads, to borrow Claude Lefort’s term, to further “complications.”<sup>2</sup> Thus, the interest in the idea of a ‘socialist harmonious society’ stems less from what it holds aloft than from what it hides.

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<sup>1</sup> Taken from the resolution adopted at the 6th plenary session of the 16th Central Committee of the Communist Party of China in October 2006. English transliteration: *Hexie shehui, shu yao yi ge geng shang da de, geng quan wei de fazhi*.

<sup>2</sup> In reference to the book of CLAUDE LEFORT, *COMPLICATIONS, COMMUNISM AND THE DILEMMAS OF DEMOCRACY* (2007), and of course, to essays on communism published right after its fall in Eastern Europe by FRANÇOIS FURET, *THE PASSING OF AN ILLUSION: THE IDEA OF COMMUNISM IN THE TWENTIETH CENTURY* (1999), and MARTIN MALIA, *THE SOVIET TRAGEDY: A HISTORY OF SOCIALISM IN RUSSIA 1917-1991* (1994). Although I feel that Lefort’s theories cannot be applied as such to today’s China or international law, my reasoning is informed by these comparative references.

This 'global concept' not only casts an unclear light on Chinese legal reforms, but also on China's practice of international law. Indeed, 20 years after the Tiananmen protests, law is the expression of the gap between the conflict-free society dreamt up by the Chinese Communist Party and the autonomy the people eagerly seek at the national and international levels. Law is not a mere totalitarian instrument, but serves as the arena for playing out this tension between the aspiration for individualism and concerns about social cohesion or global harmony under the party's guidance.

At the domestic level, this theoretical framework turns law into a disciplinary principle given over to society's moral construction. At the international level, based on its ability to Sinicize legal concepts and on a purely pragmatic and utilitarian use of norms, the socialist harmonious world adopts diversionary tactics and allows a troublesome political universal model to be kept at bay. In these two cases, avoidance of conflict through the mediation of law understood as moral discipline belongs to a political vision of modernity in which democratization is systematically delayed and human rights are not placed at the core of the international legal construction. This could be exemplified in a variety of legal fields from China's relations to the UN system, to the Chinese practice of bilateral investment treaties or its relation to the WTO dispute settlement system (China and the UN system, the Chinese practice of bilateral investments agreements and major international contracts, China and the WTO dispute settlement mechanism, *etc.*).

In this paper, disciplinary law is used as a category for thinking critically and comparatively about legal systems and reforms in the context of a post-totalitarian transition towards a *sui generis* rule of law. In this regard, the analysis could get closer to Foucault's idea of "*institution disciplinaire*."<sup>3</sup> But this approach differs from Foucault in that the paradigm, and its application to the Chinese socialist harmonious society, both domestically and internationally, is relatively clearly visible. Moreover, in this perception of Chinese norms, disciplinary law is not only limited to a specific community (school, hospital, army, prison, *etc.*), but applies - this the strongest as well as the most disturbing argument - to the national and international society as a whole. As such, disciplinary law appears as a powerful social stabilizer that contrasts with liberal or individualist law. In this context, law never plays the role of a destabilizing or emancipatory power. It may limit or even control the leadership but will never challenge its legitimacy, the foundations of its very existence. From this perspective, what is essential is to ensure the cohesion of the group and not to guarantee people's individual rights. Disciplinary law is not overtly opposed to them, but individual rights are treated as secondary. Lastly, disciplinary law brings no universal claims. It is used to discipline society and harmonize the world.

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<sup>3</sup> See MICHEL FOUCAULT, *SURVEILLER ET PUNIR* (1975).

## A. Disciplining the Society

### *I. Uses and Abuses of Confucian References by a Socialist Regime*

Whereas the concept of “socialist rule of law”<sup>4</sup> (社會主義 法治國家<sup>5</sup>) punctuated political discourse in the late 1990s, it is indeed the idea of a “socialist harmonious society” (社會主義 和諧社會<sup>6</sup>) that today casts an unclear light, clearly more Marxist than Confucian, on Chinese legal reform.<sup>7</sup>

For more than seven years now, Chinese leaders have been trying to deal with numerous social protest movements<sup>8</sup> by constructing an overarching theoretical discourse, which turns law into one of the regime’s best allies. The first attempts to reduce inequalities that had widened greatly in Chinese society began in November 2002, when the need for social harmony figured in debates during the Sixteenth Congress of the Communist Party of China (CPC).<sup>9</sup> In September 2004, the Fourth Plenary Session of the Party’s Sixteenth

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<sup>4</sup> The 1999 amendments had ratified this development by inscribing the concept of “socialist rule of law” into the Chinese constitution. Article 5 says: “The People’s Republic of China governs the country according to law and makes it a socialist country ruled by law. The state upholds the uniformity and dignity of the socialist legal system.” See *Zhonghua Renmin Gongheguo Xianfa* (中华人民共和国宪法) [Constitution] Mar. 14, 2004 (China), available at: [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm) (last accessed: 24 April 2012).

