Chinese Law and International Treaties

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The influence of international law, in particular international treaties, on the Chinese legal order has been the subject of many studies published in English that focus on the period prior to the early 1990s. This article investigates the relationship between Chinese law and international treaties, particularly focussing on how this area has developed during the past 15 years following the reform and opening policy. The position of the People's Republic of China (PRC) will be analysed with respect to the abstract relationship between international law and municipal law, treaty-making competence, legal doctrine of treaty application, legislative and adjudicative practice of treaty application in addition to the rank of treaties within the municipal legal system.

1. Introduction

China was confronted with the Western concept of international treaties under unfavourable historical conditions. In the 19th century, treaties were used by the colonial powers as an instrument to force China to open up and trade with other countries.[1] In the eyes of the Chinese, international treaties represented restrictions on state sovereignty and national humiliation. When international law textbooks were translated into Chinese[2] and arguments based on international law were used by the Chinese Government in its international relations,[3] international law was not understood as an end in itself, but rather, like military science and other useful technical skills, as an instrument for the purpose

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[1] Robert Heuser, "China and Developments in International Law", (2002) 4 *Journal of the History of International Law* 142; Tieya Wang, "International Law in China: Historical and Contemporary Perspectives", (1990) *Recueil des Cours* Vol 2, p 250; Hungdah Chiu, "China's Struggle Against the 'Unequal Treaties', 1927–1946", (1985) 5 *Chinese Yearbook of International Law and Affairs* 1; William L. Tung, *China and the Foreign Powers* (Dobbs Ferry: Oceana Publishers, 1970); Rodney Gilbert, *The Unequal Treaties* (Arlington: Univ. Publ. of America, 1976).

[2] W.A.P. Martin translated Henry Wheaton's Elements of International Law into Chinese in 1863. *See* Immanuel C. Y. Hsü, *China's Entrance into the Family of Nations* (Cambridge Mass.: Harvard Univ. Press, 1960).

[3] Hsü, *ibid*, p 132.

to "control foreigners". Hence, the value of international law for the modernisation of China was regarded as marginal.[4]

Apart from the continuing influence of the traditional Chinese foreign policy and worldview, the actions of the European powers and Japan have also contributed to the Chinese disregard of international law during the second half of the 19th century as the colonial powers did not act on the basis of international law where they had the rules of international law against them. It was not until China had regained economic power, following the course of the reform and opening policy of 1978 that international treaties began to play a more positive role. This had become particularly evident by the end of the 1990s with the introduction of domestic reforms to prepare for the accession to the World Trade Organisation (WTO).[5]

Cultural tradition is one factor that has contributed to the rejection of entering into treaty-relationships, on the basis of an equal legal status of states.[6] The image of a "Middle Kingdom" that claims a central position within the international order is of significance for Chinese foreign policy to date, and the success of the economic modernisation of the country reinforces this viewpoint. Thus, the PRC constitutes a non-saturated power that only reluctantly accepts the international power structure.[7] This world view encourages a certain form of municipal application of international treaties: the implementation mechanisms that are preferred are those that give the party-state leadership the greatest possible flexibility and leave the door open to avoid an alignment of domestic rules and institutions with international standards.[8]

2. International Law and Municipal Law

The Chinese concept of sovereignty is rather a political programme with the aim of gaining "national strength" rather than a notion of legal

[4] Björn Ahl, *Die Anwendung völkerrechtlicher Verträge in China* (*The Application of International Treaties in China*) (Dordrecht: Springer, 2009), p 16.

[5] Kong Xiangjun, "The Establishment of a WTO-consistent System of Judicial Review", No 6 (2001) *Zhongguo Faxue (Chinese Legal Studies)*, p 8.

[6] Wang, "International Law (n 1 above)", p 219; Randle Edwards, "China's Practice of International Law – Patterns from the Past,", Ronald MacDonald (ed), *Essays in Honour of Wang Tieya* (Dordrecht: Nijhoff, 1994), p 243; James Hevia, *Cherishing Men from Afar. Qing Guest Ritual and the Macartney Embassy of 1793* (Durham: Duke University Press, 1995); Rune Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1847–1911* (Leiden: Brill, 2007), p 8.

[7] Sebastian Heilmann, *Das politische System der Volksrepublik China (The Political System of the People's Republic of China)* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2004), p 248.

[8] Ahl, *see* n 4 above, p 17.

doctrine. It consists of the elements of official patriotism, communist ideology as well as anti-Western tendencies.[9] On the one hand, scholars, under the influence of globalisation, seem to detach themselves gradually from the rigid dogma of sovereignty.[10] On the other hand, the rhetoric of "national strength" seems to prevail.[11] As regards the practice of the internal application of international treaties, such a concept of sovereignty implies that international obligations will only be accepted reluctantly, and their domestic implementation is subject to the condition that the relevant international obligations promote national interests.[12]

