CHINA'S ATTITUDE TOWARDS INTERNATIONAL ADJUDICATION:

A TRANSCIVILIZATIONAL PROCESS PERSPECTIVE

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ABSTRACT

This thesis observes the evolution of China's attitude towards international adjudication. Unlike the conventional rule-oriented approach which studies Chinese attitudes merely through China's acceptance of international adjudication or its compliance with international rules and principles, this thesis—applying a transcivilizational decision-making process perspective—profiles how the Chinese feel, think, say and behave in past, present and future contexts when they interact with international courts and tribunals. Given the long period of intervention and imperialism by Western powers and the significance of Sino-Western cultural differences, China has traditionally characterized international adjudication as a Western-made tool for power politics and has therefore adopted an ambivalent position on international courts or tribunals such as the PCA, PCIJ, and ICJ. The "reform and opening-up" that started in 1978 provided China with momentum to change its attitude towards international adjudication. Recent decades have demonstrated how China, through observing, learning and practicing in WTO adjudication and investment arbitration, has accustomed itself to the international legal regime and has come to realize the value of international adjudication. With its growing power and improved legal capacity, a new tendency seems to be emerging in China's future attitude towards international adjudication. Previously, China was "asked" to participate in international adjudication and to abide by many Western-dominated norms. However, this dissertation predicts that, in the future, China will show more interest in reinterpreting, or even remaking, rules of international adjudication with a salient Chinese character,

a Chinese feature and a Chinese vision. While presenting the evolution of China's attitude, this thesis also tries to deconstruct, reproduce and rethink the image of China in international adjudication with a legal-sociological perspective: it explores how traditional Chinese culture, Western culture and their interactions have shaped modern China and its approach to the international adjudicatory regime.

RÉSUMÉ

Cette thèse s'intéresse à l'évolution de l'attitude de la Chine à l'égard de l'arbitrage international. Contrairement à l'approche conventionnelle axée sur la règle qui étudie l'attitude de la Chine à travers son adhérence à l'arbitrage international ou encore sa conformité aux normes et principes internationaux, cette thèse adopte une perspective transcivilisationnelle du processus de prise de décision afin d'esquisser le portrait des interactions de la Chine avec les cours et les tribunaux internationaux, ce qu'elle ressent, pense, dit et comment elle se conduit – dans le passé, le présent et le futur. Compte tenu de la période d'intervention, de l'impérialisme des puissances occidentales et des différences culturelles sino-occidentales, la Chine a longtemps considéré l'arbitrage international comme un outil de pouvoir politique occidental, et ainsi adopté une position ambivalente par rapport aux cours et tribunaux internationaux, tels que la Cour permanente d'arbitrage, la Cour permanente de justice international et Cour internationale de justice. La réforme et l'ouverture initiées en 1978 ont marqué l'élan du changement d'attitude de la Chine. Les pratiques, observations et leçons en matière d'arbitrage et d'arbitrage relatif aux traités d'investissement de l'OMC tirées par la Chine au cours de cette dernière décennie témoignent de son accoutumance au régime juridique international et des bénéfices que lui offre l'arbitrage international. Par un pouvoir croissant et une capacité juridique accrue, une nouvelle tendance semble émerger dans l'attitude future de la Chine à l'égard de l'arbitrage international. La Chine était en effet auparavant 'invitée' à participer à l'arbitrage international. Dans le

futur, il appert que la Chine s'intéressera davantage à la réinterprétation, voire à la modification des règles d'arbitrage international, qui seront alors marquées par l'emprunte singulière de la Chine dans leur caractéristique, leur fonction et leur vision. S'appuyant sur une perspective culturelle et sociojuridique, cette thèse tente de déconstruire, reproduire et repenser l'image de la Chine en arbitrage international. En plus des règles internationales 'noires ou blanches', cette étude explore également comment la culture traditionnelle chinoise, la culture occidentale et leurs interactions façonnent la Chine moderne et l'approche du régime de l'arbitrage international.

Contents

ABBREVIATIONS AND ACRONYMS

1899 Convention	1899 Convention for the Pacific Settlement of International Disputes
4 Noes	No Acceptance, No Participation, No Recognition, and No Implementation
AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of Southeast Asian Nations
BIT(s)	Bilateral Investment Treaty(s)
BLEU	Belgium-Luxembourg Economic Union
BRI	Belt and Road Initiative
CCP	Chinese Communist Party
CETA	Comprehensive Economic and Trade Agreement
CICC	China International Commercial Court
ECJ	European Court of Justice
ECHR	European Court of Human Rights
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
G7	The Group of Seven Wealthy Nations
GLF	Great Leap Forward
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
IIA(s)	International Investment Agreement(s)
IMTFE	International Military Tribunal for the Far East
IPS	International Prosecution Section
ISA	Investor-state arbitration
ITLOS	International Tribunal for the Law of the Sea
KFC	Kentucky Fried Chicken
KMT	Kuo Min Tang
MES	Market Economy Status
MOFCOM	Ministry of Commerce of the People's Republic of China
NAFTA	North American Free Trade Agreement
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OFDI	Outbound foreign direct investment
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PRC	People's Republic of China
RCEP	Regional Comprehensive Economic Partnership
ROC	Republic of China
RTA	Regional Trade Agreement

SCAP	Supreme Commander for the Allied Powers
SPC	Supreme People's Court
SOE(s)	State-Owned Enterprise(s)
Tokyo Trial	A series of military tribunals held by the Allied forces under the International Military Tribunal for the Far East
TPP	Trans-Pacific Partnership
Treaty of Nanjing	Treaty of Perpetual Peace and Friendship between China and Great Britain
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
USITC	United States International Trade Commission
WTO	World Trade Organization
WTO DSM	World Trade Organization Dispute Settlement Mechanism
WWI	World War I
WWII	World War II

INTRODUCTION

On 22 January 2013, the Republic of the Philippines filed a claim against China[1] at the Permanent Court of Arbitration (PCA) and requested an *ad hoc* arbitral tribunal constituted under the *United Nations Convention on the Law of the Sea* (UNCLOS) to decide maritime rights, entitlements and zones in the South China Sea, as well as the protection of marine life and the environment of the region. In response, China adopted a position of non-acceptance and non-participation, arguing that the *ad hoc* arbitral tribunal established at the request of the Philippines lacked jurisdiction because the Philippines' claim was not an arbitrable subject. Tension escalated when the arbitral tribunal issued its final award in favor of the Philippines on 12 July 2016. After the announcement of the award, China released its "No Acceptance, No Participation, No Recognition, and No Implementation" policy (the "4 Noes" policy), alleging that the arbitration was a political farce aimed at undermining China's interest in the South China Sea.[2]

While China considered that its rejection of the South China Sea Arbitration was legitimate, the international community perceived the rejection differently. The European Union urged "the parties to the dispute to resolve it (the South China Sea Arbitration) through peaceful means, to clarify their claims and pursue them in respect

[1] Unless otherwise indicated, the term "China" in this thesis refers to the political entity that represents all China at the relevant time. "China" here denotes the People's Republic of China (PRC).

[2] See in: "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea" (13 July 2016), online: *Ministry of Foreign Affairs of People's Republic of China* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml>. In Chinese Foreign Minister Wang Yi's remarks concerning the South China Sea Arbitration dated 12 July 2016, the arbitration was described as "completely a political farce staged under legal pretext", see in "Remarks by Chinese Foreign Minister Wang Yi on the Award of the So-called Arbitral Tribunal in the South China Sea Arbitration" (12 July 2016), online: *South China Sea Issue* <http://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1380003.htm>.

and in accordance with international law, including the framework of UNCLOS".[3] Likewise, the Group of Seven (G7) – the collective of seven of the world's wealthiest and most developed economies – called on all states to fully implement decisions binding on them in courts and tribunals established under the UNCLOS.[4] Japan went even further. In its Ministry of Defense White Paper, Japan stated that China's response to the arbitration was creating instability over the South China Sea and posing a great risk to the international community.[5] Scholars and the media were also outspoken in their criticisms of China's rejection. Jerome Cohen of New York University claimed that China's rejection of the arbitration ruling "reinforc[es] the image of lawlessness that it has acquired by its expansive territorial claims and assertive maritime actions".[6] In a scholarly conversation organized by *Foreign Policy*, all participants argued in favor of the legitimacy of the arbitration award. Peter Dutton of the China Maritime Studies Institute at the U.S. Naval War College asserted that the award "will inevitably alter perceptions about right and wrong actions in the South China Sea".[7] Most scholars were also concerned about the impact of the arbitration on China's willingness to accept international law and participate in international adjudication, predicting that instead China would be "belligerent", and "more chauvinist, militarist, and revisionist".[8]

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[3] "Declaration by the High Representative on Behalf of the EU on the Award Rendered in the Arbitration between the Republic of the Philippines and the People's Republic of China - Consilium" (15 July 2016), online: *Counc Eur Union* <http://www.consilium.europa.eu/en/press/press-releases/2016/07/15-south-china-sea-arbitration/>.

[4] "G7 Leaders' Communiqué, June 2014 – Foreign Policy" (4 June 2014), online: *Minister of Foreign Affairs of Japan* < https://www.mofa.go.jp/ecm/ec/page24e_000049.html>.

[5] In Japan's 2016 Defense of Japan Annual White Paper, it takes China's behavior in the South China Sea as "active maritime advancement and attempts to change the status quo in the East and South China Seas". "Ministry of Defense: DEFENSE OF JAPAN 2016", (2016), online: *Ministry of Defense* <http://www.mod.go.jp/e/publ/w_paper/2016.html>.

[6] Jerome A. Cohen, "Forecasting the Aftermath of a Ruling on China's Nine-Dash Line" (20 April 2016), online: *Foreign Policy* < http://foreignpolicy.com/2016/04/20/a-big-ruling-on-the-south-china-sea-nine-dash-line-draws-near-beijing-philippines-japan-taiwan-aftermath/>.

[7] "What is the Future of South China Sea" (12 July 2016), online: *Foreign Policy* <http://foreignpolicy.com/2016/07/12/what-is-the-future-of-the-south-china-sea/>..

[8] *Ibid*.

The international commentary on China's response to the South China Sea arbitration concretely illustrates the perceptions that many people have about China's attitude to international law and international adjudication. First, China is lawless. Cohen's reference to China's international image as "lawlessness" reflects a general logic in the international community: the award represents international law, China's non-acceptance of it is in violation of international law, *ergo* China is lawless. Even though China invoked its reservation to the UNCLOS to explain its non-acceptance,[9] many in the international community—especially in the West—considered that explanation to be unpersuasive and not in accordance with international law.[10] Second, China is a predator.[11] Even though there is no significant indication that China is about to take more aggressive action—for example the use of force—in the aftermath of the arbitration award, international anxiety about further action has grown, bringing with it a reliance on radical rhetoric to describe China as "belligerent", "chauvinist" and "militarist".[12]

Of course, perceptions about China's attitude to international adjudication are not limited to the commentary on China's 4 Noes policy, but the image portrayed in most other contexts is consistent: China is viewed as a lawless predator. As China's power continues to grow, its foreign policies attract greater attention. However, when

[9] China in 2006 made a declaration after the ratification of the UNCLOS, where stated that China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to disputes relating to territory and maritime delimitation, see in "Declarations and Statements" (19 October 2013), online: *Oceans & Law of the Sea United Nations* <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

[10] See e.g. Julian Ku, "Goodbye UNCLOS Dispute Settlement? China Walks Away from UNCLOS Arbitration with the Philippines" (19 February 2013), online: *Opinion Juris*< http://opiniojuris.org/2013/02/19/goodbye-unclos-dispute-settlement-china-walks-away-from-unclos-arbitration-with-the-philippines/>.

[11] Lisa Toohey, "Regarding China: Images of China in the International Economic Order" in Lisa Toohey, Colin B Picker & Jonathan Greenacre, eds, *China in the International Economic Order: New Directions and Changing Paradigms* (New York: Cambridge University Press, 2015) at 35.

[12] Note 7.

reviewing the scholarly literature, one finds that much of this attention revolves around concerns about the rising power's compliance with international law, exemplified by questions such as "will China be a satisfied mature power or an insecure nouveau riche power"; "how will China integrate itself into the international legal regime"; "does China seek to undermine or change international rules and institutions"; and "can China meet its existing bilateral and multilateral obligations".[13] In parallel, the media often describes China as a "kid" who needs to come of age and accept the "mature" international legal regime, or as a "dragon" waiting in the East, ready to attack others.[14] These narratives perpetuate a mainstream image of China as a lawless predator.

When examining China's behavior in a particular international context, observers too often lock themselves into this mainstream image. Instances where China presents other, different faces to the world are rarely recognized. For example, there is little general acknowledgement that China and the ASEAN countries—including the Philippines—recently adopted a more cooperative approach to the South China Sea dispute. In October 2016, Chinese vessels left a disputed ridge in the South China Sea and allowed the Philippines coast guard and fishing boats to enter the area. This was contrary to what most scholars had previously anticipated.[15]

My dissertation argues that the mainstream image of China in international

[13] See e.g. Jerome Alan Cohen & Hungdah Chiu, *People's China and International Law, Volume 1: A Documentary Study* (Princeton: Princeton University Press, 1974); Phil C W Chan, "China's Approaches to International Law since the Opium War" (2014) 27:4 Leiden J Int Law 859; Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures" (2016) 27:4 Eur J Int Law 945; Julian Ku, "China and the Future of International Adjudication" (2012) 27 Md J Int Law 154; Henry Gao, "Elephant in the Room: Challenges of Integrating China into the WTO System" (2011) 6 Asian J WTO Intl Health Pol 137; Phil CW Chan, *China, State Sovereignty and International Legal Order* (Leiden: Brill Nijhoff, 2015).

[14] For example, Forbes referred to the initiation of China's first case in the WTO as a "coming of age." See Tina Wang, "China's Coming of Age in the WTO War" (20 April 2009), online: *Forbes* <www.forbes.com/2009/04/20/china-wto-trade-markets-economy-law.html>.

[15] "Philippines Says Chinese Vessels Have Left Disputed Shoal" (28 October 2016), online: *Reuters* <http://www.reuters.com/article/us-philippines-southchinasea-china-idUSKCN12S18B>.

adjudication is a product of ethnocentric distortion, and also the result of a Western-centric, positivist discourse characterized by homogenization and stereotyping. Of course, I do not suggest that the mainstream image is totally unfounded. The image of China as a lawless predator contains some truth—China's behavior in some international cases indeed reflects some lawlessness and some aggressiveness. What I state is that the mainstream image of China and studies that purport to support that image, are improperly balanced and insufficiently nuanced. To enable observers to view China in a new, less Western-centric way, this dissertation deconstructs, reproduces and rethinks the image of China in international adjudication through a transcivilizational decision-making process analysis.

A transcivilizational decision-making process views China's attitude towards international adjudication as a continuing process of how China and its people transcend civilizational boundaries and interact with other civilizations (mostly Western civilization). This transcivilizational interaction is concretely illustrated by China's participation in a series of decision-making processes relevant to international adjudication. Within these decision-making processes, Chinese participants (e.g. the Chinese government, non-governmental organizations and individuals) actively communicate with others (e.g. other states, private individuals) in domestic and international arenas: creating, interpreting and reinterpreting international rules, and formulating, reformulating, applying or rejecting policies relevant to international adjudication. When participating in the processes, the Chinese participators—including their perspectives and the strategies they employ—are continually impacted by both

Chinese traditional culture and foreign cultures, especially those from the West which has been influencing China since the mid-19th century.

Specifically, studying China's attitude towards international adjudication through the lens of a transcivilizational decision-making process aims to answer four questions. First, where did China's attitude come from? Second, what is China's attitude? Third, how can one explain China's attitude? Fourth, what will China's attitude be in future?

The first question attempts to address a pertinent but often-overlooked issue: where did China's attitude come from? The desire for progressive development often compels observers to focus only on the present and future. By studying the evolution of China's attitude from the late 19th century to now, this dissertation seeks to fills this historical vacuum, and further attempts to provide a more comprehensive understanding of China in the historical study. The image of China in international adjudication is multi-dimensional, influenced by a mixture of changes and continuities over time. Over past centuries, China's inherent order was destroyed and replaced by a succession of new leaderships, new institutions, new state building plans and new ideologies. Its attitude towards international adjudication changed correspondingly over the same period: from the Qing dynasty's doubts about the PCA to the PRC's endeavor to build international commercial courts to handle Belt & Road Initiative (BRI) disputes.[16] While China's attitude has undergone many changes, continuities also appear. These continuities suggest that some stages of China's attitude are cyclical and will repeat. The historical

[16] The Belt and Road Initiative (BRI), also known as *Yidai Yilu* (One Belt One Road,一带一路), is a development strategy adopted by the Chinese government in 2013 involving infrastructure development and investments in countries in Europe, Asia and Africa. Xinhua News Agency, "China Unveils Action Plan on Belt and Road Initiative" (28 March 2015), online: *The State Council of the People's Republic of China* < http://english.gov.cn/news/top_news/2015/03/28/content_281475079055789.htm>.

study that responds to the first research question will show how China, from the past to present day, has faced both different and similar social situations, and will analyze how its policies towards international adjudication over that period have responded in parallel to these situations.

To address the second question—"what is China's attitude to international adjudication"—this dissertation uses a dynamic decision-making process analysis rather than the traditional rule-oriented approach. The rule-oriented approach assesses China's attitude towards international adjudication with static logical derivation, discovering "correct rules" in particular cases and checking whether China's behavior or policy in these cases is in line with these discovered rules. In contrast, the dynamic decision-making process goes beyond "law on the books" to investigate "law in action". Specifically, China's attitude towards international adjudication can be unpacked to show how Chinese participants (*participant*), on their own terms (*perspective*), interact with other participants in the adjudication-related contexts (*arena*) and try to produce their preferred outcomes (*outcome*) through manipulating (*strategy*) the available resources (*base of power*).[17] In other words, the dynamic decision-making process approach examines China's attitude by assessing the way the Chinese feel, think, say and behave when making policies related to international adjudication.

In responding to the third question—"how can one explain China's attitude to international adjudication?"—this dissertation adopts a transcivilizational perspective, examining how the interaction between Chinese and Western civilizations influences

[17] W Michael Reisman, Siegfried Wiessner & Andrew R Willard, "The New Haven School: A Brief Introduction" (2007) 32 Yale J Intl L 575 at 577.

the Chinese value cluster and ultimately shapes China's attitude. The term "Chinese value cluster" in this dissertation denotes Chinese views on the world, the international order and law when participating in adjudication-related decision-making processes, as reflected in the perspectives of Chinese participants, their strategic choices, their manipulation of power bases and finally their preferred outcomes. The values of different Chinese participants may differ in detail, but they reflect a consistent theme: to what extent should China adopt or adapt its traditional values to accommodate Western values in its approach to international courts and tribunals? In this dissertation, I theorize this theme as a dynamic process among three ideological bases—Chinese traditionalism, Westernism and Chinese nationalism—to explain China's attitude.

In answering the fourth and final research question—what is likely to be China's attitude towards international adjudication in the future?—this dissertation relies on the aforementioned studies. In particular, by extrapolating from the continuities and changes in China's historical attitude to international courts and tribunals, it predicts that China in the future will shift from a rule-taker to a rule-maker in the international adjudicatory regime. It will be seen that this prediction is subject to three caveats. First, since nobody can precisely predict the future, the prediction offered is probable, not inevitable. Second, this prediction does not purport to predict China's future attitude towards any specific international courts or tribunals, but only the broad overall tendency. Third, the prediction is made within the context of the Sino-Western transcivilizational interaction that informs this dissertation, meaning that it assesses the proportionate influence of Westernism, traditionalism and Chinese nationalism in

China's future attitude.

This dissertation is divided into four parts.

Part I (Chapter 1) reviews the literature on China's attitude towards international adjudication and elaborates the theoretical and methodological framework of the dissertation. Part II (Chapter 2) identifies and discusses the three ideological bases that have shaped, and continue to shape, China's attitude towards international adjudication (i.e. Chinese traditionalism, Westernism and Chinese nationalism) and their dynamic interaction. Part III (Chapters 3 to 6) examines the historical evolution of China's attitude through the lens of a multi-factored (i.e. participant, perspective, arena, strategy, power base, and outcome) decision-making process and shows how China's attitude has been shaped by the dynamic interaction between traditionalism,Westernism and Chinese nationalism.

Specifically, Chapter 3 presents the Qing dynasty's attitude using the example of its interactions with the PCA, including the Qing government's initial acceptance of the jurisdiction of the PCA, its participation in the establishment of the PCA at the Second Hague Peace Conference, and its purported consideration (and ultimate rejection) of PCA arbitration in the Sino-Japanese *Jiandao* dispute and the Sino-Portuguese Macau Demarcation. Chapter 4 deals with the Republic of China (ROC)'s attitude using the examples of *Belgium v. China* and the Tokyo Trial. Chapter 5 looks at the attitude of the PRC in the Mao era, using the examples of the adjudication of Japanese war criminals and China's response to India's proposal to settle the 1962 Sino-Indian border dispute by recourse to the International Court of Justice (ICJ). Chapter 6 concentrates

on China's attitude in the post-Mao era, comparing the PRC's respective policies towards the World Trade Organization (WTO) Dispute Settlement Mechanism (DSM), investor-state arbitration (ISA) and the South China Sea Arbitration. Part IV (Chapter 7) predicts and evaluates China's probable future attitude towards international adjudication.

PART I THEORETICAL AND METHODOLOGICAL FRAMEWORK

CHAPTER 1 CHINA'S ATTITUDE TOWARDS INTERNATIONAL ADJUDICATION AS A TRANSCIVILIZATIONAL DECISION-MAKING PROCESS

1.1 Literature Review and the Problem of Perspective

Among many reasons that contribute to the mainstream image of China as a "lawless predator" in international adjudication, the problem of observational perspective in the literature is the most significant. Perspective determines the way observers characterize issues, the tools they employ to research them, and the information they think relevant for solving them. The literature relevant to China's image in international adjudication tends to lean heavily on two perspectives: a positivist perspective and a Western-centric perspective. These two perspectives are not mutually exclusive. In many cases, studies of China's compliance with existing international rules are conducted through a Western lens, because most notions, principles and rules of the international legal regime are based on Western knowledge and values.

1.1.1 The Positivist Perspective: Discovering China in Rules

The positivist perspective originates from legal positivism, which regards law as a

command that a political inferior must obey.[1] This perspective conceives of international law as a body of rules that are given and self-contained, and of international adjudication as a mechanism that discovers and applies the "correct rules" to particular cases.[2] To observe China's image in international adjudication, the positivist perspective primarily uses logical derivation, which understands China through its compliance with existing rules. In other words, the positivist perspective discovers China in the written rules.

This perspective has been prevalent for decades in research relevant to China's attitude towards international adjudication. As early as 1974, Jerome Cohen and Hundah Chiu introduced the rule-oriented research paradigm in their path-breaking study *People's China and International Law*.[3] In the preface, they explicitly stated that the aim of their research was to determine "the extent to which the People's Republic accepts the rules, institutions, and procedures of the world community".[4] Although both international adjudication and China have changed dramatically in the decades following the publication of Cohen and Chiu's text, the preference for applying a positivist perspective to the study of China's engagement with international adjudication has endured. In the current literature—notably that addressing China's participation in the WTO DSM—most topics focus on China's legal arguments in relation to specific issues in particular cases. Examples of this approach include Julia

[1] John Austin, *The Province of Jurisprudence Determined* (London: J. Murray, 1832) at 1 to 3, at 9 to 33.
[2] Lung-chu Chen, *An Introduction to Contemporary International Law: a Policy-Oriented Perspective*, 3d ed (New York: Oxford University Press, 2014) at 12; Cesare Romano, Karen Alter & Yuval Shany, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014) at 4 to 9.
[3] Jerome Alan Cohen & Hungdah Chiu, *People's China and International Law, Volume 1: A Documentary Study* (Princeton: Princeton University Press, 1974).
[4] *Ibid* at Preface.

Ya Qin's commentary on the *China-Publications* case,[5] Wei Liang's case study of the US-China Semiconductor Trade Dispute,[6] and Henry Gao's comprehensive analysis of China's legal claims in the *US-Steel Safeguard* case, the *China - Value Added Tax on Integrated Circuits* case, and the *Sino-EC Dispute over Coke Export Quota*.[7] Even in articles other than specific case studies, the preferred research approach is mostly rule-oriented and doctrinal, as exemplified by Junwu Pan's design of the legal framework for the peaceful settlement of China's territorial and border disputes,[8] Timothy Webster's observation of China's enforcement of WTO decisions,[9] Minxuan Gao and Junping Wang's analysis of the legality of China's concerns over the International Criminal Court (ICC),[10] and Manjiao Chi and Xi Wang's examination of the evolution of China's ISA clauses in international investment agreements.[11] In viewing China as the receiver of international law, the matter of China's image in international

[5] Julia Ya Qin, "Pushing the Limits of Global Governance: Trading Rights, Censorship, and WTO Jurisprudence – A Commentary on the China-Publications Case" (2011) 10:2 Chin J Int Law 271.

[6] Wei Liang, "China's WTO Commitment Compliance : a Case Study of the US-China Semiconductor Trade Dispute" in Ka Zeng, ed, *China's Foreign Trade Policy: the New Constituencies* (London: Routledge, 2009) at 101 to 117.

[7] Henry Gao, "Taming the Dragon: China's Experience in the WTO Dispute Settlement System" (2007) 34 Leg Issues Econ Integr 369. See examples also in Xiaohui Wu, "Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/AB/R)" (2010) 9:2 Chin J Int Law 415; Han-Wei Liu & John Maughan, "China's Rare Earths Export Quotas: Out of the China-Raw Materials Gate, But Past the WTO's Finish Line?" (2012) 15:4 J Int Econ Law 971; Bin Gu, "Applicability of GATT Article XX in China – Raw Materials: A Clash within the WTO Agreement" (2012) 15:4 J Int Econ Law 1007; Guohua Yang, *Study of WTO Cases Involving China* (Beijing: Intellectual Property Press, 2015); Naigen Zhang, "Analysis on 'China - Certain Measures on the Transfer of Technology'" (2019) 1 Res Rule Law 126.

[8] Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden: Martinus Nijhoff Publishers, 2009).

[9] Timothy Webster, "Paper Compliance: How China Implements WTO Decisions" (2013) 35 Mich J Intl L 525.

[10] Mingxuan Gao & Junping Wang, *Issues of Concern to China Regarding the International Criminal Court* (Paper prepared for the Symposium on the International Criminal Court, Beijing, 3 to 4 February 2007). See also in Jianping Lu & Zhixiang Wang, "China's Attitude towards the ICC" (2005) 3:3 J Int Crim Justice 608.

[11] Manjiao Chi & Xi Wang, "The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications" (2015) 16:5–6 J World Invest Trade 869. See examples also in Lucy Reed & Kenneth Wong, "Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China" (2016) 110:4 Am J Int Law 746; Melissa H Loja, "Status Quo Post Bellum and the Legal Resolution of the Territorial Dispute between China and Japan over the Senkaku/Diaoyu Islands" (2016) 27:4 Eur J Int Law 979; An Chen, "Should 'The Perspective of South–North Contradictions' Be Abandoned? Focusing on 2012 Sino-Canada BIT" in *The Voice from China: An CHEN on International Economic Law (Understanding China)* (New York: Springer, 2013) at 373; E Dulac, "The Emerging Third Generation of Chinese Investment Treaties" (2010) 7:4 Transnatl Dispute Manag, online: <https://www.transnational-dispute-management.com/article.asp?key=1636>; Jielong Duan, *International Law in China: Cases and Practice* (Beijing: Law Press, 2011).

adjudication is essentially reduced to a technical problem of how to identify the contents of rules and determine the degree of China's obedience to these rules in concrete cases.

When addressing this technical problem, the positivist perspective rarely realizes the full picture of China's attitude towards international adjudication. As a largely doctrinal method, the positivist perspective relies too much on positive, concrete legal phenomena embodied in rule texts and judicial practice (for example, the existing cases or rules that involve and affect China). Much of the literature focuses on China's image in WTO adjudication,[12] because, in recent years, China has participated actively in the WTO dispute settlement process as both a respondent and a claimant. Based on China's performance in numerous WTO cases, scholars like Marcia Don Harpaz, Henry Gao and Youngjin Jung conclude that China is moving towards lawfulness or even towards aggressive legalism.[13] Yet China's progress in WTO adjudication cannot represent the complete picture, because its performance in international adjudication in different contexts varies. While China is active in the WTO DSM, its attitude towards the International Court of Justice (ICJ) is relatively negative: because, at present, it has not accepted the ICJ's compulsory jurisdiction.[14] Some writers might note China's different images in different international courts/tribunals,[15] but then fail to explain the

[12] See in Lisa Toohey, "Regarding China: Images of China in the International Economic Order" in Lisa Toohey, Colin B Picker & Jonathan Greenacre, eds, *China in the International Economic Order: New Directions and Changing Paradigms* (New York: Cambridge University Press, 2015) 27; Marcia Don Harpaz, "Sense and Sensibilities of China and WTO Dispute Settlement" (2010) 44:6 J World Trade 1155; Xiaojun Li, "Understanding China's Behavioral Change in the WTO Dispute Settlement System" (2012) 52:6 Asian Surv 1111; Wenhua Ji & Cui Huang, "China's Path to the Center Stage of WTO Dispute Settlement: Challenges and Responses" (2010) 5 Glob Trade Cust J 365; Wei Zhuang, "An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010" (2011) 4:1 Law Dev Rev 218; Manjiao Chi, "China's Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts" (2012) 15:1 J Int Econ Law 29; Gao, *supra* note 7; Guohua Yang, "China in the WTO Dispute Settlement: A Memoir" (2015) 49:1 J World Trade 1.

[13] Harpaz, *supra* note 12; Henry Gao, "Aggressive Legalism: the East Asian Experience and Lessons for China" in Henry Gao & Donald Lewis, eds, *China's participation in the WTO* (London: Cameron, 2005) 315; Youngjin Jung, "China's Aggressive Legalism" (2002) 36 J World Trade 1037.

[14] Duan, *supra* note 11 at 368.

[15] See e.g. Hungdah Chiu, "Communist China's Attitude toward International Law" (1966) 60:2 Am J Int Law

underlying rationale for these differences, or only provide partial explanations. One example of this approach is Julian Ku's "China and the Future of International Adjudication".[16]

China's attitude towards international adjudication that we derive from the positivist scholarship is simple: if China is shown to comply with the rules, then it is "lawful", which seems good; and if China is proved to violate the rules, then it is "lawless", which seems bad. Yet, these images are fragmented and discrete, and it may be hard for the positivist perspective to transform them into a general and coherent one. This is because the rule-oriented approach rarely relates China's image in one case to its images in other cases, or considers the complex politico-economic, historical and social circumstances that shape the images. In sum, scattered case-by-case studies are unable to give us a coherent, complete understanding of China, for they cannot provide an answer to the question of why China is "lawful" in some cases, but "lawless" in others.