<sup>5</sup> English transcription: *shehui zhuyi fazhi guojia*.

<sup>6</sup> English transcription: *shehui zhuyi hexie shehui*.

<sup>7</sup> For example, The China Law Society has recently organized the XXIV World Congress of philosophy of law and social philosophy on the theme of “Global Harmony and the Rule of Law.” Although many different approaches of law were used to inform the discussions, the Chinese organizers consciously and systematically referred to the concept of ‘harmony’ perceived as a component of a ‘Chinese’ and ‘socialist’ approach of law.

<sup>8</sup> Figures for the annual number of incidents seem to be getting harder to find. A report of the Congressional Research Service based on official Chinese sources provides for a 50% increase in “public order disturbances” between 2003 and 2005, with 87,000 incidents for 2005 alone. See THOMAS LUM, CONG. RESEARCH SERV., RL3341, SOCIAL UNREST IN CHINA (2006). As the global economic crisis is now deepening, tens of thousands of protests are erupting from a mixture of economic grievances and political resentment. With ‘only’ 5% growth this year, these mass protests clearly constitute one of the government’s principal concerns. See also Symposium, *China’s Social Insecurity*, 1 CHINA RIGHTS FORUM 13 (2005). These movements have obviously not stopped over the last two years. On local order and the impact of provincial governments on the ‘suppression’ of Chinese resistance, see e.g. Yongshun Cai, *Local Governments and the Suppression of Popular Resistance in China*, 193 THE CHINA Q. 24 (2008).

<sup>9</sup> See e.g., 16th National Congress of the Communist Party of China, 2002, CHINA.ORG.CN, available at: <http://www.china.org.cn/english/features/44506.html> (last accessed: 24 April 2012).

Central Committee clarified the leadership's goals. From then on, Hu Jintao and other top Chinese leaders repeatedly referred to the concept of "socialist harmonious society," which acquired a theoretical foundation in the landmark resolution of the Sixth Plenary Session of the Sixteenth Central Committee in October 2006.<sup>10</sup> Its resolution,<sup>11</sup> organized as a system of core values,<sup>12</sup> specifies in familiar ideological terms a set of principles based on "Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the 'Three Represents.'"<sup>13</sup> All this is directed towards the progressive realization of a harmonious society by 2020. Although the text of the resolution is rather vague, it has an eye-catching group of binary elements. These concepts, conceived as complementary, nonetheless contain a number of contradictions in terms that become clearly apparent once the proposition is analyzed in its entirety. The socialist harmonious society is to be founded on democracy and the rule of law, equity and justice, honesty and comradeship, vitality, stability and order, as well as harmony between Man and nature.<sup>14</sup> All these elements are closely linked to the establishment of the "socialist rule of law"—an ideal that seems to run through the whole edifice. But it remains to be seen which will prevail: rule of law over democracy, equity over justice, or order over vitality.

Hu Jintao actually gave a rudimentary explanation on March 4, 2006, when he drew up a list of 'Eight Honors, Eight Disgraces' that marked a moral boundary between good and evil:

(1) Love the country; do it no harm.

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<sup>10</sup> For a contextual perspective, see Joseph Kahn, *China Makes Commitment to Social Harmony*, N.Y. TIMES, Oct. 12, 2006, available at: <http://www.nytimes.com/2006/10/12/world/asia/12china.html?scp=2&sq=china+makes&st=nyt> (last accessed: 24 April 2012).

<sup>11</sup> Full text available in Mandarin on the *Xinhua* website: 中共中央关于构建社会主义和谐社会若干重大问题的决定 (The decision of the CPC Central Committee on major issues of building an associational harmonious society), XINHUA, Oct. 18, 2006, available at: [http://news.xinhuanet.com/politics/2006-10/18/content\\_5218639.htm](http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm) (last accessed: 24 April 2012).

<sup>12</sup> See *China publishes resolution on building of harmonious society*, XINHUA, Oct. 18, 2006, available at: [http://news.xinhuanet.com/english/2006-10/18/content\\_5219111.htm](http://news.xinhuanet.com/english/2006-10/18/content_5219111.htm) (last accessed: 24 April 2012).