Chinese scholars reject both the monistic and dualistic views that are typically used to describe the relationship between international law and municipal law. The monist theory with primacy of international law is criticised as denying state sovereignty and as reflecting an imperialist policy to control the world through world law.[13] The dualist theory is regarded as overemphasising the formal antagonistic aspect of international law and municipal law.[14] Instead, commentators favour a "dialectical model" that is borrowed largely from soviet legal doctrine. According to this dialectical view, international law and municipal law are separate systems that are infiltrating and supplementing each other rather than conflicting with each other.[15] Commentators state that when states enact municipal law, they take into account the requirements of international law. Similarly, when states participate in enacting international law, they consider it from the standpoint of

[9] Samuel S. Kim, "Sovereignty in the Chinese Image of World Order", Ronald Macdonald (ed), *Essays in Honour of Wang Tieya* (Dordrecht: Nijhoff, 1994), p 425; Xiao Jialing, *Guojia zhuquan lun (Theory of State Sovereignty)* (Beijing: Shishi chubanshe, 2003), p 234; Lin Xiaohong and Xie Ping, "Economic Globalisation and the Protection and Innovation of State Sovereignty", Vol 26, No 8 (2005) *Hunan Keji Xueyuan Xuebao (Hunan Academy of Science and Technology Journal)*, p 4.

[10] Geng Mingjun, "Globalisation and the State Sovereignty of China", No 1 (2003) *Shehui Zhuyi Yanjiu (Socialism Studies)*, p 71; Jiang Hongchi, "State Sovereignty against the Background of Globalisation", Vol 29 (2005) Xiangtan Daxue Xuebao (Xiangtan University Journal), p 188.

[11] Wang Chuanbao and Sun Hui, "Erosion of State Sovereignty under the Influence of Economic Globalisation and China's Answer", Vol 1 No 1 (2003) Ningbo Guangbo Dianshi Daxue Xuebao (Ningbo Broadcast and Television University Journal), p 32; Xiao, n 9 above, p 231.

[12] Ahl, n 4 above, p 39.

[13] Liang Shuying, *Guoji gongfa (Public International Law)* (Beijing: Zhongguo zhengfa daxue chubanshe, 1996), p 38; Mu Yaping, *Dangdai guojifa lun (Theory of Contemporary International Law)* (Beijing: Falu chubanshe, 1998), p 23; *Wang Tieya, Guojifa (International Law)* (Beijing: Falu chubanshe, 1995), p 29.

[14] Cao Jianming, *Guoji gongfa xue (Public international Law)* (Beijing: Falu chubanshe, 1998), p 22; Yang Zewei, *Guojifa jiaocheng (International Law Textbook)* (Beijing: Zhongguo zhengfa daxue chubanshe 1999), p 25.

[15] Wang Tieya, *Guojifa yinlun (Introduction to International Law)* (Beijing: Beijing daxue chubanshe, 1998), p 191; Zhou Gengsheng, *Guojifa (International Law)* (Beijing: Shangwu yinshuguan, 1983) p 20; Zhaojie Li, "The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problems in China", Benedetto Conforti (ed), *Enforcing International Human Rights in Domestic Courts*, (The Hague: Martinus Nijhoff, 1997), p 338.

domestic law. As long as states seriously perform their international obligations, international law and domestic law can always be reconciled.[16] As the dialectical model is based on the assumption of separate systems of law, it can be interpreted in the sense of a differentiating dualism. This approach is comparable with various views of Western scholars insofar as it leaves the normative question open with regards to how existing conflicts between municipal law and international law should be resolved.[17] The main consequence of this theoretical position for the practice of domestic treaty implementation lies within the flexibility that is granted to state organs in the application of treaty provisions.

3. Treaty-making

The conditions of domestic treaty application relate not only to existing treaty obligations but also to the participation of different state organs in the treaty-making process.[18] In respect of the external representation of the PRC on the international plane, the current Constitution, unlike the Constitution of 1954,[19] does not explicitly assign the exclusive competence of external representation to the State President. Commentators affirm that the power to make treaties is jointly exercised by the National People's Congress (NPC) Standing Committee, the State President and the State Council.[20] In practice, the State President represents the PRC to conclude more important treaties; the President ratifies treaties in accordance with Art 81 of the Constitution.[21] Less important treaties or agreements are concluded by a Minister of the State Council.[22] Some scholars opine that the State President is only exercising a "symbolic role" when ratifying treaties, and suggest that the NPC Standing Committee should be responsible for the treaty ratification upon the international

[16] Liang, n 13 above, p 39; Wang, n 13 above, p 29.

[17] Daniel Thürer, "International Law and Municipal Law", (1999) 3 *Schweizerische Zeitschrift für internationales und europäisches Recht (Swiss Journal of International and European Law)* 217.

[18] John Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", (1992) 86 *American Journal of International Law* 315, 323; Thomas Cottier and Krista Schefer, "The Relationship between World Trade Organization Law, National and Regional Law", (1998) 1 *Journal of International Economic Law* 115.

[19] *See* Art 41 of the 1954 Constitution.

[20] Li Jinrong, *Guojifa (International Law)* (Beijing: Falu chubanshe, 2002), p 291; Wu Jie, *Xianfa jiaocheng (Textbook on Constitutional Law)* (Beijing: Falu chubanshe, 1996), p 228.