1.1.2 The Western-centric Perspective: Discovering China in the West

The other perspective prevalent in the current literature is the Western-centric perspective. As some international legal scholars have noticed,[17] the architecture of the

245; Hungdah Chiu, "Chinese Attitudes toward International Law in the Post-Mao Era" (1988) 1988:1 Md Ser Contemp Asian Stud 1; Julian Ku, "China and the Future of International Adjudication" (2012) 27 Md J Int Law 154; Hanqin Xue, *Chinese Contemporary Perspectives on International Law* (Leiden: Brill, 2012); Phil CW Chan, *China, State Sovereignty and International Legal Order* (Leiden: Brill Nijhoff, 2015); Harriet Moynihan, "China's Evolving Approach to International Dispute Settlement" (29 March 2017), online: *Chatham House* <https://www.chathamhouse.org/publication/chinas-evolving-approach-international-dispute-settlement>; Xiaohong Su, "Why Great Powers Dislike International Adjudication" (2003) 11 Leg Sci 20; Thomas Eder, "China Leans in on International Adjudication: Why Beijing's Answer to Defeat will be More Forceful Engagement?" (2 May 2018), online: *EJIL Talk* <https://www.ejiltalk.org/china-leans-in-on-international-adjudication-why-beijings-answer-to-defeat-will-be-more-forceful-engagement/>.

[16] Ku, *supra* note 15.

[17] See e.g. Yasuaki Onuma, *A Transcivilizational Perspective on International Law* (Leiden ; Boston: Brill Academic Publishers, 2010); Toohey, *supra* note 12; Bhupinder Singh Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (New York: Cambridge University Press, 2017); Teemu Ruskola,

international legal regime is a Western creation – its legal principles are imported from Western systems, its institutions are shaped by Western powers, and its underlying rationales reflect Western values.[18] The dominance of Western discourse in international law gives rise to a Western-centric perspective for observing China: the West is the "self" of international law.[19] Western views—such as those involved in the definition of international legal concepts, the appropriate means of interpretation of international treaties and the idea that any party aggrieved in an international dispute should have that dispute adjudicated by a court/tribunal—represent "universal" international norms that are applied to describe, evaluate and authorize commentary on China. In contrast, China, as an Eastern, socialist country with a substantially different domestic politico-economic context, is the "other" of international law. Its words and deeds in international disputes are different, but nonetheless the expectation is that China should be bound, evaluated and authorized by "universal" international norms.

The Western-centric perspective permeates much of the research about China's image in international adjudication. It is reflected in common themes like "China's integration into the global system", "Challenges of integrating China" and "China's long march towards rule of law".[20] Notably, Marcia Don Harpaz—in her study of China

"Legal Orientalism" (2002) 101:1 Mich Law Rev 179.

[18] Onuma, *supra* note 17 at 47 to 48.

[19] The classification of "self" and "other" in Sino-Western relationship originates from Edward Said's *Orientalism*. Said believes that the Western view of the East indicates a difference that separates the "self" and "other". See in Edward Said, *Orientalism* (New York: Pantheon, 1978). The "self" and "other" categories are also echoed and applied by Teemu Ruskola and Lisa Toohey in describing orientalism in contemporary legal study relating to China. See in Ruskola, *supra* note 17 at 182 to 183; Toohey, *supra* note 12 at 29 to 32.

[20] See e.g. Macia Don Harpaz, "China and International Tribunals: Onward from the WTO" in Lisa Toohey, Coling B Picker & Jonathan Greenacre, eds, *China in the International Economic Order: New Directions and Changing Paradigms* (New York: Cambridge University Press, 2015) at 43; Henry Gao, "Elephant in the Room: Challenges of Integrating China into the WTO System" (2011) 6 Asian J WTO Intl Health Pol 137; Jiangyu Wang, "The Rule of Law in China: A realistic view of the Jurisprudence, the impact of the WTO, and the prospects for future development" (2004) Singap J Leg Stud 347; Ji & Huang, *supra* note 12.

in the WTO Dispute Settlement—employs socialization theories to test how China demonstrates its faith in western legal institutions and is "socialized" into the rules of international order.[21] Not only foreign (Western) scholars but also Chinese indigenous scholars are profoundly impacted by the Western-centric perspective. Some leading Chinese international legal scholars, such as Chongli Xu (徐崇利), Zhipeng He (何志鹏) and Xiaohong Su（苏晓宏）acknowledge that international law is a product of Western civilization, which makes China and its study of international law always subject to an "outsider" mentality.[22] The Western-centric perspective is also demonstrated in the prescription-oriented research paradigm on China's participation in international adjudication, where Western legal practice is used as the standard for China's engagement with international tribunals/courts, and where legal advice is given to help China improve its performance, so as to meet the Western standard.[23]

The great preponderance of Western-centric scholarly work results in information asymmetry in terms of understanding China's policies and behavior regarding international adjudication. Today, there is much information about China to draw on.

[21] Harpaz, *supra* note 12; Ann Kent, "China's International Socialization: The Role of International Organizations" (2002) 8:3 Glob Gov 343; Alastair Iain Johnston, *Social States: China in International Institutions, 1980-2000* (Princeton, NJ: Princeton University Press, 2007).

[22] Chongli Xu, "The 'Outsider' Mentality and the Poor Chinese International Legal Research" (2006) 24:5 Trib Political Sci Law 33. In his "International Justice in the Changing World", Su attributed China's reluctance in its approach to international adjudication to the incompatibility of cultures, for "when China as a novice entries the 'game' that has been designed by others, it is inevitably marginalized by the 'game rules'" See in Xiaohong Su, *International Adjudication in the Changing World* (Doctoral Thesis, East China Normal University, 2004) [unpublished] at 130. Zhipeng He in his newly published book *Chinese Theory of International Law* also pointed out that Western civilization leads the development of international law and this fact to some extent contributes to the backwardness of international legal research in China. See in Zhipeng He & Lu Sun, *Chinese Theory of International Law* (Beijing: Law Press, 2017) at 53 to 54.

[23] See e.g. Qin, *supra* note 5; P L Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building" (2010) 13:4 J Int Econ Law 997; Karen Halverson, "China's WTO Accession: Economic, Legal, and Political Implications" (2004) 27:2 Boston Coll Int Comp Law Rev; Pan, *supra* note 8; Axel Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" (2015) 16:5–6 J World Invest Trade 843; Pitman B Potter, "The Legal Implications of China's Accession to the WTO" (2001) 167:1 China Q 592; Pitman B Potter, "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices" (2003) 2:1 Wash Univ Glob Stud Law Rev 119.

China's interactions with international courts/tribunals (especially the WTO DSM) have been well examined by various scholars, but most of these studies depend heavily on vocabulary, concepts, principles, theories and analytical paradigms borrowed from the West.[24] Essentially, the so-called "Chinese studies" are no different from Western studies: their theme is still how the West perceives other subjects (i.e. China). The result is that, while information about Western views of China is abundant, information from the other side—explaining how China sees itself and how China sees the West—is scarce. In theory, Chinese indigenous scholars, who have exceptional advantages in obtaining and handling Chinese sources, should be able to bring the world inside China and to facilitate communication between China and other states (in particular Western states). Yet, Chinese scholars are reluctant to articulate how the Chinese feel about international adjudication; rather, they spend their efforts on introducing Western practice and arguing that China should fall in line with it.[25] This approach assumes that only by emulating the West will China improve its status in the international legal regime.

To some extent, the lack of information from the Chinese side creates a mysterious, exotic and incomprehensible China, which ultimately reinforces the perception that China is a lawless predator. Consider the South China Sea Arbitration as an example.

[24] See e.g. Duan, *supra* note 11; An Chen, "Should the Four Great Safeguards in Sino-Foreign BITs be Hastily Dismantled -Comments on Provisions Concerning Dispute Settlement in Model US and Canadian BITs" (2006) 7 J World Invest Trade 899; Harpaz, *supra* note 20; Liang, *supra* note 6; Veron Mei-Ying Hung, "China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform" (2004) Am J Comp Law 77.

[25] Shibo Jiang describes the scenario as an utilitarian study of international adjudication, see in Shibo Jiang, "Complex of Power and the Academic Mind-set in the Studies of International Law: Penetrating from the Negative Attitude of China to International Justice" (2009) 2009:2 Shandong Soc Sci 33. Zhipeng He similarly criticizes the shortage of Chinese position, Chinese values and Chinese culture in China's contemporary international legal scholarship. See in He & Sun, *supra* note 22 at 37 to 43.

Given the long-standing ambiguity in the definition of its Nine-Dash Line concept,[26] China's territorial claim in the South China Sea is always assumed by the West to be an indicator of expansion and hegemony, which confirms the claim that the rise of China presents various threats to the international order.[27] Further, not only in the South China Sea dispute, but also in some other international disputes, China's poor skills in explaining its actions contribute to miscommunication between China and the outside world.[28] Without efficient and symmetric information about how and why China acts, the fear of China, or the so-called "China Threat Theory", is both self-perpetuating and self-reinforcing. That is, other states perceive China as a threat because they believe that China perceives them as a threat, and China perceives other states as a threat because other states have perceived it as a threat.[29]

By pointing out the problem of perspective, I do not mean to suggest that the current literature lacks value in terms of observing China's attitude towards international adjudication. In fact, the current literature provides us with a useful basis for a deeper

[26] Florian Dupuy and Pierre-Marie Dupuy, in their legal analysis of the South China Sea dispute, held that China's maritime claim is uncertain, for it "does not distinguish between insular features that qualify as 'islands' within the meaning of UNCLOS and those qualifying as 'rocks'" and "it remains unclear whether the function of the nine-dash line is to delimit the waters claimed by China" See Florian Dupuy & Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea" (2013) 107:1 Am J Int Law 124 at 128 to 129. In 2014, Zhiguo Gao and Bingbing Jia released a book titled *The Nine-Dash Line in the South China Sea: History. Status and Implications*, in which they argue that the nine-dash line has become synonymous with a claim of sovereignty over the island groups that always belonged to China and may also have a residual function as potential maritime delimitation boundaries. It is the first time that Chinese scholars systematically clarified the long-term ambiguous nine-dash line. Zhiguo Gao & Bingbing Jia, *The Nine-Dash Line in the South China Sea: History. Status and Implications* (Beijing: Ocean Press, 2014).

[27] Emma V Broomfield, "Perceptions of Danger: The China Threat Theory" (2003) 12:35 J Contemp China 265 at 265 to 284.

[28] For instance, in the Sino-Japanese dispute over the Diaoyu Islands, China's claims to the islands rest largely on historical records dating back to the 14th century, asserting that "the Diaoyu island and its affiliated islands have been China's scared territory since ancient times." This assertion, thought reasonable in the Chinese eyes, is considered nationalist and insufficiently convincing in international law. Erica Strecker Downs & Phillip C Saunders, "Legitimacy and the Limits of Nationalism: China and the Diaoyu Island" (1998) 23:3 Int Secur 114; Loja, *supra* note 11 at 986 to 987.

[29] Emma Broomfield similarly states that the idea that China is a threat is a circle of accusation. "We have here a circle of accusation: China perceives America as a threat because America perceives China as a threat and vice-versa." See in Broomfield, *supra* note 27 at 271.

study of China's image in international adjudication. The positivist research has accumulated massive research materials—such as cases and rules—for scholars to draw on when creating works that offer different and deeper insights. In addition, Western-centrism (as a perspective) enables scholars to discern more clearly the role of the West in China's perception of international adjudication. The main problem with the current literature is that its intellectual reach is too limited, in that it does not enable people to discover the "real" China. Or, to put this another way, positivist and Western-centric perspectives account for some things well, but they cannot tell the whole story of China.

1.2 Discovering China in Transcivilizational Decision-Making Processes

Of course, no one would assert that the image of China in relation to international adjudication can ever be fully and accurately perceived. Thus, the research task in this dissertation is not to eliminate all potential distortion and bias. Rather, the task is to pursue the possibility of reducing distortion or bias derived from the positivist and Western-centric perspectives, and to provide a new and different lens from which to view China's attitude towards international adjudication. In order to correct the distortions resulted by the positivist and Western-centric perspectives, the search for a new perspective should take at least three requirements into account. First, the new perspective should be comprehensive and dynamic, in the sense of viewing the role China plays in international adjudication not only in relation to the written rules, but also in the broad, ever-changing social context that international adjudication operates

within. Second, it should employ multiple methods rather than rely on pure doctrinal study. Third, it should analyze China's interaction with international adjudication within a cognitive framework that recognizes the plurality of civilizations and cultures.

1.2.1 Starting Point: International Adjudication as a Decision-Making Process

The search for a new perspective begins with a basic theoretical question: what is international adjudication? According to most legal scholars, the term "international adjudication" denotes a law-based process that renders legal decisions binding on international parties. Romano, Alter and Shany define international adjudication as a law-based way of reaching a final decision either by judicial bodies or by arbitration.[30] Instrumentally, it seems plausible to see international adjudication as a tool for applying, articulating and enforcing the international rule of law, thereby heading off the use of force in international disputes. This perception of the value of international arbitration has fostered a proliferation of international courts and tribunals in recent decades.[31]

However, if we take the rule-oriented approach to international adjudication as our starting point, we will find it insufficient to explain the complicated, ever-changing reality. The emphasis on rules and doctrinal studies makes the rule-oriented approach unable to satisfactorily address why, in practice, China does not always use international adjudication. The PRC's border disputes with India led to the China-India war in 1962, and their boundary issues still have not been resolved. China and its

[30] Romano, Alter & Shany, *supra* note 2 at 4 to 9.
[31] See e.g. Gary B Born, "A New Generation of International Adjudication" (2012) 61 Duke Law J 775 at 782; Robert O Keohane, Andrew Moravcsik & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54:3 Int Organ 457; Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?" (2001) 14:02 Leiden J Int Law 267.

neighbors also have an ongoing serious disagreement about their maritime boundaries, e.g. sovereignty over the Diaoyu ("Senkaku" in Japanese) islands and maritime rights over the South China Sea. Many other such conflicts persist, notwithstanding the developed international adjudicatory regime.

For this reason, scholars like Eric Posner, Jack Goldsmith, and John C. Yoo—with the assistance of quantitative data and empirical studies—argue that international courts and tribunals are actually agents that serve a state's interest (e.g. adding information, settling disputes) and are created to increase states' power and prestige.[32] This view has its theoretical roots in realism. Hans Joachim Morgenthau, one of the most prominent proponents of realism, maintained that the essence of international disputes is a tension between the desire to maintain the existing distribution of power and the desire to overthrow it. Thus, the international legal regime—on which the authority of international adjudication rests—is regarded as a mere reflection of the *status quo* (mainly the interest of dominating states). Correspondingly, international adjudication is designed to serve power politics, even though it appears to decide only purely legal matters.[33]

The power-oriented approach to international adjudication is accurate to the extent that it analyzes international adjudication in terms of its practical effects, and to the extent that it recognizes the weak binding force international courts and tribunals have on states. However, the emphasis on power generates an unreasonably narrow view of

[32] Eric A Posner & John C Yoo, "Judicial Independence in International Tribunals" (2005) 93 Calif Law Rev 3; Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2005); Eric A Posner & John C Yoo, "Reply to Helfer and Slaughter" (2005) 93 Cal Rev 957.
[33] Hans Joachim Morganthau, *Politics among Nations: The Struggle for Power and Peace* (New York: AA Knopf, 1960) at 341 to 349.

China's attitude towards international adjudication. In the contemporary world, states are realizing different ways to strengthen their power; shifting from traditional zero-sum games to a focus on the expansion of the world market in value-added goods and services. In this context, the benefits of pursuing the common good through cooperation are gradually being seen as exceeding the benefits of competition. In such an environment of growing international interdependence, China has discovered a coincidence of strategic and economic interests in the international rule of law and has joined many international treaties to reach win-win results.[34] Recently, China has also resorted to independent international tribunals for settling trade disputes, a typical example being its active participation in WTO adjudication.[35]

In practice, the concept of international adjudication and its functions ranges across a spectrum from the rule-oriented approach to the power-oriented approach. In most cases, legal authority and political power coexist in the operation of international adjudication. When deciding international disputes, international rules and principles are made and remade, interpreted and reinterpreted and applied and adjusted by the various participants in the adjudication to meet their changing expectations of power and order. Because of the dual influence of power and authority, states—including China—do not adopt universal policies towards international adjudication: sometimes they use international adjudication for settling disputes but sometimes they don't. Equally, states use some certain sorts of international adjudication, but they reject others.

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[34] Xue, *supra* note 15 at 54 to 57; Duan, *supra* note 11 at 185.

[35] Since 2001 China has actively participated in the WTO DSM: it was a respondent in 40 disputes (the third highest number of all 164 members), a complainant in 17 cases (top 10 ten initiators of cases before the WTO), and a third party in 145 cases. See "Disputes by Member" (20 June 2018), online: *World Trade Organization* <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.

Thus, in reality, the concept of international adjudication should be understood by reference to a balanced approach which includes both authority and power.

Some may claim that legal realism can provide such a balanced approach. Indeed, legal realism, summed up by the aphorism "the life of the law has not been logic: it has been experience",[36] rejects the concept of law as a corpus of established and logically connected rules and instead regards law as the output of decisions and behavior by judges and others in concrete social contexts.[37] It is plausible that the legal realist approach can provide a balanced approach to international adjudication: it interprets law and adjudication through examining real and dynamic social processes using diverse methods, such as legal sociological study.

However, legal realism also has weaknesses as a theoretical starting point for this dissertation. First, it mainly focuses on decision-making processes occurring in adjudicatory proceedings,[38] and ignores other relevant activities such as the decision-making process underlying China's acceptance of the jurisdiction of an international court or tribunal, which is also an important indicator of its attitude towards international adjudication. Second, it applies quantitative, empirical studies of social behavior to assess the interplay between international adjudication and China but overlooks the influence of other factors. For instance, as a country with more than 5,000

[36] Oliver Wendell Holmes, *The Common Law* (Cambridge: Harvard University Press, 2009) at 3.
[37] The realist movement and pragmatism were founded by Oliver Wendell Holmes Jr. who insisted that judges, in deciding cases, are not simply deducing legal conclusions with inexorable, machine-like logic, but are influenced by ideas of fairness, public policy, and other personal and conventional values. Legal realism maintains that jurisprudence should emulate the value-free methods of natural science, i.e., rely on empirical evidence. See generally in Catharine Wells Hantzis, "Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr." (1987) 82 Nw UL Rev 541.
[38] Legal Realism was in favor of Rule Skepticism, seen as a "distrust of traditional legal rules and concepts as effective guidance for deciding cases. Realists considered an attack on the rigidity of legal rules to be a critical step toward better legal decision-making and a more accurate understanding of what courts were actually doing when they decided cases" See in Marcus J Curtis, "Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence" (2015) 27 Yale JL Hum 157.

years of ongoing civilization, history and culture loom large in China's foreign policy. Third, since legal realism is originally and mainly focused on the U.S. legal regime, it gives insufficient attention to the global dimension and the social context in China.

The New Haven School (or the policy-oriented school) developed by Myres S. McDougal and Harold D. Lasswell may overcome the weaknesses of legal realism and help to better understand the relation between international adjudication and the broader social context. Like legal realism, the New Haven School holds that international law should not be simply understood as a pre-existing body of rules. However, it goes beyond legal realism and expands the conceptual spectrum of law: international law in the New Haven context is a comprehensive process of authoritative and controlling decision-making in which rules are continuously made and remade, and the function of the rules of international law is to communicate the perspectives (demands, identifications and expectations) of the peoples of the world in relation to this comprehensive process.[39] If international law is regarded as an authoritative, controlling and continuous decision-making process, then international adjudication, as the New Haven School puts it, means more than court activity that responds to dispute resolution through the application of rules. Instead, it should be seen as a decision-making process "in which decision-makers, located in many different institutional positions and contexts, are continually creating, interpreting and reinterpreting rules and continually formulating and reformulating, applying and terminating policies".[40]

[39] Harold Dwight Lasswell & Myres Smith Mcdougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy,Vol.1* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992) at 182 to 183.
[40] Myres Smith McDougal, "International Law, Power, and Policy: a Contemporary Conception" (1953) 82 Collect Courses Hague Acad Int Law 133 at 182 to 183.

The first significant advancement in the concept of international adjudication provided by the New Haven School is that it recognizes the dynamic relation between power and authority (or rules) in international adjudication. [41] Whereas the conventional rule-oriented approach separates international law from power politics by emphasizing the formal authority of rules, the New Haven School recognizes the existence of effective power that actually formulates and influences decisions, holding that the global community is a part of the global process of effective power.[42] While acknowledging the role of power, the New Haven school is different from the power-oriented approach, in that it never means to replace the authority of international adjudication with power politics. Instead, power and authority are interdependent: the global process of effective power establishes and maintains the basic features of the global process of authoritative decision-making, but the latter also influences the former.[43] In a sense, this conception of international adjudication is both realistic and flexible: it escapes dogmatism by allowing attention to be focused on "what international adjudication ought to be" as well as "what international adjudication actually is".

Second, in comparison with the rule-oriented and legal realism approaches, the concept of international adjudication in the New Haven School is more comprehensive, including not just the making of legal decisions, but the entire social process relating to

[41] According to the Hew Haven School, authority means community's expectations of rightness, control refers to the actual participation in the decision, namely effective power. See in W Michael Reisman, *The View from the New Haven School of International Law* (Cambridge University Press, 1992) at 121; Lasswell & Mcdougal, *supra* note 39 at 183.
[42] Lasswell & Mcdougal, *supra* note 39 at 191.
[43] *Ibid* at 190.

adjudication. This is in contrast to the rule-oriented approach, which understands international adjudication from the standpoint of a command receiver, and which focuses on how to identify given rules and to make decisions based on the identified rules.[44] Although the New Haven School also characterizes international adjudication as a process of making decisions, the process is not limited to the decision-making activities of the adjudicators. Rather, decision makers can include any of the participants in international adjudication: not just adjudicators, but also states, international organizations, non-governmental organizations, private individuals and other participants.[45] Relatedly, the scope of a decision-making process in the New Haven context is extended to out-of-court area events that create, interpret and reinterpret rules and that formulate, reformulate, apply and terminate policies relevant to international adjudication (for example the parties' pre-trial negotiations).[46] To conclude, the New Haven approach holds that, in addition to the making of an award or judgment, there are many other decision-making occasions whereby the decision makers, by various tools and techniques, make or try to influence decisions to optimize their preferred outcome.

Third, the concept of international adjudication in the New Haven School has a global perspective, since it understands the role of international adjudication as a continuous social process that is happening in both domestic and international arenas. In similar terms to legal realism, the New Haven approach believes that international

[44] Reisman, *supra* note 41.
[45] W Michael Reisman, Siegfried Wiessner & Andrew R Willard, "The New Haven School: A Brief Introduction" (2007) 32 Yale J Intl L 575 at 576.
[46] McDougal, *supra* note 40 at 182 to 183.

law exists both "in action" and "on the books", but it refuses to confine itself to the domestic context. Rather, it places law in the most comprehensive process of authoritative decision-making which embodies the decision makers' expectations of authority and control.[47] As a result, international adjudication is comprehensive in scope: it is related to the larger global community processes of which it is a part and which it in turn affects.[48] It is also comprehensive in depth, since it covers all different phases of the continuous decision-making process, ranging from the establishment of the participants' perspectives and their structures of authority, to the allocation of bases of power, the conduct of strategies, and to the securing of demanded outcomes.[49]

Finally, and perhaps most importantly, because the New Haven School examines a dynamic, comprehensive, global authoritative decision-making process, it allows the employment of multilevel interdisciplinary methods. Characterizing international law as a continual process of authoritative decision-making, the New Haven School suggests that scholars should employ various approaches to understand what people actually do and the way people behave, say, think and feel in practice.[50] Of course, the New Haven School is not the only school looking to go beyond classical doctrinal study and to encourage interdisciplinary research. An increasing number of legal scholars have started to try to solve international legal problems using more creative interdisciplinary perspectives. Nonetheless, compared to its counterparts, the New

[47] Lasswell & Mcdougal, *supra* note 39 at 26 to 28.
[48] *Ibid* at 183.
[49] *Ibid* at 95.
[50] Reisman, *supra* note 41. Prof. Reisman further explains that the "understanding and influencing" can be obtained through the full and realistic description of effective power processes – in terms that include all important participants, perspectives, arenas, bases of power, strategies, and outcomes.

Haven School is enormously flexible. Apart from the traditional legal-political method, New Haven School literature has borrowed insights from legal-anthropology, legal-social psychology and legal-geography when studying law.[51] Michael Reisman quoted the Chinese proverb "it does not matter whether a cat is black or white but whether it catches mice" to describe how open-minded the New Haven approach is: "the New Haven School was established to refine and apply tools to achieve that goal. If there is a better cat around, we would be the first to use it."[52]

The New Haven approach satisfies the requirement referred to earlier for a dynamic, comprehensive and multi-method perspective. But there remains another crucial question: does it offer a perspective that can accommodate diverse value systems and civilizations?

1.2.2 Attitude as the Pursuit of Values

Does the New Haven approach offer a relatively neutral framework to observe China's attitude towards international adjudication? If international adjudication—according to the New Haven School—is regarded as a decision-making process, then China's role would be more than an entity regulated by or subjected to international law. Rather, it would be a decision maker interacting with other participants in the decision-making process. The notion of "attitude" is thus narrower than its semantic meaning,[53]

[51] See e.g. in Harold D Lasswell, "The Impact of Crowd Psychology upon International Law" (1967) 9 Wm Mary Rev 664; Hari M Osofsky, "A Law and Geography Perspective on the New Haven School" (2007) 32 Yale J Int Law 421; Ji Li, "From See You in Court-To See You in Geneva: An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution" (2007) 32 Yale J Intl L 485; Anthony Carty & Fozia Nazir Lone, "Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes" (2011) 19:1 Asia Pac Law Rev 93.

[52] Reisman, Wiessner & Willard, *supra* note 45 at 582.

[53] The plain meaning of "Attitude", according to the *Oxford English Dictionary*, is a "settled behavior or manner

and specifically refers to China's behavior or manner of actions when participating in adjudication-related decision-making processes. For example, how China creates, interprets and reinterprets international rules, and how it formulates, reformulates, applies and terminates policies towards international adjudication.

However, the New Haven School does not confine itself to simply describing the decision-making process. Rather, it analyzes the process with the value thesis, claiming that the decision makers "pursue values through institutions using resources".[54] In the New Haven context, the role of values is superior: they are the concern for undertaking intellectual tasks, the thread for solving international problems, and the goal of international law.[55] Taking this perspective, we can infer that China's attitude towards international adjudication is the process of how the Chinese pursue values in decision-making processes that are relevant to international adjudication. Some may disagree with this proposition on the ground that decision makers, notably states, generally make decisions to advance their "national interest."[56] Yet the "national interest" is ultimately decided by values, because the definition of "national interest" and the degree of importance of the "national interest" necessarily depends upon a state's value system.

The New Haven approach could have been a neutral framework if its value thesis is open enough to accommodate class, gender, race and geographical standpoints, but the

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of acting, as representative of feeling or opinion". *The Oxford English Dictionary*, 2nd ed, *sub verbo* "attitude". Psychologically, attitude is defined as "a psychological tendency that is expressed by evaluating a particular entity with some degree of favor or disfavor". Alice H. Eagly & Shelly Chaiken, "Attitude, Structure and Function" In D.T. Gilbert, Susan T. Fisk & G. Lindsey, eds, *Handbook of Social Psychology* (New York: McGowan-Hill, 1998) at 269 to 322.

[54] Lasswell & Mcdougal, *supra* note 39 at 375.

[55] Harold D Lasswell & Myres S McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1942) 52:2 Yale Law J 203 at 212; Harold Hongju Koh, "Is There a New New Haven School of International Law" (2007) 32 Yale J Intl L 559 at 563.

[56] See e.g. in Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2007).

New Haven School adopts an exclusive, normative approach to the understanding of values. This approach gives rise to two problems. The first problem lies in the dominant role values play in the decision-making process. When elaborating the nature of decisions, the New Haven School highlights those that shape and protect a society's values, naming these the "public order" decisions.[57] By describing value-oriented decisions as "public order", the New Haven School seems to set values as the criteria for appraising the quality of decisions. Michael Reisman argues that the New Haven School always insists "that the end of law and the criterion for appraisal of particular decisions was their degree of contribution to the achievement of a public order of human dignity."[58]

However, values are too weak, and too vague to be applied as the central index for evaluating law and adjudication. Since there is no international consensus on the required standards, scopes and categories of values, they will vary from culture to culture, from state to state and even from individual to individual. If a value-centric analysis is applied to our understanding of China's attitude towards international adjudication, a thorny problem will emerge then: given that adjudication often occurs between China and other states with different, or even conflicting value systems, how should we scrutinize Chinese attitudes and behavior with value criteria? For example, whose values should be applied to evaluate the decisions made by the Philippines and China in relation to the South China Sea dispute? Can it be said that the Philippines'

[57] Myres S McDougal, Harold D Lasswell & W Michael Reisman, "Theories about International Law: Prologue to a Configurative Jurisprudence" (1967) 8 Va J Intl L 188 at 203.
[58] W Michael Reisman, "Theory about Law: Jurisprudence for a Free Society" (1998) 108 Yale Law J 935 at 939.

initiation of the South China Sea Arbitration is lawful because it accords with the Philippines' values? Or can it be said that China's rejection of the arbitration is also lawful because this action serves China's values? Such analysis would produce only ambiguous conclusions along the lines of: "China's decision is right according to its value system, and the Philippines' decision is also right according to the Philippine value system".

To avoid this scenario, the New Haven approach proposes that fundamental values can be understood to refer to "human dignity", including power, enlightenment, wealth, well-being, skill, affection, respect and rectitude.[59] These specific values are assumed to be universal and therefore to have the quality of objective truth which, when applied to the decision-making process, will result in the right outcome. Although a universal theory of values would solve the ambiguity problem, as Burns H. Weston has noted, it raises another difficult problem: how can one guarantee that the discovered eight values are actually held by some 6 billion people?[60] The New Haven School might respond that, even if it is impossible to exhaustively determine the perceptions of all the world's people, widely-accepted international documents like the *Charter of the United Nations* demonstrate that the eight suggested values are held by "overwhelming numbers of people of the world".[61] Yet, even if an overwhelming number of the world's people do agree with the eight values, the New Haven School ignores another issue: given the diversity in cultures and civilizations, people's understanding and interpretation of

[59] See e.g. Reisman, Wiessner & Willard, *supra* note 45 at 576.
[60] Burns H Weston et al, " Remarks on McDougal's Jurisprudence: Utility, Influence, Controversy", 79 American Society of International Law Proceedings (January 1985) 266 at 270.
[61] *Ibid*.

these so-called "universal" values vary greatly.[62] To be sure, decision-makers are likely to share some universal normative values, but these values and their connotations may be not as the same as those identified by the New Haven School.

