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978-1-107-06201-6 - China in the International Economic Order: New Directions and Changing Paradigms

Edited by Lisa Toohey, Colin B. Picker and Jonathan Greenacre

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China in the International Economic Order

*New Directions and Changing Paradigms**Colin B. Picker and Lisa Toohey*

1. INTRODUCTION

While there have been many examinations of China's participation in the individual fields that comprise the international economic order, this work considers international economic law (IEL) as a whole, identifying broad themes that cut across all aspects of the international economic legal order. In particular, the chapters that comprise this volume highlight the new directions and changing paradigms associated with China's growing and critical relationship with all aspects of IEL.

Much has changed in the field of IEL since China joined the World Trade Organization (WTO) at the start of this century, and yet China remains without doubt one of the most keenly observed players. While China's WTO accession in 2001¹ was a significant milestone for the international trade system, and for the WTO itself, WTO membership was also symbolic of greater engagement by China with the international economic order as a whole. Along with trade, all fields of IEL have been and continue to be impacted by greater Chinese participation, including international investment law, international financial and monetary law, competition law, and international intellectual property law. The fundamental question that has motivated this volume, just over a decade later, is whether China's unique characteristics make its engagement with the international economic order fundamentally different from that of other players.

Throughout history, China has been an object of fascination for the West. China, for its part, spent a large proportion of its very long history in deliberate isolation, until forced to engage with the rest of the world by the West, one of whose primary mechanisms was the imposition of trading missions and settlements

¹ *Accession of the People's Republic of China: Decision of 10 November 2001 of the Ministerial Conference* (11 December 2001), World Trade Organization Document WT/L/432. Accession effective on 11 December 2001. See also Chapter 6.

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following military victories. But even then, the penetration of China by the West was marginal and at the periphery – geographically, economically, and culturally. China remained largely unknown until recent times, only comparatively recently engaging in sustained interaction with the outside world. The intrigue with China as an actor in IEL is far from surprising and arises for several reasons.

First, the sheer size of the state, and its economy, is overwhelming. China comprises nearly 20% of the world's population (1,360,720,000 people at the end of 2013), making it the most populous country on earth.² China's rates of growth remain incredibly strong, exhibiting rates of GDP growth of more than 7% even as the economies of the West exhibit negative or very low growth,³ and visitors to China can only marvel at the rapid expansion of its cities and infrastructure, and the dynamism of its urban consumer population. In 2014, China for the first time had the top three largest public banks on the Forbes 2000 list (the Industrial and Commercial Bank of China, China Construction Bank, and the Agricultural Bank of China) and five of the largest ten companies worldwide.⁴

In addition to very strong domestic growth, China's economy is further strengthened by its exports. China is the largest trade partner for numerous countries and is among the top five trading partners for almost every single trading nation on the planet. In 2010, China overtook the United States to become the world's largest net recipient of inward investment, with World Bank data reporting \$253,474,944,300 worth of investment in 2013. China is therefore the world's largest inbound investment destination and one of the largest outbound investor states. And in an era in which many traditional powers are heavily indebted, China remains one of the world's largest creditor nations. Finally, China's currency, the renminbi ("people's money"), is becoming one of the world's primary trading currencies. As the Organisation for Economic Co-operation and Development (OECD) and others have observed, the economic fulcrum of the globe is shifting with an ever-increasing role for China, with India not far behind.⁵ This presents opportunities, but also great challenges, for incumbent global powers such as the United States.

Given the huge size of the Chinese economy and the speed with which it has grown and likely will continue to grow, there is no doubt that its global power and influence will continue to expand worldwide. In the process, China will have the

² National Bureau of Statistics of China, *Statistical Communiqué of the People's Republic of China on the 2013 National Economic and Social Development*, February 24, 2014. Online at www.stats.gov.cn/english/PressRelease/201402/t20140224_515103.html

³ National Bureau of Statistics of China, *Statistical Communiqué of the People's Republic of China on the 2013 National Economic and Social Development*, February 24, 2014. Online at www.stats.gov.cn/english/PressRelease/201402/t20140224_515103.html.