[21] Art 81 of the 1982 Constitution: "The President of the People's Republic of China receives foreign diplomatic representatives on behalf of the People's Republic of China and, in pursuance of decisions of the Standing Committee of the National People's Congress, appoints and recalls plenipotentiary representatives abroad, and ratifies and abrogates treaties and important agreements concluded with foreign states."

[22] *See* Art 89 No 9 of the 1982 Constitution and Art 3 (1) of the 1990 Law on the Procedure for the Conclusion of Treaties.

plane.[23] However, the aforementioned scholarly views disregard the requirements of intergovernmental intercourse as well as the text of the Chinese Constitution and ignore that the Office of the President is regularly held by the Secretary General of the Communist Party.[24]

The NPC Standing Committee decides on the ratification of treaties and important agreements concluded with foreign States in accordance with Art 67 No 14 of the Constitution. Although the power of the NPC Standing Committee to participate in the treaty-making process has been gradually broadened, the circumstances of the accession of China to the WTO revealed the relatively weak position of the NPC Standing Committee in relation to the executive. Art 67 No 14 of the PRC Constitution stipulates that the President shall not ratify a treaty unless the Standing Committee of the NPC – after reviewing the treaty at one of its sessions – renders a decision to that effect. However, when acceding to the WTO, the PRC government deposited the instrument of ratification only two days after signature, without the consent of the Standing Committee. Although the Standing Committee published a decision on the accession to the WTO, the decision referred only to the progress of the accession negotiations in general and was taken 15 months before the date of signature.[25] The intention of this action was to demonstrate that the Standing Committee had, in this case, either made an anticipated decision on the accession or waived its power of decision regarding the ratification.[26] But it is very doubtful whether the PRC Constitution allows State organs to waive their powers or to delegate competences as was the case for accession to the WTO. Some commentators therefore regard the accession of China to the WTO as a violation of the PRC Constitution.[27]

When the NPC Standing Committee approves a treaty, the internal decision-making process includes not only the delegates of the Standing

[23] Chen Hanfeng et al, "The Relationship between International Treaties and Municipal Law and the Practice in China" Zhu Xiaoqing and Huang Lie (eds): *Guoji tiaoyue yu guoneifa de guanxi (The Relationship between International Treaties and Municipal Law* (Beijing: Shijie zhishi chubanshe, 2000), 86, 95; Xu Lisha, *On the Legislative Practice of the Domestic Execution of International Treaties (Lun guoji tiaoyue za iguonei zhixing de lifa shijian)*, http://www.hicourt.gov.cn/theory/artilce_list.asp?id=903&l_class=2 (visited 9 November 2009).

[24] The reason to question the State President's external powers may be related to the inconsistency between the constitutional status of the President as the highest representative of the State in external matters on the one hand, and the constitutional status of the NPC and the NPC Standing Committee respectively as the highest State organs on the other.

[25] Decision of the NPC Standing Committee on the Accession of China to the World Trade Organisation of 25 August 2000, *Zhonghua renmin gongheguo renda changweihui gongbao (Gazette of the NPC Standing Committee of the PRC)* (2001), p 600.

[26] Minyou Yu, "Compliance with China's WTO Accession Agreement: A Chinese Lawyer's Perspective", Shao Shaping (ed), *Guojifa wenti zhuanlun (International Law Issues Monograph)* (Wuhan: Wuhan Daxue Chubanshe, 2002), p 408; *Kong Xiangjun, WTO falü de guonei shiyong (Domestic Application of WTO Law)* (Beijing: Renmin fayuan chubanshe, 2002), p 146.

[27] Zhang Naigen, *Guojifa yuanli (Theory of International Law)* (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2002), p 25, Bing Ling, *Is China's Accession to the WTO Legally Valid?* (unpublished paper).

Committee; it also involves other relevant actors of the Party-State in the process of informal decision-making.[28] Therefore, the NPC Standing Committee's power to approve treaties is, in practice, not a genuine power of parliamentary participation and control.

The Special Administrative Region of Hong Kong is vested with a separate power to conclude international treaties. The treaty-making competence is provided for in the Basic Law of Hong Kong.[29] The Central Government retains the competence to conclude treaties in the field of foreign affairs.[30] Chinese scholars have made various attempts to interpret Hong Kong's treaty-making power restrictively.[31] In practice, the Special Administrative Region exercises its treaty-making power independently and is not subject to the proposed limitations.[32]

4. Legal Doctrine of Treaty Application

Chinese legal doctrine distinguishes three types of implementation mechanisms: (a) adoption; (b) transformation; and (c) a hybrid form that combines both adoption and transformation mechanisms.

a. Adoption

The term "adoption" is understood as a process by which international treaties are *en bloc* incorporated into the domestic legal system without being transformed into domestic law.[33] Sometimes "adoption" is equated with "automatic application" or "direct application".[34] Adoption is conducted either by an implied or an explicit domestic act.