<sup>13</sup> Included in the preamble of the constitution through the 2004 amendments, the theory of the 'Three Represents' (*sange daibiao*) seeks to legitimize the move to integrate "the most advanced productive forces" in running the country – hence the opportunity for entrepreneurs to become Party members.

<sup>14</sup> See *CPC Promotes "Core Value System" to lay Moral Foundation for Social Harmony*, XINHUA, Oct. 18, 2006, available at: [http://news.xinhuanet.com/english/2006-10/18/content\\_5220576.htm](http://news.xinhuanet.com/english/2006-10/18/content_5220576.htm) (last accessed: 24 April 2012).

- (2) Serve the people; do no disservice.
- (3) Follow science; discard ignorance.
- (4) Be diligent; not indolent.
- (5) Be united, help each other; make no gains at others' expense.
- (6) Be honest and trustworthy; do not give up morals for profits.
- (7) Be disciplined and law-abiding; not chaotic and lawless.
- (8) Live plainly, struggle hard; do not wallow in luxuries and pleasures.<sup>15</sup>

These rules of conduct for the development of a ‘socialist morality’ are not just a flight of fancy but are meant to be practiced. An example of this is Hu Jintao having ceremoniously greeted fifty-three new “moral models.”<sup>16</sup>

## *II. When Disciplinary Law is applied to the Society as a Whole*

The penultimate proposition above bears reflection: “Be disciplined and law-abiding; not chaotic and lawless.” This goes to the heart of the theoretical framework, which seeks to turn law into a disciplinary principle bearing in mind the moral construction of the society as a whole. Law does not only discipline the conduct of the physical individual, and disciplinary law is not only limited to a specific community (school, hospital, army, prison, etc.); law captures the heart of the people through a willing commitment to higher moral imperatives.<sup>17</sup> This objective was clearly illustrated in the opinions published by the Supreme People’s Court on January 15, 2007. The recommendations, aimed at clarifying the role of the judiciary in building the socialist harmonious society,<sup>18</sup> were emphasized in

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<sup>15</sup> *Id.*

<sup>16</sup> See *President Hu Calls for Building Socialist Morality*, XINHUA, Sep. 19, 2007, available at: [http://www.chinadaily.com.cn/china/2007-09/19/content\\_6118495.htm](http://www.chinadaily.com.cn/china/2007-09/19/content_6118495.htm) (last accessed: 24 April 2012).

<sup>17</sup> See e.g. THE STATE COUNCIL INFORMATION OFFICE OF CHINA, *The Socialist System of Laws with Chinese Characteristics* (2011), available at: [http://www.npc.gov.cn/englishnpc/news/2011-10/28/content\\_1677839.htm](http://www.npc.gov.cn/englishnpc/news/2011-10/28/content_1677839.htm) (last accessed: 24 April 2012).

<sup>18</sup> Supreme People’s Court, Jan. 15, 2007, Notice of the Supreme People’s Court on Printing and Distributing Some Opinions of the Supreme People’s Court about Providing Judicial Protection for the Construction of Socialist Harmonious Society (China), available at: <http://www.lawinfochina.com/law/display.asp?db=1&id=5886&keyword=harmoniou> (last accessed: 24 April 2012).

March 2007 in two statements by the Supreme People's Court stressing the "positive role" of mediation in resolving conflicts.<sup>19</sup> According to this set of directives, the first "duty" of people's courts is to resolve social conflicts while maintaining stability, safeguarding economic development, and promoting social harmony in the pursuit of justice and equity.<sup>20</sup> The idea of a *socialist rule of law* is a constant point of reference, as can be seen in this set of injunctions: "A harmonious society is a society governed by law" (和諧社會就是法治社);<sup>21</sup> "A harmonious society depends on the rule of law" (和諧社會，要靠法治<sup>22</sup>); "A harmonious society needs a stronger legal system that wields greater authority" (和諧社會，需要一個更強大的、更權威的法治<sup>23</sup>).<sup>24</sup>

At the same time, Luo Gan's statements have clearly set limits on the judiciary's ambition to act independently. In a statement entitled "[T]he political responsibility of judicial organs in constructing a harmonious society," published in the Party periodical *Seeking Truth*, Luo Gan, a prominent former member of the CPC Politburo Standing Committee who had been in charge of judicial matters, launched a vicious attack on the regime's enemies, who were accused of using the courts to modernize China by westernizing and dividing it.<sup>25</sup>

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<sup>19</sup> See Supreme People's Court, Mar. 6, 2007, Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society, available at: <http://www.lawinfochina.com/law/display.asp?db=1&id=5930&keyword=supreme%20people%20court> (last accessed: 24 April 2012).