⁴ Forbes, *Global 2000: The World's Biggest Public Companies*, 1 May 2014. Online at www.forbes.com/global2000/list

⁵ www.oecd.org/newsroom/balanceofeconomicpowerwillshiftdramaticallyoverthenext50years/saysoecd.htm

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potential to dramatically impact the international economic order. Conversely, however, engagement with the international economic order cannot fail to impact in countless ways on China itself. The mutual interactions between China and the international economic order are without doubt complex, dynamic, and often oversimplified or misunderstood.

Each of the contributions in this edited collection considers closely the context and operation of China in the international economic environment, reflecting on the challenges and approaches that China takes in different subsectors of the field of IEL as applied to China. It thus presents a rare opportunity for reflection and comparison of China's approach across the full spectrum of international economic activity, including not just the usual foci of trade and investment, but also monetary law, finance, competition law, and intellectual property. Each of those fields interacts with China through field-specific modes. But, when considered together in one volume, we are able to compare China's role within the different subfields and to consider whether China's engagement will lead to a paradigm shift within the international economic system.

2. CHINA AND THE INTERNATIONAL ECONOMIC LEGAL ORDER: NEW OR CHANGED PARADIGMS?

There is a widely held view that China operates in ways fundamentally different from the majority of other states. Compounding this is the view that China's very size and historical development has created an incredibly complex system. The critical question that this book then asks is whether China correspondingly represents a fundamentally different or challenging paradigm for its engagement with the international economic legal order.

Inevitably, the use of the term "paradigm" brings to mind Thomas Kuhn's epochal work *The Structure of Scientific Revolutions*, although as Kuhn himself wryly observed in his final interview: "Paradigm was a perfectly good word, until I messed it up."⁶ Kuhn's life work was to understand the process of paradigm shifts, understanding how one scientific theory was displaced by another. For Kuhn, a paradigm is a model or pattern of traditional methods, of "the right way to do things."⁷

A second observation of Kuhn's is particularly apt for the present context – he observes the fundamental different perceptions on the part of purveyors of different paradigms:

⁶ Aristides Baltas et al., "A Discussion with Thomas S. Kuhn," in *The Road since Structure*, edited by James Conant and John Haugeland, Chicago: University of Chicago Press (2000), 253–324, at 298.

⁷ *Ibid.*

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[P]roponents of competing paradigms practice their trades in different worlds . . . Practicing in different worlds, the two groups of scientists see different things when they look from the same point in the same direction . . . That is why a law that cannot even be demonstrated to one group of scientists may occasionally seem intuitively obvious to another.⁸

A question that motivates this volume is thus whether the “scientists” of IEL from the West and from China view the international economic system in fundamentally different terms and consequently whether Chinese engagement with that order will result in the clash “of two different worlds.” Readers might be reminded of Samuel Huntington’s piece, “The Clash of Civilizations,” where he declared that the future of international relations would be based on conflict between cultural groupings, with China and the West being just two of many civilizations who would compete in the post–Cold War world for “relative military and economic power, struggle over the control of international institutions and third parties, and competitively promote their particular political and religious values.”⁹

Regardless of what one may think of Huntington’s theory, it is enticing to view China as operating with and within a fundamentally different paradigm. As an initial matter, much of that difference can be attributed to a profoundly different legal cultural context. Accordingly, two of the early chapters in this book discuss those underlying different paradigmatic contexts. Picker examines the historical and modern legal cultural influences that have laid the ground for much of the difference we see today. In that chapter Picker provides discrete examples of how those factors influence and drive China’s relationship with the international economic order. Bai and Morris similarly take a fundamental aspect of China’s legal culture, Taoism, and analyse China’s regulation of finance through that prism, providing unique insights and understandings along the way.

Given such deep axiomatic differences, it is no surprise that there has too often been a lack of nuance by outsiders in their understandings of the nature of the “Chinese model” – with simplistic models time and again reigning supreme. Peerenboom’s chapter critiques one of those traditional views of China’s development, labeled the China Model or the Beijing Consensus,¹⁰ and even argues that perhaps it was not, as is commonly argued, the driver of reform in China. Furthermore, its elements may not even remain relevant to China now that it has “caught up” and become a middle-income country. Instead, Peerenboom argues, there is an emerging “Post-Washington Post-Beijing Consensus,” an emerging paradigm,

⁸ Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., 1970), at 150.