To some extent, the value thesis in the New Haven School also reflects a Western-centric perspective. Beginning as a response to the post-war debate between naturalism and positivism in the West,[63] the New Haven School was created to contribute insights to a new legal theory that could strengthen Western morality and values. This purpose is made most explicit in the New Haven masterwork *Jurisprudence for a Free Society: Studies in Law, Science and Policy*,[64] the preface to which states that: "we recommended that inquiry and education about law adopt a comprehensive focus of attention upon community values and institutions…the values we recommended for postulation were of course those that are today commonly described as the value of human dignity."[65]

The New Haven School's Western-centric disposition met the needs of the Cold War era, for only by portraying Western values as "universal" and "centered" could they attract more support and counter Communist values in the East.[66] However, this

[62] For instance, China and the West have conflicting understandings of the human rights enshrined in the Universal Declaration of Human Rights. In the West, human rights are regarded as claims by individuals against the power of the state. However, the Chinese traditionally believe that human rights should be subject to the state's authority, in other words, it is the state's duty to take care of its people's rights and welfare. Qi Zhou Qi, "Conflicts over Human Rights between China and the US" (2005) 27:1 Hum Rights Q 105 at 113; Xue, *supra* note 15 at 121 to 167.

[63] In the time after WW II, the debate between naturalism and positivism resurged, as the problems of strict positivism emerged in the moral dilemma caused by many offensive Nazi laws that were made and enforced under correct formal procedures. See e.g. in Herbert Lionel Adolphus Hart, "Positivism and the Separation of Law and Morals" (1957) 71 Harv Rev 593; Lon L Fuller, "Positivism and Fidelity to Law–A Reply to Professor Hart" (1957) 71 Harv Rev 630; Nigel Purvis, "Critical Legal Studies in Public International Law" (1991) 32 Harv Intl LJ 81 at 82 to 83.

[64] Lasswell & Mcdougal, *supra* note 39.

[65] *Ibid* at Preface.

[66] Actually, in his articles, Prof. McDougal explained the contents of eight values that are drawn mainly from the Western (or even American) point of view. For example, in his context, "power" means "participation in or the ability to participate in the making of important decisions. When such participation or ability is general, there is democracy" see in Lasswell & McDougal, *supra* note 55 at 212 to 219. The fact that he deemed the Western style

Western-centric orientation seems inconsistent with contemporary global needs. With the emergence of post-modern perspectives such as feminist, third world and indigenous approaches,[67] value diversity has increasingly gained popularity in contemporary international legal scholarship. Moreover, following the disintegration of the Soviet Union, new great powers have emerged, meaning that realpolitik—which constitutes the basis of the international adjudicatory regime—will most likely be multipolar rather than unipolar or bi-polar.[68] Because the major actors of the multipolar system, notably the United States, the European Union, Russia, China, India and Japan, have significantly different cultural, religious and civilizational backgrounds, their attitudes toward international adjudication are influenced by their own value systems, which are colored in turn by unique civilizational patterns. Even if, to some extent, the recent phenomenon of globalization shows a tendency towards value unification, it will never erase diverse cultures and civilizations: even seemingly unified values (e.g. liberalism) will still be modified by each state's longstanding tradition and culture.[69]

That said, we cannot simply conclude that the New Haven approach is inapplicable for observing China's attitude towards international adjudication, notwithstanding its

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explanation as "normative" reflects Western-centralism in his time: Western scholars—consciously or unconsciously—relied on legal notions such as democracy, human rights and sovereignty as mainly constructed by major Western international lawyers. They not only took these notions as the universal standard, but also promoted these notions to non-western states. Borgen describe this promotion as a sort of "hegemony". See generally in Christopher J Borgen, "Whose Public, Whose Order-Imperium, Region, and Normative Friction" (2007) 32 Yale J Intl L 331.

[67] Since the mid-1980s, more critical approaches to international law have been emerging, as it became clear that international law was largely impervious to feminist, non-Western and indigenous concerns, with these issues marginalized by specialist institutions and instruments and women, non-Westerners, and indigenous peoples still being treated protectively rather than as full rights-bearing subjects of the law. Feminist, structural and postcolonial critiques of international law—which examine normative and institutional structures of the international legal regimes—were deeply committed to the reconstruction of international law and significantly reduced the masculinist and imperial power in the international legal studies. See in Chimni, *supra* note 17 at 143 to 147.

[68] Onuma, *supra* note 17 at 45.

[69] Yu Keping, "'Westernization' Vs.'Sinicization': An Ineffaceable Paradox Within China's Modernization Process" in Tianyu Gao, Xueping Zhong & Kebin Liao, eds, *Culture and Social Transformations in Reform Era China* (Leiden: Brill, 2010) 151.

Western-centric and value-centric perspective. What makes the New Haven School approach still valuable is its perception of international adjudication as a continuing and comprehensive decision-making process. Although the New Haven School's value thesis reflects Western-centric patterns, its conception of the decision-making process is relatively neutral, to the extent that it also recognizes the fundamental concern over how power and authority are dynamically shaped and shared in the international community, and because it commits to the interdisciplinary study of international law. This is why the New Haven School still has vitality in contemporary times.[70] In recent years there have emerged some new New Haven and New Haven-relevant approaches which downplay the normative analysis of values and emphasize interdisciplinary studies on the decision-making process.[71] One of the principal examples is Harold Hongju Koh's transnational legal process. Combining the classical New Haven School with the legal pluralism proposed by Robert Cover,[72] Koh's transnational legal process describes international law as a process where states and non-states actors "interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."[73]

Koh's theory indicates that the New Haven School's value thesis and its process-based thesis are separable *and* should be separated and changed to modernize the New Haven School. For this reason, this dissertation attempts to make two adjustments to

[70] Siegfried Wiessner & Andrew R Willard, "Policy-Oriented Jurisprudence" (2001) 44 Ger YB Intl L 96 at 99 to 100.
[71] Koh, *supra* note 55.
[72] Robert Cover insisted that law does not reside solely in the coercive commands of a sovereign power. Instead, law is constantly constructed through the contest among various norm-generating communities. See generally in Paul Schiff Berman, "A Pluralist Approach to International Law" (2007) 32 Yale J Intl L 301 at 302.
[73] Harold Hongju Koh, "Transnational Legal Process" (1996) 75 Neb Rev 181 at 183 to 184.

the classical New Haven approach. First, values are included in the analysis of Chinese attitudes, but values are not taken to be the *only* factor influencing China's interaction with international adjudication. After all, as Oscar Schachter has pointed out, the international legal regime is still based on binding rules and principles to define choices and justify actions, even though the processes of creating and applying these rules and principles "necessarily involve conditions, determinants and values that fall outside the law." [74] Second, going beyond the New Haven School's exclusive, normative interpretation of values, this dissertation instead regards value analysis as an empty framework that can accommodate the plurality of civilizations and cultures. Because this dissertation is about China's attitude to international adjudication, the value analytic framework is placed in the context of Chinese cultural and social change, which is then named the "Chinese value cluster".[75] According to the new New Haven approach (as applied in this dissertation), China's attitude towards international adjudication is the process of how the Chinese pursue the Chinese value cluster through participation in the decision-making processes that are relevant to international adjudication.

1.2.3 The Chinese Value Cluster as a Product of Sino-Western Transcivilizational Interaction

The theoretical framework for observing China's attitude towards international

[74] Weston et al, *supra* note 60 at 268 to 269.
[75] It should be noted that the term "Chinese value cluster" does not mean all values held by the Chinese people. Rather, as the next chapter will show, it is a contextualized term, referring to those values that can significantly influence China's attitude towards international adjudication. Specifically, the Chinese value cluster in this dissertation refers to the Chinese perspectives on the world, the international order and law.

adjudication is still missing a piece: how should we conceive of the Chinese value cluster? One approach to identifying Chinese values would be to look to Chinese indigenous culture. However, while providing rich intellectual sources, this approach could also produce a distorted or misleading picture. This is because most Chinese indigenous scholarship tends not to treat China as an object "out there" to be discovered; instead, the scholars unconsciously become inseparable from the subject matter they observe, and their work reflects a strong emotional connection between their Chinese identity and their observational standpoint. For instance, by always construing Western penetration into China after the mid-19th century as a disruption of Chinese civilization and a key contributor to China's semi-colonial status in the international community, some Chinese indigenous scholars have a biased perspective of Western influences, often characterizing them as "imperialism".[76] Of course this bias finds support in the history of Western aggression against China, but exclusively interpreting China in terms of an opposition to the West hinders the production of a relatively neutral observational standpoint. After all, while the influence of Western civilization in the formation of modern Chinese society is undeniable, this influence was also not always adverse. For example, Western concepts such as sovereign independence and equality—which were almost unknown in ancient China—are frequently used by modern Chinese people and China to justify positions in international law.[77] As a result, equating the Chinese value

[76] See e.g. Ch'i-wu Chu, "Looking at the Class Character and Inheritable Character of Law from the Point of View of International Law, Kuang-ming Jih-pao (May 13, 1957), p.3" in Cohen & Chiu, *supra* note 3 at 50 to 52; Chen, *supra* note 24; Chen, *supra* note 11; Hung-jen Wang, *The Rise of China and Chinese International Relations Scholarship* (Lanham: Lexington Books, 2013) at 3.

[77] See e.g. Hanqin Xue, "Chinese observations on international law" (2007) 6:1 Chin J Int Law 83; Tieya Wang, *International Law* (Beijing: Law Press, 1981); "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines", (7 December 2014), online: *Minist Foreign Aff Peoples Repub China*

cluster with Chinese civilization will not lead to any more accurate a perspective than the Western-centric one. Rather, it would reduce the complexity of the Chinese value cluster to a cognitive system belonging to one civilization that stands in contrast to all others, known as Sinocentrism. The perspective we are seeking should eliminate not only Westcentrism, but also any other forms of ethnocentrism (as much as possible), and instead include the equal influence of multiple civilizational factors in the formation of the Chinese value cluster.

Perhaps Onuma Yasuaki's transcivilizational theory can offer such a perspective. Like the New Haven School, Onuma attempted "to elucidate the socio-political underpinnings and functions of international law in the various forums and arenas where it works".[78] However, in terms of the values that influence the operation of international law, he was skeptical about the allegedly neutral and normative approaches proposed by Western scholars. By engaging in a cultural and historical study, Onuma theorized that the "universal" international law today is "in its origin, *jus publicum europaeum*, whose scope of application was limited to Europe and North America prior to the middle of the 19th century."[79] Thus he suggested de-Westernizing the international legal regime with the addition of other non-Western (especially Asian) civilizational approaches that had been ignored over the centuries. By doing so, Onuma did not present himself as a nationalistic scholar who only criticized and thus rejected Western scholarship. Instead, as Richard Falk noticed, a common theme running

<http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

[78] Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press, 2017) at 22.

[79] Lee Keun-Gwan, Book Review of *International Law in a Transcivilizational World* by Onuma Yasuaki, (2018) The British Yearbook of International Law bry008 at 010.

through Onuma's theory is a spirit of universal humanism.[80] Onuma argues that scholars should adopt "a cognitive and evaluative framework based on the recognition of the plurality of civilizations and cultures that have long existed throughout human history" to analyze international legal issues.[81]

Onuma's theory includes two major arguments on the concept of "transcivilizational". The first is derived from his critique of the prevalent ethnocentrism (basically Westcentrism) in international legal scholarship.[82] Attributing the long-existing "-centric" research bias to scholars' exclusive notion of civilization, Onuma believed that people tend to regard civilizations as monolithic and substantive entities, and thus generate a mutually exclusive and conflicting manner of conceiving of intercivilizational phenomena.[83] Second, based on his observation of human history, Onuma posited that "[t]here is no monolithic civilization existing as a substantive entity".[84] Rather, civilizations transcend "not only national boundaries but also civilizational boundaries" and impact other civilizations.[85] From his perspective, in any state, be it homogenous or heterogeneous, one can easily find civilizational diversity in its culture, politics, historical experience and social patterns. This is because a state contains not only internally incubated civilizations but also some "external" civilizations originating from other states.[86]

From this point of view, the Chinese value cluster cannot be assumed to be a

[80] Richard A. Falk, Book Review of *A Transcivilizational Perspective on International Law* by Onuma Yasuaki, (2011) 105 American Journal of International Law 835 at 835.
[81] Onuma, *supra* note 17 at 81; Onuma, *supra* note 78 at 19.
[82] Onuma, *supra* note 17 at 81.
[83] *Ibid.*
[84] *Ibid* at 83.
[85] *Ibid*.
[86] *Ibid.*

cognitive system belonging exclusively to Chinese civilization. Instead, it should be comprehensively cognized, interpreted and evaluated, taking into account plural cultural and civilizational (including religious) factors. But when it comes to the application of the transcivilizational perspective to scrutinize the connotation and development of the Chinese value cluster, Onuma's theory seems to be problematic. Although Onuma himself admitted that modern society and modern people are transcivilizational, are children of "Grotius, Kant and Marx" as well as "children of Buddha, Confucius, Mohammad, and many other non-Western thinkers",[87] he did not elaborate on how the mindset of modern people, including the Chinese, became a hybrid of various civilizations. In other words, the transcivilizational approach described by Onuma is still static, limited to the state of legal pluralism in which different civilizations are conceived as separate entities coexisting in the same international legal regime. As for the dynamic "trans-" process concerning how different cultures and values become superimposed, interpenetrated, and mixed in people's minds and actions, Onuma's theory is unfortunately unclear.

Hence this dissertation attempts to enrich the transcivilizational perspective by combining it with the New Haven process-based thesis, locating the dynamic "trans-" process in China's participation in the adjudication-related decision-making process. In this dissertation, the connotation and development of the Chinese value cluster is basically presented through Sino-Western transcivilizational interaction. Admittedly, the contemporary Chinese value cluster is a multi-civilizational construct: it stems from

[87] Onuma, *Supra* note 78 at 13.

ancient Chinese civilization but its development is inextricably woven into the fabric of transcivilizational interaction between China and other regions such as Japan, the Soviet Union and some Afro-African states.[88] However, it is argued that none of these influences has had as profound an impact on Chinese society in the past century as that of the West. The mid-19th to 21st century period saw frequent contact between China and the West in terms of political policies, commercial trade and cultural exchanges. As Sino-Western transcivilizational interaction has since deepened, what the Chinese sense, think and behave is increasingly influenced not only by their own civilization and culture, but by the accumulated strata of various kinds of Western cultures and values.[89]

Sino-Western transcivilizational interaction is particularly relevant for this dissertation since China's participation in international adjudication exemplifies Sino-Western interaction, if we remember that the idea of using adjudication to settle international disputes originated in the West.[90] As a result of the global expansion of Western civilization, adjudication since the 19th century rapidly transformed from a regional practice to an international one, as demonstrated by the emergence of international courts and tribunals. This internationalization of adjudication illustrates how Western civilization transcends civilizational borders and penetrates other civilizations. With its advantages in military, technology and social institutions, the

[88] The Chinese modern translation of many international law concepts and theories, "international law", for one, is actually taken from the Japanese. See Qinhua He, "Elements of International Law and International Law in the Late Qing Dynasty" (2001) 5 Chin J Law 139 at 143 to 144. Chinese international law research in the 1950s to 1970s was profoundly impacted by research in the Soviet Union. Most publications draw on the research of Soviet scholars, and most textbooks used by Chinese universities are translations of Soviet books. See "Summary of the Symposium on Soviet Russian Legal Studies and Chinese Legal Studies" (2001) 5 Chin J Law 149 at 155.

[89] John K Fairbank & Denis Twichett, *The Cambridge History of China: Republican China, 1912–1949, Part 1 Vol. 12* (Cambridge: Cambridge University Press, 1983) at 1 to 9.

[90] Romano, Alter & Shany, *supra* note 2 at 42 to 47; Bardo Fassbender et al, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at 146 to 165.

West made other states accept the "Western" international order and enter the international legal regime that was constructed by Western discourses.

Also, it is necessary to clarify two points about the emphasis on Sino-Western transcivilizational interaction in the analysis of the Chinese value cluster in this dissertation. First, the focus on Sino-Western interaction does not totally exclude transcivilizational interactions between China and others. As this dissertation will demonstrate, when receiving Western values, the Chinese value cluster is also influenced by other cultures and values. For instance, Marxist discourses in the Soviet Union significantly shaped the PRC's perspective on international adjudication. Second, Sino-Western transcivilizational interaction is not synonymous with an impact-response model. Much of the scholarship on modern China tends to reduce Sino-Western interaction to a determination of how the West imposes consequences (or challenges) on China and how China changes (or does not change) in response to this imposition.[91] This model seems to subordinate Chinese indigenous culture to foreign (Western) culture by presenting westernization in active terms and China's indigenous culture in passive terms. Thus, to some extent this model is also Western-centric.[92] Because of these weaknesses in the model, this thesis does not impose any absolute judgement on the changes and continuities in the Chinese value cluster through Sino-Western transcivilizational interaction. As Paul A. Cohen concluded in his critique of the impact-response model, "all societies undergo change all the time, and the degree

[91] The most typical writing is Ssu-yü Teng & John King Fairbank, *China's Response to the West: a Documentary Survey, 1839-1923* (Cambridge: Harvard University Press, 1979).
[92] Paul A Cohen, *Discovering History in China: American Historical Writing on the Recent Chinese Past* (New York: Columbia University Press, 1984) at 3 to 4.

to which such change is deemed significant, is 'noticed', is ultimately a relative matter, dependent upon what a particular historian living in a particular society at a particular time happens to regard as important."[93]

We can now see that this dissertation has outlined a new perspective from which to observe China's attitude towards international adjudication. This perspective is based on three notions which have been re-conceptualized according to the New Haven School and the trancivilizational perspective. We have clarified that "international adjudication" refers to a decision-making process where various decision makers, located in many different institutional positions and contexts, interact with each other to continually create, interpret and reinterpret rules and to continually formulate and reformulate, apply and terminate policies. The term "China's attitude" refers to the process of how China pursues the Chinese value cluster by participating in this decision-making process. The analysis of the Chinese value cluster is placed in the transcivilizational context, and I have argued that the Chinese value cluster is largely a product of Sino-Western transcivilizational interaction. This new "transcivilizational decision-making process perspective" discovers China's attitude towards international adjudication from the perspective of identifying and classifying how China pursues the Chinese value cluster when participating in the decision-making processes relevant to international adjudication. Further, this perspective analyzes China's attitude in Sino-Western transcivilizational interaction which shapes the Chinese value cluster.

[93] *Ibid* at 6.

1.3 Methodological Framework

Having set out the theoretical framework, the next step is to determine the method(s) that can best perform the intellectual tasks required by that framework. Specifically, the chosen methods should facilitate: (1) the clarification of the Chinese value cluster; (2) the description of the past trend of China's attitude; (3) the analysis of the conditions affecting attitude; (4) the projection of future trend; and (5) the invention and evaluation of China's attitude.[94]

1.3.1 Historical Study of China's Attitude

Describing the historical trend of China's attitude is an essential goal of this dissertation, because "we need to know from whence we came, where we stand now, and in what direction we are moving, if we are to have any rational hope of transforming our aspirations of the present into the facts of the future."[95] The historical study of China's attitude towards international adjudication in this dissertation ranges from the late Qing (清) dynasty (1839), when China accepted the jurisdiction of the Permanent Court of Arbitration (PCA) and started to engage in the international adjudicatory regime, to the present day (2019). During the 180 years of this historical period, China has fractured and re-unified twice. The Qing dynasty, which was China's last empire based on hereditary monarchies, ruled China until 1911. In 1912, the Republic of China (ROC) replaced the Qing dynasty and ruled the Chinese mainland until 1949, when it

[94] See generally in Harold Dwight Lasswell & Myres Smith Macdougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy, Vol.2* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992).
[95] Myres S McDougal, Harold D Lasswell & Lung-chu Chen, *Human Rights and World Public Order*, 1st ed (New Haven: Yale University Press, 1980) at 423.

was defeated by the Chinese Communist Party (CCP) in the Chinese Civil War. Established by the CCP in 1949, the PRC has since governed China. To provide a clear picture of China during this turbulent period, the historical narrative in this dissertation is organized according to changes in the Chinese political entities. It is therefore split into three periods – the late Qing dynasty (1839 – 1911), the ROC (1912 – 1949), and the PRC (1949 –).[96] Due to the significant policy and social shifts within the PRC after the death of Mao Zedong (毛泽东),[97] the study of the PRC is then sub-divided into two periods: the Mao era (1949 – 1978) and the post Mao era (1979 –).

China's attitudes toward international adjudication during each period are examined in the context of specific adjudication-related decision-making processes. As Judge Kenneth James Keith observes, a state's attitude towards international adjudication is actually a series of attitudes towards particular areas and not towards the system as a whole.[98] No state—even those that are most hostile to international adjudication—has ever claimed to categorially reject the entire international adjudicatory system; and no state—even those that are most in favor of international adjudication—has ever claimed to completely accept it. Rather, each state's attitude varies according to the specific issue and particular context.

The scope of adjudication-related decision-making processes is broad. For the purposes of this dissertation, it includes China's participation in the establishment of

[96] Besides using the general term "China", I may also use the name of the political entity governing China in the given period to refer China, for instance, I may use "China" and the "PRC" interchangeably when studying China in the period from 1949 to present.
[97] Here I mean the reform & opening-up policy led by Xiaoping Deng in 1976.
[98] Kenneth J Keith, "Asian Attitudes to International Law" (1967) Aust YBIL 1 at 1. As a matter of fact, Keith's claim is for Asia's attitude to international law, yet I believe it could also be applied to a state's attitude towards international adjudication.

international adjudicatory bodies, its influence on the operation of those bodies, its acceptance of their jurisdiction, its willingness to file cases with them, its response to the claims of other participants, its behavior in the proceedings of these bodies, its compliance with their decisions, and other related events. The notion of international adjudicatory bodies is also broad and includes international arbitral tribunals.[99] In summary, this dissertation will observe China's interactions with a wide range of international adjudicatory bodies, including international courts of a public character (such as the ICJ); international arbitral tribunals (such as those constituted by the PCA and the International Centre for Settlement of Investment Disputes (ICSID)); international tribunals for international economic disputes (such as the WTO DSM); and specialized international tribunals (such as the International Military Tribunal for the Far East (IMTFE)).

In this dissertation, China's attitude towards international adjudication is described by reference to its concrete participation in various specific adjudication-related

[99] At the national level, adjudication is regarded as compulsory, *i.e.*, the procedure and decision-making process rarely depends on the willing of litigating parties, whereas domestic arbitration relies largely on parties' autonomy. Thus, there exists controversy about whether international arbitration can be viewed as a part of international adjudication. Internationally, the boundary between judicial bodies and arbitration is ambiguous. Notwithstanding differences in selecting adjudicators, party autonomy, and sources of authority, both of them are law-based processes that can render binding decisions. Many wide accepted international conventions, e.g., *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Inter-American Convention on International Commercial Arbitration (Panama Convention), Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)* require domestic courts to recognize and enforce awards issued by international arbitral tribunals. Moreover, because of the principle of sovereign equality of states, international judicial bodies have neither compulsory jurisdiction over states nor centralized authority to enforce the decisions. Compared with their domestic counterparts, they have to depend on some form of parties' consent, which is similar to arbitration. For example, the jurisdiction of the ICJ in contentious proceedings is based on the consent of the states. One of the explicit bases for consents is a special agreement that disputing states provide the registry before filing cases in the court. In the agreement, the subject of the dispute and the parties must be indicated. Such special agreement is similar to an arbitration agreement which is the precondition of commencing an arbitration. See generally in *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7; *Statute of the International Court of Justice*, 18 April 1946, 33 UNTS 993, art 40 at para.1. For the relations between arbitration and adjudication, see also Jürgen Basedow, "EU Law in International Arbitration: Referrals to the European Court of Justice" (2015) 32:4 J Int Arbitr 367; Romano, Alter & Shany, *supra* note 2 at 4 to 9.

decision-making processes. To avoid a fragmented portrayal of this participation, the interplay between China's attitude and the Chinese value cluster is analyzed in each case. In other words, the evolution of the Chinese value cluster is a thread which weaves together China's attitude in each concrete decision-making process, so as to produce an overall "big picture" of the evolution of China's attitude towards international adjudication. By presenting the dynamics between China's attitude and the Chinese value cluster, I will show how China, over time, has faced and continues to face different and similar social situations, and how it has made and continues to make policies in relation to international adjudication that respond to a parallel set of old and new structural constraints.

1.3.2 Legal-Sociological Examination of Decision-Making Processes

The second research task of this dissertation is the discovery and analysis of the factors conditioning China's attitudes to adjudication-related decision-making processes. Explicitly identifying these factors and their influence on China's attitude will show not only how China has perceived and reacted to international adjudication in the past and present, but will also prepare the way for projecting its future attitude.

Specifically, this examination can be broken down into the exploration of six conditioning factors in China's participation in an adjudication-related, decision-making process: (1) participant, i.e. who engages the decision-making process; (2) perspective, i.e. the subjective dimensions that animate the participants; (3) arena, i.e. the situations in which participants interact; (4) the base of power, i.e. the resources

upon which participants can draw; (5) strategy, i.e. the ways that participants manipulate these resources; and (6) outcome, i.e. the aggregate outcomes of the process of interaction.

Unlike the conventional approach that only looks at international adjudicatory institutions, the third factor—the "arena"—includes all occasions where decisions are made, including court and out-of-court contexts. For example, this dissertation includes analysis of occasions where, while China did not attend the relevant international proceedings, its attitudes were reflected in diplomatic negotiations and communications within the Chinese government. Also, the arena that will be the topic of research will include both domestic and international contexts. It used to be common, in studies of a state's attitude or behavior, to distinguish between domestic influences and international influences. However, this approach assumes that a state's foreign policies are outward-looking and largely deal with state-to-state relations.[100] In contrast, when China formulates its attitude towards foreign affairs, its domestic context—including leadership, ideology, politics and economic development—is invariably linked to the international environment to which it has to respond. The close linkage between the domestic and international arenas is rooted in China's longstanding inward-looking spirit in foreign affairs. From ancient to modern times, the Chinese have always believed that the aim of diplomacy is to create a more stable and friendlier external environment for advancing domestic goals.[101] In other words, diplomacy for China is

[100] Stuart Harris, *China's Foreign Policy* (Cambridge: Polity, 2014) at 172; Lin Su, *China's Foreign Policy Making: Societal Force and Chinese American Policy* (London: Routledge, 2017) at 1 to 17.

[101] And in the contemporary period, the PRC Foreign Ministry has repeatedly affirmed that the goal of foreign policy is to serve China's domestic development. For example, see: "Top Diplomat Outlines Priorities of Chinese Diplomacy" (26 February 2016), online: *Xinhuanet* <http://news.xinhuanet.com/english/2016-

essentially an extension of internal affairs. This is not likely to change. As globalization has brought its domestic market closer to the international market, China has become even more dependent on the international system and linkages across borders are even more important today.

Given that the "arena" of this study includes both domestic and international arenas, the first factor— "participant"—can be similarly divided into two categories. The first category comprises domestic participants that are formally endowed with decision-making competence or that play important roles in forming and influencing China's attitude, such as Chinese leadership, Chinese public officials, influential Chinese intellectuals and the Chinese public. The second category comprises participants in the international arena that are also decision makers in international adjudication, including other states (for example, states that have trade or territorial disputes with China), non-state entities (for example, foreign enterprises that have investment disputes with China) and individuals (for example, the Japanese war criminals).

The second factor—"perspective"—denotes the subjective dimensions of the participants in decision-making processes, including their expectations, demands and identifications. It should be emphasized that the perspectives of participants are not co-extensive with China's attitude, even in the case of Chinese participants. China's attitude is not well-represented by the perspectives of some Chinese participants on some issues at specific times and within specific arenas. Instead, China's attitude should be viewed as a comprehensive dynamic process that is formed by interactions in

02/26/c_135133224.htm>.

adjudication-related decision-making processes over time. In this process, Chinese participants continually communicate with other participants. Through the communication, the identification of participants, their expectations and the value demands they project, continually shape and reshape China's overall attitudes and policies towards international adjudication.[102]

The fourth factor—"bases of power"—refers to the available resources that participants (especially the Chinese) have in order to effectively participate in adjudication-related decision-making processes. The term "bases of power" includes "both effective power and symbols of authority."[103] The symbols of authority relate to theories, legitimacy myths and discourses legitimizing certain decision makers and justifying their perspectives. For example, compliance with international law is a typical source of authority that a participant determines and views as supporting his/her perspective. "Effective power" means the material resources or capacities that participants can use to support their participation in decision-making processes,[104] such as China's legal, financial, human and institutional capital that can effectively influence its participation in decision-making processes.

The fifth factor—"strategy"—relates to how participants (especially the Chinese) manipulate their available resources to support their perspectives and optimize their preferred outcomes in adjudication-related decision-making processes. Concrete examples of strategies include, *inter alia*, diplomatic skills (for example, lobbying),

[102] Reisman, Wiessner & Willard, *supra* note 45 at 578.
[103] *Ibid*; Reisman, *supra* note 41 at 122.
[104] Lasswell & Mcdougal, *supra* note 39 at 26 to 27; John Scott, *Power* (New York: Polity, 2001) at 1 to 2.

ideological instruments (for example, ideological propaganda), economic instruments (for example, foreign loans) and military instruments (for example, the use of force).[105]

The sixth and final factor—"outcome"—is not limited to judgements, awards or other formal documents that are produced by international courts/tribunals. In practice, a court's or tribunal's decision does not necessarily mean the ultimate outcome of an adjudicatory decision-making process. Rather, the process may continue when a state decides to (or not to) recognize and enforce that decision. Moreover, in many decision-making processes, there may be no award or judgment at all, either because the proceedings were never ultimately commenced or because the parties withdraw their claims. For these reasons, the term "outcome" should be understood broadly to refer to the final result brought about by the interaction of participants in a particular context.

1.3.3 Discourse Analysis of the Interplay between Attitude and the Chinese Value Cluster

As I have already explained, the third research goal of this dissertation is to analyze the interplay between China's attitude and the Chinese value cluster in each of the concrete decision-making processes that are examined. However, how can we identify this interplay, when the values pursued by China in these processes are typically not explicitly articulated? This practical challenge is addressed by discourse analysis, which explores what participants (especially the Chinese participants) are implicitly feeling or doing, by way of reading and interpreting the language in texts.[106]

[105] Reisman, Wiessner & Willard, *supra* note 45 at 578.
[106] Johanna Niemi-Kiesiläinen, Päivi Honkatukia & Minna Ruuskanen, "Legal Texts as Discourses", in Åsa

Most actions in international adjudication have a highly textual character: that is, the only way that participators often act and interact is to speak or to write with language. Therefore, the discourse analysis used in this dissertation relies first on a linguistic analysis of verbal or written texts. Yet, linguistic analysis alone is insufficient. After all, language is dialectically interconnected with the adjudication-related decision-making process that produces it: what is "said" in a text always depends upon "unsaid" assumptions or information.[107]

Thus, the second part of the discourse analysis employed in this dissertation tries to identify the "hidden meaning" of texts (namely, the act of interpretation). Interpretation is a complex process involving: (1) understanding (that is, understanding the intention of speakers or writers); (2) judging and evaluating (judging whether someone is saying something sincerely or not, or judging whether the claims that are explicitly or implicitly made are true, and/or evaluating the underlying relations that texts try to expose or mystify); and (3) explaining (that is, explaining why the speakers or writers are saying what they say).[108] Discourse analysis is admittedly an imprecise interpretive tool, since there is no opportunity to verify the interpretation with the writer or speaker who produced the texts. Therefore, this dissertation does not rely solely on the data collected by discourse analysis to determine the content of the Chinese value cluster. Rather, discourse analysis is used as one major methodology among others.