[28] Heilmann, n 7 above, p 253.
[29] Art 151 Basic Law.
[30] Art 13 (1) Basic Law.
[31] Deng Zhonghua, "Issues relating to the Treaty-making Power of the Hong Kong Special Administrative Region", No 2 (1993) *Xiang Ao Tai falü wenti yanjiu (Hong Kong, Macau and Taiwan Legal Problems Studies)*, p 60; Xu Chongli, "How to Continue to Apply Treaties of International Economic Law to Hong Kong after 1997", No 1 (1997) *Zhongwai Faxue (Peking University Law Journal)*, p 106; Liu Wenzong, "On the Application of International Treaties in Hong Kong after the Return in 1997", No 2 (1997) *Waijiao Xueyuan Xuebao (Diplomacy Academy Journal)*, p 6; Wang, "International Law (n 1 above)", p 313.
[32] Ahl, n 4 above, p 115.
[33] Qin Xiaocheng, "The Domestic Application of Treaties", Zhu Xiaoqing and Huang Lie (eds): *Guoji tiaoyue yu guoneifa de guanxi (The Relationship between International Treaties and Municipal Law* (Beijing: Shijie zhishi chubanshe, 2000), p 158; Che Pizhao, "On the Application of Treaties in China", No 3 (2005) *Faxue Zazhi (Legal Studies Journal)*, p 97.
[34] Liu Nanlai, "The Domestic Application of Treaties and the Establishment of a Legal System in China", Zhu Xiaoqing and Huang Lie (eds): *Guoji tiaoyue yu guoneifa de guanxi (The Relationship between International Treaties and Municipal Law* (Beijing: Shijie zhishi chubanshe, 2000), p 139; Mu Yaping and Xian Yifan, "The Problem of the Application of the WTO Agreement in China", Zhang Naigen (ed), *21 shiji de Zhongguo yu guojifa (China and International Law in the 21st Century)* (Shanghai: Shanghai renmin chubanshe, 2002), p 204.

The traditional interpretation of the Chinese practice of treaty implementation is based on the mechanism of adoption. This inference suggests that treaties become part of the domestic law and are directly applicable by the courts and the administration when they bind the PRC upon the international plane.[35] The arguments in favour of this kind of automatic standing incorporation of international rules are mainly based on the existence of statutory norms of reference which provide for the application of a treaty provision in the event that national legislation should conflict with an international treaty.[36]

In the second half of the 1990s, this traditional interpretation was largely abandoned when Chinese scholars started to explore the question of treaty implementation more closely in preparation for the accession to the WTO. The Chinese scholars arrived at the conclusion that the WTO Agreement and its annexes should not be directly applicable.[37] Although the traditional view of automatic or general adoption of treaties is still advocated by some authors, others try to limit the domestic effects of treaty norms on different stages of the implementation process. One group of commentators limits the domestic effects of treaties on the level of application by arguing that making treaties part of the domestic legal system does not mean that treaties can be directly applied by the courts.[38] The more recently developed view of "selective adoption" advocates that only those treaty norms, which are explicitly referred to in a statutory reference norm, would become part of the domestic legal system.[39] According to this view, the restriction already takes place on the effectiveness level when the national legal order

[35] Wang, "International Law (n 1 above)", p 329; Li, "The Role of Domestic Courts (n 15 above)", p 340.

[36] Rao Geping (ed), *Guoji fa (International Law)* (Beijing: Bejing daxue chubanshe, 1999), p 29; Pan Baocun, *Zhongguo guojifa lilun tantao (Studies of the Chinese Theory of International Law)*, (Beijing: Falu chubanshe, 1988), p 105; Chengsi Zheng, "The TRIPS Agreement and Intellectual Property Protection in China", (1998) 9 *Duke Journal of Comparative and International Law* 220. An often cited example of a national provision referring to international treaties is Art 142 (2) of the General Principles of Civil Law which stipulates: "If any international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the PRC, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations. International practice may be applied to matters for which neither the law of the PRC nor any international treaty concluded or acceded to by the PRC has any provisions."

[37] Yu An, "The Problem of the Domestic Implementation of the WTO Agreement", No 3 (2000) *Zhongguo Faxue (Chinese Legal Studies)*, p 4; Cao Jianming, "WTO and the Rule of Law in China", (2002) 16 *Temple International and Comparative Law Journal* 380.

[38] Li, "The Role of Domestic Courts (n 15 above)", p 347; Chen Dan and Yang Hongbo, "The Application of the WTO Agreement from the Perspective of International Law and Municipal Law", No 1 (2002) *Huaihua Shizhuan Xuebao (Huaihua Normal School Journal)*, 29.

[39] Che Pizhao, n 33 above, p 97; Zhao Jianwen, *Guojifa xinlun (New Introduction to International Law)* (Beijing: Falu chubanshe, 2000), p 50; He Xiaoyong, "Problems regarding the Application by Chinese Courts of the WTO Agreement", No 3 (2001) *Guoji Maoyi Wenti (Issues of International Trade)*, p 50.

incorporates exclusively those treaty provisions which national legislation explicitly refers to. A final group of authors regards the mode of automatic adoption only as a "legislative tendency" without normative effect.[40] This supposition introduces the restriction simply by regarding the implementation of international treaties as not being subject to effective legal regulation.

