CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER

With contributions by a variety of internationally distinguished scholars on international law, world trade, business law and development, this unique examination of the roles of China and India in the new world economy adopts the perspectives of international economic law and comparative law. The two countries are compared with respect to issues concerning trade and development, the World Trade Organization, international dispute settlement, regional/free trade agreements, outsourcing, international investment, foreign investment, corporate governance, competition law and policy, and law and development in general. The findings demonstrate that, though their domestic approaches to economic issues diverge, China and India adopt similar stances at the international level on many major issues, recapturing images which existed during the immediate post-colonial era. Cooperation between China and India could provide leadership in the struggle for economic development in developing countries.

MUTHUCUMARASWAMY SORNARAJAH is C. J. Koh Professor at the Faculty of Law of the National University of Singapore and the Tunku Abdul Rahman Professor of International Law at the University of Malaya at Kuala Lumpur.

JIANGYU WANG is an associate professor at the Faculty of Law of the National University of Singapore.
CONTENTS

Notes on contributors vii
Preface xv

Introduction and overview: China, India and the international economic order 1
MUTHUCUMARASWAMY SORNARAJAH AND JIANGYU WANG

PART I China, India and the global trade system 15

1 The WTO and development policy in China and India 17
JOEL P. TRACHTMAN

2 China, India and developing countries in the WTO: Towards a pro-active strategy 53
JIANFU CHEN

3 China–India cooperation, South–South coalition and the new international economic order: Focus on the Doha Round 92
CHEN AN AND CHEN HUIPING

4 India, China and foreign investment 132
MUTHUCUMARASWAMY SORNARAJAH

5 China, India and WTO Law 167
JULIA YA QIN

6 China, India and the WTO dispute settlement system: Towards an interpretative strategy 217
B. S. CHIMNI
7 China, India and dispute settlement in the WTO and RTAs 250
Locknie Hsu

8 China, India and global outsourcing of services under GATS 277
Dora S. Neo

9 International dispute settlement: The Chinese approach and practice, and their implications 314
Kong Qingjiang

Part II China, India and regional economic integration in Asia 331

10 The role of China and India in Asian regionalism 333
Jiangyu Wang

11 The Asian Economic Community: ASEAN – A building or a stumbling block for China and India economic cooperation 387
Michael Ewing-Chow and Edrick Gao

12 The China–ASEAN tariff acceleration clause 427
C. L. Lim

13 Financial cooperation and integration in East Asia 454
Douglas W. Arner, Wei Wang and Paul Lejot

Part III Law and development in China and India: Domestic issues 489

14 Law and development in China and India 491
Randall Peerenboom

15 The development of modern corporate governance in China and India 513
Nicholas Calcina Howson and Vikramaditya S. Khanna

16 An institutional race: A comparative study of the competition law regimes in India and China 577
Zhang Xian-Chu

Index 617
NOTES ON CONTRIBUTORS

DOUGLAS ARNER is a professor at the Faculty of Law of the University of Hong Kong (HKU), specialising in financial law, regulation and development. He is Director of the Asian Institute of International Financial Law (AIIFL), Faculty of Law, HKU and Director of the LLM (Corporate and Financial Law) Programme at HKU. In addition, he is the Co-Director of the HKU–Duke University Asia–America Institute in Transnational Law. Douglas has served as a consultant with, among others, the World Bank, Asian Development Bank, APEC, European Bank for Reconstruction and Development, and Development Bank of Southern Africa. Douglas holds a BA in literature, economics and political science from Drury University, a JD (cum laude) from Southern Methodist University, an LLM (with distinction) in banking and finance law from the University of London (Queen Mary College), and a Ph.D. from the University of London.