The scope of texts used for discourse analysis is very broad. It is not limited to words

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Gunnarsson, Eva-Maria Svensson and Margaret Davies, eds, *Exploiting the Limits of Law*: *Swedish Feminism and the Challenge to Pessimism* (London: Routledge, 2007) at 69.

[107] Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003) at 5 to 8, 11.

[108] *Ibid* at 11.

and sentences in the texts produced by the Chinese governments. Governmental texts are analyzed in conjunction with other categories of texts, for instance, personal diaries, memoirs, newspaper articles and academic papers. The form of texts is also broadly conceived. Written and printed texts such as diplomatic statements are clearly "texts", as are transcripts of (spoken) conversations and interviews. Further, the contents of webpages are also regarded as "texts", including webpages that contain not only words but also visual images and audio.

PART II THE CLARIFICATION OF VALUES

The present part and the two parts immediately following observe examines China's attitude towards international adjudication through the five intellectual tasks recommended by the New Haven approach. The New Haven School proposes that one must undertake five intellectual tasks in order to cope with individual or collective problems: (1) the clarification of values and goals; (2) the description of trends; (3) the analysis of conditioning factors; (4) the projection of future developments; and (5) the invention, evaluation and selection of policy alternatives.[1]

The initial step is clarifying the values relevant to China's attitude towards international adjudication. The previous part refers to the values that impact China's attitude towards international adjudication as the "Chinese value cluster", where it is argued that the "Chinese value cluster" is largely a product of Sino-Western transcivilizational interaction. However, the previous part did not clarify what the "Chinese value cluster" is in the research context, nor how it is shaped by Sino-Western transcivilizational interactions. This part will answer these questions by exploring the basic structure of the Chinese value cluster and charting its early evolution. The main purpose of this part is to understand the Chinese mindset when international adjudication was first introduced into China during the late 19th century.[2] Studying the early mindset of China will help us to scrutinize China's attitude towards international

[1] Harold Dwight Lasswell & Myres Smith Macdougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy, Vol.2* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992) at 725.
[2] In 1899, China signed the *Convention for the Pacific Settlement of International Disputes* and accepted the jurisdiction of the PCA, the world's first global institution for the settlement of international disputes. *Convention for the Pacific Settlement of International Disputes*, 29 July 1899, 1 Bevans 230.

adjudication in the 20th to 21st centuries, as such a mindset helps explain when and how Chinese attitude came into being and why the Chinese view international adjudication in some certain ways.

CHAPTER 2 THE CONCEPTION AND EVOLUTION OF THE CHINESE VALUE CLUSTER

The Chinese value cluster in the context of this research refers to Chinese views of the world, the international order and law. This mindset lays the foundation for China's attitude towards international adjudication. How the Chinese civilization understands the world implicitly reveals the Chinese view of the ideal international order and interpretation of good governance. Also, the ways in which the Chinese perceive international order fundamentally shapes the way China understands itself and its relationship to the international community. Equally so, the Chinese view of law directly influences China's interpretation of the rules regulating international relations and its perception of the international courts and tribunals that are supposed to govern international relations (including disputes).

The Chinese value cluster is a product of Sino-Western transcivilizational interaction and can be drawn from two sources: traditional Chinese thinking and Western thinking. Traditional Chinese thinking—what will be referred to as "traditionalism" in this dissertation—denotes the Chinese *dayitong* (Great Unity, 大一统) view of the world, the *tianxia* (All under Heaven, 天下) order and a *li*-based (rites, 礼) approach to international law. Western thinking—what will be referred to as "Westernism" in this dissertation—refers to the Western pluralistic philosophy of the world, the Westphalian

state system and the rule-based approach to international law. As Sino-Western transcivilizational interaction evolved, there emerged a third ideological basis: Chinese nationalism. Chinese nationalism asserts that China is a sovereign nation and promotes its cultural and national unity along with its sovereignty and independence.

2.1 Traditionalism

This section examines how Chinese civilization has traditionally conceptualized the world, the international order and law. As is often observed, Chinese civilization has for a long time developed in "an area largely cut off from other centers of ancient civilization by formidable geographic obstacles—deserts, mountains, jungles, and the immense expanse of the Pacific".[3] This geographic isolation prevented Chinese civilization from being invaded or assimilated by other great civilizations and as such it can be argued that the Chinese value cluster in these early times was actually traditional Chinese thought about the world, the international order and law.

2.1.1 *Dayitong*

China's traditional view of the world can be summarized by the concept of *dayitong*. Before discussing *dayitong*, the meaning of "world" in the eyes of the ancient Chinese should be explained. In the modern age the planet Earth, along with the various human civilizations living on it, is often regarded as the "world". Yet the concept of the "world" for ancient China was much broader. They saw the "world" as derived from a monistic

[3] Witold Rodzinski, *The Walled Kingdom: History of China from 2000 B.C. to the Present* (London: Fontana Press, 1988) at 13.

force named *taiyi* (太一).[4] *Taiyi* first arose without form, but then it formed two entities: Heaven (*tian*, 天) and Earth (*di*, 地) – this was the beginning of the "world".[5] Although the "world" had been divided into two parts, it was still seen by the ancient Chinese as an essentially correlated whole in which Heaven was paramount.[6] Heaven's superiority was first reflected in its physical position above Earth – that is why the geographic existence of planet Earth (namely, the "world" in the modern sense) was also described by the ancient Chinese as "All under Heaven" (*tianxia*). Second, Heaven was believed to embody the natural law and will of the universe and to control Earth.[7] As to how Heaven controlled Earth, ancient Chinese philosophy (such as Confucianism) argued that Heaven bestowed its mandate on the ordering of Earth (i.e., *tianming*, the Mandate of Heaven, 天命) by sending its son, the emperor, to rule Earth and the people who lived there.[8] At that point, in the eyes of the ancient Chinese, *tianxia* became an exclusively property of the emperor, the son of Heaven. Such a view was explicitly stated in the *Shijin* (Classic of Poetry，诗经): "under universal Heaven, all lands are

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[4] "The world came from *taiyi*. *Taiyi* was divided and became Heaven and Earth. It then revolved and became the dual force (in nature), before changing once again and becoming the four seasons. *Taiyi*, in this context, means a force in the chaos. Comments: *Taiyi* is a chaotic force without form." [translated by author] (《礼记·礼运》："必本于太一，分而为天地，转而为阴阳，变而为四时。"其注："太，音泰。"疏："太一者，谓天地未分混沌之元气也。") See in Gaowei Cui, ed, *Book of Rites*, reprinted ed (Shenyang: Liaoning Education Press, 1997) at section Liyun.

[5] *Ibid*.

[6] This claim was articulated in Confucian writings: "In this way government is the means by which the ruler keeps and protects his person, and therefore it must have a fundamental connection with Heaven." [translated by author] (《礼记》："故政者君之所以藏身也。是故夫政必本于天，殽以降命。") Cui, *supra* note 4. The Confucian editors believed that by saying so, Confucius implied that all the principles under the sky were expressive of the mind of the one Heaven. Heaven is everywhere, and its distributions from which we see its ordinations are also everywhere. Earth obediently receives the influences of Heaven and consequently, when we see how the earth supports all things, we know how the ordination of Heaven has descended on it. Heaven is the author of all things. See in Hsi-hsiung Lu & Yun Ji, eds, *Siku Quanshu (the Complete Library in Four Sections)* (Beijing, 1782) at vol 21. (《四库全书：礼记注疏卷二十一》)

[7] "The rules of ceremony have their origin in heaven, the movement of them reaches to earth." [translated by author] (《礼记·礼运》："夫礼必本于天，动而之地。"） Cui, *supra* note 4 at Section Liyun; Lu & Ji, *supra* note 6 at vol 12.

[8] Zhongshu Dong, *Luxuriant Gems of the Spring and Autumn*, translated by John Major & Sarah Queen (New York: Columbia University Press, 2015) at 528.

the emperor's lands; within the farthest limits of the land, all are the emperor's subjects."[9]

The concept of *dayitong* is derived from the emperor-centric worldview. *Dayitong* denoted a belief in the unitary nature of political governance – that is, all the power and authority of *tianxia* should fall into a mono-centric hierarchy in which the superior and subordinates are clearly defined. This notion first appeared in the Confucian classic *Chunqiu Gongyang Zhuan* (Gongyang Commentary to the Spring and Autumn Annals, 春秋公羊传). There, *dayitong* is viewed as a situation where the entire *tianxia* is under the control of a single and dominant ruler – the emperor.[10] Confucian thought argued that *dayitong* was the source and prerequisite of an orthodox ruler's reign, for only after the ruler united *tianxia* according to the Mandate of Heaven, could he determine the policies of government and spread his teaching.[11] The idea of *dayitong* was further developed by Zhongshu Dong (董仲舒) and Xiu He (何休) in the course of making Confucianism the state ideology of the Han dynasty. Dong and He highlighted that *dayitong* was not only the model for right governance under Confucianism, but also a universal truth underlining human society. They believed that a society should go through three ages: *juluanshi* (the Age of Disorder, 据乱世), an age when many states coexisted and fought with each other; *shengpingshi* (the Age of Rising Peace, 升平世),

[9] Translated by author. (《诗经·小雅·谷风之什·北山》: "溥天之下，莫非王土；率土之滨，莫非王臣。") See in Chapter *Xiaoyao·Beishan* (Lesser Court Hymns: Decade of *Beishan*) in *Shijing* (Classic of Poetry).
[10] Section 1 of *Gongyang* started with a dialogue: "- What does 'original year' mean? It means the beginning year of a ruler's reign. What does 'spring' signify? The beginning of the year. To whom does 'king' refer? To King Wen. Why does it first say 'king' and then say 'rectified month?" The king rectifies the calendar. What is meant by saying 'king's rectified month?' The great unification." [translated by author] ("春王正月，元年者何？君之始年也。春者何？歲之始也。王者孰謂？謂文王也。曷為先言王而後言正月？王正月也。何言乎王正月？大一統也"。) See also in H Miller, *The Gongyang Commentary on The Spring and Autumn Annals: A Full Translation* (New York: Palgrave Macmillan, 2015) at 7.
[11] *Ibid*.

an age when these separate states gradually became one; and *taiping shengshi* (the Age of Great Peace, 太平盛世), an age when all under Heaven, whether close or distant, small or great, merged into one polity – namely, the state of *dayitong*.[12] Thereafter, along with the dominance of Confucianism in Chinese political thought, the idea of *dayitong* spread from generation to generation, becoming a deep-rooted orthodoxy in the Chinese consciousness.

Dayitong demonstrates a major feature of traditional Chinese thinking about good governance: adherence to unification and centralization. Of course, the state of *dayitong* was never consistently achieved in history: the unified Chinese empire often split into *de facto* independent states. Nevertheless, these *de facto* states hardly desired to remain separate in the long term, nor did they form a Westphalia-like international community. Rather, any multi-state system was considered to be temporary and less than ideal by the Chinese, as such a system only produced wars, insecurity, and disaster for elites and commoners alike.[13] Rather, unification was the desired norm and *dayitong*, which was believed to nurture stability and prosperity, was regarded as the natural course of historical development.[14] Accordingly, unification—and the maintenance of such unification—became the primary concern, even at a great human cost.[15] In sum, although *de facto* pluralism appeared at certain points in history, the leitmotif of

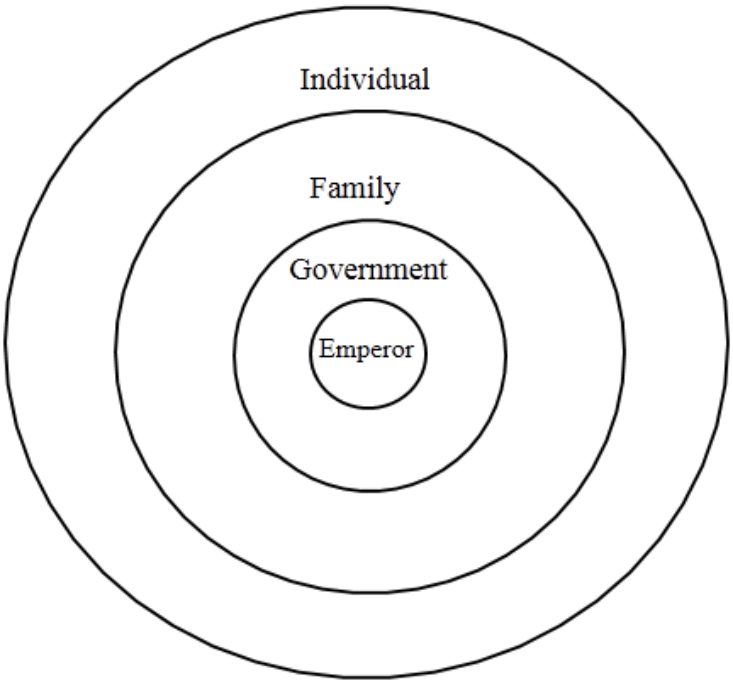
[12] Vincent Shen, ed, *Dao Companion to Classical Confucian Philosophy* (New York: Springer, 2013) at 48 to 49.
[13] The *Lvshi Chunqiu* (吕氏春秋)puts that "there is no turmoil greater than the absence of the Son of Heaven; without the Son of Heaven, the strong overcome the weak, the many lord it over the few, they incessantly use arms to harm each other." Lüshi chunqiu. See also in Yuri Pines, "'The One That Pervades the All' in Ancient Chinese Political Thought: the Origins of ' The Great Unity' Paradigm" (2000) 86:4 Toung Pao 280 at 316.
[14] Victoria Tin-bor Hui, "War and History China: Problematizing Unification and Division in Chinese History" (2007) EAI Working Paper Series 7.
[15] Christopher Ford, *The Mind of Empire: China's History and Modern Foreign Relations* (Kentucky: University Press of Kentucky, 2010) at 82.

Chinese civilization throughout its thousands of years of history was the presence of a powerful central ruler in combination with a single ruling philosophy. This is why modern China has consistently stressed on sovereignty and territorial integrity, saying that "China is a natural territorial and cultural polity with five thousand years of history; since ancient times there is only one China and in the future China must be one."[16]

2.1.2 *Tianxia* Order

The unitary, centralized power structure proposed by *dayitong* shaped the Chinese conception of social order. In ancient China, it was thought that the ideal society should be based on a close-knit, hierarchic, and centralized ethnic network named *sangang* （Three Fundamental Bounds, 三纲）. In this network, it was assumed that an individual should serve his/her family (and within the family, that women as wives should serve their husbands, and men as sons should serve their fathers), that a family (or clan) should behave as a minister and serve the ruling class (government), and that the government as a sum of ministers should serve the ultimate ruler (the emperor).[17]

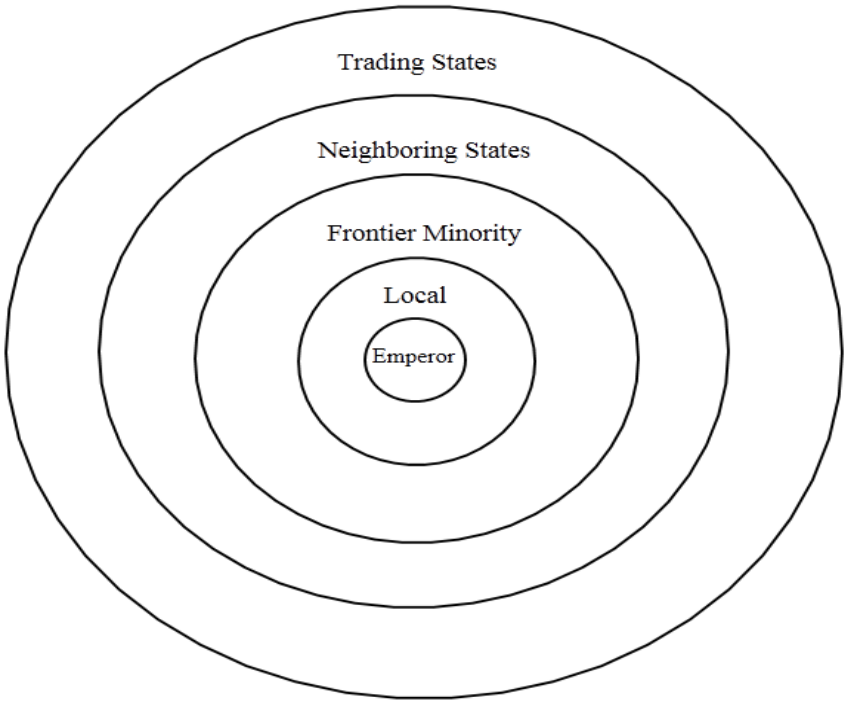
[16] See e.g. in "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea" (13 July 2016), online: *Ministry of Foreign Affairs of the People's Republic of China* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml>.
[17] Dong, *supra* note 8 at 528.



The *sangang* social order conditioned the Chinese approach to the international order. Just as individuals form a society by *sangang*, Zhongshu Dong asserted that Earth, (that is, all states/regions on Earth) could not proceed anywhere on its own accord but was subject to Heaven and the Son of Heaven.[18] Therefore, relations between China and other states (regions) were thought to be similar to the *sangang* system where the individuals were subject to the emperor.[19]

[18] "Biography of Dong Zhongshu" in Gu Ban (班固), *Book of Han*, reprinted ed (Beijing: Zonghua Press, 1962) at vol 56.

[19] A similar argument can be found in Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden: Martinus Nijhoff Publishers, 2009) at 73.



The Chinese image of the international order can be shown as "concentric circles with the Chinese domestic center (emperor) -local relation at the core".[20] The emperor, as the son of Heaven, was mandated to rule over *tianxia* and thus he stood at the core (also the top) of the order together with his central and local governments that swore their allegiance to him. Traditionally, the emperor and the local areas surrounding him formed the center of the international order. They called themselves *huaxia* (China, 华夏), or *zhongguo* (the Middle Kingdom, 中国). Peoples who fell outside the *huaxia* circle were the so-called *yidi* (Barbarians, 夷狄), which included ethnic minorities, those from neighbouring states and foreigners who lived in trading states (e.g. the European states). Due to the geographic distance, the emperor was unable to administer the *yidi* as effctively as he did those within the *huaxia* circle, yet through means such as validating the group headman's power or sending a supervisor, the emperor could

[20] Takeshi Hamashita, *China, East Asia and the Global Economy: Regional and Historical Perspectives*, Mark Selden & Linda Grove, eds. (London and New York: Routledge, 2008) at 16 to 17.

still maintain his *de jure* authority over the *yidi*.[21] Perhaps certain states or regions that were more remote, such as Korea, Liu-ch'iu (now a part of Japan), Annam (Vietnam), and Siam (Thailand), had more independence in politics, economy and culture, but China still loomed large in their development. These states applied the Chinese calendar, their people used the Chinese language, and their rulers accepted titles conferred by the Chinese emperor.[22]

2.1.3 *Li*-based Approach to International Law

The ancient Chinese believed that social order and conduct should be maintained by a set of norms called *li*. *Li* originally referred to the rituals undertaken in religious ceremonies for worshiping Heaven.[23] But since the Zhou dynasty (1100-221BC), *li* had been understood more expansively, not only as a rite in the Western sense of religious custom, but as also embodying rules, customs, and practices covering the entire spectrum of interaction between humans, nature, and even material objects.[24] Confucianism was a leading proponent of this understanding of *li*. According to *Liji* (Book of Rites, 礼记), people of different social ranks were expected to comply with different standards, which included ways of greeting, talking, dressing, along with their vehicles, houses, food, marriages, funerals and sacrifices.[25] Externalizing differences

[21] John K Fairbank, *The Cambridge History of China: Volume 10, Late Ch'ing 1800-1911, Part 1* (Cambridge: Cambridge University Press, 1978) at 32.
[22] *Ibid* at 30.
[23] Jinfan Zhang, *The Tradition and Modern Transition of Chinese Law* (New York: Springer, 2014) at 3.
[24] Basically, *li* in ancient times was divided into five categories, namely *jili* (the rites for ancestral worship and the religious sacrifices, 吉礼), *xiongli* (the rites for funerals, 凶礼), *jiali* (the rites for weddings, 嘉礼), *junli* (the military ceremonies, 军礼) and *binli* (the greetings for guests, 宾礼). See in *ibid* at 6.
[25] See generally in Cui, *supra* note 4.

through *li* was believed to reinforce the *sangang* social order. In a state governed by *li*, people would show respect to nobility represented by the emperor (*Zunzun*, 尊尊) and in a family governed by *li*, members would show respect to relatives represented by parents (*Qinqin*, 亲亲).[26]

In the international arena, the relationship between China and other states/regions was thought to be like the relationship between the emperor and his subjects.[27] The other states or regions were expected to obey *li* to show their respect and loyalty to the emperor. *Li*, in the *tianxia* order, was reflected in the obligations of envoys from non-Chinese regions/states to pay tribute to the Chinese emperor, known as *chaogong* (Tribute, 朝贡).[28] These envoys had to perform certain rituals in presenting their tribute to the emperor, ranging from requesting permission to pay tribute to engaging in certain presentation ceremonies.[29] For instance, during the audience at which the emperor of the Qing dynasty received tributes, the tributary envoys had to wear their countries' court dresses and were guided by eunuchs to the palace's western courtyard.[30] There, the envoys stood until the emperor appeared.[31] When the emperor stopped near an envoy, the envoy had to kneel and present a memorial to the throne (as written on paper folded in accordion form) by holding it with both hands as high as his forehead.[32] A mandarin would then approach the envoy and pass the memorial to the emperor.[33]

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[26] *Ibid*.
[27] Pan, *supra* note 19 at 73.
[28] *Chaogong* in the Chinese language means "the 'kings' of surrounding states (regions) yearned for the Emperor's virtue" and paid loyalty and gave gifts to the Emperor. See in Bardo Fassbender et al, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at 455.
[29] T Hamashita Kindai, *Modern China's International Opportunity: The Tribute and Trade System and Modern Asia* (Tokyo: The University of Tokyo Press, 1990), cited in *ibid*.
[30] John K Fairbank & Ssu-yu Teng, "On the Ch'ing Tributary System" (1941) 6:2 Harv J Asiat Stud 135 at 171.
[31] *Ibid*.
[32] J J L Duyvendak, "The Last Dutch Embassy to the Chinese Court (1794-1795)" (1938) 34:1/2 Toung Pao 1 at 56.
[33] *Ibid*.

When presenting, the envoy had to kowtow nine times to pledge tributary status to the Qing emperor.[34]

Li is not merely a sort of social practice or custom. Rather, in the eyes of the ancient Chinese, it was a sort of law. The term "law" in ancient China was broadly defined as a model or standard for human behaviour and actions. Mozi (墨子) in *Fayi* (Standards and Norms, 法仪) described law as the thing by which one regulates himself and the thing for those who are engaged in governing, equating it to the rulers used by carpenters when working.[35] The Chinese ancient legal scholar Yin Wenzi (尹文子) expressed a clearer notion of law. In *Dadao* (大道) he divided law into four categories: "the first is the unchangeable law, which draws a line between the ruler and the subjects, and between the superior and the inferior; the second is the social law, which helps to overcome differences in customs; the third is the governing law, which regulates rewards and punishments; and the fourth is the law of equity, which is the scale of balancing."[36] From these theories, it is fair to conclude that, in ancient Chinese thought, law as a standard governing human activities in society, included the ethical precepts and rites which were expressed in *li*.

Li in practice had been incorporated into legal codes since the Han dynasty when Confucianism became the state ideology. For instance, *Tanglv Shuyi* (the Tang's Code, 唐律疏议) stated that, except in cases of conspiracy against the emperor, individuals were prohibited from reporting crimes committed by their parents or grandparents; if

[34] For the details of audience, please see *ibid* at 53 to 56.
[35] Xiaolong Li, *Mozi*, reprinted ed (Beijing: Zhonghua Book Company, 2007) at vol 1 chap 4.
[36] See Wenzi Yin, *Dadao* at vol 1, cited in Hyung I Kim, *Fundamental Legal Concepts of China and the West: A Comparative Study* (Port Washington, NY: Associated Faculty Pr Inc, 1981) at 3.

someone did so, that person was considered to be in violation of filial piety and deserving of punishment.[37] It may seem inconceivable to punish a person who reports a crime because of that person's familial relationship to the alleged criminal, but this response reflected the hierarchical expectations of social and moral values set by *li*. The inferior was always expected to respect the superior in the sphere of family – the only exception being when this respect was in conflict with loyalty to the emperor. Even when *li* was not formally incorporated into the codified system, it was still considered in judicial practice. It is said that in the Han dynasty, a woman named Gou Yu (缑玉) killed someone in revenge for the death of her father. In determining her punishment, the judge did not sentence her to death as required by the formal, positive rules. Instead, the judge absolved her of guilt due to her compliance with *li*, as represented by her filial duties to her father.[38] In this sense, it can be argued that the Chinese traditional legal regime contains not only positive rules that have been discovered and formulated into a codified system (much like the law as perceived in modern times), but also *li* that reflects Confucian teachings on social practice, customs, moral values and ethical principles.[39]

We can thus infer that, from the traditional Chinese perspective, *li* in the *tianxia* order is viewed as a sort of international law regulating China's relations with other states/regions – Junwu Pan (潘俊武) names it "international *li*".[40] International *li* as

[37] *The T'ang Code, Volume I: General Principles*, translated by Wallace Johnson (New Jersey: Princeton University Press, 1979) at 246 to 248.
[38] "The Legend of Shen Tufan" in Ye Fan, *Book of the Later Han*, reprinted ed (Beijing: Zhonghua Book Company, 2007) at vol 53.
[39] See e.g. in Kim, *supra* note 36.
[40] Pan, *supra* note 19 at 73.

the Chinese version of international law had four prominent features. First, it was essentially hierarchic – or more precisely, Sino-centered. Obligations in international *li* were non-reciprocal. Whereas non-Chinese states/regions were required to present tributes to China and to perform kowtow, the Chinese side, as the superior in the *tianxia* order, did not have to reciprocate. International *li* was created by China alone, and its content mostly revolved around the tribute obligations of non-Chinese states/regions to China rather than inter-state communication.[41] Arguably, international *li* was a reflection of loyalty to the Chinese monarchic power. Perhaps this Sinocentrism had its roots in Chinese views of the superiority of their civilization. As C. P. Fitzgerald observed that, because of its geographic isolation, there was no other great civilization in close proximity to ancient China and such isolation contributed to its self-image as the center of the world.[42] Proudly calling their country *liyi zhibang* (the Nation of Etiquette, 礼仪之邦), the Chinese people condemned the non-Chinese people for their lack of *li* and believed China bore the responsibility of spreading *li* to civilize the "barbarians".[43]

China's responsibility of civilizing the "barbarians" may be reminiscent of the *mission civilisatrice* (civilising mission) that stood as the rationale for Western colonization of indigenous peoples in the 15th – 20th centuries. However, compared to the *mission civilisatrice* which invovled Western coercive conquests and the indigenous people's revolutionary responses, observers may be surprised to find that there were

[41] For example, in *Daqing Huidian* (Qing's Collected Statutes, 大清会典) which discussed *li* for tribute, most of its contents are about the approval of tributary permission, the travel routine of tributary envoys, and the list of tributes. See in Fairbank & Teng, *supra* note 30.
[42] C P Fitzgerald, *The Chinese View of Their Place in the World* (Oxford: Oxford University Press, 1964) at 7.
[43] Zhang, *supra* note 23 at 15.

few battles and little bloodshed between China and its tributary states (regions). Although international *li* assumes inequality in inter-state relations, this inequality was not accompanied by violent coercion or bloody conquests. Rather, the entire legal regime built by *li* was pacifist — which is the second feature of international *li*. The authority, or legitimacy, of the Sino-centered *tianxia* order lay in the principle of benevolence, and more instrumentally from the perspective of foreign envoys, in the huge profits to be earned from formal subordination.[44] The emperor not only defrayed the expenses of foreign envoys but also typically bestowed much more valuable gifts on them than the tributes he himself received.[45] China also offered the envoys other benefits as proof of its humanness and generosity – most importantly, permission to trade with China.[46] Although in practice, ancient China also traded with its neighbors for profit, trade did not play a significant role in the ancient Chinese economy.[47] It was important for the tribute-payers, however, as the foreign market demand for Chinese goods (notably tea, silk, porcelain and manufactured items) was always strong.[48] Thus, while permission to trade with China was considered by the ancient Chinese as a special favor granted to other states/regions, foreigners probably reckoned that accepting *li* and the tribute system was a small price to pay to obtain the lucrative benefits of trade.

The pacifist nature of international *li* leads us to a discussion of its third feature: its

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[44] Fassbender et al, *supra* note 28 at 454 to 455; Phil CW Chan, *China, State Sovereignty and International Legal Order* (Leiden: Brill Nijhoff, 2015) at 70; R Randle Edwards, "Imperial China's Border Control Law" (1987) 1 J Chin Law 33 at 37 to 40. It is noted that, in some circumstances—such as when non-Chinese people offended China, or some warlike emperors desired to expand the territory—coercion might be used.

[45] Chan, *supra* note 44 at 71.

[46] Mark Mancall, "The Persistence of Tradition in Chinese Foreign Policy" (1963) 349:1 Ann Am Acad Pol Soc Sci 14 at 17.

[47] For instance, Ray Huang estimated that, from 1570 to 1590, the Chinese annual revenues from international trade and commerce was around 410,000 teals of silver, amounting to only 1.1 percent of the grand annual revenues. See in Ray Huang, *Taxation and Governmental Finance in Sixteenth-Century Ming China* (New York: Cambridge University Press, 1974) at 263 Table 18.