The main reason for the deviation from the traditional internationalist approach may have been that until the second half of the 1990s, there was practically no provable practice of direct treaty application. Thus, the internationalist position remained merely theoretical. At the time when the internationalist position was developed, treaty obligations were mainly aimed at the State as such, and the possibility of individuals invoking treaty provisions before municipal courts was not regarded as relevant.[41] Therefore, the restriction of the principle of general adoption is rather a realistic adaptation to the implementation practice of other states and follows, to a certain extent, the requirements of the constitutional structure of the PRC. It would contradict the People's Congress System of the Chinese Constitution, if the courts directly applied all treaty provisions which are binding upon the PRC and, as a result, the courts would be conferred a stronger position in relation to the People's Congresses.[42] It is more appropriate if the NPC or its Standing Committee[43] controls the direct application of treaty norms by courts through legislative acts like, for instance, the enactment of norms of reference, or if the Supreme People's Court demands the direct application of certain treaties or certain treaty provisions by issuing judicial interpretations.[44]

b. Transformation

Compared to the notion of "adoption", the term of transformation lacks clarity. There is an agreement insofar as international law is translated into domestic law by way of transformation.[45] Some regard it as an act of

[40] Mu Yaping, n 13 above, p 26; Cao Jianming, n 14 above, p 24.

[41] Donald Clarke, "China's Legal System and the WTO: Prospects for Compliance", (2003) 2 *Washington University Global Studies Law Review* 100.

[42] For a discussion of the constitutional implications of the direct application of treaties, *see* Cottier and Schefer, n 18 above, p 91.

[43] The Chinese Constitution describes both the NPC and its Standing Committee as legislative organs, Art 58. The National People's Congress enacts basic laws, Art 62 (3), whereas the enactment of "other laws" falls into the domain of the Standing Committee, Art 67 (2).

[44] The Supreme People's Court issues "judicial interpretations" which have the effect of law. Abstract judicial interpretations do not arise out of specific application of law and often explain the national law subject to interpretation in a very detailed manner. *See* Liu Nanping, *Judicial Interpretation in China: Opinions of the Supreme People's Court* (Hong Kong: Sweet & Maxwell, 1997).

[45] Yang, n 14 above, p 26; Mu Yaping and Xian Yifan, n 34 above, p 204.

transformation, if the legislator takes into consideration treaty obligations in the process of drafting a national statute.[46] Transformation, unlike adoption, refers in most scholarly writings not to the international treaty as a whole but to selective parts. The act of transforming is conducted selectively as individual treaty provisions are transformed into national law through an *ad hoc* legislative act and others are omitted from transformation.[47] The scholars who interpret implementation practice in the sense of transformation sustain their view predominantly upon the rejection of the interpretation of reference provisions as embodying a general rule of automatic treaty incorporation.[48] With regard to the WTO Agreement and international human rights treaties, a transformation of treaty obligations into Chinese law is considered to be necessary.[49]

c. Hybrid Form

Another group of scholars opines that the Chinese practice of treaty implementation is a "hybrid form", which is described as a synthesis of adoption and transformation.[50] The underlying assumption is that directly applicable treaty provisions become binding within the Chinese legal system without an additional domestic act, whereas treaty provisions that are not directly applicable require a transformation into domestic law. Further, the hybrid form may be understood as a process that, in the first stage, adopts the treaty as a whole into the domestic sphere and, in the second stage, provides for implementing legislation of non-directly applicable treaty provisions. This view is a form of interpretation of the current practice that attempts to seek a solution with "Chinese characteristics". It borrows arguments from the description of the interrelationship between international law and municipal law that was described in terms of legal spheres which are separate as well as interconnected.[51] This practice leads to the "dialectical unity" of two

[46] Mu Yaping and Xian Yifan, *ibid*.

[47] Liu Nanlai, n 34 above, p 139; Zhang Lijuan, "On the Relationship between International Treaties and Chinese Municipal Law", No 2 (2001), *Gansu Zhengfa Chengren Jiaoyu Xueyuan Xuebao (Journal of Gansu Adult Education Academy of Politics and Law)*, p 33.

[48] Zhu Qiwu, *Zhongguo guojifa de lilun yu shijian (Chinese Theory and Practice of International Law)* (Beijing: Falu chubanshe, 1998), p 14; Wang Xianshu, Guojifa (International Law) (Wuhan: Wuhan daxue chubanshe, 2000), p 43.

[49] With regard to the WTO *see* Yu An, n 37 above, p 4; Cao Jianming, n 37 above, p 380; for human rights treaties *see* Zhu Qiwu, n 48 above, p 15; Li Jinrong, n 20 above, p 281; Zhou Hongjun, *Guojifa (International Law)* (Beijing: Zhongguo zhengfa daxue chubanshe, 1999), p 400.

[50] Dong Guolu, "The Application of International Law in China", Vol 55 No 3 (2002) *Wuhan Daxue Xuebao (Wuhan University Journal)*, p 350; Qin Xiaocheng, n 33 above, p 155; Liao Fuyao and Liu Jian, "On the Application of International Treaties in China", No 1 (2004) *Tianshui Xingzheng Xueyuan Xuebao (Tianshui Administration Academy Journal)*, p 50.