<sup>20</sup> Specifically, these opinions stress the need to protect individual rights, especially those of workers and peasants. A number of social conflicts such as those arising from campaigns to restructure state enterprises are targeted. Direct reference is made to protecting fundamental rights in the penal system. Courts must also pay special attention to resolving environmental disputes and issues involving international and comparative law, especially those pertaining to Taiwan, Hong Kong, or Macao. Lastly, the court's opinions stress the fight against judicial corruption and the need for transparency of the justice system. These latter goals must be fully achieved by 2020, by which time the Chinese judicial system, having become more transparent, will thereby be better able to protect human rights. See *supra* note 19.

<sup>21</sup> English transcription: *hexie shehui qiu shi fazhi shehui*.

<sup>22</sup> English transcription: *hexie shehui yao kao fazhi*.

<sup>23</sup> English transcription: *hexie shehui xuyao yi ge gengqiang da de geng quanwei de fazhil*.

<sup>24</sup> See *supra* note 19.

<sup>25</sup> This caused something of a stir and notably drew comment in an article by Joseph Kahn in the New York Times; see Joseph Kahn, *Chinese Official Warns Against Independence of Courts*, N.Y. TIMES, Feb. 3, 2007, available at: [http://www.nytimes.com/2007/02/03/world/asia/03china.html?\\_r=1&n=Top%2fReference%2fTimes%2](http://www.nytimes.com/2007/02/03/world/asia/03china.html?_r=1&n=Top%2fReference%2fTimes%2) (last accessed: 24 April 2012).

In the Chinese context, disciplinary law defines itself as law and applies to the society as a whole. But if law is viewed as an instrument for legitimizing power, its utilization is implicitly dependent on a higher imperative —the regime’s durability and stability. The same observation can be made at the international level, where law is used to support the development of a ‘harmonized’ world disciplining international relations in a pragmatic way and hiding more than what the apparent benevolence of the concept seems to reveal.

## B. Harmonizing the World

While the rise of China as a global economic leader has now become conventional wisdom, its international approach to world affairs and its use of international law have hardly been conceptualized. The various series of vague platitudes recently proposed by Beijing under the banner of the “Harmonious World” may not help us further decode the PRC’s strategy. China’s practice of international law could, on the other hand, provide us with a clearer account of a pragmatic and status quo oriented strategy drawing upon Beijing’s will to stabilize and discipline its international relations.

### I. “Building a Harmonious World”

First outlined on 15 September 2005 by the Chinese President Hu Jintao at the United Nations 60<sup>th</sup> Summit, the idea of a “harmonious world” (和谐世界)<sup>26</sup> has been further elaborated on by China’s top leaders and diplomats to accompany the country’s integration in world affairs. Here, again, China’s main objective is the perpetuation of the system to achieve the “lasting peace” and “common prosperity” needed for internal economic growth and international expansion. When looking closely at the words employed in this new policy discourse, one cannot fail to observe the clear emphasis put on traditional Chinese international law concerns: sovereignty and independence. Indeed, in his UN discourse, Hu already insisted on the right for all to “independently choose their own social systems and paths of development” as well as on the duty for others to “respect” this right.<sup>27</sup> Here lies the core of the Chinese proposal: the “harmonious world” policy positions itself in line with the existing UN system, favoring multilateralism and

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<sup>26</sup> English transcription: *hexie shijie*.

<sup>27</sup> See Hu Jintao, President of the People’s Republic of China, Build Towards a Harmonious World of Lasting Peace and Common Prosperity, Speech Before the United Nations Summit, (Sep. 15 2005), available at: <http://www.china-un.org/eng/xw/t212915.htm> (last accessed: 24 April 2012). See also *President Hu Elaborates the Theory of Harmonious World*, PEOPLE’S DAILY ONLINE, Nov. 26, 2007, available at: <http://english.peopledaily.com.cn/90001/90780/91342/6824821.html> (last accessed: 24 April 2012).

development.<sup>28</sup> The official rhetoric needs to be understood in the context of the socialist market economy's international expansion, rather than in a classical Confucian perspective. However, the ambiguity of the formulation leaves ample room for (mis)interpretation.