[48] Rhoads Murphey, *East Asia: A New History*, 4th ed (New York: Longman, 2007) at 151.

moral nature. While representing the social hierarchy, *li* was also supposed to reflect virtues emerging from the family and social relationships it governed, such as *ren* (benevolence, 仁), *yi* (righteousness,义), *li* (propriety, 礼), *zhi* (wisdom, 智) and *xin* (trustworthiness,信).[49] Confucianism held that, only through correctly performing *li* and obeying the morality it brought, could human beings cultivate the underlying order of Heaven, move society in alignment with the Mandate of Heaven, and establish the harmony of Heaven, Earth and humanity.[50] Even the emperor, who occupied the top of the social hierarchy and was exempted from performing certain requirements of *li*, was still required to cultivate the virtues promoted by *li* when ruling his subjects, otherwise he would lose the blessing of Heaven and would be overturned.[51] Of course, the rule of virtue was sometimes accompanied by coercion, as we find in the use of force in certain disputes between ancient China and other states/regions.[52] However, in the long history of China's foreign relations, pacifism generally prevailed.[53] Coercion was seen as a poor substitute for a proper, harmonious society.[54] Confucianism insisted that *li* could effectively control society, for it transformed individuals into moral people who

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[49] Dagobert D Runes, *Dictionary of Philosophy: Revised and Enlarged* (Lanham: Rowman & Littlefield Publishers, 1984) at 338.

[50] See also in Stephan Feuchtwang, "Chinese Religions", in Linda Woodhead et.al, eds, *Religions in the Modern World: Traditions and Transformations*, 3rd ed (London: Routledge, 2016) at 143 to 172

[51] For example, Mencius suggested that the ruler must be genuinely benevolent – meaning, he should notice how his policies will affect his subjects and should only pursue policies consistent with their wellbeing. See e.g. Mengzi & Mencius, *Mengzi: With Selections from Traditional Commentaries* (Indianapolis: Hackett Pub Co Inc, 2008) at 1 to 2.

[52] For example, the emperor Yang-ti' initiated wars against Korea. See details in Denis Twitchett, *The Cambridge History of China: Vol 3, Sui and T'ang China 589-906, Part 1* (Cambridge: Cambridge University Press, 1979) at 144 to 146.

[53] John K Fairbank & Kwang-Ching Liu, eds, *The Cambridge History of China, Vol. 11: Late Ch'ing, 1800-1911, Part 2* (Cambridge: Cambridge University Press, 1980) at 144.

[54] The Master said, "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame". [translated by author] (子曰："道之以政，齊之以刑，民免而無"), "Wei Chang" in Confucius, *Analects*, reprinted ed (Beijing: Zhonghua Book Company, 2006) at chap 3.

knew their place in the cosmos and would discipline themselves.[55] Even if someone acted contrary to *li*, he or she could be righted through moral education.[56]

But *li* as international law is ambiguous in some respects – this is also its fourth feature. Since all lands were regarded as the property of the emperor, the Chinese traditionally had little concept of a fixed geographic state border.[57] Instead, "foreign" was a cultural and civilizational concept, referring to those who did not accept *li* — as opposed to a catchall label for everything existing or originating outside sharply defined physical boundaries.[58] Moreover, *li* as the boundary between the "Chinese" and the "foreigners" was not fixed. Xiu He pointed out that *dayitong* required rulers to develop and spread Chinese civilization to *yidi* for a peaceful, orderly and harmonious world to emerge.[59] Consequently, China's *li*-based national boundary fluctuated, for the Chinese encouraged the non-Chinese to become a part of China by adopting *li*, believing that the *yidi* could become Chinese if they internalized *li*.[60]

2.2 Early Sino-Western Transcivilizational Interaction

Chinese civilization and its traditional way of thinking remained relatively isolated and stable up until the arrival of Western powers in the mid-19th century. The decades

[55] See in Pan, *supra* note 19 at 72.
[56] Confucius argued that physical punishments could effectively control society, but people therein generally behave well because of their fear of external coercion; whereas under moral persuasion, where people internalize the virtues through learning the patterns of proper behavior, people voluntarily behave properly because they fear shame and want to avoid losing face. See e.g. in Kim, *supra* note 36 at 13.
[57] Zhimin Chen, "Nationalism, Internationalism and Chinese Foreign Policy" (2005) 14:42 J Contemp China 35 at 36 to 37.
[58] Ford, *supra* note 15 at 239.
[59] Shen, *supra* note 12 at 48 to 49.
[60] For example, the famous Chinese philosopher and poet Yu Han once alleged that "the Chinese who behave like the barbarians will become the barbarians, the barbarians who behave like the Chinese will become the Chinese"[translated by author] (诸侯用夷礼则夷之，夷而进于中国则中国之). See in Yu Han, *Changli Corpus Commented by Five Hundred People (五百家注昌黎文集)*, reprinted ed (Beijing: Zhonghua Book Company, 2005) at vol 1.

after the First Opium War (1839-1842) brought increased contact and conflict between China and the West. Because of Western military and technological superiority, China was forced to establish "equal" diplomatic relations with the Western powers, paving the way for the early westernization of Chinese society. By the conclusion of the Second Opium War (1856–1860), Westernism began to exert significant influence on Chinese traditionalism, marked especially by the establishment of new diplomatic institutions and the introduction of "Western" international law.

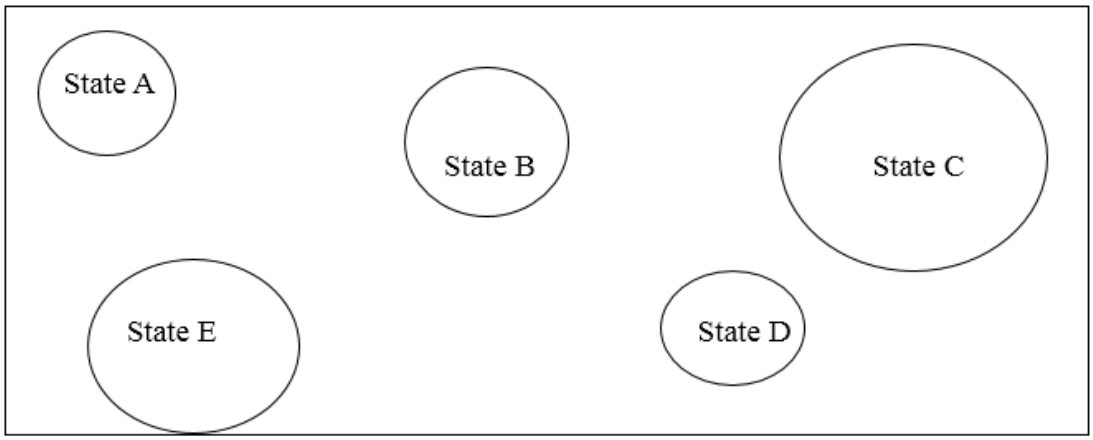
2.2.1 Westernism

Before looking at how Western civilization interacted with ancient Chinese civilization, it is useful to point out some interesting parallels—and sharp distinctions—between Westernism and traditionalism regarding the views about world, the international order and law. Both China and the West had experienced devastating zero-sum warfare before encountering one another,[61] but the two regions forged different responses to inter-state relations and international governance.

Similar to Chinese traditionalism, Westernism's original conception of the world was colored by myths in which a supernatural being, i.e. God, oversaw the human world. According to the Christian biblical story of the Tower of Babel, God became displeased with the arrogance of a united humanity when it sought to construct a tower in the land of Shî'när that would be tall enough to reach to Heaven. God responded by confounding their language so that they could no longer understand one other and duly "scattered

[61] Ford, *supra* note 15 at 62.

them abroad from thence upon the face of all the earth".[62] According to this early Christian/Western point of view, God's natural and inescapable will resulted in pluralism. Although the West (that is, Europe) aspired to universality in the medieval period,[63] the Renaissance saw the Western vision return to pluralism. During the Renaissance, Westerners distinguished between two realms of power (i.e., the natural or civil realm and the supernatural/religious realm) which had been conflated during the middle ages in the hands of the papacy.[64] This new separation of the civil and religious realms of power facilitated the decline of papal authority over temporal matters and shattered a shared world order in which Europeans were bound under a single, common religious leader.[65] The absence of a supernational authority paved the way for the appearance of a new international order in the West, marked by the establishment of the Peace of Westphalia – a nation-state system characterized by the coexistence of a multiplicity of independent states.[66]



[62] "The Tower of Babel" in *Genesis* 11:1–9.
[63] This concept of world order represented a blending of the traditions of the Roman Empire and the Catholic Church. See Ford, *supra* note 15 at 63; Henry Kissinger, *Diplomacy* (New York: Touchstone, 1994) at 56.
[64] Ford, *supra* note 15 at 63.
[65] *Ibid* at 64 to 66.
[66] The peace of Westphalia is a series of peace treaties signed between May and October 1648 in Osnabrück and Münster. The Peace of Münster was ratified on 15 May 1638 and two complementary treaties were both signed on 24 October 1648, namely the *Treaty of Münster* and the *Treaty of Osnabrück*. See in Leo Gross, "The Peace of Westphalia, 1648-1948" (1948) 42:1 Am J Int Law 20 at 29.

In contrast to the Chinese *tianxia* order, the Westphalian system, as the above figure shows, was a horizontal, anarchic system of sovereign states where inter-state diplomacy was unconcerned with matters of domestic politics, economics and society.

Meanwhile, Western scholars (such as the Spanish School) began developing common rules to govern the interactions of coequal sovereign states, gradually fleshing out what would become the basis for modern international law.[67] While international law in China was reflected by rites performed in the tribute system, international law in the West was a set of mutually beneficial written rules known as the treaty system.[68]

The treaty system was quite different from international *li*. Firstly, it secularized and re-conceptualized state power. In the tribute system, the emperor as the son of Heaven could claim the legitimacy for his rule over *tianxia* by divine right (i.e. the Mandate of Heaven) and set himself up as a substitute for Heaven. In the treaty system, the power of governing a state no longer required divine authority for legitimacy; instead, it was conceptualized as sovereignty, "an artificial soul" constructed and agreed by multiple groups adhering to the same social contract.[69] The essence of sovereignty lies in a wide-accepted doctrine which endows "state governments with absolute jurisdiction over a specified piece of real estate and exclusive authority over the individuals who reside upon it".[70] Secondly, the treaty system defined the degree of absoluteness of sovereignty, states' co-equal rights and their duties in international communications.[71]

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[67] The earliest recognizably international legal scholars in the making of modern international law were the great Spanish theologian-lawyers Franciso de Vitoria and Francisco Suárez, see in Fassbender et al, *supra* note 28 at 1087 to 1091.
[68] *Ibid* at 71 to 72.
[69] Thomas Hobbes, *Leviathan* (New York: Continuum, 2006) at 9.
[70] Marianne Heiberg, ed, *Subduing Sovereignty: Sovereignty and the Right to Intervene* (London : New York: Pinter Pub Ltd, 1994) at 12.
[71] Fassbender et al, *supra* note 28 at 77 to 80; Andrew Coleman & Jackson Nyamuya Maogoto, "'Westphalian'

Emphasizing the balance of power, the Westphalian sovereign states claimed to be absolutely supreme within their own territories and desired not to be dominated by any ‘‘foreign’’ entity. As a result, states, through a series of treaties and principles, voluntarily agreed to limit or give up some of their absolute sovereign rights (for example, expanding sovereignty to other state’s jurisdiction) in exchange for a mutual respect of sovereign independence and equity.[72] Finally, the treaty system established the principle of sovereign equality and independence,[73] which was manifested in the three following dimensions: (1) regardless of their differences in size and power, all states could claim absolute and unchallenged authority within their own realms and were entitled to interact with each other on the basis of equality in a legal sense; (2) the scope of sovereignty was clearly delimited by a state’s territory whose geographic boundary was provided and fixed by international treaties; (3) the obligations and rights that each state enjoyed would be reciprocal.[74]

The Western treaty system led to the conception of international adjudication. Given that no state had jurisdiction over another within the Westphalian system, issues arising from the interpretation and application of international treaties became a sticking point when matters involved more than a single nation’s sovereign territories. Ideally, international disputes would be settled by cooperation between the state parties. States

Meets ‘Eastphalian’ Sovereignty: China in a Globalized World” (2013) 3:2 Asian J Int Law 237 at 246 to 247.

[72] Coleman & Maogoto, *supra* note 71 at 247; Michael J Kelly, “Pulling at the Threads of Westphalia: Involuntary Sovereignty Waiver-Revolutionary International Legal Theory or Return to Rule by the Great Powers” (2005) 10 UCLA J Intl Foreign Aff 361 at 374 to 375.

[73] David P Fidler, “Revolt against or from within the West - TWAIL, the Developing World, and the Future Direction of International Law Agora: Third World Approaches in International Law” (2003) 2 Chin J Int Law 29 at 35 to36.

[74] Emer De Vattel & Joseph Chitty, *The Law of Nations: or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Philadelphia: PH Nicklin & T. Johnson, 1835) at book 1 Sec 4, Sec 36 to 37; book 2 Chap.1.

could find ways to cooperate in international disputes, such as through negotiation, reconciliation and mediation. However, the failure of states to reach a settlement of their own accord resulted in the need for international adjudication.

As Cornelis G. Roelofsen has pointed out, one of the reasons contributing to the Western preference for settling disputes by adjudication is the tradition of the European arbiter.[75] The so-called European arbiter originated from the medieval theocracy when the papacy claimed to be a hegemonic ruler maintaining peace over Christendom and the arbiter served as a judge in inter-state disputes.[76] Although ecclesiastical power declined after the rise of the Westphalian system, the Western attitude to settling international disputes maintained a great degree of continuity. For instance, although the Spanish School no longer recognized the Pope's supreme authority, it supported resort to a third-party neutral mechanism for settling international disputes.[77] Similarly, Hugo Grotius, who was a Protestant theologian and also the father of modern international law, maintained that "it would be helpful – as a matter of fact, necessary – for the Christian powers to hold conferences where those whose interests were not involved might settle the disputes of the rest, and even take measures to compel the parties to accept peace on fair terms."[78]

The practice of international adjudication began in earnest in the 18th century. Through the Jay Treaty of 1794, the United States and Great Britain agreed to create

[75] Fassbender et al, *supra* note 28 at 155.
[76] *Ibid*.
[77] Cesare Romano, Karen Alter & Yuval Shany, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014) at 43.
[78] II H. Grotius, *De Jure Belli Ac Pacis*, (L. Loomis trans, 1949) at ch. 23 sec. 8. Cited in Anthony Giustini, "Compulsory Adjudication in International Law: The Past, the Present, and Prospects for the Future" (1985) 9 Fordham Intl LJ 213 at 213 to 217.

mixed commissions to settle matters in the aftermath of the War of Independence. These commissions issued a total of 536 arbitral awards between 1794 and 1804 alone.[79] After the Jay Treaty, international adjudication among Western states grew rapidly and the 19th century was known to history as the "golden age of arbitration".[80]

2.2.2 Early Sino-Western Encounters

Given that the Western approach to the world, the international order and law was so alien to the Chinese, a clash became inevitable when the two civilizations began interacting with each other more frequently.[81] This is revealed in the conclusion of two sets of treaties: the Treaty of Nanjing (1842) with its two annexes,[82] and the Treaties of Tianjin of 1858 along with their revision (known as the Convention of Beijing of 1860).[83]

After its military defeat in the First Opium War, China concluded the Treaty of Nanjing with Great Britain.[84] This treaty crystalized the early conflict between the West and China over viewpoints on the world, the international order, and law. With the purpose of forming an India-China-Britain triangular trade regime as a part of its global expansion,[85] Great Britain attempted to integrate China into the treaty system. This

[79] Romano, Alter & Shany, *supra* note 77 at 44; Fassbender et al, *supra* note 28 at 160 to 161.
[80] Romano, Alter & Shany, *supra* note 77 at 44.
[81] Of course China and the West had some interactions before the mid-19th century, but such connections were scattered and were too weak to influence each other.
[82] The two annexes are the *General Regulations for Trade and Tariff of 1843* and the *Supplementary Treaty (also known as the Treaty of Bogue) of 1843*.
[83] Dong Wang, *China's Unequal Treaties: Narrating National History* (Lanham: Lexington books, 2005) at 11.
[84] The First Opium War (第一次鸦片战争), also known as the Opium War or the Anglo-Chinese War, was a series of military engagements fought between Great Britain and the Qing dynasty of China over the legalization of the British opium trade with China. The conflict began on 3 November 1839 and ended on 29 August 1842. See generally in Fairbank, *supra* note 21 at 178 to 212.
[85] Through the treaties, China was supposed to be a regular importer of Indian opium, as well as a long-term stable supplier of tea, silk and porcelain for London. See in Kuanbai Li, "Forming of Triangular Trade among Great Britain, India and China before the Opium War" (2006) 27 Journal of Harbin University 93 at 96.

intention is evident in the English text of the Treaty of Nanjing, where Great Britain requested China provide written, clear, and fixed provisions with respect to tariff rates, procedures for customs clearance, duty payment, and most-favored-nation treatment.[86] Yet China's was resistant – it still viewed the British as a tributary state. As such, the Chinese text of Treaty of Nanjing kept the British in an inferior position with the usage of terminology and rhetoric like "His Majesty [the Chinese emperor] gave permission that …"[87]

The clash between China and the West intensified in the making of the Treaties of Tianjin during the Second Opium War.[88] During negotiations, the British proposed that their envoy—as the representative of a sovereign state—should reside in Beijing permanently.[89] The main motivation for this request, according to some Western historians' speculation, was to bypass the xenophobic local Chinese officials and to establish a direct communication with the central government, for the British believed that only by imposing diplomatic pressure on the emperor could they efficiently enjoy their treaty rights in China.[90]

China, at this time, resented this demand. The Chinese rejection is understandable, as previous practice had been that, unless presenting tributes, the foreign representatives

[86] See details in the *Treaty of Peace, Friendship, and Commerce Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China*, China and United Kingdom, 29 August 1842 (entered into force 26 June 1843).
[87] *Ibid*.
[88] The *Treaties of Tientsin*, now also known as the *Treaties of Tianjin*, are a collective name for several documents signed at Tianjin in June 1858. The Treaties involve the *Treaty of Tianjin between China and the United Kingdom*, the *Treaty of Tianjin between China and France*, the *Treaty of Tianjin between China and the United States of American*, and the *Treaty of Tianjin between China and Russia*.
[89] Fairbank, *supra* note 21 at 250.
[90] *Ibid* at 252.

could not reside at the capital.[91] Moreover, the principle of sovereign equality was completely contrary to the *tianxia* order which stressed China's centrality. The emperor thus tried his utmost to reject the demand – even offering an imperial exemption from all customs duties on British trade with China so long as they withdraw the residence requirement.[92] The British negotiators finally agreed to make concessions, but their desire to build a Westphalian diplomatic relation with China was still strong, as they insisted on exchanging and ratifying the treaty before the Chinese emperor without the performance of *li*.[93]

The emperor took a hardline position on the exemption of *li*, insisting that the envoys could come to Beijing only if they fulfilled the Chinese etiquette rules and performed kowtow.[94] This response annoyed the British. To protest against the emperor's request, the British—together with the French envoys—tried to enter Beijing by force;[95] however, the attempt was met by an unexpectedly strong resistance from the Chinese armies.[96] In taking advantage of this victory, the Qing government then annulled the Treaties of Tianjin in August 1858.[97] This resulted in Great Britain dispatching an even larger allied expeditionary force.[98] In 1860, the Anglo-French allied forces marched into China, occupied Beijing and burned one of the imperial palaces –*Yuan Ming Yuan*

[91] *Ibid* at 250.
[92] *Ibid* at 251.
[93] *Ibid.*
[94] *Ibid*, at 254.
[95] *Ibid*, at 256.
[96] In an attempt to enter Tianjin forcefully, the British encountered a resistance led by the Chinese general Senggerinchin. Their forces suffered 432 casualties and lost four gunboats. See in *ibid.*
[97] *Ibid*.
[98] The force included over 60 French ships with 6,300 troops, 10,500 British troops plus 2,500 collie corps from Hong Kong. See also in *ibid*, at 257.

(Summer Palaces, 圆明园) as revenge.[99]

In the aftermath of the Anglo-French occupation of Beijing, the emperor sent his brother, Prince Gong, to sue for peace, bringing the Second Opium War to an end. China in the new round of negotiations not only ratified the Treaties of Tianjin, but also concluded the Conventions of Beijing with the United Kingdom, the French Empire and the Russian Empire. The conclusion of the Conventions of Beijing signaled the start of Western penetration into Chinese civilization, for the Conventions permitted Westerners (mostly diplomatic representatives) to reside in Beijing permanently and manage their contacts with the central government on Western terms,[100] paving the way for future westernization in Qing China's foreign policy-making processes and its guiding values.

2.2.3 Western Penetration into the Chinese Value Cluster

Western penetration into the Chinese value cluster began with the reformation of China's foreign policy decision-making institutions. In 1861, China established the *Zongli Yamen* (Office in Charge of Affairs of All Nations, 总理衙门).[101] This was the prototype of the Chinese Ministry of Foreign Affairs, meant to deal with "barbarian" representatives who resided at Beijing on an equal footing with Chinese officials. This

[99] *Ibid* at 258.

[100] For instance, the *Convention of Beijing between China and the United Kingdom* reaffirmed the provisions provided by the Treaty of Tianjin, stating that Great Britain would have the right to station a legation in Beijing. As such, not only Britain, but also other foreign states gained diplomatic residence in China through their respective convention with China. See *the Convention of Beijing between China and the United Kingdom*, China and the United Kingdom, 24 October 1860, art II; *the Convention of Beijing between China and France*, China and France, 25 October 1860, art II; *the Convention of Beijing between China and Russia*, China and Russia, 14 November 1860, art VIII.

[101] Zongli *Yamen* is a traditional abbreviation of the official name in Chinese, *Zongli Geguo Shiwu Yamen*(总理各国事务衙门). It literally means the "Office in Charge of Affairs of All Nations".

move was a significant change in the Chinese bureaucracy. Prior to it, foreign issues had played only a marginal role in Chinese politics, and they were scattered and handled concurrently by several administrative agencies.[102] But the *Zongli Yamen*, which consolidated a number of small agencies, specialized in foreign relations, marking the professionalization of diplomacy in the Chinese government.[103]

Several years after the establishment of the *Zongli Yamen*, more Western-style institutions were introduced into Chinese diplomacy. In 1865, the Western advisors Robert Hart and Thomas Wade suggested that the Qing government adopt the Western practice of sending diplomatic representatives abroad.[104] Following their suggestions, China sent exploratory missions to Europe as a first step toward dispatching official envoys.[105] After years of preparation, Songtao Guo (郭嵩焘) became the first Chinese minister residing in a western country. He acted as Minister to Britain and Minister to France from 1877 to 1879.[106] After Guo, China successively appointed Lanbin Chen (陈兰彬) as the envoy to the United States, Ruzhang He (何如璋) as the envoy to Japan,

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[102] China's foreign affairs were previously managed by several different agencies, such as the *Li Bu* (礼部) and the *Li Fan Yuan* (理藩院). See in Fairbank & Teng, *supra* note 30.

[103] Thomas Wade, the British Minister to China, appraised that "it [the establishment of the Zongli Yamen] is just what we have prayed for decades." Others Western diplomats even regarded the inauguration as "the best way to maintain peace among states." See in Gongsu Yang ed, *The Diplomacy of Late Qing* (Beijing: Beijing University Press, 1991) at 116.

[104] In his memorial entitled "Observations by an Outsider", Hart summed up the benefits of diplomatic representation: "The Western nations traditionally regard the exchange of high officials as a comity of intercourse…if there were communication, then warm feeling would replace the cold regard…" see details in Immanuel Chung-yueh Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858-1880* (Cambridge: Harvard University Press, 1960) at 155 to 157.

[105] *Ibid* at 167 to 172.

[106] Guo's appointment was a response to Great Britain's demands after the Margary affair for an Imperial commissioner to be posted to Britain. The Margary affair refers to the murder of a British Diplomat named Augustus Raymond Margary in 1875. In 1874 China granted permission to a British trade expedition from Burma to explore the mineral resources of Yunnan province. Margary was assigned as the interpreter and guide of Colonel Browne, the expedition leader. During his work as a guide, he was killed by the local tribesmen. Besides the investigation and hefty compensation, Britain demanded China send an apology mission to England. The request was met by the Chefoo Convention, under which set up a new code of etiquette between Chinese and foreign diplomats. After the signing of the Convention, China considered it necessary to send envoys overseas to facilitate the communication between China and other countries. See details in *ibid* at 176 to 180.

Xihong Liu (刘锡鸿) as the envoy to Germany and Chong Hou (崇厚) as the envoy to Russia.[107] Exchanging envoys with foreign states implied that China had begun to practice Western-style diplomacy.

Along with the incremental acceptance of Western diplomatic institutions, Western international legal theories were systematically imported into China. In 1862, W. A. P. Martin, an American Presbyterian missionary and interpreter, translated Henry Wheaton's *Elements of International Law* into Chinese and submitted his manuscript to the *Zongli Yamen*.[108] Martin's work was soon recognized by Prince Gong, who was the *de facto* head of the *Zongli Yamen*. In his memorial to the throne, Prince Gong wrote:

> While the Westerners master Sinology, we know nothing about them due to the language barrier and have hitherto been at an unfair disadvantage in negotiations …recently I hear from Anson Burlingame that the West uses a set of universal rules called international law to solve disputes among states and bind states' conducts…now these rules have been translated into Chinese by Martin and they might be useful for us to address Western affairs……I hereby request for Your Majesty's permission of publishing and circulating Martin's translation.[109]

In early 1865, Martin's manuscript, entitled *Wanguo Gongfa* (Public Law of Nations, 万国公法), was published and circulated to assist the making of China's foreign policies towards France, Britain, France, the United States, and Russia.[110] Wheaton's theories were helpful to China's diplomatic practices. Relying on his arguments about territorial neutrality in time of war, Prince Gong is said to have successfully forced the Prussian Minister to release a Danish ship that had been detained in Chinese territorial

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[107] See generally in *ibid* at 181 to 186.
[108] His manuscript was actually handed by the American Minister Anson Burlingame to the *Zongli Yamen* Fairbank & Liu, *supra* note 53 at 96; Fassbender et al, *supra* note 28 at 460.
[109] Translated by author. Jia Zhen et al., eds, *A Complete Account of the Management of Barbarian Affairs under the Tongzhi Regime* (Beijing: Zhonghua Book Company, 1979) vol 27 at 25 to 26.
[110] Fassbender et al, *supra* note 28 at 461.

waters.[111] In the aftermath of the publication of *Elements of International Law*, Martin continued to promote Western international legal theories in China. During his stay at Peking *Tongwen* College (京师同文馆) as a Professor in international law,[112] he translated more international legal writings, such as *Theodore D Woolsey's Introduction to the Study of International Law*, into Chinese.

The westernization of China's diplomatic institutions and the introduction of Western international legal theories brought challenges to China's traditional approaches to foreign relations – notably to the existing tribute system. After the Conventions of Beijing, China had to operate a "double standard" in its foreign policy. While maintaining the usual hierarchic tributary relationship with Korea, Liu-ch'iu, Annam, Nepal Burma (Myanmar) and other neighboring states, it established *de jure* equal relationships via treaties with the Western countries.[113] As the West gradually colonized Asia during the latter half of the 19th century, the tribute system decayed correspondingly. The Sino-French War of 1885 caused China to lose Vietnam's tributes.[114] Then, in 1895, with the conclusion of the treaty of Shimonoseki, China's last tribute-payer, Korea, ended its loyalty to China,[115] marking the *de facto* extinction of the tribute system.

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[111] *Ibid* at 463.

[112] In 1862, the Peking *Tongwen* College was established as a subsidiary of the *Zongli Yamen*. Recruiting a large number of foreign missionaries as its teachers, this school committed to teaching Chinese foreign languages and other Western knowledge. Martin was employed in 1867, but he did not begin his career there until 1873. See also in *ibid* at 463 to 464.

[113] *Ibid* at 468 to 469.

[114] The Sino-French War was a limited conflict fought from August 1884 through April 1885, to decide the control of Tonkin (northern Vietnam). In two years of fighting on land and sea, China suffered heavy losses in capital, manpower and materials, and relinquished its suzerainty over Vietnam. See details in Fairbank & Liu, *supra* note 53 at 96 to 97.

[115] According to Article 1 of the treaty of Shimonoseki, China recognized the full independence and autonomy of Korea, and, in consequence, the payment of tribute and the performance of ceremonies and formalities by Korea to China ceased. See details in *Treaty of Shimonoseki*, Japan and China, 17 April 1895, art 1 (entered into force 8 May 1895).

2.3 Traditionalism vs. Westernism

The entrance of Western civilization into Chinese society created a constant tension, beginning in the mid-19th century and continuing to the present: how much traditionalism and Westernism should be adopted and applied in the Chinese value cluster? Although the early wave of westernization in the 1860s and the following decades oversaw the decay—and even the extinction—of traditional institutions, Chinese values were not fully westernized. Traditional values erode more slowly than institutions, and thus the characteristics of the newly borrowed Western institutions and ideas were often quite different from the originals as they had to pass through the eye of the traditional needle and face a certain degree of Sinification. In other words, while the inherent tension between traditionalism and Westernism in the Chinese value cluster started to take shape, traditionalism, at least in the early stage of Sino-Western transcivilizational interaction, still had the upper hand.