[51] *See* n 15 above and accompanying text.

opposing implementation mechanisms: international treaties are incorporated into national law through the modality of adoption as well as through the mechanism of transformation. However, legal scholars have not yet reached a consensus regarding the applicable criteria to determine whether a treaty norm can be directly applied or not.[52]

5. Legislative Practice of Treaty Application

It is suggestive, from the analysis of legislative practice, that four different modalities of State actions must be distinguished and become relevant for the application of international treaties in the PRC: (a) the publication of the treaty text; (b) the adoption of statutory reference norms by the legislature; and (c) the issuance of judicial interpretations by the Supreme People's Court; and (d) the harmonisation of domestic legislation with international obligations. The interaction of those four elements constitutes a mechanism for the application of treaties within the PRC.

a. Publication of Treaties

It follows from practice that the first precondition for the legal relevance of an international treaty within the domestic legal system is that the text of the treaty has been published in the Official Gazette of the National People's Congress (NPC) Standing Committee. In practice, the text of the treaty is always published together with the NPC Standing Committee's decision on the ratification in the sense of Art 67 (14) of the PRC Constitution.[53] This implies that the authorisation by the NPC Standing Committee to conclude or to accede to a treaty must precede the publication of the treaty text. At the moment of the publication of the treaty text, the treaty becomes legally binding within the domestic legal system. In the event that the publication in the Gazette precedes the entry into force of the treaty upon the international

[52] For a discussion of different criteria that may determine whether a treaty is directly incorporated or requires transformation *see* Zhang Lijuan, n 47 above, p 33; Yu Xiuling and Zhao Jing, "On the Hybrid Form of the Domestic Application of International Treaties", Vol 4 No 1 (2005) *Luohe Zhiye Jishu Xueyuan Xuebao (Luohe Professional Technology Academy Journal)*, p 118; Xia Qingxia, "The Relationship between International Law and Municipal Law from the Perspective of International Human Rights", No 3 (2002) *Nanjing Jingji Xueyuan Xuebao (Nanjing Economic Academy Journal)*, p 67.

[53] *See*, for example, *Jingji, shehui ji wenhua quanli guoji gongyue (International Covenant on Economic, Social and Cultural Rights)* 19 December 1966, Gazette of the NPC Standing Committee No 2 (2001), p 142; *Laodong xingzheng guanli gongyue (Convention on Labour Administration)* 26 June 1978, No 7 (2001) Gazette of the NPC Standing Committee, p 617; *Lianheguo daji kuaguo you zuzhi fanzui gongyue (United Nations Convention against Transnational Organized Crime)* 15 November 2000, No 5 (2003) Gazette of the NPC Standing Committee, p 479.

plane, the internal legal force of the treaty is subject to the condition of its binding effect among states. Treaties the conclusion of which has been authorised by the NPC Standing Committee have the same rank in the Chinese hierarchy of norms as laws that are enacted by the NPC Standing Committee.[54] It must be noted that Chinese scholars do not discuss the act of publication of the treaty text in relation to the domestic implementation of treaties which implies that, in their view, the publication has no legal effect. However, practice indicates that the publication of both the treaty text and the ratification decision would intend legal effect.

If the practice of publication of treaty text is examined without taking into account the other State actions in relation to international treaties, it may be interpreted as an act transforming the content of the treaty into domestic law. If this interpretation is correct, the domestic courts and the administration would apply the published treaty like a national law. If the treaty publication in the Gazette is viewed separately from other acts of the State in relation to treaties, it may as well be interpreted as commanding the direct application by domestic State organs, but without incorporating the treaty into the municipal legal order. However, the practice of applying statutory reference norms and issuing judicial interpretations[55] indicates that the treaty publication does not have the capacity to allow the administration and the courts to apply the relevant treaty provisions directly. In order to achieve this result, another State action is required, in addition to the publication of the international treaty in the Gazette. This practice excludes an interpretation of the publication in terms of the transformation doctrine. Hence, publication of a treaty text does not imply that it can be applied like a national statute or that it can be regarded as a direct and unconditional command for national authorities to enforce the relevant treaty provisions.

Instead, the publication of a treaty in the Gazette of the NPC Standing Committee constitutes the first and necessary step in the process that a treaty provision must pass in order to become directly applicable within the domestic sphere. Therefore, the publication of a treaty text may be interpreted in terms of the adoption doctrine, ie the publication, in general, brings about the integration of the treaty into the domestic legal system. In particular, the practice with regard to human rights treaties emphasises that a treaty that forms part of the domestic legal system does not assume direct applicability. In order to directly apply a treaty norm, an additional step is necessary in either the form of a

[54] *See* n 64 below and accompanying text.
[55] *See* n 60 below and accompanying text.

statutory reference norm or a judicial interpretation that refers to the relevant international treaty.