The recent debate on China's international strategic objectives has contributed to the confusion. In the past five years, a number of books published by Chinese scholars have brought little clarification while trying to provide the reader with a theoretical framework for the Chinese world's ascension. Amongst them, two books by Zhao Tingyang have been placed under particular scrutiny. In *The Tianxia System: The Philosophy for the World Institution* (2005) and *Investigations of the Bad World: Political Philosophy as the First Philosophy* (2009),<sup>29</sup> the philosopher from the Chinese Academy of Social Sciences (CASS) builds upon the traditional concept of "Tianxia" (天下; literally "under Heaven") closely associated, in Chinese philosophy, with civilization and order. In contrast to a violent West marked by the Hobbesian tradition, this "peaceful system" serves as a basis to conceptualize a disciplined Chinese world's vision, in which order would prevail over disorganized freedom, ethics over law, and a strong elite government over a potentially destabilizing democracy. The whole project aims at "rethinking" China so that the world power could develop its own methodologies and values to face its international role and responsibilities while seemingly relying on the existing world's institutional design (multilateralism and the UN) to achieve this harmony.

While concepts remain rather poor and certainly ambiguous, China's recent practice of international law, and international economic law in particular, sheds a clearer light on the whole edifice. Amongst the many examples provided by China's increasing integration into world affairs, we have chosen to focus on its accession to and participation in the WTO as well as its foreign investments practices in the developing world.

## *II. China's Accession to and Participation in the WTO: An Incomplete Rule of Law through Internationalization*

China's accession to the World Trade Organization (WTO) highlighted the ability of the People's Republic of China (PRC) to internationalize by incorporating the norms and

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<sup>28</sup> See also, THE STATE COUNCIL INFORMATION OFFICE OF CHINA, *China's Peaceful Development Road* (2005).

<sup>29</sup> See Zhao Tingyang (赵汀阳), *Tianxia Tixi: Shijie Zhidu Zhexue Daolun* (天下体系：世界制度哲学导论) (2005); Zhao Tingyang (赵汀阳), *Huai Shijie Yanjiu: Zuowei Diyi Zhexue de Zhengzhi Zhexue* (坏世界研究：作为第一哲学的政治哲学) (2009).



practices of globalized trade.<sup>30</sup> Such institutional importation is not new: Chinese law opened up to foreign influences in the late 19<sup>th</sup> century, turning first toward the Roman-Germanic model, then, of course, to the socialist paradigm and, finally, to the modern West, incorporating various international norms and practices in successive waves.<sup>31</sup> This process of harmonization, which is part of the overall trend of globalizing law, accelerated over twenty years and reached its climax on December 11, 2001, when after fifteen years of particularly difficult negotiations, China became the WTO's 143<sup>rd</sup> member.<sup>32</sup>

To understand this major political decision, which engaged “the future of China in the world as well as the future of its economy,” it must be placed in historical perspective.<sup>33</sup> Chinese development strategy was largely based on internationalizing its economy, particularly by increasing foreign trade and direct investments.<sup>34</sup> China's participation in the General Agreement on Tariffs and Trade (GATT) was thus a way to meet the goal of

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<sup>30</sup> For a global approach to the internationalization of China, see DAVID ZWEIG, *INTERNATIONALIZING CHINA: DOMESTIC INTERESTS AND GLOBAL LINKAGES* (2002).

<sup>31</sup> On the role of Shen Jiaben (1840-1913) in the progressive internationalization of Chinese law, see LI GUILIAN, *SHEN JIABEN ZHUAN* (2000) (biography of Shen Jiaben); Jérôme Bourgon, *Shen Jiaben et le droit chinois à la fin des Qing* (1994) (unpublished doctoral thesis, École des Hautes Études en Sciences Sociales). For a more synthetic view of the historical relationship between China and international law, see WANG TIEYA, *INTERNATIONAL LAW IN CHINA: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 237-262 (1990); see also Li Zhaojie, *Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order*, 5 SINGAPORE JOURNAL OF INT'L AND COMP. L. 314 (2001). For a contemporary approach put into historical perspective, see HÉLÈNE PIQUET, *LA CHINE AU CARREFOUR DES TRADITIONS JURIDIQUES* (2005).

<sup>32</sup> This veritable diplomatic marathon ended at the WTO ministerial conference in Doha with the signing of a 900-page accession agreement. The accession documents are available on the WTO website; see generally <http://www.wto.org> (last accessed: 24 April 2012).

<sup>33</sup> Interview with Pierre-Louis Girard, President of the GATT Working Party on China's Status, later WTO Working Party on Accession of China, in Geneva, Switz., (Sep. 21, 2001). For a more complete historical development, see Leïla Choukroune, *L'État de droit par l'internationalisation, objectif des réformes?*, 69 PERSPECTIVES CHINOISES and CHINA PERSPECTIVES 4, 4-6, 7-21, 78-80 (2002).