2.3.1 The Sinification of Western Views of International Order

The arrival of Westernism impacted and influenced the pre-existing Chinese value cluster. Western science and technology gradually weakened the older Chinese mythic, religious and metaphysical worldview. When reading the world map, the Chinese realized that "both sky and earth are round and that there is no center and periphery whatsoever; there were more than 100 countries in the world, and China was but one

of them. Its position was not at the center of the world but in the southeast of Asia".[116] After several defeats in military conflicts with the West, the Chinese found that the countries that they used to consider as barbaric were actually prosperous – they were no less developed than China in many aspects, and were even more developed and progressive than China in terms of their economic and military capacities.[117]

This advancement in epistemology made the Chinese rethink their long-held *tianxia* vision of the international order. Tao Wang (王韬), an influential scholar and reformist in the Qing dynasty, began doubting the hierarchy of the *tianxia* order in his article titled "*Hua Yi Bian*" (Articulating Chinese vs Barbarians, 华夷辩), regarding the narrative that "China is superior and barbarians are inferior (*Hua zun Yi be*, 华尊夷卑)" as "way too absurd".[118] Changes also occurred in the Qing government's policy towards the "barbarian" countries. In the Qing court's official documents after 1860, China refrained from calling itself *tianchao* (Celestial Empire, 天朝), and this term had almost disappeared by 1875.[119] Instead of treating other countries as *yidi*, China renamed them *xiyang zhuguo* (Western Ocean states, 西洋诸国), *youguo* (friend states, 友国), or even *lieqiang* (strong enemies, 列强).[120] The emperor even abandoned his insistence on the performance of *li*. In 1873, the emperor agreed to simplify audience

[116] Dahua Zheng, "On Modern Chinese Nationalism and Its Conceptualization" (2012) 6:2 J Mod Chin Hist 217 at 218.
[117] *Ibid*. In his *Haiguo Tuzhi*, Yuan Wei acknowledged that the Barbarians are developed in warship, weapon and military training (夷之长技三：一战舰，二火器，三养兵练兵之法). See Yuan Wei (魏源), *Haiguo Tuzhi* (*Illustrated Treatise on the Maritime Kingdoms, 海国图志*) (Hunan: Yuelu Press, 2011) at Preface.
[118] Tao Wang,"Hua Yi Bian" (Articulating Chinese vs Barbarians, 华夷辩), in *Taoyuan Wenlu Waibian* (Supplements to the Selected Works of Wang Tao, 弢园文录外编) (Shenyang: Liaoning People Press, 1994) at 387.
[119] Department of History of Fudan University, *The Self-Image and National Identity in Modern China* (近代中国的国家形象与国家认同) (Shanghai: Shanghai Classics Publishing House, 2003) at 265 to 281.
[120] *Ibid*.

ceremonies, including replacing kowtow with five bows to him.[121]

The above examples seem to illustrate that the Chinese view of the international order was moving from *tianxia* towards the Westphalian system. This is partly true, but it does not tell the whole story, for it ignores three variables in the evolution of the Chinese worldview. First, the westernization movement in China had, since its inception, encountered considerable resistance from those with a traditional mindset. While some open-minded Chinese led the reformation, the conservatives, who were in the majority, still approached Sino-Western relations within the *tianxia* context and firmly objected the Western-style diplomacy.[122] When Songtao Guo left China for Britain as minister in 1876, many of his Confucian colleagues blamed him for serving the foreign devils, claiming that dealing with the "barbarian affairs" was beneath a gentleman's dignity.[123]

Second, even the reform-minded Chinese carried over certain traditional patterns when embracing the Westphalian system. Tao Wang questioned the existing *tianxia* system, yet he still took the Westphalian system as a temporary state moving towards *dayitong*, arguing that in order to make China great again, Heaven sent the Western nations to sharpen China like a knife being ground on a whetstone.[124] Wang's opinion was later endorsed and developed by Youwei Kang (康有为). In his *Kongzi Gaizhikao* (Confucius as institutional reformer, 孔子改制考), Kang articulated his call for a

[121] Jia Zhen et al., eds., *A Complete Account of the Management of Barbarian Affairs under the Tongzhi Regime* (Beijing: Zhonghua Book Company, 1979) vol 90 at 39.
[122] For example, the Qing literati, composed largely of officials, writers, and gentry, still considered the principle of *li* as the unwritten constitution of the state and the moral code of society. The Westernization movement was condemned by them as contrary to the national tradition and unfilial to the ancestors. See details in Hsü, *supra* note 104 at 201 to 202.
[123] Fairbank & Liu, *supra* note 53 at 183&187.
[124] *Ibid* at 160 to 161.

sovereign, modern China within the traditional discourse, characterizing his reform proposal as the Mandate of Heaven.[125]

The third variable is that the international order after the mid-19th century was not truly Westphalian; rather, it was essentially hierarchic and Western-centric. Peace, substantial sovereignty and equality during this period was only enjoyed by a small number of Western states that shared a common religious system, economic mode and political structure.[126] For the non-Western states like China, the Western states applied a double standard: on the one hand, they required non-Western states to accept Westphalian sovereignty and treat the West according to the principle of equality and independence; yet, on the other hand, they obtained non-reciprocal privileges (e.g. the unilateral most-favored-nation treatment) in the unequal treaties they signed with the non-Western states.[127] In brief, the *de facto* international order during this period can be characterized as hegemonism with a Westphalian façade – a Western-led hegemonic structure that merely granted the non-Western states formal equality and sovereignty while exploiting them through the treaties.[128]

Because of these three influential factors, the Chinese actually Sinified the Westphalian system with their *dayitong* discourse, perceiving the international order as a repetition of the ancient Spring & Autumn and Warring State periods.[129] Youwei

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[125] See also in *ibid* at 288.

[126] Lassa Oppenheim acknowledged in *International Law: A Treatise* that " international law as a law between sovereign and equal States based on the common consent of these States is a product of modern Christian civilization…" see Oppenheim, L. Lassa & Roxburgh, Ronald, Sir, *International Law: A Treatise*, 3rd ed (London: Longmans, 1920) at 48.

[127] Fassbender et al, *supra* note 28 at 53.

[128] Hui Wang, *China from Empire to Nation-State*, translated by Michael Gibbs Hill (Cambridge: Harvard University Press, 2014) at 129 to 130.

[129] Weiming Zhang, "Analogy in Chinese Understanding of Modern International Situation and of Public International Law in the Period of Westernization Movement" (2010) 6 World Econ Polit 79 at 80 to 85. The Spring & Autumn and Warring State period (771–221 BC) was an era of division in ancient China. Various states

Kang claimed that, given that the contemporary world had been characterized by the co-existence of multiple states, the emperor should abandon the older tributary system and reengage in the world as one of the contending powers.[130] Likewise, many Chinese elites and officials recognized the multi-state system in international society but believed that they were enduring a new Spring & Autumn and Warring State period. Tao Wang held that "the Western states, who are strong rivals of China, constitute a society similar to that in the Warring State period".[131] Zhaoyong Yin (殷兆镛）also analogized the Western states in the current world (such as Great Britain, America and Germany) to states in ancient China, for they coexisted with each other and could not be united into one empire.[132] From this point of view the Chinese understanding of the international order was slightly different from that in the West, for they still believed that the multi-state situation was temporary and the world's development tendency was *dayitong*.[133] This is evidenced in Kang's *Datongshu*, which understood the intensive Sino-Western warfare and conflicts as an attempt to achieve greater unity.[134] In this sense, it can be argued that the new Chinese image of the international order was largely traditionalistic, as it was constructed within the traditional discourse, seeking in Chinese traditions and history the equivalents or counterparts of Western ideas.

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during this period were at war before the Qin（秦）state conquered them and reunited China under their dynasty.

[130] Translated by author. (“窃以为今之为治，当以开创之势治天下，不当以守城之势治天下，当以列国并立之势治天下，不当以一统垂裳之势治天下”). See in Youwei Kang, "The Third Memorial to the Throne" (上清帝第三书) in *Kangyouwei Zhenglunji (Political Commentary of Youwei Kang, 康有为政论集)*,reprinted ed (Beijing: Zhonghua Book Company, 1981) vol 1 at 140.

[131] Tao Wang, T*aoyuan Wenlu Waibian (Wang Tao's Collections, 弢园文录外编*), reprinted ed (Shanghai: Shanghai Book Press, 2012) at 32 to 33.

[132] Zhaoyong Yin, "Secrete Report on the Barbarian Affairs" in Kejing Zhu ed., *Bianshi Xuchao* (边事续钞), reprinted ed (Taibei: Wenhai Press, 1968), vol 5 at 3, cited in Zhang, *supra* note 129 at 82.

[133] Wang, *supra* note 128 at 130 to 131.

[134] Kang argued that "the world now is in the Age of Disorder, but it will enter into *Dayitong* in thousands years later"[translated by author].(方今列国并争，必千数年后乃渐入大同之域), see in Youwei Kang, *Datong Shu* (Book of the Great Unity, 大同书), reprinted ed (Beijing: Renmin University Press, 2010), vol 4.

But this does not mean the Chinese worldview after the mid-19th century was unaffected by Westernism. Regardless of how the Chinese perceived the current international order, the older Sino-centric self-image—which declared the world the private property of the Chinese emperor—had to give way to the recognition of the multi-state reality and the consciousness which prioritized survival and self-development in the time of coexistence. From this, there emerged an inward-looking and defensive self-image which was concerned specifically with defending the integrity of the Chinese territory and the interests of the Chinese inhabitants, laying the psychological foundations for the rise of Chinese nationalism a few decades later.[135]

2.3.2 The Sinification of Western International Legal Theories

Sino-Western transcivilizational interactions also altered the Chinese view on international law. As mentioned before, it was after W.A.P. Martin translated and published Henry Wheaton's *Elements of International law* that China systemically imported Western theories of international law. However, the transplant process often verged upon Sinification, as the legal concepts and theories, which were originally from Western language and cultures, had to be conveyed in the Chinese epistemological system if they were to affect the Chinese mindset.

When translating the *Elements of International law*, Martin borrowed several Chinese counterparts, most of which came from Confucian writings, to express the key terms of Western legal theories. For instance, he coined a neologism named *quanli* (权

[135] Fairbank & Liu, *supra* note 53 at 568.

利) to render the meaning of "right".[136] Although the word *Quanli* was new, the characters composing this word, namely *quan* (权) and *li* (利),[137] had appeared very early in China and established their meaning under the framework of *li*. According to the Confucian theories, *Quan* generally referred to power, privilege or authority, and *li* (利) meant profit, interest or benefit.[138] In view of this, Martin in his *Translators' Headnote* for *Gongfa Bianlan* (The Study of International Law, 公法编览) explicitly explained that he used *quan* to describe a power that "every ordinary person is entitled to".[139] In order to avoid confusing *quan* with a negative power (such as having authority or privilege over the peers), he said that the word *li* (利) was added so that people would know that "right" had positive connotations and could bring them benefit.[140]

When choosing *quanli* to describe the legal entitlement that one (including a state) should have, Martin might have neglected the concrete context in which the Chinese used *quan* and *li*(利). In the Confucian classics, if *quan* and *li* (利) are put together, they would convey a negative meaning as a whole.[141] *Xunzi* (荀子) in *Jundao* (On the Way of a Lord, 君道) maintained that a lord should govern his country by observing *li* and duly play his role as a moral model: "when a lord was exposed to the pleasure of music and women, to the privileges and benefits of power (*quanli*)...he should consistently

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[136] See e.g. John K Fairbank & Denis Twichett, *The Cambridge History of China: Republican China, 1912–1949, Part 1 Vol. 12* (Cambridge: Cambridge University Press, 1983) at 5; Hui Wang, *The Rise of Modern Chinese Thought*, 3d ed (Beijing: SDX Joint Publishing Company, 2015) at 720; Lydia H Liu, ed, *Tokens of Exchange: The Problem of Translation in Global Circulations* (Durham, NC: Duke University Press Books, 2000) at 149.

[137] It is noted that the Romanization of *li* (礼) and *li* (利) are the same, but they represent different Chinese characters. Hence the meaning of *li*（礼）and *li*（利）differs. To differentiate between the two characters, in the following texts I will use " *li* (利)" to denote the Chinese character "利".

[138] Liu, *supra* note 136 at 149.

[139] *Ibid*.

[140] *Ibid*.

[141] Yong Xia, *The Philosophy of Civil Rights in the Context of China* (Leiden ; Boston: BRILL, 2011) at 395.

hew to his moral principles".[142] In this context, the words *quan* and *li* (利) together mean a sort of temptation that seduces the powerful to violate the principle of *li* and thus become immoral. Hence, in the eyes of some Chinese philosophers, it seems that the claim to one's rights (*Quanli*, 权利) in law is something to be discouraged.

Martin and his colleagues may have realized the deficiencies of translation. From the 1880s onwards, they committed to bridging the theoretical gap between Western international law and international *li*. To promote and help the Chinese understand Western international law, Martin, like his Chinese counterparts, relied largely upon the Chinese traditional discourse. In a paper on the theory of Chinese ancient international law, Martin likewise invoked the Spring & Autumn and Warring States period to explain the Western international legal theories.[143] He argued that the international *li* during the Spring & Autumn and Warring States period had contained many principles and practices prevalent in the contemporary West, such as the interchange of embassies, the making of international treaties, the Just War Doctrine and the recognition and respect of the rights of neutrals.[144] By displaying the similarities between the two legal systems, Martin seemed to tell the Chinese that Western international law was not a set of alien, strange rules that the West forced China to obey; rather, it helped the Chinese to find and revive old customs, ideas and principles that already existed in their own traditions. This intention was clear in his "Diplomacy in Ancient China", where modern

[142] Translated by the author. "接之以声色、权利、忿怒、患险而观其能无离守也"。"Chapter 12: The Way to be a Lord" in *Xunzi: The Complete Text*, translated by Eric L. Hutton (Princeton: Princeton University Press, 2016) at 117 to 130.

[143] William Alexander Parsons Martin, "Traces of International Law in Ancient China" (condensed outline of a paper read before the Congress of Orientalists in Berlin, 13 September 1881) at 71.

[144] *Ibid* at 72 to 73.

diplomacy among equal sovereign states was described as an art that had once flourished in the Zhou dynasty, disappeared for two thousand years and then reappeared, "like a river that rises with an increase of volume."[145] In sum, Martin heavily relied upon traditionalism and actively Sinicized many theories in the process of introducing Western international law into China. To some extent, this strategy was a stroke of genius. Owing to people's historical and cultural memory of traditional principles, an alien idea that attached itself to China's indigenous culture and values would likely gain support and social acceptance.[146]

But Sinification also somewhat distorted Western international law by analogizing it to international *li* in the Spring & Autumn and Warring State period. While states coexisted with each other during this period, their relationship was different from that within the Westphalian system. For instance, the principle of state equality and independence during the Spring &Autumn and Warring State period was *pro forma* and temporary.[147] With the goal of creating one Chinese empire, strong states were allowed to violate or manipulate international *li* to swallow weaker states, leading to an era when subterfuge and violence were more dominant than ritual and trust.[148] As a result, relating Western international law to international *li* gave the Chinese an impression

[145] W.A.P. Martin, "Diplomacy in Ancient China" (1887) 2 J Peking Orient Soc 241 at 241 to 242.
[146] Roy Bin Wong, *China Transformed: Historical Change and the Limits of European Experience* (New York: Cornell University Press, 1997) at 195; Fairbank & Liu, *supra* note 53 at 200.
[147] Statehood in the Spring & Autumn and Warring State period was different in conception from the modern sovereign state. During that time, the equity and independence the states enjoyed was limited and relative, as these co-existing states were *de jure* subject to the Zhou (周) royal authority. See in Wang, *supra* note 136 at 718 to 719.
[148] Confucius in the *Analects* famously described this period as a time of Chaos, "Confucius said, when the *dao* (here means order) prevails in the world, *li*, music, and punitive military actions proceed on the order of the Son of Heaven. When the *dao* does not prevail in the world, *li*, music, and punitive military actions proceed on the orders of the feudal lords. Once they proceed from the feudal lords, it is rare that after ten generations those lords have not lost their power."[translated by author] (孔子曰："天下有道，则礼乐征伐自天子出;天下无道，则礼乐征伐自诸侯出。自诸侯出，盖十世希不失矣"). Confucius, *supra* note 54 at chap 16.

that Western international law could be used by the strong Western states as a tool for bullying weaker China – and the way the West behaved in the following decades (in particular during the making of unequal treaties with China) reinforced this impression.[149] Thus, despite many Western legal principles and concepts being successfully applied by the Qing government, the Chinese view of international law after the mid-19th century contained some anti-Western sentiments. Shin Kawashima observed that the Chinese introduced and used Western international law not for guiding or changing their foreign affairs, but instead for political convenience and expediency – notably, for gaining the upper hand over the West in negotiations by familiarizing themselves with Western rules along the lines of *yiyi zhiyi* (controlling the barbarian countries by using barbarian tools, 以夷制夷).[150]

Regardless, it cannot be claimed that the borrowing of Western international legal theories failed to change the Chinese views of international law. After all, the "others" China had to deal with were not tribute-payers but states supposed to be on the same footing as China. This was a new sort of foreign relations, and it could not be regulated merely by old international *li*. As such, Western international legal theories filled at least two gaps that international *li* left regarding the regulation of new foreign relations. First, Western international law offered China a new discourse for rebuilding its power and authority. The end of the tribute system exposed a deep crisis in the legitimacy of Chinese governance: if Chinese civilization, which received the blessing of Heaven,

[149] Youwei Kang likewise stated that "the states nowadays are like the feudal lords in the Warring State Period when everyone followed the strong one and bullied the weak one." [translated by author] (“战国之诸侯，为今之属国，强则服之，弱则叛之”)，Youwei Kang, "Nanhai Shicheng ji, vol 2"(南海师承记卷二) in *The Collected Work of Kang Youwei*（Beijing: Renmin University Press, 2007）vol 1 at 498.

[150] Fassbender et al, *supra* note 28 at 462.

was no longer superior and could no longer "rule" all of the peoples and territories of *tianxia*, then how could the Chinese maintain their loyalty to the country and prevent Chinese civilization from being replaced by others? Many Chinese reformists, such as Kang, turned to the theory of sovereignty, calling for transforming the Qing Empire directly into a sovereign state that enjoyed inherently full authority and power over its domestic governance, without any interference from outside sources or bodies.[151] Second, Western theories renewed the Chinese view of the "self" and "others". Traditionally, the Chinese "self" vis-à-vis the non-Chinese "others" depended upon the acceptance of *li* and the underlying Chinese culture. However, the *li*-based national boundary was too weak to prevent the acceleration of Western incursion into China's frontier areas.[152] To fight against other states' encroachment on its national borders, China gradually embraced the Western concept of state territory and in practice began to demarcate Chinese geographic borders through undertaking a wide range of treaty negotiations with Russia, France Japan and Britain.[153]

2.4 The Rise of Chinese Nationalism

The Chinese value cluster in the latter half of the 19th century was further developed as its third ideological basis emerged: Chinese nationalism (*zhongguo minzu zhuyi*, 中国民族主义). Compared to traditionalism and Westernism, Chinese nationalism was relatively "young", for it did not appear until Sinocentrism disintegrated and foreign

[151] Wang, *supra* note 136 at 821.
[152] Fassbender et al, *supra* note 28 at 269.
[153] In ancient China, territory was perceived as *Tianxia*. *Tianxia* in Chinese literature means "under universal heaven, all lands are the emperor's lands; within the farthest limits of the land, all are the emperor's subjects." According to this definition, China's geographic boundary is vague and the meaning of "universal heaven" and "the farthest limits" was never authoritatively interpreted.

invasions intensified in the mid-19th century. After the two Opium Wars, the Qing government faced an economic crisis due to the influx of foreign products, rising unemployment, costly wars, enormous foreign debt, and serious corruption of the officials.[154] Economic hardships were compounded by the increasing population, natural disasters, the shortage of arable land, large-scale famine, and peasant uprisings.[155] Meanwhile, a new wave of treaty-making activities between China and the West arose. In 1897, Germany seized Jiaozhou (胶州) and signed a ninety-nine-year long lease with China. Encouraged by this, Russia sent its warship to Lvshun (旅顺) and later asked China to grant it the right to lease Lvshun for twenty-five years. Following this, the British obtained the lease of Weihaiwei (威海卫) for twenty-five years, the lease of Hong Kong New Territories (Xinjie, 新界) for ninety-nine years and the Yangtze Valley as its sphere of influence.[156]

As the Chinese became gradually more aware of the principle of sovereign independence and equality after the introduction of Western international legal theories, they realized that the leases China had signed with the West were in effect unlawful and unfair. "The treaties lacked equality and reciprocity, and China stood on the disadvantaged side…China was often unable to use the treaties for her purposes and was, on the contrary, restrained by them."[157] A sense of humiliation, together with a concern over the nation's destiny thus arose in Chinese society and a series of "national

[154] Fairbank & Liu, *supra* note 53 at 116 to 117.
[155] The influential uprisings include the Taiping Rebellion (a massive peasant rebellion lasted from 1850 to 1864) and the Nian Rebellion (an armed uprising that took place in northern China, from 1851 to 1868). See details in Fairbank, *supra* note 21 at 264 to 317.
[156] See the powers' encroachment on China generally in Fairbank & Liu, *supra* note 53 at 112 to 113.
[157] *Ibid* at 194.

salvation" movements ensued.

This nationalistic consciousness coagulated into Chinese nationalism in the early 20th century, when Qichao Liang (梁启超) took the lead in translating "nationalism" into the neologism *minzu zhuyi* (民族主义) in his article titled "*Guojia Sixiang Bianqian Yitong Lun*" (On the Similarity and Difference in the Transformation of Ideas on State, 国家思想变迁异同论).[158] Grounded in the study of the nationalistic consciousness in old Europe, old China and modern Europe, Liang maintained that "nationalism does not permit violation of our freedom by other nations, and does not permit violation of other nations' freedom by us. It means the independence of the people within a nation, the independence of each nation in the world. If all countries in the world could follow this principle of nationalism, then they would know their boundaries and there would have been no invasion and oppression."[159] Inspired by modern Western nationalism, Liang in his later essays put forward the notion of *zhonghua minzu* (Chinese nation, 中华民族), calling for a rapid nurturing of nationalism among the Chinese to resist the Western incursion.[160]

Chinese nationalism since its inception (as will be shown in the next chapters) developed rapidly and became an influential ideology that shaped nearly every facet of China's politics in the century that followed. China's sovereignty during the first half of

[158] Qichao Liang, "Guojia Sixiang Bianqian Yitong Lun" (On the Similarity and Difference in the Transformation of Ideas on State, 国家思想变迁异同论)" in Qichao Liang, *Liangqichao Xuanji Liang Qichao's Sel Work* (Shanghai: Shanghai People's Publication, 1984) at 184 to 193.

[159] Translated by author. ("民族主义者…不使他族侵我之自由，我亦毋侵他族之自由。其在于本国也，人之独立；其在于世界也，国之独立。使能率由此主义，各明其界限以及于未来永劫，岂非天地间一大快事…") See *ibid.*

[160] Qichao Liang, "Zhongguoshi Xulun" (A Narrative Analysis of Chinese History, 中国史叙论), in Qichao Liang, *Yinbingshi Heji (The Complete Works of Liang Qichao, 饮冰室合集)* (Beijing: Zhonghua Shuju, 1989) at vol 6.

the 20th century was further impaired due to the intensification of Western imperialist penetration as well as the decline of China's central power. The perceived need to strengthen China and defend Chinese sovereignty from intervention became so powerful that it not only contributed significantly to the success of revolutions,[161] but also permeated China's domestic and foreign affairs, manifesting itself in ideas and movements that differed widely in every other respect.[162] Revolutionaries, communists and nationalists, regardless of their different ideologies, all disseminated patriotic slogans to legitimize their actions.[163] In this sense, Chinese nationalism should be singled out and viewed as an independent ingredient of the Chinese value cluster.

But giving Chinese nationalism an independent role in the Chinese value cluster does not mean that Chinese nationalism, traditionalism and Westernism are competitors. Rather, Chinese nationalism had intricate connections with Westernism and traditionalism respectively. Essentially, the term "nationalism" was invented in Europe, and its overall framework was derived from Western ideas such as Westphalian sovereignty.[164] Like nationalism in the Western sense, Chinese nationalism carries the essential features of modern nationalism – where ethnic groups band together to attain, enhance and protect its self-perceived nation from foreign invasion.[165] Yet Chinese nationalism also had its cultural roots in traditionalism – especially the idea of *dayitong* that required the Chinese to form a polity with homogenous culture, ethnics and politics.

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[161] For example, having been exacerbated by ethnic resentment against the ruling Manchu minority and a desire to modernize China, the Xinhai Revolution overthrew China's last imperial dynasty (the Qing dynasty), and established the ROC. See Fairbank & Liu, *supra* note 53 at 515 to 534.
[162] James Townsend, "Chinese Nationalism" (1992) 27 Aust J Chin Aff 97 at 101..
[163] Fairbank & Twichett, *supra* note 136 at 319..
[164] Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (London: Zed Books, 1986) at 8.
[165] See generally in Gellner Ernest, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983) .

Immanuel Chung-yueh Hsu believed that, even though the tribute system was extinct, "the old dream of universal empire, the glory of advanced culture, and the prestige of the tribute system still lingered in the Chinese mind."[166]

It should be noted that the persistence of traditionalism was also evident in early Chinese nationalism. Despite different causes, participants, contents, approaches and influences, most national salvation movements at the turn of the century adopted a powerful strain of traditionalism. For example, Kang in his proposal for the 1898 Hundred Days' Reform suggested that the emperor should transform China into a sovereign state-based constitutional monarchy.[167] Kang's state-building model was profoundly influenced by traditional *dayitong* consciousness – notably, that the power and authority of a state comes ultimately from a single ruler who represents the peoples and territories of the country. In Kang's eyes, if the ruler's power was to collapse, the breakup of China would become unavoidable and the Chinese identity would be eliminated by other civilizations (basically Western civilization).[168] The traditionalistic traces were more explicit in the Boxer Rebellion from 1899 to 1901. Making the popular claim that Heaven sent millions of soldiers to assist the Chinese in purifying China of foreign oppression,[169] the Boxer groups portrayed themselves as the embodiment of supernatural powers from Heaven and immune from bullets, cannon

[166] Hsü, *supra* note 104 at 210.
[167] Kang led the Hundred Days' Reform to establish a constitutional monarchy in China in 1898. The Hundred Days' Reform was a failed 103-day-long cultural, political, and educational reform movement which aimed to change the government from an absolute monarchy to a constitutional monarchy with democracy. It was undertaken by the young Guangxu（光绪）Emperor and his reform-minded supporters. The movement proved to be short-lived, ending in a coup d'état ("The Coup of 1898", Wuxu Coup) by powerful conservative opponents led by Empress Dowager Cixi. See also in Fairbank & Liu, *supra* note 53 at 326 to 329; Wang, *supra* note 136 at 821 to 822.
[168] Wang, *supra* note 128 at 131; Wang, *supra* note 136 at 822 to 823.
[169] Lanxin Xiang, *The Origins of the Boxer War: A Multinational Study* (London: Routledge, 2003) at 172.

blows, and knife attacks.[170]

Conclusion

Up to this point, the values influencing China's attitude towards international adjudication and its early evolution have been discussed. The Chinese value cluster was not fixed but one that changed over time. In ancient times, it referred to the notion of *dayitong*, the *tianxia* order and international *li*. Yet, it changed after the signing of the Treaty of Nanjing, and continued to do so after the conclusion of the Conventions of Beijing of 1860. As China permitted foreign states to build equal diplomatic relations with it, Chinese values had to include Westernism to suit the new situation. While the Chinese value cluster was gradually westernized, traditionalism still played a major role and *dayitong* and *li* continued to provide the Chinese with the theoretical framework to understand and assimilate Westernism. Besides traditionalism and Westernism, Chinese nationalism emerged when Sinocentrism disintegrated and the Western incursion intensified. With the influences from traditionalism, Westernism and Chinese nationalism, distinctly Chinese views of the world, international order and international law emerged. They accepted the fact that the world was multi-state but claimed that the international order was experiencing a "new Spring & Autumn and Warring State period." When China had to struggle for its survival among the great Western powers, it introduced and assimilated Western international legal concepts –"sovereignty" for example – to rethink its relations with other states and build its nationalistic discourse,

[170] Fairbank & Liu, *supra* note 53 at 118.

with a strong strain of traditionalism.

In sum, the conception and evolution of the Chinese value cluster in this chapter offers a starting point to observe and understand the trend of China's attitude towards international adjudication in the following parts. Again, one should be aware that the Chinese value cluster is not static. In the years since the Chinese first participated in international adjudication, the Chinese value cluster continued and reflected the dynamic interaction among traditionalism, Westernism and Chinese nationalism. While the Chinese value cluster would experience change, some areas of continuity remain. The following part will show that, no matter what kinds of governmental system China has had, all governments from the late Qing dynasty to contemporary times have always faced transcivilizaitonal interactions between Chinese and Western civilization and have therefore always made their decisions to respond to a common question: to what extent does China adopt Westernism and traditionalism in its approach to international adjudication?

PART III TREND AND FACTOR ANALYSIS

This part addresses the second and third intellectual tasks recommended by the New Haven approach: the description of trends and an analysis of conditioning factors. Specifically, part III, which contains four chapters, conducts a historical study examining how China from the late 19th century to the present has participated in international adjudication and how China has pursued the Chinese value cluster while interacting with international courts and tribunals. The configurative model of Chinese participation can be revealed using the six New Haven conditioning factors elaborated in chapter 1 – namely, participants, perspectives, arenas, bases of power, strategies and outcomes. With the New Haven language, China's participation in every concrete case can be constructed as a decision-making process in which participants with different or even conflicting perspectives communicate and interact in the domestic or international arenas, striving to achieve or influence their preferred outcomes with the application of various strategies based on their available power and resources. In addition to the New Haven narrative of China's attitude towards international adjudication, this part also locates the Chinese attitude in Sino-Western transcivilizational interaction. By analyzing the dynamic relationship among traditionalism, Westernism and Chinese nationalism in every given period, it seeks to explain how the development of the Chinese value cluster both generates changes and maintains continuities in China's approach to international adjudication.

CHAPTER 3 THE QING DYNASTY'S ATTITUDE TOWARDS INTERNATIONAL ADJUDICATION

Qing China's attitude towards international adjudication mainly revolved around its interaction with the PCA – for the PCA, according to the current research, was the first and only permanent international adjudicatory body in which the Qing government participated.[1] Qing China's connection with the PCA can be traced back to the First Hague Peace Conference, to which the Qing government was invited to discuss the building of a world-wide permanent adjudicatory institution.[2] The First Hague Peace Conference aspired to establish a permanent international court for settling inter-state disputes, but the attempt failed due to the conflicting interests of the attendees.[3] As a compromise, the attendees concluded the *1899 Convention for the Pacific Settlement of International Disputes* (the "1899 Convention") and created the PCA, an international organization providing a variety of dispute resolution services to the international community including *ad hoc* arbitral tribunals to resolve disputes between states.[4] Although it is not an international court in the strict sense, settling international

[1] From 1899 to 1907, Qing China attended the First and Second Hague Peace Conferences and signed the Hague Conventions, including the founding conventions of the PCA. This was the first time that the Qing government participated in international conferences and international organizations. See in Bardo Fassbender et al, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at 716. The PCA was also the only international adjudicatory body in which the Qing government participated, because a few years after its establishment, the Qing dynasty was succeeded by the Republic of China.

[2] Czar Nicholas II of Russia, calling for limitation of armaments, proposed the First Hague Peace Conference in 1899 at The Hague and invited representatives from 27 governments to attend. In 1904, President Theodore Roosevelt, while responding to the wishes of peace movement leaders, suggested a second peace conference take place. The Czar officially called the Second Hague Peace Conference in 1907 and 44 governments attended. See in *ibid* at 60 to 61; Cesare Romano, Karen Alter & Yuval Shany, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014) at 47 to 48; Mark Janis, ed, *International Courts for the Twenty-First Century* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 9 to 10.

[3] Romano, Alter & Shany, *supra* note 2 at 47 to 51.

[4] Fassbender et al, *supra* note 1 at 165; Romano, Alter & Shany, *supra* note 2 at 47 to 50.

disputes through *ad hoc* arbitration services provided by the PCA ("PCA arbitration") represented the dominant international adjudicatory mechanism in the early 20th century.[5]

3.1 Qing China's Acceptance of PCA Jurisdiction

As reflected in the *Proceedings of the Hague Peace Conference 1899*, China's participation in the process of adopting the 1899 Convention was limited.[6] This may derive from two factors. First, given that the Qing government had barely attended international conferences before this event, its officials were inexperienced and their perspectives on international affairs were generally prudential. Most of the time the officials merely "reported the proceedings to the *Zongli Yamen* and waited for the court's instructions".[7] Second, in light of Qing China's relatively low political place in international society, it was almost impossible for China to take an active role in the decision-making processes at The Hague. China's limited involvement in the making of the 1899 Convention in the international arena, however, does not mean that China had no opinions about the PCA. Although silent at The Hague, the Qing officials, participated in a heated debate in the domestic arena concerning China's accession to the 1899 Convention and the acceptance of PCA arbitration as a dispute settlement.