This interpretation of the publication practice negates the traditional view of Chinese scholars that international treaties become part of the domestic legal system upon their entry into force on the international level and are directly applicable without further conditions.[56] However, the traditional view could not convincingly reflect the implementation practice of the 1980s and 1990s, and it was negated by the modern literature that evolved in the run-up to the PRC's accession to the WTO.

b. Statutory Reference Norms

Reference norms are statutory provisions that command, under certain conditions, the application of norms of international law within a particular area of municipal law.[57] Under Chinese law, reference norms provide for a mechanism that allows the courts and the administration to directly apply those treaty provisions published in the Gazette that the statutory reference norm refers to. Consequently, state organs are not permitted to apply treaties directly, if the treaty has been published but no statutory reference norm explicitly refers to the relevant treaty.

The publication of the treaty text must be regarded as a necessary precondition for the application of a treaty provision on the basis of a statutory reference norm. A reference norm that refers to a treaty that has not been published in the Gazette, cannot serve as the basis for a direct application of the treaty provision. Therefore, reference provisions that potentially refer to the WTO law cannot enable the direct application of the WTO Agreement because the Agreement has not been published in the Gazette of the NPC Standing Committee. This result is further reinforced by the fact that the Supreme People's Court issued a judicial interpretation which excluded the direct application of the WTO law within the domestic legal system.[58]

c. Judicial Interpretations

The judicial interpretation of statutes by the Supreme People's Court is a particular feature of the Chinese legal system that may be explained by the configuration of the court system that resembles the structure of the

[56] *See* n 35 above and accompanying text.
[57] *See* the example in n 36 above.
[58] *See* Art 9 of the *Zuigao renmin fayuan guanyu shenli guoji maoyi xingzheng anjian ruogan wenti de guiding (Regulations of the Supreme People's Court on some Questions of the Trial of Administrative Cases relating to International Trade)* 27 August 2002, No 5 (2002) Gazette of the Supreme People's Court, 165. Che Pizhao, n 33 above, p 99.

administration. It is by virtue of this structure that an attempt to monopolise the interpretation of law may be inferred.[59] In general, the judicial interpretations regarding the implementation of international treaties reiterate the contents of reference norms supplement or adjust the content of reference norms.[60] The practice of issuing judicial interpretations that relate to international treaties would imply that a reference norm must not necessarily be supplemented by a judicial interpretation in order to enable direct applicability of a treaty provision.

Due to the practice of the Supreme People's Court to issue judicial interpretations that fulfill a legislative rather than an adjudicative function, and which sometimes interfere with the law-making competence of the NPC Standing Committee, it is assumed that a judicial interpretation may mandate direct application of a treaty norm without a relevant statutory reference norm. Thus it appears that a judicial interpretation may substitute a statutory reference norm. On the other hand, it is assumed that, on the basis of the same reasoning, the Supreme People's Court may exclude the direct applicability of an international treaty, despite the fact that a reference norm refers to that treaty.

d. Harmonisation of Domestic Laws

The harmonisation of the domestic legal system with international treaties by amending existing laws and regulations or by adopting new legislation constitutes another modality of state action in relation to international treaties.[61] The adaptation of laws and regulations is independent from the abovementioned State actions because the reception of the contents of an international treaty by way of passing or changing laws is not based on the publication of the treaty. Further, no separate reference norm is required which commands direct applicability because the harmonised laws are of the same quality as other laws that have been adopted without any reference to international law, and are therefore directly applicable. Often,

[59] Albert H. Y. Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Lexis Nexis, 2004), p 133.

[60] Ahl, n 4 above, p 261.

[61] For the WTO law *see* Liu Qiaofa, *Lun guoji tiaoyue jian lun WTO xieyi zai guonei de shiyong (On International Treaties and the Domestic Application of the WTO Agreement)* 2004, at: http://chinalawlib.com/181997166.html (visited 10 November 2009); for the harmonisation of the Chinese intellectual property rights law regime with international treaties *see* Derek Dessler, "China's Intellectual Property Protection: Prospects for Achieving International Standards," 19 (1995) *Fordham International Law Journal* 181; Naigen Zhang, "Intellectual Property Law in China: Basic Policy and New Developments," 4 (1997) *Annual Survey in International and Comparative Law* 1.

the relationship between a harmonised law and an international treaty is not made explicit.[62]

It is assumed that the harmonisation of laws may be considered even if the treaty has been published and a reference norm or a judicial interpretation has already effected the direct applicability of the treaty. Doctrine and practice indicate the possibility that both the incorporated treaty and the legislation that has been adjusted to that treaty become valid within the domestic legal order.[63] In the event that the treaty provision conflicts with the parallel domestic legislation, such a conflict might be resolved by applying statutory reference norms which provide for the priority of the treaty norm. This presupposes that the scope of the relevant reference norm covers the ambit that is regulated by the parallel domestic legislation and that it orders the prior application of the treaty norm which conflicts with the provision of domestic law. If the imponderabilities of the application of reference norms by courts are taken into account, it is unlikely that a provision of an international treaty would prevail over conflicting parallel domestic legislation.