<sup>34</sup> See NICHOLAS LARDY, *INTEGRATING CHINA INTO THE GLOBAL ECONOMY* (2002); see also Yuwen Li, *Fade-Away of Socialist Planned Economy: China's Participation in the WTO*, in *INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE* 453 (Fried Weiss, Erik Denters & Paul de Waart eds., 1998); and, above all, the very complete study by the OECD, which currently provides the best assessment of the internal economic consequences of China's accession to the WTO: ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *CHINA IN THE WORLD ECONOMY: THE DOMESTIC POLICY CHALLENGES* (2002). See also (but with a critical eye) ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *ECONOMIC SURVEYS: CHINA* (2005). Foreign Direct Investments (FDI) in China reached the record sum of USD 60.6 billion in 2004, 53.5 billion in 2003, and 52.7 billion in 2002. China thus moved ahead of the United States, receiving the highest amount of FDI in the world.

opening up to the market economy, which the government had set when it launched the policy of reform and opening up. This approach was preceded by China's re-entry into the United Nations (UN) on October 25, 1971, which was followed by its integration into the World Monetary Fund (WMF) and the World Bank on May 15, 1980. On July 10, 1986, the Chinese government presented the GATT director general with a request to resume its status as contracting party to the Agreement:<sup>35</sup> "(...) the Government of the People's Republic of China, recalling the fact that China was one of the original contracting parties to the General Agreement on Tariffs and Trade, has decided to seek the resumption of its status as a contracting party to GATT."<sup>36</sup> Beijing further specified that "China is currently pursuing the basic national policy of opening to the outside world and revitalizing the domestic economy..." and that "[i]t is the firm belief of the Government of the People's Republic of China that the ongoing process of economic reform will contribute to the expansion of economic and trade relations with the contracting parties, and that the participation of China as a contracting party in the work of the GATT will further the objectives of the General Agreement."<sup>37</sup> The PRC concluded its request for reinstatement in the GATT by insisting on its status as a developing country and its desire to benefit from the trade regime granted such countries. China made this request for five very clear reasons: to "increase the volume of foreign trade, deepen economic reforms, participate in international affairs and the formulation of trade rules, combat protectionism, and acquire greater information on exchanges."<sup>38</sup> It is difficult to make it more clear how internal policy goals determined China's international strategy: in the space of thirty years, China went from associating with the international legal order to excluding/challenging it, then actively participating in it.

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<sup>35</sup> China launched its policy of rapprochement with the GATT in November 1982 by sending a delegation to participate as observers in the thirty-eighth conference of contracting parties, insisting that it was one of the original parties to the Agreement. In November 1984, China had to obtain authorization to sit in as an observer on the GATT Council and in the conferences of its subsidiary bodies. In April 1985, it became a member of the advisory committee on developing countries.

<sup>36</sup> General Agreement on Tariffs and Trade, Communication from the People's Republic of China L/6017, (Jul. 14, 1986).

<sup>37</sup> *Id.*

<sup>38</sup> See Yang Guohua and Cheng Jin, *The Process of China's Accession to the WTO*, 4 n° 2 J. OF INT'L ECON. L. 297 (2001). Yang Guohua is deputy director of the treaty division of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). After reorganizations related to China's accession to the WTO, the MOFTEC is now the Ministry of Commerce of the People's Republic of China (MOFCOM). It comprises twenty-five departments, one of which is devoted to "WTO Affairs." See <http://english.mofcom.gov.cn> (last accessed: 24 April 2012). The MOFCOM site has been greatly improved and includes more and more useful information. Beyond this undeniable formal improvement, however, the site is not very readable due to the frequently incoherent and biased choice of information.

And this participatory stance sums up the current Chinese position towards the WTO. China is a system continuator, not a reformer, and even less a ‘perturbator.’ After almost 10 years within the system, China has shown a clear understanding of the multilateral trade rules and a constant will to use these rules as much as other major trading partners, such as the US or the EU. Putting apart Beijing’s mixed record in implementing its complex and unique Protocol of accession to the WTO – this question deserving an entire article to be analyzed in a balanced way – one can illustrate this position with two series of examples: rule-making and dispute settlement. In the first case, China has participated to the Doha Round’s negotiations in submitting, for instance, a detailed proposal on the revision of antidumping rules,<sup>39</sup> but generally shown a rather low profile favoring the development of bilateral and regional trade agreements beneficial to its direct economic interests.<sup>40</sup> As to dispute settlement, after a few years of a good student’s observation, China’s position is evolving towards a more offensive stance. Since its accession, China has brought seven complaints (most of them very recently), has been sued 20 times and appeared as third party in 71 cases.<sup>41</sup> Some of these contested issues, dealing with anti-dumping or intellectual property related commitments, are key to the Chinese economy and have been highly debated.<sup>42</sup> But in all these cases China is playing with the rules, not against them, and offers the image of the perfect supporter of the international liberal trading system. Nevertheless, this apparent socialization does not bring a genuine adherence to the principles of international law in their liberal form. Here again, the harmonization of China’s international relations aims at nothing else than keeping a troublesome democratic universal at bay in focusing on the development and maintenance of economic stability.