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[5] Romano, Alter & Shany, *supra* note 2 at 49; Janis, *supra* note 2 at 9 to 11.

[6] For example, at the eighth meeting, the Chinese delegate declared that "he can only confine himself, according to his instructions, to having a careful translation made of it (the Hague Conventions), to be sent, with the original text of the Convention, to the Imperial Government with the recommendation to accept it". See in James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts (The Conference of 1899)* (Oxford University Press, 1920) at 213.

[7] Translated by author. ("将会中大概情形迭次电陈总理衙门代奏请旨遵行"), in Ru Yang's Memorial to the Throne in the Grand Council: on the Proceedings at the Hague Peace Conference (1899) , Taibei, Archives of Modern Chinese History (No. 01-28-001-03-005).

3.1.1 Decision-Making Process Concerning China's Accession's to the 1899 Convention

The participants in the domestic debate can be roughly divided into two camps: one is the *Junjichu* (Grand Council, 军机处) which served as the top decision-making body within the government;[8] the other is the *Zongli Yamen*, which, as mentioned before, was the government body in charge of foreign policy in imperial China during the late Qing dynasty. Although both groups were made up of Confucian gentry literati who had remained relatively homogeneous since the establishment of the Qing dynasty, they became significantly diversified by the addition of the Western influences which had swept across China since the mid-19th century. In response to the exigencies of political and economic relations with the West, a new group of officials (most of whom served or were closely connected with the *Zongli Yamen*) was forming within the Confucian gentry literati.[9] Because they were in close contact with the West, these officials willingly adopted Western technologies, institutions and values, and incorporated these, together with their traditional habits, into a hybrid cultural mélange.[10] Due to the rapid expansion of westernization in Qing China after the mid-19th century, these officials gradually came to power – notwithstanding their relatively low formal status in the Qing administrative hierarchy.[11] By the end of the 1890s, the *Zongli Yamen*'s influence

[8] The Grand Council, or *Junjichu* (军机处) in Chinese, was set up in 1729 as the Qing government's top decision-making agency. See in John K Fairbank, *The Cambridge History of China: Volume 10, Late Ch'ing 1800-1911, Part 1* (Cambridge: Cambridge University Press, 1978) at 26.
[9] John K Fairbank & Kwang-Ching Liu, eds, *The Cambridge History of China, Vol. 11: Late Ch'ing, 1800-1911, Part 2* (Cambridge: Cambridge University Press, 1980) at 548 to 549.
[10] *Ibid*.
[11] The members of the *Zongli Yamen* served concurrently in other government agencies. Furthermore, the *Zongli Yamen* was not the sole policy-making body in foreign affairs - a prerogative continued to rest in the hands of the emperor. Masataka Banno, *China and the West, 1858-1861: The Origins of Tsungli Yamen* (Cambridge: Harvard

had gone beyond foreign policy and extended to many Chinese key sectors, such as mining, the navy, steam shipbuilding, railway construction, customs and other matters considered as *yangwu* (foreign matters, 洋务).[12] To some extent, the *Zongli Yamen* officials had become the *de facto* leaders of Qing China's state-building during the late 19th century.

Diversification of the participants was accompanied by a marked decline in their cohesion when deciding China's foreign policy. Confrontations emerged between the *Junjichu* and the *Zongli Yamen* concerning China's accession to the 1899 Convention. The *Junjichu* was reluctant to trust international adjudication. It stated that "it [international adjudication] could be an alternative, peaceful way to settle disputes, but we are afraid that it would probably become a Western conspiracy to hide their use of force in the wars".[13] Apparently, the *Junjichu* viewed international adjudication as a Western conspiracy against China – which was not unreasonable. While contributing to Qing China's state-building, the introduction of Western knowledge, institutions and values—especially the treaties and laws—also served the Western purpose of encroaching on China's territory, exploiting the Chinese people, and demanding more privileges from China.[14] In light of this, the *Junjichu* insisted that international adjudication, like its counterparts, would become a tool for the West to invade China and thus swallow up China.

University Press, 1964) at 223 to 229.

[12] Fairbank, *supra* note 8 at 504.

[13] Translated by author. ("虽系遇事转圜。弭衅息争之一术。惟外国皆联为一气， 控临战时专视彼此交锋之利钝，巧为和解之谋。") See in Grand Council's Reply to Zongli Yamen: On the accession of The Convention for the Pacific Settlement of International Disputes (1899), Taibei, Archives of Modern Chinese History (No. 01-28-001-02-006).

[14] For the details of the unequal treaties and their influences on Chinese society, see in Dong Wang, *China's Unequal Treaties: Narrating National History* (Lanham: Lexington books, 2005) at 9 to 34.

It is also worth noting that the *Junjichu* had a strong base of supporting power in their opposition to China's accession to the 1899 Convention. The traditional Confucian gentry literati returned to power in late 1898, when the conservative faction led by Empress Dowager Cixi (慈禧) abolished the Hundred Days' Reform, imprisoned her nephew emperor, punished officials who promoted the Reform, and took over much of the *Zongli Yamen*'s power and authority.[15] Assuming that the foreigners lacked *li*, and because it was by no means certain whether they would treat China honestly,[16] the opposition to all innovations from the West and the maintenance of Confucianism once again permeated the court[17] and shaped the *Junjichu*'s resistance to the Convention. In this particular case, the *Zongli Yamen* officials, who were once the pioneers of westernization and who retained effective control of Qing China's state-building, had to make compromises: "We acknowledge that when facing with disputes involving Eastern affairs, the European states always conspire together against China. If we are in a dispute, they would take peaceful dispute settlement as a plot to stall us …"[18]

But the *Zongli Yamen* officials did not entirely reject the 1899 Convention; rather, they believed that the Convention was not totally against China. In a memorial to the

[15] In September 1898, Cixi staged a successful coup d'etat which stripped the Emperor Guang Xu (光绪) (the official leader of the Hundred Days' Reform) of his power and made her acting regent. Meanwhile, she dismissed and arrested many literati and officials who took part in the Reform. See in Fairbank & Liu, *supra* note 9 at 328; Lanxin Xiang, *The Origins of the Boxer War: A Multinational Study* (London: Routledge, 2003) at 20 to 21.

[16] Since the Warring State period, Chinese literati and officials held that "if he be not our kin, he is sure to be our enemy that has a different mind" [Translated by author]. "非我族类，其心必异". See in "Duke Cheng Yeat Four" in Bojun Yang, ed, *Zuozhuan (左传)*, reprinted ed (Beijing: Zhonghua Book Company, 2009) at book VIII.

[17] The most alarming sign was Cixi's tension with the West concerning the Hundred Day's Reform. Cixi was particularly irritated by the fact that the West sympathized with the Reform – some powers even aided the reformers. For example Youwei Kang, was able to escape abroad and given political asylum. Influenced by Cixi's hatred of the West, the anti-Western sentiment among the Qing elites resurged. Prince Duan and his two brothers led the newly emerged ultra-conservative faction, with the support of most of the leading officials in the government. See in Xiang, *supra* note 15 at 23 to 24.

[18] Translated by author. ("（欧洲各国）遇东方交涉之事则恐其联为一气协以谋我…彼乃借口公断令他国出为调处，阳居和解之名，阴行牵制之计…".) See in Zongli Yamen: Explanation: the accession of The Convention for the Pacific Settlement of International Disputes (1899), Taibei, Archives of Modern Chinese History (No. 01-28-001-02-007).

throne, they argued that, if China was sued by other states in an arbitration in the future, it was not totally bound by the tribunal since China could invoke the party autonomy provided by Article 16 and 24 of the Convention to control the proceedings.[19] Obviously, the *Zongli Yamen* was actually in favor of China's accession to the Convention. Yet the problem was, how could the *Zongli Yamen* officials, who had been deprived of considerable power and authority after the failure of the Hundred Days' Reform, still maintain their influence over China's foreign policy-making process and convince the conservative decision makers to support China's accession?

To answer this question, it is necessary to first examine the power and resources available to the *Zongli Yamen* in the decision-making process. The most advantageous resource the *Zongli Yamen* had in its confrontation with the conservative *Junjichu* was its expertise on foreign affairs. First, in the *Zongli Yamen* there were many interpreters who could understand the 1899 Convention;[20] second, there were many specialists in foreign relations and international law, such as the Chinese ministers residing in foreign states.[21] Because these officials had linguistic competence, a greater understanding of international treaties, and more experience and insights into Chinese administration, the *Zongli Yamen* were able to put forward cogent reasons for China's accession. Regarding the *Junjichu*'s "Western conspiracy" claim, the *Zongli Yamen* contended that, if the disputants rejected adjudication or if they failed to consent to adjudication, the Convention—according to its articles—would not have the effect of interrupting,

[19] Translated by author. ("操纵之权仍可临时自定机宜，不受公会之牵掣。") See *ibid*.
[20] Fairbank & Liu, *supra* note 9 at 548.
[21] *Ibid* at 548 to 549.

delaying, or hindering the mobilization and preparations for war in the case of an international dispute.[22] Moreover, if China no longer wanted to be bound by the Convention in the future, it could, as Article 61 stipulated, notify the Dutch government and withdraw from the Convention without any punishment.[23]

The *Zongli Yamen* did not employ political or military strategies to attack the conservative *Junjichu*; instead, it took full advantage of its rich experience and diplomatic skill to persuade the throne (who had the final say in the decision-making process) to support China's accession. In its memorial to the throne, the *Zongli Yamen* not only evaluated the benefits and risks China would encounter from the Convention, but also offered the throne detailed reports of the powers who had entered or would enter the Convention: "according to the report from our delegate Ru Yang (杨儒), 16 states have jointed the Convention, and on 15 September Yang said Austria, Italy and America would accept the Convention. We also hear that the Great Britain and Germany intend to send ministers for the Convention…"[24] Emphasizing these states' endorsement of the Convention was an effective strategy of persuasion, for it hit a point: the Qing rulers' fear of the Great Powers.

Since the Opium Wars, China had already faced the Great Powers in a less than equal capacity on multiple occasions, each one resulting in disaster. Unequal treaties, extraterritoriality, and the concession of territory allowed China to recognize the

[22] Translated by author.("祥其文义，所谓公断和解在两国未交锋之先，此时利钝未形，调处之国无所用其阴谋袒助，若相争之国不允调处或即允调处而未订专条，此时并不停止用兵，于战事机宜并无阻碍。") See in note 18.
[23] Translated by author.("而公约最后一条即 61 条又称'业经订议之国，将来如不愿遵从本约，准备文知照荷兰政府声明不愿遵从之意，并由该政府随即通知所有其他缔约国一年后生效'。") See in *ibid.*
[24] Translated by author.("其公断一条据杨儒译稿画押已有十六国，本年九月二十五日又据杨儒电称奥意美三国亦赴和将全款画押，闻英德亦有派员画押之信等语…") See in *ibid.*

dominant force of the Great Powers in international society. Thus the Qing government's policy, especially its foreign policy, was sensitive to the reaction of the Great Powers and the need to adjust Chinese state behavior in order to avoid any future conflict. This reality was recognized and utilized by the *Zongli Yamen*. In the last part of the memorial, the *Zongli Yamen* suggested that "currently our country on the one hand develops military domestically, on the other hand promotes moderate foreign policy…After studying the convention by our best effort, we sincerely hope Your Excellency could follow the majority and grant our petition, or we will be distrusted, or even isolated by other states."[25]

With the skillful manipulation of its power bases and strategies, the *Zongli Yamen* won the debate. On 6 November, Ru Yang, the Chinese delegate at the First Hague Conference, initialed the 1899 Convention on behalf of China.[26] Yet it would be too hasty to declare that this outcome indicated China's wholehearted acceptance of PCA jurisdiction. As will be shown in the following sections, in practice, the Qing government never resorted to or agreed to resort to the PCA for settling disputes with other states, despite being a *de jure* member state.

3.1.2 Suspicion of the PCA and the Periodic Revival of Traditionalism

The split in attitudes within the Qing government between the *Junjichu* and the *Zongli Yamen* towards China's acceptance of the jurisdiction of the PCA demonstrated

[25] Translated by author.(“国家整军经武， 内严戒备，外示怀柔…所有公断一条臣等再三详核，尚无窒碍，拟请旨该大臣届时一并从众画押，以泯猜疑而示辑睦。”）See also in *ibid*.
[26] Xinhua Yin, *The Relation between International Convention and China during the Late Qing Dynasty (晚清中国与国际公约)* (Doctoral Thesis, Hunan Normal University, 2011) [unpublished] at 88 to 89.

that Chinese foreign policy, which had been moving towards westernization since the mid-19th century, had encountered a critical shift. As the result of political changes in 1898, traditionalism was resurgent and beginning to dominate the values that shaped China's policy-making process in both internal and foreign affairs. The periodic revival of traditionalism generated two major approaches to international adjudication within the Qing government.

The first, manifested in the *Junjichu*'s perspective, opposed the government's policy of accommodation with the West and adopted an exclusionary attitude towards the PCA, regarding the PCA as a threat or a potential threat to the Middle Kingdom. This approach attempted to maintain the *tianxia* political order, and its perception of international adjudication was heavily influenced by the traditional Chinese policy towards international dispute settlement. In Chinese history, there was no precedent for settling international dispute through adjudication; rather, war and political means were considered the modes of response to international disputes.[27] Arguably, the *Junjichu* projected their thoughts onto the Westerners', assuming that the idea of international adjudication was merely a "conspiracy" and the Westerners would, like the Chinese themselves, take up arms against foreigners whenever they had international disputes.

[27] As for the settlement of international disputes, ancient China advocated a policy named *Jimi* (Loose Rein, 羈縻). The plain meaning of *Jimi*, according to Chinese ancient texts, is "controlling the foreigners in the manner of driving a carriage." Specifically, the use of force mirrors pulling the reins of horses and bulls, while conciliation, negotiation and appeasement are akin to loosening the reins. From the meaning of *Jimi*, one can find that China's policy towards international dispute settlement includes two strategies: in the case that the strength of the Chinese government is assumed to be insufficient to defeat or deter enemy states, the emperor chooses negotiation, conciliation, bribery or political marriage to settle the disputes peacefully; when the government becomes robust and wealthy, force is to be used to make the enemy yield. In practice, due to changing calculations of powers, the application of two strategies is dynamic, sometimes emphasizing one strategy, sometimes using both. See in Qian Sima, *Shiji* (Records of the Grand Historian) (Beijing: Chung Hwa Book Co., 1982) vol 9 at 3049 to 3050； Gu Ban, *Hanshu* (Book of Han) (Beijing: Zhonghua Book Company, 1962) vol 4 at 1248; see also in Fairbank & Liu, *supra* note 9 at 153.

To conclude, the *Junjichu*'s approach represents an extreme suspicion of the PCA.

The second approach was, in comparison with the first, less conservative but still suspicious of the PCA. The *Zongli Yamen*'s general position was in favor of China's acceptance of the 1899 Convention; though it was nevertheless influenced by the prevailing traditionalism, reflecting a basically passive, defensive attitude towards international adjudication. In many respects the *Zongli Yamen* tried to minimize the impact which international adjudication could have on Qing China. For example, it considered PCA arbitration acceptable because this mode of dispute settlement granted states some degree of procedural autonomy (*e.g.* the selection of arbitrators), which would enable China to maintain enough control over the proceedings so that they would not constitute a danger. The voluntary nature of the PCA's jurisdiction was also a merit in the eyes of the *Zongli Yamen*. Because of the requirement of party consent, even if China became a member of the PCA, it would still retain its right to the use of force in a specific dispute.

Unlike the conservative *Junjichu* that flatly rejected the PCA,[28] the *Zongli Yamen*'s mentality was more nuanced. On the one hand, it shared the *Junjichu*'s fear of Western invasion and doubted the rationale of international adjudication. "The disputes involving Eastern affairs" mentioned in the memorial might refer to the *Zongli Yamen*'s traumatic experience with third-party intervention in the Sino-Japanese dispute on the Liaodong peninsula (辽东半岛).[29] In that dispute, Russia, France and Germany took

[28] Actually, the conservatives indiscriminately opposed almost everything from the West. Perhaps the Western weapons were the only exception as they could be used as a tool to resist further Westerner encroachment. John E Schrecker, *Imperialism and Chinese Nationalism：Germany in Shantung* (Massachusetts: Harvard University Press, 1971) at 45.

[29] The control of the Liaodong peninsula and Korea was the *casus belli* of the First Sino-Japanese War (1894–

advantage of their successful mediation and asked for great concessions from China. Russia demanded Chinese railway construction, Germany sought a naval base in China, and France wanted to lease Guangzhou Bay.[30] Due to this precedent, the Chinese believed that international adjudication and international law, even if they might bring peace to international disputes, would rarely protect China's interests and sovereignty.[31] Thus the *Zongli Yamen*, notwithstanding their thorough research of the provisions, actually rejected the binding force of international adjudication on China. This intention was clear in the *Zongli Yamen*'s highlighting of the right of withdrawal in Article 61as an available last resort for avoiding of international adjudication.

On the other hand, the *Zongli Yamen* did not want to reject the political benefit of being a member of the 1899 Convention, as being a member state was a way to expand China's influence in international politics. Having recognized that China was no longer the Middle Kingdom of the world and had to coexist with other states,[32] some Chinese literati and officials (in particular, those from the *Zongli Yamen*) proposed that China, as an economically and militarily weak state at that time, should actively participate in the international community and work with other states for the sake of survival.[33] Accordingly, a new policy-making spirit—*yiyi zhiyi*—emerged among several Chinese officials.[34] *Yiyi zhiyi* was a strategy inspired by the traditional *hezong lianheng* (Vertical

1895). After the Japanese victory, the peninsula was ceded to Japan, along with Taiwan and Penghu, by the *Treaty of Shimonoseki* of 17 April 1895. See Fairbank & Liu, *supra* note 9 at 106 to 109; *Treaty of Shimonoseki*, Japan and China, 17 April 1895 (entered into force 8 May 1895).

[30] *Ibid* at 109 to 113.

[31] Zhipeng He & Lu Sun, *Chinese Theory of International Law (国际法的中国理论)* (Beijing: Law Press, 2017) at 70.

[32] For instance, Jianzhong Ma (马建忠) in 1878 systemized the *yiyi zhiyi* policy in combination with the Western balance of power theories and suggested that the Chinese government should apply it to its foreign policy. See in Fairbank & Liu, *supra* note 9 at 198.

[33] Schrecker, *supra* note 28 at 44.

[34] Hongzhang Li (李鸿章), who was one of the domineering ministers of the Qing court, was a powerful advocate

and Horizontal Alliances，合纵连横) policy, which encouraged a weak state to ally with some Great Powers in order to resist again the aggression of others.[35] To pave the way for the implementation of *yiyi zhiyi*, China needed to secure its status in the international community and portray itself as a reliable ally. Perhaps this explains why the Qing officials were so anxious about the number of signatory powers and the potential isolation China would encounter if it rejected accession. In other words, the political implications of accession—such as China's improved status in the international community, rather than the actual treaty provisions—acted as the underlying rationale of the *Zongli Yamen*'s position. Xinhua Yin (尹新华) even claimed that China's accession to the 1899 Convention did not illustrate its recognition of the values of international adjudication; rather, it was arguably used as a political expediency against further Western incursions.[36]

3.2 Qing China's Participation in the Building of the PCA

The 1899 Convention was revised during the Second Hague Peace Conference. The *1907 Convention for the Pacific Settlement of International Disputes* was intended to transform the PCA into a compulsory arbitration institution. The Chinese attended the Second Hague Peace Conference, and their participation this time greatly increased over that of their previous visit. A possible explanation for this is that owing to their increased contact with the international community post-1899, the Chinese improved

of the *yiyi zhiyi* policy. In practice, he adopted the policy in the treaty negotiations between the powers in the Sino-French war and the first Sino-Japanese war, trying to keep a delicate balance of foreign influences in China. Since the 1890s the *yiyi zhiyi* was prevalent among Chinese officials. Fairbank & Liu, *supra* note 9 at 197 to 199.

[35] "Strategies of Qin", in Wenyuan Miu, ed, *Zhan Guo Ce* (Strategies of the Warring States, 战国策), reprinted ed (Beijing: Zhonghua Book Company, 2006) at vol 3.

[36] Yin, *supra* note 26 at 99.

their understanding of the international order and international law.[37] Another explanation is that after having their voices largely drowned out and marginalized by the Great Powers in past contact, which aroused their feelings of humiliation and anger, the Chinese desired to make certain concrete efforts to fight for China at the Second Hague Peace Conference.

3.2.1 Decision-Making Process on the Building of the PCA at the Second Hague Peace Conference

The Chinese participants at the Second Hague Peace Conference differed from those who attended the first. On this occasion, a cadre of capable and trained Chinese diplomatic personnel, such as Zhengxiang Lu (陆征祥) who was the Chinese plenipotentiary, attended the Conference.[38] The rise of such professional diplomats in China was owed in part to a dramatic shift in the Qing government's power structure in the years following 1899. In 1901, when the anti-foreign Boxer Rebellion was put down by the Eight-Nation Alliance,[39] the Qing government was forced to sign the Boxer Protocol (also known as the *Xinchou* Treaty, 辛丑条约), which put a stop to the revival of traditionalism helmed by the conservatives.[40] As requested by the Protocol, the

[37] For example, China participated the first congress of the International Institute of Agriculture in 1905 and signed the foundation convention. See *ibid* at 110 to 112.
[38] James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts (the Conference of 1907)* (New York: Oxford University Press, 1921), vol 1 at 5.
[39] The Boxer Rebellion was actually patronized by the Qing government, as the conservatives advocated that the government could take advantage of the Boxers to achieve the expulsion of foreign troops and foreign influences. The Qing government in 1900 formally ordered the provincial officials to organize the Boxers to resist the foreign invasion. Xiang, *supra* note 15; Fairbank & Liu, *supra* note 9 at 118 to 123.
[40] For instance, Article II of the Protocol ordered the execution of high-ranking officials and other officials who were found guilty for the slaughter of foreigners in China. *Settlement of Matters Growing out of the Boxer Uprising (Boxer Protocol)*, was signed by The Qing Empire of China, the United Kingdom, the USA, Japan, Russia, France, Germany, Italy, Austro-Hungary, Belgium, Spain and the Netherlands, 7 September 1901, art 2 (entered into force 7 September 1901).

government upgraded the *Zongli Yamen* to become the Ministry of Foreign Affairs (*Waiwu Bu*, 外务部).[41] Compared to the *Zongli Yamen*, the Ministry of Foreign Affairs enjoyed greater power and authority in controlling foreign affairs – for instance, it ranked above the other six ministries in the government.[42] Moreover, its officials were even more Western than those from the *Zongli Yamen*; most were young diplomats who had studied or worked in the West for considerable periods of time.[43] There they had systematically learnt Western international legal theories and practices – some even receiving degrees in international law from Western universities.[44] Their increased status in the Qing bureaucratic system, along with their Western-educated backgrounds, made it possible for the new Chinese diplomats to introduce substantial Western legal values, ideas and theories into China's foreign policy.

The main significance of these new Chinese participants was that they explicitly advocated the preservation and strengthening of China's national sovereignty through the involvement of international adjudication. Of course, the Qing officials had also attempted to defend the existing government and territory of China when deciding China's accession to the 1899 Convention. Yet what the new Chinese diplomats

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[41] Jennifer M Rudolph, *Negotiated Power in Late Imperial China: the Zongli Yamen and the Politics of Reform* (New York: East Asia Program Cornell University, 2008) at 177.

[42] Article XII of the Boxer Protocol stipulated that "An Imperial Edict of the 24th of July, 1901 (Annex No. 18), reorganized the Office of Foreign Affairs (*Zongli Yamen*), on the lines indicated by the Powers, that is to say, transformed it into a Ministry of Foreign Affairs (*Waiwu Pu*), which takes precedence over the six other Ministries of State", see in Settlement of Matters Growing out of the Boxer Uprising (Boxer Protocol), *supra* note 40.

[43] Since the 1860s, the Qing government sent students to Britain, France, and Germany. In the early 20th century the United State used the reparations it received from China through the Boxer Protocol to fund Chinese students to study in the U.S universities. In the meantime, Japan became a popular destination for Chinese students. By the early 20th century, the number of Chinese students in Japan had reached almost 10,000. Most overseas students later became talented elites who made noteworthy contributions to China's social advancement and economic development. Fassbender et al, *supra* note 1 at 471 to 472.

[44] For example, Jianzhong Ma, who obtained a diploma in law (*licence de droit*) from *École Libre des Sciences Politiques*, later became Hongzhang Li's secretariat in 1880 and his legal knowledge became a useful asset to Li's foreign policy making. See in Shucun Jia, "Li Hongzhang and the Ma Brothers(李鸿章与马建忠弟兄）" (1997) 3 Qing Hist J.

espoused was broader and more radical, including a rejection of any assumptions or practices associated with the violation or humiliation of China's sovereignty in international affairs.[45] This perspective is, in a crucial respect, qualitatively different from that of both the *Zongli Yamen* officials and the conservatives, for it demonstrates a desire to actively voice opinions in the decision-making processes in the international arena.

A prominent example is China's veto of the British proposal concerning the jurisdiction of the new PCA. The attendees of the First Hague Peace Conference had planned to create a permanent international court for settling inter-state disputes, but that effort failed. In 1907 states again gathered at The Hague to modify the 1899 Convention and, in particular, to develop the PCA into a permanent court.[46] The call for a permanent court had wide support among the delegations but floundered on some specific issues, such as the scope of compulsory jurisdiction of the new PCA.[47] Great Britain proposed that the obligatory arbitration "cannot be invoked in any case where the interpretation or application of extraterritorial rights is involved".[48] This proposal was strongly opposed by China. In a declaration dated 5 October 1907, Zhengxiang Lu, the Chinese delegate at the Conference, invoked the fundamental principles of international adjudication and called for a veto of the British proposal:

> We believe it our duty to state before the high assembly that the article in question is in full contradiction with the opinion of the champions of arbitration. The goal towards which all our efforts are tending, the efforts both of the committee and of the Commission, is to widen as much as possible the classes of differences that might be submitted for arbitration; a restriction of these

[45] Schrecker, *supra* note 28 at 47.
[46] Romano, Alter & Shany, *supra* note 2 at 51 to 52.
[47] *Ibid*.
[48] Scott, *supra* note 38 vol 2 at 1008.

> classes would be a grave denial of the so noble and so elevated purpose of extending the empire of law and of fortifying the sentiment of international Justice…We could not but vigorously protest against this clause, and, until it is removed: we could not but vote against this project containing a clause contrary to equity and to justice, which are the fundamental elements of arbitration itself. [49]

After the close of the meeting, the British participants sought to clarify that their proposal was intended to maintain the *status quo* of exercising extraterritorial rights and friendly inter-state relations, for extraterritoriality "forms a part of the sovereign rights of the States possessing them."[50] In their eyes, opposition was an "absurdity" and "unreasonable", because extraterritoriality was among "matters of comparatively trifling importance".[51] But the British clarification seemed to irritate other Asian participants. The Siamese (Thailand) delegation felt that they "shall be obliged to make reservations regarding Article 16*l*, of the British project, dealing with the interpretation or the application of extraterritorial rights"[52] and the Persian (Iran) delegation even described the British proposal as "a deliberate box on the ear administered by Great Britain to the Oriental States".[53]

Why did the Asian states oppose the exclusion of extraterritoriality from the compulsory jurisdiction of the new PCA? Extraterritoriality in the British proposal included "extraterritorial consular jurisdiction" (*lingshi caipan quan*, 领事裁判权), a special extraterritorial right denoting the exemption, partial or complete, of non-diplomatic personnel from the territorial laws of another state or normative culture, and

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[49] *Ibid* at 83 to 84.
[50] *Ibid*. at 115 to116.
[51] *Ibid*.
[52] *Ibid* at 85.
[53] G P Gooch and Harold Temperley, *British Documents on the Origins of the War: 1898-1914* (London: His Majesty's Stationery Office, 1932) vol 18 at 289 to 290.

the application in disputes of a foreign or mixed character of the laws of their country of origin by their consular representatives.[54] Through many treaties, the extraterritorial consular jurisdiction was quite frequently available to ordinary Western citizens residing in Asian states such as China in the 19th century.[55] The establishment of consular jurisdiction was based on the perceived need to protect Western interests in Asian states, for the West was suspicious of local legal systems.[56] What made the West distrust Asian laws was the so-called clash of civilizations. G.W. Keeton argued that "[t]wo civilisations, fundamentally different – even directly opposed – in every important characteristic, have found it necessary to regulate their intercourse by a system of extraterritoriality" and this system would be abolished only if Asia accepted and met Western standards.[57] But Asian nations hated consular jurisdiction. First, implicit in the rationale for this extraterritorial right was a form of discrimination, which supposed the superiority of Western legal institutions above that of other civilizations.[58] Second, consular jurisdiction essentially constituted an abuse of extraterritoriality and was thought to substantially challenge state's territorial sovereignty.[59] Every

[54] There is a fundamental difference between the "extraterritorial consular jurisdiction" and "extraterritoriality" in common sense: the foreign nationals who enjoyed the "extraterritorial consular jurisdiction" were not official state representatives but rather ordinary citizens, and their infraction or offences were assigned to the adjudication of a judge-consul. Mariya Tait Slys, *Exporting Legality: The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China* (Geneva: Graduate Institute Publications, 2014) at chap 1 <https://books.openedition.org/iheid/800>.

[55] For example, in the Treaty of Wangxia（望厦）signed between China and the United States, "citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the Consul, or other public functionary of the United States, thereto authorized according to the laws of the United States." See in Wang, *supra* note 14 at 10 to 11. Not only in China, but many other Asian states, such as Siam, Korea and Japan, were forced to grant such forms of extraterritoriality to the Westerners. See in Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-century China and Japan* (New York: Oxford University Press, 2012) at 15.

[56] John C H Wu, "The Problem of Extraterritoriality in China" (1930) 24 Proc Am Soc Int Law Its Annu Meet 1921-1969 182 at 182 to 183.

[57] G W Keeton, *The Development of Extraterritoriality in China: Vol 1* (New York: Longmans, 1928) at 2.

[58] Wu, *supra* note 56 at 183 to 185.

