Introduction and overview

China, India and the international economic order

MUTHUCUMARASWAMY SORNARAJAH
AND JIANGYU WANG

The rise of China and India as global economic powers has now become conventional wisdom. A recent Financial Times report, quoting the International Monetary Fund (IMF), observes that “the striking thing about the global economy [in 2007] is how little it relies on the U.S. as the main engine of growth. For the first time in 2007, China’s rapidly expanding economy has provided the largest contribution to global growth, while half of the world’s expansion over the past year has come from three countries: China, India and Russia.”1 And the implication is this phenomenon’s lasting impact on the evolving international economic order. As Martin Wolf notes, “[t]he economic rise of Asia’s giants is . . . the most important story of our age. It heralds the end, in the not too distant future, of as much as five centuries of domination by the Europeans and their colonial offshoots.”2

In June 2006, an international symposium was held at the Faculty of Law, National University of Singapore, to study the resurgence of China and India as world powers from the perspective of international economic law and development. Bringing together a group of eminent scholars from Australia, China, India, Malaysia, Singapore and the United States, the project aims to approach three aspects of the China–India relationship and its impact on the international economic order, including: (1) China and India in the global economic system, especially the multilateral trade system under the umbrella of the World Trade Organization (WTO); (2) China and India within Asian regionalism; and (3) some domestic issues which concern the economic growth strategy of both China and India.

This volume reflects the views and discussions presented at this symposium. In accordance with the theme of the conference, the contributions in this volume are organized into three parts. Part I, comprising seven papers, focuses on the roles of China and India in the Doha Development Round (DDR) and the WTO system. Part II discusses the role of China and India in the regional economic integration of Asia, with a special focus on the regional trade agreements (RTAs) signed by China and India in recent years. Part III touches on some domestic legal and policy issues in the economic development of China and India. This overview offers summaries of the main points in each chapter. Needless to say, given the number of papers and the wide range of themes tackled, this overview attempts not to make a systematic analysis of each chapter. Instead, it intends to provide a synopsis of the issues explored in the various chapters of this book from the wider perspectives such as trade and development, regionalism, and law and development.

I. China and India and the global trade system

Trading nations launched the Doha Development Round in 2001, shortly after the collapse of the Seattle WTO Ministerial Conference in 1999. The Doha Round has not been blessed with success either. On the contrary, from Cancun to Hong Kong and back to Geneva, WTO talks had marched from failure to failure. Indeed, WTO Director-General Pascal Lamy, announcing the suspension of the Doha trade talks on July 24, 2006, sadly declared that “Today there are only losers.”

Many reasons explain why the trade talks are deadlocked. Apart from the huge gap between the United States and European Union on agricultural issues (relating mainly to agricultural market access and agricultural domestic support), two other important sets of issues are also responsible for the deadlock of the WTO negotiations, both concerning the division between the developing and developed countries with respect to trade and development in the WTO system. In this regard, the first set of issues is the non-agricultural market access modality, on which the developing and developed nations have substantially conflicting positions. The second fault line is on the so-called “development issues,” which are “related to addressing the trade-related development

challenges faced by the least-developed countries (LDCs), and the so-called ‘small, weak and vulnerable developing countries’.”

The WTO deadlock demonstrates that the conventional wisdom is changing, namely that powerful developed countries, leaving aside the differences among themselves, can no longer easily impose their common will upon developing countries. Significant shifts in relative economic and political power among WTO members have become a living process. A landmark example is that WTO negotiations at Cancun in 2003 collapsed after the G20, a block of developing nations established August 20, 2003 under the leadership of Brazil, China, India and South Africa, refused to negotiate the Singapore issues and requested a different negotiating position on trade in agricultural products. In fact, the G20 itself was originally created as a response of the developing countries to a common proposal released by the United States and the European Union (EU) on agricultural negotiations.

The decade of the 1990s was dominated by what writers have termed as “neo-liberalism” or “mercantilism” – an economic philosophy which stressed free market mechanisms, liberalization of the flows of capital assets, privatization and the protection of intellectual and other property rights. The drive toward liberalism was led by the United States and the financial institutions it controlled. The “Washington consensus” sought to dominate the course of global economic events. Europe willingly participated in the project. The instrumental use of normative provisions to achieve neo-liberal objectives is an evident factor of the times, best represented by some of the measures adopted in the WTO. A succession of economic crises in Russia, Asia and Latin America along with growing disparities in wealth within the developed world led to disillusionment with neo-liberal policies and the engines of globalization which profited from it. Disenchantment with “trickle down” economics led to vigorous protests particularly in the capitals of the developed world. A return to concerns with development of the poorer states, the


5 The term “Washington consensus” describes an assumed understanding between the White House, the World Bank and the International Monetary Fund to use their power to give effect to neo-liberal economic policies.