CHEN AN is a senior professor at the Law School of Xiamen University, where he served as Dean from 1987 to 1998. He is the Chairman of the Chinese Society of International Economic Law (CSIEL, a nation-wide academic society) since 1993 and an International Arbitrator designated to the International Centre for Settlement of Investment Disputes (ICSID) under the Washington Convention by the Chinese Government since 1993. A leading scholar on international economic law in China, Professor Chen is the author of numerous academic books and articles published in China and internationally.

JIANFU CHEN, BSC (CHINA), LLM (HONOURS I, SYDNEY), PH.D. (LAW, SYDNEY), is Professor of Chinese Law and Legal Globalisation and Head of School, School of Law, La Trobe University, Melbourne, Australia. He teaches international business law and international human rights. He has published more than ten books and numerous book chapters and journal articles on Chinese law, comparative law and...

**Chen Huiping** is an associate professor at the Law School of Xiamen University. She received her BA, MA and Ph.D. degrees in international law from Xiamen University Law School between 1986 and 1999. She has published one book in English, *OECD's Multilateral Agreement on Investment: A Chinese Perspective* (2002), authored and co-authored several books in Chinese, and published academic articles or book chapters in Chinese and international journals.

**B. S. Chimni** is Vice-Chancellor, West Bengal National University of Juridical Sciences, Kolkata, India. He has been a visiting professor at the International Center for Comparative Law and Politics, Tokyo University, a Fulbright Visiting Scholar at Harvard Law School, Visiting Fellow at Max Planck Institute for Comparative and Public International Law, Heidelberg, a visiting fellow at the Centre for Research in Arts, Social Sciences and Humanity, the University of Cambridge, and a visiting scholar at the Refugee Studies Center, York University, Canada. He was a member of the Academic Advisory Committee of the Office of the United Nations High Commissioner for Refugees from 1996–2000. In 1999 he delivered the first Barbara Harrell Bond Lecture at the Refugee Studies Centre, University of Oxford. His areas of research interest are third-world approaches to international law, international economic law and international refugee law. He is one of the General Editors of the *Asian Yearbook of International Law*.

**C. L. Lim** is Associate Dean for Academic Affairs and Professor of Law at the University of Hong Kong where he is also a member of the East Asia International Economic Law (EAIEL) Programme. Following a career in England as a law teacher, he served as a member of the Governing Council Secretariat of the United Nations Compensation Commission in Geneva, and as counsel to Singapore in its FTA negotiations while he was a staff member of the Singapore Attorney-General’s Chambers. He has acted in an advisory and consultative
capacity to various governmental agencies, non-governmental organisations, and international organisations. He gives courses in trade law and policy for the WTO and other organisations. Contact: chin.leng.lim@post.harvard.edu.

Michael Ewing-Chow is an associate professor at the National University of Singapore (NUS) where he teaches world trade law and corporate law. He received an LLB (First Class) from NUS and an LLM from Harvard. Along with some colleagues, he started the first World Trade Law course at NUS. He has been a consultant to the Singapore Government as well as the World Bank and the WTO. Michael has written and published articles on trade law and investment law with a particular focus on FTAs. He has been an editor of the *Singapore Year Book of International Law*, the *Singapore Journal of International and Comparative Law* and the *Singapore Law Reports* (Reissue) series. He works with various NGOs and is a co-founder of aidha, an NGO which provides financial education and microfinance opportunities for domestic migrant workers and for which he was awarded a Social Entrepreneur of the Year Award.

Edrick Gao is an associate at Baker & McKenzie, Hong Kong, where he advises on trade-related matters and tax law. He graduated from the Faculty of Law, National University of Singapore with an LLB (Second Upper). While at the National University of Singapore, he was awarded the Law Society of Singapore Book Prize, the APAA Patent Law Book Prize and was placed on the Dean’s List. He was called to the Singapore Bar.

Nicholas Calcina Howson is an assistant professor of law at the University of Michigan Law School. He practised law in Paul, Weiss, Rifkind, Wharton & Garrison LLP between 1988 and 2003. He writes and lectures widely on Chinese law topics, focusing on Chinese corporate and securities law developments. He is a member of the Council on Foreign Relations, and is a designated foreign arbitrator for the China International Economic and Trade Arbitration Commission (CIETAC). He received his JD from the Columbia Law School in 1988.