6. Rank of Treaties within the Domestic Legal System

Despite the different views in relation to how treaties become binding on domestic State organs, the inconsistencies of the hierarchy of norms in the PRC are responsible for the ambiguities of the ranking of treaties in relation to municipal law. In general, the rank of treaties is the same as the rank of the law which is adopted by the State organ that participates in the process of treaty-making, ie international treaties which are subject to the approval of the NPC Standing Committee have the rank of national statutes.[64] The view that ranks such treaties above statutes[65] is based on an incorrect interpretation of statutory reference norms which provide for the prior application of treaty provisions. Such statutory reference norms are not providing for a primacy of international law in

[62] As long as some international treaties are associated with Western hegemonism and power politics, a harmonisation of domestic law with international standards that conceals the connection with the international realm may better take into consideration political sensitivities than the direct application of treaties by the courts. *See* Ming Wan, "Human Rights Lawmaking in China", 29 (2007) *Human Rights Quarterly* 742.

[63] Jiang Guoqing, "Some Problems relating to International Law and International Treaties", No 3 (2000) *Waijiao Xueyuan Xuebao (Diplomacy Academy Journal)*, p 17; Qin Xiaocheng, n 33 above, p 155.

[64] Dong Guolu, n 50 above, p 352; Wu Hui, "The Status of Treaties in Chinese Domestic Law", Zhu Xiaoqing and Huang Lie (eds): *Guoji tiaoyue yu guoneifa de guanxi (The Relationship between International Treaties and Municipal Law* (Beijing: Shijie zhishi chubanshe, 2000), p 126.

[65] Kong Xiangjun, *WTO falü de guonei shiyong (The Domestic Application of WTO Law)* (Beijing: Renmin fayuan chubanshe, 2002), p 149.

terms of effectiveness but provide only for a prior application of the treaty provisions that they refer to.

7. Adjudicative Practice of Treaty Application

Courts in the PRC are dependent on the People's Congresses and the administration at the respective level. Furthermore, they are subject to the control of the higher courts and the Party.[66] It is indicative from this structure of the judiciary that local courts are unlikely to prefer the application of a treaty provision in the event that an international obligation should conflict with a local regulation or a local government rule. It is, on the other hand, quite possible that local courts would prefer the application of a treaty norm to the application of a national statute, provided that the application of the international treaty is promoting local economic interest.[67] The analysis of cases in different areas of law where courts have applied international treaties has revealed that courts do apply international law not only to cases that involve a foreign element but also to mere national cases. Moreover, courts in general, have applied treaty provisions on the basis of statutory reference provisions or judicial interpretations, and not without the basis of a domestic act that specifically commands the application of international law.[68]

8. Conclusion

Originally, Chinese scholars held the view that international treaties were *eo ipso* incorporated into the domestic legal system without requiring a domestic act to trigger the municipal effects of the treaty. Moreover, the traditional opinion advocated that treaties were in all parts directly applicable. The traditional view is rejected by a modern concept that draws on many arguments that were developed to oppose the direct application of the WTO rules. Although the accession to the WTO had caused many Chinese scholars to explore in detail the question on the effects of treaties in the municipal law, studies have developed various arguments which attempted not only to limit the effectiveness of

[66] Chen, n 59 above, p 133.
[67] *PanAmSat International System Inc v Beijing State Tax Bureau*, Intermediate People's Court of Beijing, 20 December 2001 (unpublished), *see* Ge Tan, "Tax Treaties' Interpretation and Application under the Challenges of the Digital Economy", 16 (2006) *The Revenue Law Journal* 99.
[68] Ahl, n 4 above, p 313.

international trade law, but of international treaties altogether. This attitude of Chinese scholars reflects the political belief of the state-party leadership that the PRC must regain its status as a world power and that effective domestic implementation of treaty obligations rather obstructs than promotes this development.

The complex mechanism that controls the domestic application of treaties in the PRC enables State organs to limit the effectiveness of treaty implementation within the domestic legal system. As the accession of the PRC to the WTO has revealed, the NPC Standing Committee may choose not to publish the text of the treaty in the Official Gazette and, as a result, the treaty would fail to become legally valid within municipal law. Once the treaty has been published, the courts and the administration may be excluded from applying the treaty if no statutory reference provisions are adopted that refer to the treaty and enable direct application of it. Even if a statutory reference provision refers to the treaty, the Supreme People's Court is in the position to interpret the reference norm or the treaty by means of a binding judicial interpretation that inhibits the direct application of the treaty. Even without such an interpretation, the effect of the application of a reference norm is questionable due to the fact that reference provisions grant the courts a wide discretionary power. The courts have a wide discretionary authority if the reference norm makes the prior application of a treaty subject to the condition of a conflict of norms or a loophole in the law. In such cases, the courts may prefer the domestic provision which is inconsistent with an international obligation, although reference norms that provide for the prior application of treaties imply an internationalist approach. Such an implementation mechanism enables the PRC Government to prove, in relation to other States, the domestic implementation of treaty obligations by way of the publication of the treaty and by reference norms that provide for the prior application of international law. On the other hand, domestic practice may continue to ignore international obligations. This is evident in the area of human rights treaties, and is well possible in other areas.

The future development of the domestic application of international treaties in the PRC certainly depends on the evolution of the political system as a whole. Even without political liberalisation, the economic necessity of increasing efficiency may lead well to a gradual expansion and differentiation of the practice of treaty application. Such a development will depend on the consolidation of international cooperation as well as the strengthening of the courts by way of professionalisation of judges and lawyers.