6 Principally, the TRIPs instrument on intellectual property was seen as securing the interests of the large US pharmaceutical companies. The measures were dismantled by collective action by developing states in some areas.
spoliation of the environment and promotion of human rights ensured that the era of untrammeled propitiation of the forces of capital ended. The degree of concern that existed for development in the period after decolonization returned. China and India were the natural leaders of this concern with economic development. The study of their roles assumes particular significance in the light of these changing concerns.

China and India, the two largest developing countries, have a common and vital interest both in trading with each other and cooperating in the WTO to advance the trade and development agenda. An important question to ask is what can the WTO do to accommodate the development needs of developing countries such as China and India? Arguments have been made to point out that the WTO may have a “development deficit” in that it has only been driven by mercantilism. Hoekman notes that WTO members are now confronted with two challenges: “whether to ‘save’ the WTO – i.e., a multilateral trading system that is based on non-discrimination and MFN liberalization; and attaining (pursuing) national development objectives.”

The papers in Part I of this volume aim to examine China and India in the trade and development context from different perspectives, focusing their roles and positions in the WTO framework. In “The WTO and development policy in China and India,” Joel P. Trachtman provides a comprehensive and insightful examination of the constraints that the WTO may impose on China and India as they engage in industrial policy toward development. In essence, Trachtman addresses the regulatory space, or “right to regulate,” permitted under the WTO with respect to the ability of developing countries to implement development policy. The paper offers an authoritative examination of the three issues relating to trade and development in the GATT/WTO framework, namely the special and differential treatment (S&D) for developing countries, promotion of domestic liberalization and institutional reform in developing countries, and increased market access for developing country products and services in developed country markets. It also examines the four types of measures (balance of payment measures, subsidies, trade related investment measures (TRIMS), and trade related aspects of intellectual property rights (TRIPS) under the WTO law. Putting China and India in


Ibid., p. 269.
this analytical picture by examining the Chinese and Indian regulation for development, Trachtman points out that China and India, like many other developing countries, are not likely to achieve development through domestic protection and preferential treatment. From a legal perspective, Trachtman notes that Article XVIII, a GATT provision which might be replied upon by developing countries to obtain contin-
ent relaxation of commitments, is not helpful in practice. Distinguishing among four types of WTO obligations, Trachtman suggests, as a con-
clusion of the paper, the establishment of a development policy review mechanism under the auspice of the WTO (and possibly other inter-
national institutions such as the International Monetary Fund (IMF)) that could provide exceptions to developing countries for deviating from normal WTO obligations in order to implement appropriate development-motivated policies.

Also discussing the S&D issues in general and China and India in particular, Jianfu Chen argues that the current approach adopted by China and India “amounts to a fight for a lost cause and hence a fundamental re-thinking is required if China and India are to become leaders of the developing countries in ensuring a fairer and more equit-
able treatment for developing countries.” He advances a “pro-active strategy,” which would require China and India to abandon the S&D approach and to start a completely new strategy. To Chen, S&D treatment has several major problems. S&D has become a politically entangled notion that offers little value to countries that need economic assistance. Practically it is inherently unworkable as “developing countries” is an indefinable political concept. Countries that need development assistance are not necessarily those with the lowest gross national product (GNP) per capita or with the largest number of people still in poverty (such as China and India), but those lacking regulatory and institutional cap-
acities to compete in the global market. The integrity of the WTO system is now in danger partly because of the incoherent and irrational practice of the S&D. The paper calls for the abolition of the politically charged notion of “developing countries” as well as the ineffective S&D provisions, which are to be replaced with shifts of focus to overall economic and trade capacity building. In this regard, China and India are expected to share a joint responsibility to reform the S&D system.

In their chapter forcefully titled “China–India cooperation, South–South coalition and the new international economic order,” Chen An and Chen Huiping place China in the broad context of international economic order and law. Apparently arguing from a Southern perspective,
they remark that the nature of China–India cooperation is one of South–South cooperation which is to be distinguished from North–South cooperation. Historically China–India cooperation was the core component of South–South cooperation which had facilitated the “first round” of the establishment of the New International Economic Order (NIEO), which both rose and fell in the 1970s. The authors, viewing the Doha Development Round in the WTO as “a new round of the establishment of the NIEO, are of the opinion that a South–South coalition based on strong China–India cooperation is the key to establishing the NIEO in the global trade system.