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<sup>39</sup> See Proposal of the People’s Republic of China on the Negotiation on Anti-Dumping TN/RL/W66, WORLD TRADE ORGANIZATION (Mar. 6, 2003).

<sup>40</sup> For a synthesis, see Julia Ya Qin, *China, India and WTO Law*, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 167 (Muthucumaraswamy Sorbarajah & Jianguy Wang eds., 2010); see also Leila Choukroune, *China’s participation to the WTO, a Case-Law Approach*, CHINA PERSPECTIVES (forthcoming).

<sup>41</sup> See *Member Information: China and the WTO*, WORLD TRADE ORGANIZATION (Feb 28, 2012), available at: [http://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last accessed: 24 April 2012).

<sup>42</sup> See e.g., Julia Ya Qin, *Pushing the Limit of Global Governance: Trading Rights, Censorship and WTO Jurisprudence – A Commentary on China-Audiovisual Services* (Wayne State University Law School, Research Paper No. 10-13), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1713886](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713886) (last accessed: 24 April 2012).

A piece of evidence giving clue to this taste for “complication,” to borrow Lefort’s term, can be found in China’s incomplete application of its “WTO+ commitments.”<sup>43</sup> Going beyond simple harmonization, China’s accession to the WTO was conceived, by the US and the EU, to contribute to a more ambitious legal reform founded on China’s respect for three principles established in its accession protocol’s second section on the “administration of the trade regime.” The uniform application of China’s commitments, the transparency of its legal system, and the independent and impartial judicial review of administrative acts related to WTO law were aiming at the institution of a sort of *sui generis* rule of law, an ‘economic rule of law’ or even a ‘thin rule of law,’ if one can define such concepts without altering the meaning of the original expression, ‘rule of law,’ and thus attain a form of *yi fa zhi guo* (易发治国; government by law) free of ideological elements.<sup>44</sup> But the implementation of these special requirements remains very incomplete and limited to ‘secured’ trade areas, the reform of which will not put the whole ‘harmonious’ system into question by introducing elements of transparency/democracy and so disorganize the regime’s political structure.<sup>45</sup>

### *III. International Investment Practices in the Developing World*

A similar utilitarian approach to international law is found in China’s attitude towards international investment, and more specifically, its selective use of norms and concepts when investing in the developing world. From a general perspective, China has adopted inconsistent investment policies at all levels of governance when, for instance, resisting the formation of multilateral principles on foreign investment under the WTO banner or showing a clear reluctance to give away some aspects of state control over foreign investment.<sup>46</sup> This original – and successful – path departing from the ready-made

<sup>43</sup> *Protocols of accession for the People’s Republic of China* WT/L/432, WORLD TRADE ORGANIZATION (Nov. 10, 2001), available at: [http://www.wto.org/english/thewto\\_e/acc\\_e/protocols\\_acc\\_membership\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/protocols_acc_membership_e.htm) (last accessed: 24 April 2012); see also Report of The Working Party on the Accession of China WT/MIN(01)/3, WORLD TRADE ORGANIZATION (Nov. 10, 2001), available at: [http://www.wto.org/english/thewto\\_e/acc\\_e/protocols\\_acc\\_membership\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/protocols_acc_membership_e.htm) (last accessed: 24 April 2012).

<sup>44</sup> See Leïla Choukroune *China’s accession to the WTO: a turning point?*, 69 PERSPECTIVES CHINOISES et CHINA PERSPECTIVES (2002); see also Leïla Choukroune, *China’s Accession to the WTO and Legal Reform: Towards the Rule of Law via Internationalization Without Democracy?*, in CHINA, DEMOCRACY, AND LAW: A HISTORICAL AND CONTEMPORARY APPROACH, (Mireille Delmas-Marty & Pierre-Etienne Will eds., 2011). Randall Peerenboom uses the expression “thin rule of law” in RANDAL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002).

<sup>45</sup> See e.g., U.S. TRADE REP., 2010 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (2010).