⁹ Samuel P. Huntington, “The Clash of Civilizations?,” 72(3) *Foreign Affairs* 22, at 29.

¹⁰ As Peerenboom in his chapter notes: “[T]he stripped-down version of the China Model attributes China’s success to just two factors, authoritarianism and markets, without explaining why other authoritarian regimes with market economies have not enjoyed such high growth rates.”

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based on flexible, staged, state-specific models that better account for individual socioeconomic and cultural characteristics.

This lack of understanding or misidentifying the correct paradigms may also be attributable to simple lack of information or a mistrust of the information that is available. For many years, China and the West operated with minimal interaction, and for each the logic of its own system was self-evident, and the logic of the other quite incomprehensible. Indeed, any examination of China's paradigms must also look at how China is viewed from the outside. Toohey considers this issue under an "orientalist" framework, using imagery of China to explain how the international economic order, largely a Western construct, sees China and its interactions within that same order. The resultant mistrust, especially from the Western perspective, was in part responsible for the China's WTO accession negotiations taking more than fifteen years, with every aspect of China's economic regime scrutinized by a General Agreement on Tariffs and Trade (GATT) and then a WTO Working Party of sixty members (three times the average size of an accession Working Party).¹¹ Even today, as O'Brien, Gilligan, and Greenacre argue, investment recipients such as Australia express uncertainty, better described as mistrust, about the nature of Chinese state capitalism, despite being keen to receive Chinese capital.

That mistrust is further probed by some of the contributors who question whether China is, as is so often claimed, "gaming the system." Webster's study of China in WTO dispute settlement suggests that not only is its behavior not dissimilar to other large trading powers, but in fact China has not gone as far as states such as the European Union (EU) and the United States in avoiding implementation of adverse WTO decisions. Buckley and Zhou likewise conclude that China has not acted outside what one would expect from the usual state behavior. They argue that a better characterization is that China has skillfully navigated the rules set by the West for its engagement with the international economic legal order in the WTO accession negotiations. China has, in other words, proven to be highly adept at furthering its national interest in its engagement with the global economic system, primarily by skillfully bending or selectively ignoring rules to favor its own progress. It cannot be said that this behavior is unique to China, but rather similar to other states that are naturally self-interested and acting within a complex international system.

In a similar vein, Gao examines China's engagement in WTO negotiations, pointing out that far from being a "game changer," China has thus far taken a fairly modest role in the Doha Round and seems set to remain a "system-maintainer for the foreseeable future. Marcia Harpaz also considers China's engagement with dispute settlement, contextualizing China's IEL engagement within the broader public international law context. Even in the area of intellectual property, so often

¹¹ Maxine Kennett et al., *Evaluating WTO Accessions: Legal and Economic Perspectives* (Berne: World Trade Institute, 2005), at 33–40.

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viewed as the great example of Chinese rule breaking, its approach to intellectual property, according to Mercurio, while “challenging [it is] not a challenge to the existing legal order.” Gruin, too, ends by positing that stability, and hence absence of conflict, is the underlying goal, a goal of all countries, though one of peculiar challenge to a country such as China.

Although these contributors have suggested that in so many ways China is like other states, it still has lingering vestiges of its former approaches to economic development, reflecting older paradigms. One of the most visible manifestations of the older state-centered nonmarket approach is the continuing strength of state-owned enterprises (SOEs). But they too may not be as much of a challenge as is often assumed. Nakagawa’s analysis of the future of SOEs within the international economic order suggests that although there is no sign that the paradigm of protecting state capitalism will decline, it is unclear whether it is sustainable. Nakagawa raises the idea that the emerging disciplines contained in China’s recent trade and investment agreements can provide good guidance, self-imposed through the adherence to such agreements. Those agreements may force the necessary reform, weaning China away from its present SOE paradigm. Similarly, Bath explores the traditional dominance of the state in China’s economy in light of recent liberalization of investment regulation. But she concludes that although there have been significant changes in Chinese policy toward investment, these are still taking place within the traditional heavy state regulatory environment. The result of that clash may generate a new paradigm, but it is still too early to know how this will play out.