In “India, China and Foreign Investment,” Sornarajah offers an in-depth analysis of the foreign investment policies of China and India at the global, bilateral and domestic levels. In the international arena, the joint efforts of China and India (together, of course, with other larger developing countries) successfully diffused the pressure of developed nations to codify investment liberalization discipline in the WTO. This, though it may not yet be a sign of the restoration of the days of the NIEO from a pragmatic perspective, demonstrates that “cohesion of the developing states under the leadership of China and India could bring about sufficient countervailing power to meet the demands of the developed states, including the hegemonic power, the United States.” Further, given their gradualist approach in economic reform, both China and India would be averse to losing regulatory space. Further, with a comprehensive examination of the domestic investment laws and policies in China and India, including the admission of investment, privatization programmes, post-entry national treatment, performance requirements, environment protection versus property protection, corporate accountability and foreign investment protection, as well as the bilateral and regional investment treaties concluded by the two economies, the chapter concludes that the experience of China and India challenges the common liberalization assumption of neo-liberalism in that: (1) it is simply wrong to credit liberalization for the two countries’ economic growth; (2) both countries have retained the power to control the flow of foreign investment; (3) it may not be accurate to describe China’s success as a result combining neo-liberal economic solution with political authoritarianism; (4) India’s experience suggests that the relaxation of rules on foreign investment must be addressed at the same time as the issue of poverty reduction; (5) neo-liberal prescriptions have been resisted by both states; and (6) China and India must be cautious about wholeheartedly participating in international investment dispute settlement.
In “China, India, and the law of the World Trade Organization,” Julia Ya Qin attempts to assess the respective contributions of China and India to the law of the WTO with a view to gaining from a comparative perspective a better understanding on the potential impact of China on the WTO legal system. It is observed that China has played a much less significant role than India in both WTO rule-making and adjudicatory process. China’s major impact on WTO law stems from the special terms of its accession, many of which depart from the basic norms and principles of the WTO law. The author suggests several factors that determine the different behavioral patterns of the two countries, including experience and legal expertise in the WTO system, calculation of economic and political interests, influence of domestic institutions, and legal culture. Significantly, the paper points out that China’s relative passivity in the WTO is directly related to the elite-oriented decision-making culture, which tends to undervalue international legal process and favors instead power and diplomacy-based bilateral dealings. India, as a democracy founded on the rule of law, could however take politically strong and legally principled positions in the WTO.

In their respective contributions, Bhupinder Chimni and Locknie Hsu deal with legal topics concerning dispute settlement in the WTO and regional trade agreements. Chimni evaluates the divergent approaches to the interpretation of WTO agreements from the perspective of developing countries. He observes that the advantages of participation in the WTO dispute settlement system are also a function of the interpretative approach and method adopted by the WTO Appellate Body and panels, as the balance of rights and obligations embedded in the WTO agreements is actually decided at the interpretative moment. The chapter further concludes that the current interpretative approach, combining the textual and activist methods, favors the major trading powers and should hence be reformed from the perspective of developing countries. Hsu compares the practice of China and India in the dispute settlement in the WTO and RTAs. Although China so far has demonstrated the tendency of “dispute avoidance,” Hsu finds that both China and India are poised to make valuable contributions in Dispute Settlement Understanding (DSU) reforms and in shaping dispute settlement provisions in free trade agreements.

Dora Neo conducts a comprehensive study of the roles of China and India in global outsourcing of services, focusing on the legal aspects of outsourcing under the General Agreement for Trade in Services (GATS). In particular, she examines the extent to which the provisions of GATS
are conducive to promoting and regulating services outsourcing, and the implications of these findings for China and India. Her chapter offers insightful suggestions for improving the regulatory framework for world trade in services, including an update of the classification of services sectors, increased commitments by countries under GATS Mode 1, further liberalization under Modes 3 and 4 and development of rules of origin for services. Further, it suggests China and India, as outsourcing providers, conclude beneficial bilateral or regional free trade agreements with their main trading partners for offshore services in order to get round the limitations currently existing under the GATS system.

From a public international law perspective, Kong Qingjiang traces the history of China’s engagement with international dispute settlement. He observes, although China used to be suspicious of judicial dissolution of disputes at the international level, it has been changing this attitude and becoming more receptive of international arbitration. Further, China’s accession to the WTO, as well as its commitments to the Treaty of Amity and Cooperation in Southeast Asia and the Agreement on Dispute Settlement Mechanism with the Association of Southeast Asian Nations (ASEAN), has manifested this changing attitude.

II. China, India and regional economic integration in Asia

The chapters in Part II address the legal and policy issues relating to regional economic integration in Asia. Regional trade agreements (RTAs) are proliferating in Asia and worldwide. While Asia has jumped on the bandwagon of regionalism only recently, the current pace of development of RTA initiatives in this region is nothing but daunting. China and India, both late comers, now can be placed among the most active pursuers of RTAs.