Locknie Hsu is an associate professor of law at the School of Law of Singapore Management University. She obtained her LLB degree from the National University of Singapore (NUS) and Masters in
Law degree from Harvard Law School. She practised as a lawyer before joining the Faculty of Law of the National University of Singapore. Her work has taken her to stints at the International Court of Arbitration of the International Chamber of Commerce, Paris, as well as at the Singapore Permanent Mission to the UN in Geneva. Her research areas include WTO law, dispute settlement and ASEAN economic integration. She has served as legal consultant to the Singapore Government, participating in a number of cross-border trade negotiations on its behalf. A member of the the Trade Law Committee of the International Law Association (London) and of the Executive Council of the Society of International Economic Law (London), she has frequently provided training in trade law for government officials.

Vikramaditya S. Khanna joined the University of Michigan Law School Faculty in 2004. He earned his SJD at Harvard Law School and has been visiting faculty at Harvard Law School, a senior research fellow at Columbia Law School, and a visiting scholar at Stanford Law School. His areas of interest include corporate law, securities fraud and regulation, corporate governance in emerging markets, corporate crime, corporate and managerial liability, and law and economics. He is a recipient of the John M. Olin Faculty Fellowship for 2002–3 and his papers have been published in the Harvard Law Review, Boston University Law Review, and the Georgetown Law Journal amongst others. He has also presented papers at Harvard Law School, Columbia University School of Law, American Law and Economics Association Annual Meeting, the National Bureau of Economic Research, Wharton Business School, Indian School of Business Hyderabad, Indian Institute of Management Bangalore, Tsinghua University Beijing, Stanford Law School and Yale Law School amongst others.

Kong Qingjiang is currently the Dean of the Faculty of Law and Professor of International Economic Law, Zhejiang Gongshang University (previously: Hangzhou University of Commerce), China. Professor Kong’s articles appear in journals such as Journal of International Economic Law, International and Comparative Law Quarterly and Journal of World Trade. He has authored three books, among which are China and the World Trade Organization: A Legal Perspective and WTO, Internationalization and the Intellectual Property Rights Regime in
China. He has also authored a few book chapters, which were published by Cambridge University Press and Oxford University Press.

Dora S. Neo is an associate professor at the National University of Singapore Faculty of Law. She was Vice-Dean (Research and Graduate Studies) from 2001–3, after which she took her sabbatical as a visiting scholar at Harvard Law School from 2003–4. She holds a first-class honours degree from the University of Oxford and an LLM from Harvard Law School, and has been called to the bar in England and Singapore. She was a consultant to the Ministry of Law in Singapore and was seconded there in 1993–4. She has researched at institutions such as the UN Commission for International Trade Law (UNCITRAL) in Vienna, Austria, presented papers in the UK, USA, Europe and Asia, was a visiting scholar at Georgetown University, Washington DC, and in 2004, was a visiting professor at the University of Aix-Marseille III, France.

Paul Lejot is a visiting fellow at the Asian Institute of International Financial Law, Faculty of Law, University of Hong Kong and a visiting research fellow, ICMA Centre, University of Reading.

Randy Peerenboom is a professor of law at the La Trobe University, Melbourne, Australia, and Associate Fellow at the Center for Socio-Legal Studies, University of Oxford. He obtained a BA in Philosophy, MA in Chinese Religion and Ph.D. in Philosophy before obtaining a JD from Columbia Law School. In addition to serving as an expert witness on PRC legal issues, he has been a consultant to the Ford Foundation and Asian Development Bank on legal reforms and rule of law in China. He is editor-in-chief of The Hague Journal on Rule of Law, and general editor of the Routledge comparative law series on Asian legal systems. His recent books include China Modernizes: Threat to the West or Model for the Rest? (2007); Human Rights in Asia, ed. Peerenboom, Petersen and Chen (2006); Asian Discourses of Rule of Law (ed., 2004); China’s Long March toward Rule of Law (Cambridge University Press, 2002) and the recent: Regulation in Asia: Pushing Back on Globalization (ed., with John Gillespie, 2009).

