

# China's Conception of the Rule of Law and its Impact on Market Governance

Closed Roundtable for Academics and Practitioners

20 January 2016

## SUMMARY OF PROCEEDINGS

### Context

On 20 January 2016, the Bingham Centre and the China Policy Institute at the University of Nottingham co-hosted a closed expert roundtable on China's understanding of the rule of law, its impact on market governance and the new Foreign Investment Law from the Ministry of Commerce. In particular, the aim was to bring together practitioners and academics to exchange knowledge and experience on this subject to determine whether current research might inform practice, law and policy, and whether those working in the area might inform research directions and ways that research may be particularly practice-relevant.

The event took place over three hours and featured a number of designated speakers and commentators. A summary of the discussion is below. The programme is appended to this summary.

### Session 1: China's Conception of the Rule of Law and Impact on Market Governance

The discussion in Session 1 focused on whether China's understanding of the rule of law coincided at all with Lord Bingham's conception of the concept. The tenor of the discussion generally was that China has advanced an understanding of the rule of law that promotes economic growth and curbs corruption, while simultaneously interpreting law in a way that could be considered radically anti-liberal because it puts a power-centred, morally relativist and increasingly repressive re-conception of 'law' at centre-stage. It was suggested that a better balance must be struck between instrumentality of the law on the one hand, and the rule of law on the other, as China is currently emphasising the former without considering the wider impact of the laws it is developing. Moreover, it was thought that China's continued reliance upon its understanding of the rule of law, described by the state as the 'rule of law with Chinese characteristics', will make it more difficult for law firms to do business in China. The view was expressed or supported by a number of contributors that a cultural shift must occur in the teaching of law in China to foster a new understanding of the rule of law among academics and students. Though there was some recognition that Chinese lawyers are embracing certain aspects of English law, owing, for example, to the need for developing intellectual property rights protection, it was thought that a cultural shift was unlikely to occur in the near future.

The discussion also recognised that the business focus of the Chinese legal system has regrettably occurred at the expense of human rights, and that in that regard, China has much work to do. However, the view was put that in a one-party state it is unlikely that a Western understanding of the rule of law will ever emerge particularly because those who are in power are unwilling to relinquish it. This is, of course, directly in contrast with the main aim of the rule of law, which is to create a great centre of power outside of central government, for example, by recognising the independence of judges in law, or by providing effective access to justice to individuals. Given its great size, it is undoubtedly difficult to do this for over one billion people, and it might be that the creation of a mediation system assisted by judges and lawyers will lay the foundations for better rule of law in China.

## **Session 2: The New Foreign Investment Law and the Transformation of Foreign Investment Regulation in China**

The discussion in the second half of the programme considered in detail China's new Foreign Investment Law, highlighting key issues such as national security review procedures and the scope of the new law, and placing these issues in the domestic, international and comparative contexts. In particular, it was emphasised that multinational companies are increasingly concerned by the fact that foreign companies are often prevented from investing in China on national security grounds and unable to seek judicial review of these decisions, though it was admitted that the UK has imposed similar restrictions on foreign entities. Participants generally felt that the term 'national security' was unnecessarily broad in Article 52 of the new Foreign Investment Law and was therefore open to abuse by the Chinese authorities.

With regard to investment development (inward and outward) and market regulation, concern was expressed that Chinese investors have a lack of knowledge regarding compliance with certain matters. For example, matters relating to HM Revenue & Customs could easily raise difficulties because this type of regulation does not typically exist in China in the same way and, where it does exist, there are many loopholes, illegal in nature, that people can use to overcome such measures. There was also a more general concern that Chinese investors have a tendency to value advice less than investors from other countries. It was felt that the creation of bilateral and multi-lateral treaties would help to bridge the gap between the markets, because there is a recognition that strategic partnerships are important. However, the dearth of practicing Asian-based arbitrators could mean that the legitimacy of investment treaties will suffer.

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Bingham Centre for the Rule of Law, BIICL

Charles Clore House, 17 Russell Square, London WC1B 5JP

## PROGRAMME

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### 1:30-2:00 Buffet Lunch

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2:00-3:20

#### Session 1: China's Conception of the Rule of Law and Impact on Market Governance

Welcome &  
introductions

Dr Qianlan Wu, University of Nottingham  
Dr Lawrence McNamara, Bingham Centre for the Rule of Law

Presentations  
(6-8 mins each)

Chair: Dr Lawrence McNamara, Bingham Centre for the Rule of Law

- Dr Eva Pils, King's College London
- Dr Qianlan Wu, University of Nottingham

Comment (5 mins)

- Keith Oliver, Senior Partner, Peters & Peters
- Professor Sir Bernard Rix, 20 Essex Street
- Charles Wang, Farrer & Co
- Hui Zheng, Freshfields, Bruckhaus Deringer

Discussion

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### 3:20-3:40 Tea/Coffee Break

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3:40-5:15

#### Session 2: The New Foreign Investment Law and the Transformation of Foreign Investment Regulation in China

Presentations  
(6-8 mins each)

Chair: Dr Qianlan Wu, University of Nottingham

- Dr Ming Du, University of Lancaster
- Cecelia Xu, Barrister & Arbitrator, Malins Chambers

Comment (5 mins)

- Gordon Nardell QC, 20 Essex Street

Discussion

**Closing comments and next steps**

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### 5:15 Drinks Reception

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