Jiangyu Wang examines the roles of China and India in the growing regionalization development in Asia. In the process of the seemingly inevitable regional integration in Asia, China and India, given the size of their populations, as well as their central strategic position in international and regional relations, will undoubtedly play fundamentally important, and sometimes even dominating, roles. Wang notes that, in promoting Asian integration, China and India are faced with a few possible options, including bilateralism, pan-Asian free trade area, and sub-regional integration. After examining the pros and cons of each option from the perspective of small developing Asian countries, the paper concludes with offering a roadmap for Asian integration which
advances, first of all, sub-regional integration in East Asia and South Asia, while simultaneously linking up the two sub-regions with bilateral free trade agreements (FTAs), amongst which the most important one should be a China–India FTA. Eventually, all the Asian FTAs will be consolidated into one pan-Asian FTA. China and India are advised to lead the region in the practice of open regionalism and deeper integration.

In Asian economic integration, the Association of Southeast Asian Nations (ASEAN) is also an important player, rhetorically even regarded as the leader of this process. Two papers authored by Michael Ewing-Chow and C. L. Lim address ASEAN-related issues. In his paper titled “The Asian Economic Community: ASEAN – A Building or Stumbling Block for China and India economic cooperation,” Ewing-Chow asks how ASEAN should achieve the goal of forming the Asian Economic Community (AEC). Using the game theory to propose a normative framework, he maintains that four factors are crucial for ensuring ASEAN serves as a foundation stone of the AEC. These include clearly defined ASEAN rules and obligations, ASEAN decision-making institutions, ASEAN monitoring institutions and ASEAN enforcement institutions. The author, observing that the existing ASEAN rules and institutions do not fulfill those requirements, offers policy recommendations for improvement. Lim discusses the “China and India” phenomenon from the perspective of an eventual pan-Asian trade regime supported by the two economies. He begins his chapter by describing ASEAN’s current attempt to form part of an “Asian mega jumbo-jet” with ASEAN as the fuselage, India as one wing and the Northeast Asian nations of China, Japan and South Korea as the other. However, the main focus of the chapter is on what he terms “an especially noteworthy doctrinal and legal-design innovation” under the China–ASEAN Framework Agreement’s Early Harvest Programme (EHP). Lim points out two problems in this arrangement, namely it results in the misapplication of the most-favored nation (MFN) status, which would allow FTA members, the number of which is more than two, to conclude further FTAs on bilateral basis either with members or non-members of that FTA, and the further phenomenon of FTAs which do not in any event contain any significant multilateralized tariff concessions. Given that the world free trade system is based on MFN, the global impact of this novel China–ASEAN arrangement might be negative. He concludes that an arrangement of this kind between China and India might be a useful device for measuring the future impact of China and India on the legal health of the world trading system.
The last chapter in Part II, authored by Douglas Arner, Wei Wang and Paul Lejot, discusses Asian economic integration from a financial perspective. It notes that the prospect for financial cooperation and integration in East Asia is becoming generally accepted as a consensus goal of national policies. This has been driven by reasons stemming from crisis imperative, economic imperative, development imperative and political imperative. East Asian states have launched a number of concrete initiatives supporting financial cooperation and integration in areas covering trade in financial services, cooperation in monetary affairs, and development in Asian capital markets, with the assistance of institutional arrangements developed under the patronage of the Asian Development Bank. However, the essay finds that Asian economic and financial integration is still relation-oriented and lacks a developed institutional and legal framework.

III. Law and development in China and India:
Domestic issues

Part III turns to some selected domestic issues in China and India from the perspective of the law and development movement, with special focuses on corporate governance and competition law issues.

Randall Peerenboom, in a chapter which provides a broad overview of the law and development in China and India, argues that the experiences of China and India are not necessarily inconsistent with the prevailing wisdom regarding the relationship between law and development. Although it is generally problematic to make direct comparisons between China and India given the enormous differences between the two giants, some possible observations would suggest that both policies and institutions matter in their economic development. With command economies from the late 1940s to the late 1970s, both countries began economic reform around 1980, although China opened its economy more rapidly than India. Both adopted a gradual approach and both followed some aspects of the Washington consensus while rejecting or modifying others. Surveys show that, to the extent that China and India are comparable in terms of institutional development, India has better judicial independence and property rights protection, but China fares better in regulation and governance. Peerenboom, however, warns that the survey results should be interpreted with caution as China’s poor human rights records might have tarnished the image of the judiciary,