Julia Ya Qin is an associate professor of law at Wayne State University Law School of the United States. Professor Qin teaches international business transactions, international finance, international trade law and
Chinese law at Wayne State University Law School. Professor Qin received her LLB from Peking University, and LLM and SJD degrees from Harvard Law School. She joined the faculty of Wayne State University Law School in 2000. Before then she practised in the Hong Kong and New York offices of Cleary, Gottlieb, Steen & Hamilton, specialising in international corporate and securities transactions. Previously she clerked for the late Chief Judge Dominick DiCarlo of the United States Court of International Trade. She also taught as an adjunct professor at NYU Law School and was a research fellow at the General Agreement on Tariffs and Trade (GATT). Professor Qin has had articles published in various law journals in the areas of international trade law, public international law and Chinese law.

MUTHUCUMARASWAMY SORNARAJAH LLM (Yale) LLD (London) was Dean of the Law School of the University of Tasmania prior to joining the NUS Law School where he is the C. J. Koh Professor of Law. He was Sterling Fellow at the Yale Law School, Research Fellow at the Centre for International Law, University of Cambridge and the Max Planck Institut für Öffentliches Auslandisches Recht at Heidelberg, Germany. He is Professorial Fellow at the Centre for Petroleum and Natural Resources Law at the University of Dundee, Scotland. He is Visiting Professor at the World Trade Institute of the Universities of Berne and Neuchatel, Switzerland. He is the author of *The Pursuit of Nationalized Property* (1986); *International Commercial Arbitration* (1992); *The Law of International Joint Ventures* (Longman, 1994); *The International Law on Foreign Investment* (Cambridge University Press, 1996, 2nd edn, 2004) and *The Settlement of Foreign Investment Disputes* (2001). He is the Director of the UNCTAD/WTO Programme on Investment Treaties, Pretoria and New Delhi. He is a Fellow of the Australian Centre for International Commercial Arbitration and is on the Regional Panel of the Singapore International Arbitration Centre. He is an honorary member of the Indian Society of International Law.

JOEL P. TRACHTMAN is Professor of International Law at The Fletcher School of Law and Diplomacy at Tufts University. The author of over 50 scholarly publications, Professor Trachtman is a member of the Boards of the *American Journal of International Law*, the *European Journal of International Law*, the *Journal of International Economic Law* and the *Singapore Yearbook of International Law*. He has consulted
for the United Nations, the OECD, APEC, the World Bank, the Organization of American States, and the US Agency for International Development. He is a member of the bar of the State of New York. From 1998 to 2001, he was Academic Dean of the Fletcher School, and during 2000 and 2001, he served as Dean ad interim. In 2002, he was Manley O. Hudson Visiting Professor of Law, and in 2004 he was Nomura Visiting Professor of International Financial Systems, at Harvard Law School. He graduated in 1980 from Harvard Law School, where he served as editor in chief of the *Harvard International Law Journal*. His undergraduate education was at the London School of Economics and Columbia College.

**Jiangyu Wang** (SJD and LLM, University of Pennsylvania; MJuris, Oxford; LLM, Peking University; LLB, China University of Political Science and Law) is an associate professor at the Faculty of Law of the National University of Singapore. From 2006–09, he was on secondment as an associate professor of law at the Chinese University of Hong Kong. He practised law in the Legal Department of Bank of China and Chinese and American law firms. He served as a member of the Chinese delegation at the annual conference of the United Nations Commission on International Trade Law (UNCITRAL) in 1999. He is also a Director on the Executive Board of the WTO Institute of the China Law Society, and a Fellow of the Asian Institute of International Financial Law (AIIFL), Faculty of Law, University of Hong Kong. He has also been invited expert/speaker for the International Trade Centre (UNCTAD/WTO) and United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP). He recently received the Young Researcher Award 2007–08 from the Chinese University of Hong Kong in recognition of his accomplishment in research in 2006–7.