In all these works, it becomes clear that China’s current interactions do not present the radical challenge that is often assumed in the West. However, given that the international economic legal order is Western in its design and approach and premised on a strongly neoliberal paradigm, it would have been no surprise if China had proved to be a significant challenger. There is no question that the international economic order is far from a perfect fit with China, even after a decade of WTO membership, and this is evident not just in the formal disputes brought against China in the WTO, but equally in the numerous other controversies within the IEL field. On the other hand, as Healey and Peng’s chapters illustrate, Chinese domestic economic regulation is starting to have an increasing impact on the development of “the rules,” and even having an impact on the domestic systems and constituents of other states. Peng illustrates how China’s approach to standards will likely impact other states’ standards settings – within their own states.

Similarly, Healey argues that Chinese merger review has already and will increasingly be one of the primary influences on global mergers – again, mergers taking place within a purely domestic context but with a connection extraterritorially to China. Thus, in these fields, there is some evidence that China is starting to generate some significant paradigmatic shifts. Also, Trakman’s more specific analysis of international investment arbitration in China suggests that while at present we

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see little evidence of a paradigm different from that within the Western economies, we should nonetheless be prepared for investment arbitration jurisprudence from China to look different and be confronting to the Western jurisprudence on international investment in several areas.

What is clear from the contributions in this volume is that, across the full spectrum of international economic activity, there are certain hallmarks of the China-inclusive international economic order:

1. The West will continue to view China as different, given the country's unique legal culture and economic model.
2. Outsiders will continue to have difficulty understanding and knowing about China's interaction with the IEL order due to both its different nature and lack of transparency.
3. China will increasingly behave in the same ways as other mature sophisticated economies, figuring out how to ensure the rules work to China's benefit.
4. In terms of its commitment to the rules of the international economic order, China will not be more of a rule breaker than other large and powerful countries.
5. China will increasingly contribute to and influence IEL, perhaps even going so far eventually as to be a standard-setter.
6. The flow of rules is not just West to East, but now East to West as well.

In relation to how China manages its international engagement from the domestic sphere, there are once again strong commonalities across the IEL spectrum:

1. China's development will follow a "Post-Washington Post-Beijing Consensus," based on flexible, staged, state-specific models.
2. China's historic legal culture will always be present and influential, even though its influence is often obscured from view.
3. China's central planning will almost always continue to be a central characteristic of its approach to domestic as well as international issues.
4. Stability will always be a central goal of the Chinese government, though this is in no way unique to China but rather a common concern of all states.
5. China will struggle with domestic implementation due the challenges of maintaining centralized power within a very large and diverse state.
6. China's domestic economic policies will increasingly have extraterritorial effect.

The factors identified in the two lists given earlier transcend all aspects of the international economic legal order, applying to China's relationship with international organizations and regimes as well as vertically to the participants within

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that order – impacting not just states and international governmental organizations, but also nongovernmental organizations and individuals (persons and multinational corporations).

In other words, the aggregate effect of China in the international economic order is both complex yet simple, contradictory in parts, organic and foreign, historical and new, and from a Western perspective both logical and counterintuitive. This should come as no surprise to China experts or to observers of the international economic order, for both are themselves inherently complex and continuously evolving entities.

So, what might be the answer to the issue posed by this book – whether China's engagement with the international economic legal order constitutes a new or changing paradigm? There are certainly unique issues to the relationship. But do these unique issues add up to a paradigm shift? It is clear that the Chinese approach produces new approaches in specific areas, such as China's standards setting in the context of technical barriers to trade in the WTO context. But is there an overarching aggregate paradigm? Readers will make their own assessments as they read the analyses of the different subfields of IEL included in this book, and debate will no doubt continue for decades to come.

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PART I

Perspectives on China in the International Order

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