<sup>46</sup> For a very insightful comparison between India and China, see Muthucumaraswamy Sonarajah, *India, China and Foreign Investment*, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 136 (Muthucumaraswamy Sorbarajah & Jiangyu Wang eds., 2010).

economic credo in favor of a market based development takes a multitude of forms, but finds an interesting illustration in Chinese practices of investment contracts in Africa and Latin America.

As has been noted for a few years now, a dramatic emerging trend in South-South economic relations is transforming traditional patterns of economic development, and this is nowhere more evident than in China-Africa and China-Latin America trade and investments flows.<sup>47</sup> China is currently the second largest commercial partner of Latin America after the US, and has recently become the (largest) commercial partner of Brazil. But China does not only trade with the region, it invests massively and provides favorable loans, thus competing with the World Bank and other major donors. The situation in Africa is even clearer: China has become a major, if not the largest, trading partner, investor and loans provider. As a matter of fact, Africa is second next to Asia as the major destination of Chinese Foreign Direct Investment (FDI), and more than 700 major Chinese companies operate in Africa.<sup>48</sup>

Interestingly, when trading with or investing in Latin America and Africa, China is also exporting a political, economic and legal model. For instance, Beijing’s effort to offer African states resources-backed development loans is inspired by its experiences at home and departs from the liberal rhetoric on conditionality. In the 1970s, China leveraged its natural resources to attract major loans from Japan. Since 2004, China has concluded similar deals in half a dozen ‘rich’ African countries. In Nigeria, Angola and the Democratic Republic of Congo, the deals exemplify the tensions and differences between Chinese and Western legal models. Moreover, law and international law are used in such a pragmatic – if not utilitarian – way that it leads to a rupture in contemporary legal thought. Unconditional, syncretic and oriented towards non-judicial settlements of disputes, the investment deals offer a perfect synthesis of legal techniques and traditions (French, Chinese, American, international) and contribute to the creation of singular and autonomous areas of nomadic law freed from the constraints of democratic values. It is here, in this emerging South penetrated by another South, that we are finally able to discover the true political meaning of the harmonious world: a world disciplined for commerce and growth and freed from democratic tensions and aspirations.

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<sup>47</sup> For a well-informed synthesis, see HARRY G. BROADMAN, *AFRICA’S SILK ROAD, CHINA AND INDIA’S NEW ECONOMIC FRONTIER* (2006).

<sup>48</sup> *Id.* However, these figures would need to be updated, as China’s presence in Africa is now bigger and deeper, taking on a variety of forms.

### C. Conclusion

The ongoing process of internationalization of Chinese norms and practices raises important questions as to the objectives of the last 30 years of legal reform and the very nature of the Chinese regime, which now advises socialist harmony as the final rampart against social destabilization.<sup>49</sup> Are individuals and their private life sufficiently protected from state intrusion in China today, or will they still have to face a “metamorphosed totalitarianism”?<sup>50</sup> “Along the road of Chinese-style socialism,”<sup>51</sup> will the PRC persist in trying to avoid the democratic path by taking the detours of “rule of law” via internationalization, which is devoid of popular legitimacy? Just as many questions could be asked about Beijing’s relations *to* and uses *of* international law.

While there is no reason to deny that China can create its own political model that does not simply transpose pre-existing Western ideas, one cannot strip legal and philosophical concepts such as the rule of law and democracy of their meaning in the name of a well-meaning denunciation of ethnocentrism and imperialist policies. China must participate in the construction of what Georges Scelle called, in 1934, “a common international law,” but this will not come along with the “harmonious world and society.”<sup>52</sup> Indeed, Socialist harmony derives from both ideological and utopian desires, and its institutionalization only helps the regime preserve and renew itself through association with a proposal that is presented as original at the national and international level, but which remains illusory.

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<sup>49</sup> For a general overview, see Stanley B. Lubman and Leïla Choukroune, *La réforme juridique chinoise*, 302 *ESPRIT* 122 (2004).

<sup>50</sup> Michel Bonnin, *Les métamorphoses du totalitarisme*, 117 *LE DÉBAT* 11 (2001).

<sup>51</sup> This phrase (*yanzhe Zhongguo tese shehuizhuyi daolu*) replaced “socialism with Chinese characteristics” in the preamble to the Constitution as amended in 2004: *Zhonghua Renmin Gongheguo Xianfa* (中华人民共和国宪法) [Constitution] Mar. 14, 2004 (China).

<sup>52</sup> GEORGES SCELLE, *PRÉCIS DU DROIT DES GENS* (1934).