**Wei Wang** is an associate professor at the Law School of Fudan University, and an honorary fellow of the Asian Institute of International Financial Law (AIIFL), Faculty of Law, University of Hong Kong.

**Zhang Xian-Chu** is Professor of Law and Associate Dean of the Faculty of Law, University of Hong Kong. He specialises in commercial law, Chinese law and comparative law. Zhang Xian-Chu has been teaching both LLB and LLM courses, including business associations, PRC security and insolvency law, PRC commercial law, and cross-border legal
relations. He has published extensively in both international and local journals. Zhang Xian-Chu is currently the Director of the Master of Common Law Programme, Co-Director of HKU–PekingU Legal Research Centre, and Deputy Director of the Institute of China and Global Development of the University of Hong Kong. He is an arbitrator of China International Economic and Trade Arbitration Commission (CIETAC), a trustee of the Legal Education Trust Fund of Hong Kong, a guest professor of Fudan University (Shanghai) and Shantou University (Guangdong).
PREFACE

It has never been so timely to examine the impact of the rise of China and India on the international economic order in the wake of the ongoing global economic crisis. The rapid integration of China and India into the world economy is not only lifting the living standards of over two billion people, but also shifting the global balance of power toward the East. However, the implications of this rise on the international economic and legal system have not been fully explored and many questions remain unanswered. For example, what is China’s or India’s attitude toward the existing international economic norms including the trading system and its dispute resolution system? What is the role of China and India in regional economic integration which may however be highly politically oriented? Further, although China and India are both on the road to economic globalisation, they seem to have adopted different domestic approaches which might have profound impact on their international behaviors.

This volume, having its origins in a highly successful international symposium of the same title organised by the Faculty of Law of the National University of Singapore in June 2006, is an attempt to address these questions. It brought together a group of distinguished scholars on international law, world trade law and law and development to conduct a unique examination of the roles of China and India in the new world economy from the perspectives of international economic law and comparative law. The two countries are compared with respect to cutting-edge issues concerning trade and development, participation in the World Trade Organization (WTO), international dispute settlement, regional/free trade agreements (RTA/FTA), outsourcing, foreign investment law, corporate governance, competition law and policy, and law and development in general. Findings of the papers demonstrate that, though their domestic approaches to economic issues diverge, China and India adopt rather similar stances at the international level on many major issues, recapturing images which existed during the immediate
post-colonial era. Cooperation between China and India could provide leadership in the struggle for economic development in developing countries.

The papers presented at the symposium in Singapore have been extensively revised for publication. The editors and authors thank the National University of Singapore (NUS) for its generous financial support and the Faculty of Law, NUS, for its unreserved administrative support of this symposium. The geographic location and the determination to support academic research make the National University of Singapore an unparalleled environment to study China and India. The work fits in well with the flourishing research institutes within the University for the study of South Asia and East Asia. We are especially indebted to Dean Tan Cheng Han and other colleagues at the Faculty of Law, NUS, including especially, Teo Keang Sood and Victor Ramraj, for their encouragement from the beginning of the project. Elizabeth Chua and Daniel Tan at the Faculty of Law, NUS provided exemplary assistance in the organisation of the symposium. We must also thank three research assistants, Edrick Guo and Ng Wuay Teck of the National University of Singapore and Sean Lai of the Chinese University of Hong Kong, for their meticulous help with editing. We are grateful to editors at the Cambridge University Press for their support throughout the publication process.

Muthucumaraswamy Sornarajah
and Jiangyu Wang