[59] Wu, *supra* note 56; Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline* (New York: Columbia University Press).

independent and sovereign State (with few exceptions) is supposed to possess absolute and exclusive jurisdiction over all persons and things within its own territorial limits, and this jurisdiction is not qualified by differences in nationality, and extends to the persons and property of local subjects and foreigners alike.[60] Since the late 19th century, many Asian states (China included) had sought to modify or abolish consular jurisdiction in order to protect their national sovereignty and territorial integrity.[61] As such, Chinese sensitivity to the British proposal come to light. In a letter to the Ministry of Foreign Affairs, Lu believed that the British, through restricting the jurisdiction of the new PCA, were conspiring to prevent China from fighting for its independence and abolishing extraterritoriality through future PCA arbitration.[62]

Because of their shared experience with consular jurisdiction and the common goal of abolishing this form of extraterritoriality in the future, China's petition to veto the British proposal seemed to gain wide support among the Asian states. Thus, there emerged an interesting development in power dynamics among the participants at the Conference. Despite its relative low position in the international community and weak national power, China—according to New Haven terminology—had more power bases than Great Britain had. Aware of this, China decided to ally itself with even more participants. In his speech at the seventh meeting, Lu asked all attendees to boycott the British proposal, arguing that it did not represent the general interest of the entire

[60] Sir Robert Phillimore, *Commentaries upon International Law: Vol.1*, 3d ed (London: T. & J. W. Johnson, 1879) at 443.
[61] Cassel, *supra* note 55 at 149 to 179.
[62] Translated by author. ("英政府亦虑及东方交涉未结各案，将遵新章径交公断，彼反无词可拒也。") See in The Ministry of Foreign Affairs Received the letter From Lu Zhengxiang: Revising the Convention for the Pacific Settlement of International Disputes (外务部收保和会专使陆征祥函：保和会公断约事) (1907), Taibei, Archives of Modern Chinese History (No. 02-12-003-03-001).

international society:

> As Article 16*l* (the British Proposal) refers to a certain number of Powers, and since the representatives of these Powers have all protested, I come, therefore, in the name of my colleagues and in the name of the Government which I have the honor to represent here, to ask of the Commission to perform before this altar of the God of Right and of Justice, so eloquently exalted by our very honorable colleague, his Excellency Mr. Martens, an act of international equity and justice, by eliminating this article which, according to our point of view, contains a striking inequality. I also address myself to the spirit of conciliation and understanding of the honorable authors of the proposition, and especially to the sentiments of equity and justice which animate, I feel convinced of it, the honorable Dean of the jurists here present, to ask of them to perform an act of renunciation which will be an act of justice and for which public opinion will be grateful to them. In consequence, I propose to the Commission the suppression, pure and simple, of Article 16*l* which, in our judgment, does not present a general interest for all the States here represented, and which would be out of place in the Convention that we are now discussing and that we desire to make a world convention.[63]

Lu's diplomatic strategy was effective as even some Western participants, such as the United States, Russia, and Germany, endorsed China's opinion and joined in the boycott. Despite their apparent agreement with Lu's passionate call for international justice and equity, the actual reasons for the Western participants' endorsement were more complicated and their positions had much to do with the new Western power structure in China. With the growing independence of certain Asian countries, British domination of Asia since the late 19th century had gradually declined and the rising assertiveness of other powers in the pursuit of their interests in Asia further challenged the previously undisputed British leadership.[64] This was recognized by Britain itself in its reflection on the failure of the Second Hague Peace Conference, where it asserted that other powers' endorsement of China's veto was actually aimed at advancing their

[63] Scott, *supra* note 38 vol 1 at 115.
[64] In the decades after 1870, British influence in China was undermined by the U.S. "Open Door Policy" in Manchuria, by Russian acts in Xinjiang and by French penetration in Southwestern China. See in Fairbank & Liu, *supra* note 9 at 71.

own interests in Asia.[65]

As a result, the British proposal was vetoed by thirty-six votes against two (France stood alone with Great Britain) and there were five abstentions (Greece, Japan, Portugal, Sweden and Switzerland).[66] This outcome was interpreted by the Chinese as "an Asian victory over Europe" and a prelude to the improvement of China's power position in the international community:

> Without a strong national strength, our position in the international society has gone down considerably…under this circumstance, Mr. Lu fought against the Great Powers at the Second Hague Peace Conference and successfully protected our judicial sovereignty. What a great achievement! Previously we have seen so much loss of territory, derogation of sovereignty and failure of diplomacy, and some even thus concluded that a "weak nation is always excluded to enjoy preferential diplomacy". Should all Chinese diplomats act as Mr. Lu, how could our country have been bullied for so long? [67]

It appears that the successful participation in the discussion of the PCA at the Second Hague Peace Conference had set a good precedent for China's future engagement in international adjudication. In the aftermath of the Second Hague Peace Conference, the Qing government began to dispatch Chinese arbitrators to the PCA. Moreover, the government included PCA arbitration in the conventions it signed with the United States and Brazil, specifying that the PCA was a forum for settling disputes arising from the interpretation or application of the treaties.[68] Research on international adjudication flourished as well. A wide range of relevant articles—such as the study of arbitration cases and discussions as how to apply international adjudication in practice—were

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[65] Gooch & Temperley, *supra* note 53 at 290.
[66] Scott, *supra* note 38 vol1 at 534.
[67] Translated by author. Cited in Yin, *supra* note 26 at 144.
[68] *Arbitration Convention between U.S and China*, the United States and China, 8 October 1908, art 1; *Arbitration Convention between Brazil and China*, Brazil and China, 3 August 1908. See the legal text in Tieya Wang, *Collection of Old Treaties between China and other Countries (中外旧约章汇编)* (Beijing: Sanlian Press, 1957).

published in Chinese newspapers and academic periodicals.[69]

3.2.2 Changes in China's Attitude: A New Wave of Westernization and Developing Chinese Nationalism

China's attitude towards the PCA at the Second Hague Peace Conference was a sharp departure from the first. Prior to the conference, China's attitude was shaped by traditionalism which aimed to control Western influences and preserve the Confucian system. But now, the Chinese had begun to adopt Westernism (especially Western theories of international law) as the main perspective from which to address issues related to international adjudication. Zhengxiang Lu speech's at the conference was as skillfully done as any Western diplomat and infused with Western legal logic and principles, notably with his reference to "the opinion of the champions of arbitration", "the God of Right and of Justice" and "international equity and justice". As the older international *li* and Confucian discourse disappeared from their rhetoric, the Chinese began taking advantage of Western international law to serve their needs and restrain the encroaching hegemony of economically and militarily stronger states. For instance, to oppose the British proposal, Lu adopted Western parliamentary practices, bringing a motion against Article 16*l* at the Second Hague Peace Conference. His reasons for the motion, such as his assertion that the Article was "contrary to equity and to justice" and "does not present a general interest for all the States here represented", complied with

[69] During 1908 to 1909, Chinese newspapers, such as *Diplomat Review*, *Journal of the East*（东方杂志）and *Datong*（大同报）published a large number of articles on international adjudication, ranging from general theory to concrete case studies. See also in Yin, *supra* note 26 at 158 to 161.

the Western pursuit of equality and democracy.

Another example of the westernization of China's attitude was the emphasis on China's national sovereignty. The notion of "sovereignty" had been known to the Chinese from the 1860s onward, but it was often reinterpreted in terms of China's traditional *dayitong* context. The term "sovereignty" in the early 20th century had new connotations, including a stress on the absolute autonomy of China, and the idea that China's status should be in no way inferior to that of any other state in the international community. Lu's declaration at the Second Hague Peace Conference, which opposed the British proposal because of its violation of international justice and equity, revealed this perceptional change. Consciousness of the need to defending China's sovereign independence and equity can be further observed in the *Diplomatic Review*'s remarks on Lu's success at The Hague, where the Chinese mourned their country's previous loss of sovereign rights and hailed Lu as a hero who had successfully protected Chinese judicial sovereignty from being further infringed upon.[70]

This new Chinese understanding of sovereignty can be attributed to the development of Chinese nationalism in the early 20th century. As mentioned in the previous chapter, Chinese nationalism at its inception was brimming with traditionalism. The responsibility of defending China was rooted in the maintenance of the monarchic regime and the envisioned achievement of *dayitong* in the future. The new wave of westernization (in particular, the introduction of Western social and political thoughts), provided momentum for Chinese nationalism to depart from the traditional *dayitong*

[70] *Ibid* at 144.

worldview.[71]

Beginning in the early 20th century, intellectuals such as Qichao Liang borrowed ideas from Social Darwinism and challenged the longstanding *dayitong* worldview. Liang doubted that the world was under the sway of a single and dominant emperor; rather, he perceived the world as an entity composed of a great numbers of races and nations which throughout the course of human history had continuously engaged in struggles for survival.[72] Unlike his Confucian counterparts who imagined the destiny of the world would be a *dayitong* achieved by China, Liang held that the world would be dominated by Western civilization.[73] The advantage of Western civilization, according to Liang, lay in nationalism. In his opinion, nationalism limited the boundaries of a nation, provided people with a sense of belonging, made them realize they had a stake in their nation's existence and growth, and assembled the collective strength of a nation for its development in the world.[74] In contrast, the traditional *dayitong*, which—in the eyes of Liang—merely advocated a non-existent harmony and stressed personal loyalty to the emperor, could not meet the practical needs and could even be a hindrance to the development of a state.[75] To develop China, Liang encouraged the Chinese to abandon *dayitong* and put their "ultimate focus of loyalty" on a nation-state ruled by themselves rather than the emperor.[76] Liang's thoughts received considerable supports from many late Qing thinkers and revolutionaries – in

[71] Hao Chang, *Liang Ch'i-ch'ao and Intellectual Transition in China, 1890-1907* (Cambridge: Harvard University Press, 1971) at 156 to 167.
[72] Qichao Liang, *New Citizen (新民说)* (Taibei: Taiwan Zhonghua Press, 1959), chap 4.
[73] *Ibid*.
[74] *Ibid*, ch 6.
[75] Chang, *supra* note 71 at 157.
[76] *Ibid* at 156 to 157.

particular, Sun Yat-sen (Sun Zhongshan, 孙中山) who sought the overthrow of the Qing dynasty and the building of an independent and democratic nation–state.[77] Under their influence, the Chinese nationalistic discourse in the early 20th century underwent two major changes. First, it narrowed the scope of *dayitong*. The Chinese were requested to devote themselves to the "Great Unity" of China instead of the "Great Unity" of *tianxia*. Second, Chinese "loyalty" had a new focus. No longer did loyalty point to the maintenance of the existing rulership or the *tianxia* order; rather, as observed in Lu's arguments on the extraterritoriality issue, it could refer to a defense of all rights which occurred in China as a fully sovereign nation in the Western sense.

Devotion to the Chinese nation was at first simply a theoretical discourse, one limited to a small number of intellectuals and elites. However, it was soon shared by Chinese who worked or studied abroad.[78] Even though these Chinese were significantly westernized, their overseas experience and their daily contacts with other nationals, allowed them to identify themselves as members of the Chinese nation. Knowledge of Western international law also played an indispensable role in systemizing and theorizing Chinese nationalism. Zunsan Huang (黄尊三), who studied in Japan from 1905 to 1912, wrote in his diary that he learnt the concepts of State, national territory and territorial integrity through studying international law.[79] The foreign invasion of China further strengthened the Chinese consciousness of the need to defend their nation. On being told of the Russo–Japanese War over rival imperial

[77] Dahua Zheng, "On modern Chinese Nationalism and its Conceptualization" (2012) 6:2 J Mod Chin Hist 217 at 222.
[78] Fairbank & Liu, *supra* note 9 at 353 to 361; Fassbender et al, *supra* note 1 at 471 to 472.
[79] Zunsan Huang, *Thirty-Year Diary (三十年日记)* (Changsha: Hunan Yinshuguan, 1933) vol 1 at 317, cited in Fassbender et al, *supra* note 1 at 472.

ambitions in Manchuria (Northeast China),[80] Zhengxiang Lu, who then worked in Russia, had his queue cut off to remind himself of China's weakness and failure.[81]

When these self-conscious Chinese returned to their homeland and occupied positions in the Qing government, becoming participants in decision-making processes in the international arena, Chinese nationalism rapidly developed into a political force and was further transformed into efforts to defend China's sovereign rights in international affairs.[82] Arguably, the Chinese participants at the Second Hague Peace Conference articulated little concerning the Chinese philosophy of international adjudication; rather, their focus was squarely on China's international status and the treatment it received from other nations. From the Chinese point of view, international adjudication (and international law) was not only a mechanism for settling disputes but also a new tool to help China shake off the yoke of foreign domination and win China a respected place in the international family of nations.

3.3 Qing China's Attitude towards PCA Arbitration in Territorial Disputes

Despite the change in attitude embodied by the new generation of officials, Qing China's policy shift towards international adjudication should not be overestimated. Although it had accepted the jurisdiction of the PCA in principle and even included

[80] The Russo‐Japanese War (1904–05) was fought between the Russian Empire and the Empire of Japan over their competing claims to Manchuria and Korea. The major theatres of operations were the Liaodong Peninsula and Mukden in Southern Manchuria and the seas around Korea, Japan and the Yellow Sea. Richard Connaughton, *The War of the Rising Sun and Tumbling Bear: A Military History of the Russo-Japanese War, 1904-5* (London: Routledge, 1991).

[81] Yuxia Han, "Lu Zhengxiang" (1990) 2 Nankai Historical Studies 166 at 169.

[82] Schrecker, *supra* note 28 at 48.

arbitration clauses in its treaties, prior consent to international adjudication when acceding to an international treaty is different from its actual application in practice. Even if China had promised to apply PCA arbitration in theory, it could bypass the PCA through settling a dispute out of court. Hence, this section will examine the decision-making processes in practice and focus on whether Qing China effectively resorted to the PCA for settling its dispute with other states, with particular attention paid to the decision-making processes in two Chinese territorial disputes: the Sino-Japanese *Jiandao* (Gando, 间岛) dispute and the Sino-Portuguese Macau dispute.

3.3.1 The Sino-Japanese *Jiandao* (Gando, 间岛) Dispute

Jiandao (also known in Korea as Gando) is a region in Manchuria where the boundaries of China, Russia and Korea meet. Since the 1900s, expanding Japanese forces, with the goal to annex Manchuria and conquer China, had infiltrated the rather porous border between Korea and China, arguing that the ownership of *Jiandao* was "unsettled" because the majority of the population was ethnically Korean who should be placed under the jurisdiction of the Japanese Empire,[83] which was the effective overlord of Korea at that time.[84] In 1907, Japan forced Korea to invade *Jiandao* and to declare ownership, which resulted in the Qing government issuing a 13-point refutation

[83] Erik W Esselstrom, "Rethinking the Colonial Conquest of Manchuria: The Japanese Consular Police in Jiandao, 1909–1937" (2005) 39:1 Mod Asian Stud 39 at 42 to 43; Huazi Li, "An Analysis of Negotiations on 'Gando Issue'and the Five Cases of Northeast China between China and Japan" (2016) 5 Collect Pap Hist Stud 49 at 50 to 53.

[84] Japanese rule over Korea began with the Japan–Korea Treaty of 1905, in which the then-Korean Empire was declared a protectorate of Japan. The annexation of Korea by Japan was completed in the Japan–Korea Treaty of 1910. Japanese occupation of Korea ended in 1945, when U.S. and Soviet forces captured the peninsula. See in Peter Duus, *The Abacus and the Sword: The Japanese Penetration of Korea, 1895-1910 (Twentieth Century Japan: The Emergence of a World Power)* (Los Angeles: University of California Press, 1998) at 18 to 24.

asserting its claim to *Jiandao*.[85] A year later, the Japanese embassy to China sent a note to the Qing government on the negotiation of their conflicting territorial claims over *Jiandao*.[86]

From its inception, the *Jiandao* negotiation attracted considerable attention. Not only did the Chinese and Japanese negotiators participate in the decision-making process, but others became involved and tried to shape the outcome in their favor. For instance, prior to the negotiation, Chinese intellectuals had voiced their perspectives on the settlement of the *Jiandao* dispute. In his influential book entitled *The Jiandao Issue*, Jiaoren Song (宋教仁) proposed that, instead of the use of force, China could submit the *Jiandao* dispute for arbitration to the PCA.[87] Song was not a direct participant, but his suggestion profoundly shaped the perspective of the Chinese negotiators. In a meeting on 18 March 1909, Rulin Cao (曹汝霖), who participated in the negotiation on behalf of the Qing government, proposed the possibility of PCA arbitration. "We have conducted several rounds of negotiations without any substantial progress…for maintaining our two countries' long-standing friendship, what if we submit the dispute for arbitration…"[88] But the Japanese side did not agree with the proposal and insisted that the matter should be resolved through bilateral negotiations: "I think arbitration is an inappropriate way to settle our dispute. Resorting to the West for addressing our Asian affairs, I have to say, will generate Tokyo's suspicions of China's sincerity, which, in my opinion, may aggravate the situation".[89]

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[85] Li, *supra* note 83 at 57 to 58.
[86] *Ibid* at 54; Yin, *supra* note 26 at 177.
[87] Xulu Chen, ed, *Selected Works of Song Jiaoren* (Beijing: Zhonghua Press, 1981) at 134.
[88] Yin, *supra* note 26 at 181.
[89] Translated by author. See in Yanwei Wang & Liang Wang, *Historical Materials of the Qing Dynasty's*

The two participants' conflicting attitudes towards PCA arbitration had its basis on the imbalance of power bases in the bilateral negotiation. Since the Meiji Restoration, Japan (which used to be a tributary state under Chinese annexation) had successful modernized its political and social structure and emerged as a rising power. During the First Sino-Japanese War,[90] Japan unprecedentedly defeated China and established itself as Asia's dominant power and for the first time in history, its influence in Asia overtook China's. Thus, China, whose power position in the negotiation was relatively low, was more inclined to initiate international adjudication as a means to protect its interests against its stronger counterpart. Conversely, the more powerful Japan refrained from bringing the *Jiandao* dispute to the PCA for fear of a possible loss of its upper hand in the negotiations. If the dispute was adjudicated by the PCA, Japan's retaliatory power against China might become subject to arbitral award.

To alter the power imbalance, China implemented the *yiyi zhiyi* strategy. As mentioned before, the *yiyi zhiyi* strategy sought to ally China with one or more Great Powers to increase China's power and to play Great Powers off against each other in order to reduce their own power. In this case, China decided to alienate Japan from its British partners. Dunyan Liang (梁敦彦), the Chinese chief negotiator, secretly contacted G.E. Morrison, one of *The Times* correspondents in China. Their communication was recorded by Morrison in his diary: "Liang Dunyan was much

Diplomacy (Beijing: Wenxian Press, 1987) vol 4 at 3368 to 3398.

[90] The First Sino-Japanese War (1 August 1894 – 17 April 1895) was a conflict between the Qing Empire and the Empire of Japan primarily over their influence of Korea. After more than six months of unbroken successes by Japanese land and naval forces and the loss of the port of *Weihaiwei*(威海卫), the Qing government sued for peace in February 1895 and sighed the Treaty of Shimonosek in April 1895. See details in Fairbank & Liu, *supra* note 9 at 107 to 108.

concerned about the Japanese negotiation…their demands are worse than before…I strongly urged him not to agree it".[91] We do not know precisely how Liang described the Japanese demands, but they must have been grave enough to convince the British that Japanese aggressiveness posed a direct threat to the British interests in China. On 24 March 1909, Morrison published the details of the ongoing Sino-Japanese negotiation, including Japan's rejection of PCA arbitration, in *The Times*.[92]

The addition of British participants complicated the decision-making process of settling the *Jiandao* dispute. In the report in *The Times*, China was portrayed as a goodwill country that sought peaceful dispute settlement, while Japan was portrayed as a potential violator of international law. Furthermore, Morrison was outspoken in his support for China's call for PCA arbitration: "I believe every independent observer in Beijing will stand on China's side…it is important that China should submit this and other Manchurian questions to the Hague tribunal, and it is difficult to imagine how Japan can decline the proposal."[93] Because of this report, the British government began to feel threatened by the Japanese expansion into *Jiandao*. T. Kato, the Japanese ambassador to Britain, observed that "the Anglo-Japanese Alliance is gradually losing popularity."[94] Soon he was warned by the British Foreign Office that: "as the Sino-Japanese negotiation…has not yet reached a settlement, regrettably some British feel that Japan is arresting the development of Manchuria."[95]

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[91] Eiko Woodhouse, *The Chinese Hsinhai Revolution: GE Morrison and Anglo-Japanese Relations, 1897-1920* (London: Routledge, 2004) at 24.
[92] G.E. Morrison, "Japan and Manchuria (Chinese Proposal for Arbitration)", *The Times* (24 March 24 1909), cited in Li, *supra* note 83 at 58; Yin, *supra* note 26 at 182.
[93] *Ibid.*
[94] Woodhouse, *supra* note 91 at 25.
[95] *Ibid* at 26.

The *yiyi zhiyi* strategy effectively altered the power dynamics between China and Japan during the negotiation. With British support, China's demand for PCA arbitration gained momentum. It repeatedly claimed that "we truly believe that the best means of appeasing the public resentment is to solve the dispute peacefully and openly. It will be greatly appreciated if you accept arbitration"[96] and "for settling the dispute, we have offered a certain extent of concessions. If you still stand on your ground, we will have to resort to Hague arbitration."[97]

Faced with the dual pressure from Great Britain and China, Japan adjusted its hardline attitude. It abandoned the territorial claim over *Jiandao* and agreed to conclude the *Treaty Relating to Boundary Questions on Tumen River between China and Korea* (namely the *Jiandao* Convention) with China on September 4, 1909. According to the Convention, Japan recognized *Jiandao* as Chinese territory and withdrew its forces from there back into Korea within two months of the date of the agreement.[98] This outcome, however, does not illustrate China's entire success in defending its sovereign rights. While Japan eventually yielded, China also lost considerable interests. In exchange for the Japanese compromise, China offered Japan exclusive rights to build the Manchurian railroad, which was regarded as the economic artery of Northeast China.[99]

[96] Wang & Wang, *supra* note 89 at 3339.
[97] *Ibid* at 3400.
[98] *Treaty Relating to Boundary Questions on Tumen River between China and Korea*, China and Japan, 4 September 1909, arts 7.
[99] *Ibid* arts 6.

3.3.2 The Sino-Portuguese Macau Demarcation Dispute

Simultaneously with the *Jiandao* dispute, China faced other territorial trouble in Macau. The Macau dispute dated back to 1887 when China ceded the right of "perpetual occupation and government of Macau" to Portugal under the Sino-Portuguese Treaty of Peking.[100] Due to the Treaty's ambiguous demarcation of Macau's border, Portugal continually expanded its occupation. The delimitation issue was brought to prominence after the occurrence of the "No. 2 Shinmaru" incident,[101] where the two countries disputed the ownership of territorial waters around Macau. When Qing China initiated its negotiation with Portugal, it found the two sides had conflicting perspectives on the interpretation of the right of "perpetual occupation and governance". The Portuguese regarded the right of "perpetual occupation and governance" as ownership of Macau, but China asserted that the right only referred to permission to use the land of Macau.[102] As both countries refused to compromise, the decision-making process concerning the Macau demarcation reached an impasse.

In an attempt to break the deadlock, Joaquim Jose Machado, the Portuguese who participated in the negotiation, suggested to settle the dispute by recourse to PCA arbitration. Machado's suggestion was favored by some Chinese participants. Shixun Liu (刘式训), the Chinese Minister to Portugal, considered that the disagreement over

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[100] *Sino-Portuguese Treaty of Peking*, the Kingdom of Portugal and China, 1 December 1887.

[101] In 1908, a Japanese vessel, the No. 2 Shinmaru, was arrested by a Chinese customs ship near Coloane Island for investigating smuggling. The Macau government demanded that the vessel should be handed over, saying that the arrest occurred in its waters; China refused on the ground that the area where the "No. 2 Shinmaru" had anchored was within Chinese territorial waters where loading and unloading goods had to require permission from the Chinese Customs. The two sides therefore had a long-running disagreement over the demarcation of Macau's territorial waters. See in Yin, *supra* note 26 at 186.

[102] *Ibid* at 186 to 189.

the demarcation of Macau was grounded on the utility and ownership of territory, which should be a subject matter of international public law.[103] Erqian Gao (高而谦), the Chinese chief negotiator, disagreed with Liu. He doubted the impartiality of the PCA: "the Westerners have a long-term racial discrimination against Chinese ethnics on the assumption that China is an uncivilized state."[104] Gao favored the bilateral negotiation: "if the Macau dispute was submitted to the PCA for arbitration, the Western powers that controlled the PCA would be partial towards the Portuguese. But if the dispute is settled through negotiation, there is still a hope of winning half of the game."[105]

The power disparity between China and Portugal in the decision-making process forced Gao to change his mind. In the aftermath of the "No. 2 Shinmaru" incident, Great Britain sided with the Portuguese, blaming China for "making an argument without reason as Portugal had indisputable sovereignty over Macau and its surrounding waters."[106] Because of the Anglo-Portuguese alliance, Gao saw that China's power bases, relative to that of its counterpart, had become low. He then corresponded with the Ministry of Foreign Affairs about the possibility of accepting the Portuguese proposal. "After rounds of failed negotiations, perhaps we can try to submit the dispute to the Hague Tribunal. Although international law is a Western product, its spirit of maintaining peace has long been agreed and respected by all states. If we turn the Portuguese suggestion down, our international reputation would nosedive."[107] Gao's

[103] The First Historical Archives of China, Macau Foundation & The Historical Material Study Institute of Jinan University, *Collection of Macau Archives During Ming & Qing Dynasty (明清时期澳门问题档案文献汇编) Vol 4* (Beijing: People Press, 1999) at 202.
[104] *Ibid* at 301.
[105] *Ibid* at 301 to 302.
[106] *Ibid* at 449.
[107] *Ibid* at 302, 306 to 307.

correspondence revealed his worries about British participation in the process and the negative outcome this participation could bring to China's position in international society. He stated that "admittedly, adjudication is the last and worst resort…If we refuse, other powers like Britain will engage in, and this will deteriorate not only the negotiations but also our friendship with the West."[108]

Gao's concerns were plausible, but they neglected another important participant in the negotiation process – the Chinese public. The Chinese public had shown great concerns about the Macau dispute since its inception. To consolidate and develop power in the dispute, Cantonese people from all walks of life voluntarily established the Guangdong General Association Backing Border Survey and Delimitation ("Guangdong General Association").[109] Through a series of activities (such as public demonstrations), this association was profoundly engaged in the negotiation, making the negotiation known to the whole country and exerting considerable efforts to back the government.[110] Hearing that Gao proposed PCA arbitration, the Guangdong General Association presented him with a petition:

> …The people who are leading PCA arbitration are always the white. Obviously their relations with the Portuguese is closer than that with the Chinese. If we submit the demarcation of Macau to the PCA for adjudication, the bias against the Chinese would permeate the proceedings. Moreover, with the influences from the newspapers and public opinion, the arbitrators must interpret the rules to suit their prejudice, create evidence to support their interpretation and do whatever they can to help the Portuguese. If we reject the decision, then we would displease many powers; but if we accept the decision, then we would suffer from the shame of losing territory…In the Macau dispute, even though the result is uncertain, the power distribution between China and Portugal is clear: Portugal is more powerful than China. If we submit the dispute to The Hague,

[108] *Ibid* at 366.
[109] Yin, *supra* note 26 at 196 to 197.
[110] "Perpetual Occupation and Government of Macao", online: *Fund Macau* <http://www.macaudata.com/macaubook/ebook007/html/01001.htm>.

> the snobbish Westerners must side with the powerful Portugal and bully us…every time when the Westerners attempt to earn interests from China, they always conspire together... if the dispute is submitted for PCA arbitration, the arbitrators, considering their shared interest with Portugal in China, would decide to favor Portugal...[111]

Faced with public opinion and foreign pressures, Gao attempted to craft a compromise strategy acceptable to both sides. "We can pick out the less disputable territories for negotiation, and then take the others for arbitration."[112] But this strategy was disapproved by the Ministry of Foreign Affairs: "the public will never allow us to do so. Arbitration is impossible."[113] Talks with Portugal broke down when Gao conveyed China's rejection of arbitration on 13 November 1909, leaving the Macau demarcation unsettled until the signature of the Sino-Portuguese Joint Declaration in 1987.[114]

Gao's failure can be chalked up to his underestimation of the power base held by the Chinese public in the decision-making process and their influence on the outcome. His compromise strategy ignored at least three facts. First, the selection of strategic options is affected not only by the participants' effective power but also their perceived power. Second, a participant's perceived power in the decision-making process is determined not only by the objective quantity of resources it entails and the probability of receiving those resources but also by the subjective importance of those resources for other participants.[115] Third, the Ministry of Foreign Affairs, which had greater authority and

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[111] The First Historical Archives of China, Macau Foundation & The Historical Material Study Institute of Jinan University, *supra* note 103 at 453 to 454.
[112] *Ibid* at 366.
[113] *Ibid* at 510 & 445.
[114] Progress in negotiations stalled as the Portuguese monarchical government was overthrown by a revolution in early 1910. Before resuming the talk with the new Portuguese government, the Qing government itself faced collapse in the waves of republican revolutions. See in Yin, *supra* note 26 at 200.
[115] Peter H Kim, Robin L Pinkley & Alison R Fragale, "Power Dynamics in Negotiation" (2005) 30:4 Acad Manage Rev 799 at 809.

power than that of other Chinese participants in the decision-making process, felt that the Chinese public's power far outweighed foreign power.

The Ministry of Foreign Affairs' emphasis on Chinese public opinion had its external and internal social contexts. Due to its waning power position in Asian affairs, Britain's policy towards China had shifted from aggression to moderation since the late 19th century: the emphasis now was to "support Chinese political stability and maintain British commercial pre-eminence by peaceful means".[116] Thus Britain in the Macau dispute only verbally blamed China and took no actual action to push China. In addition, the Qing government was weakening the Anglo-Portuguese alliance through diplomatic bribery. It promised that, if Britain stopped taking the side of Portugal, China would make some compromises in the ongoing Sino-British negotiation over the Kaipin Mine.[117] Hence in the eyes of the Ministry of Foreign Affairs, the British perspective was not the greatest concern in the Macau negotiation. From the government's point of view, the greatest concern came from Chinese public opinion: "for our people, they care about territory, for a fear that we government will concede more lands to great powers; but for the great powers, territorial possession is not their priority..."[118] As will be discussed later, along with the new wave of westernization within the government, public hatred of Westernism had rapidly grown since the early 1900s and quickly turned into attacks on the Qing government, which was thought to be incapable of resisting foreign invasion. To shore up its already weakened authority, the Qing government

[116] Fairbank & Liu, *supra* note 9 at 71.
[117] Note 110.
[118] The First Historical Archives of China, Macau Foundation & The Historical Material Study Institute of Jinan University, *supra* note 103 at 302.

resolutely opposed PCA arbitration. In a reply to the Portuguese request for PCA arbitration, the Qing government maintained that "the delimitation problem of Macau is only a matter between China and Portugal and international arbitration is unnecessary. We have already declared this in the note."[119] To reaffirm its position, the government even gathered its armed forces in the areas surrounding Macau and prepared for a battle, which frightened Portugal and Britain.[120]

3.3.3 Inconsistent Attitude towards the PCA and Internal Tensions in the Chinese Value Cluster

The two cases discussed above demonstrate that, in practice, the Qing government did not employ PCA arbitration to settle its disputes. Some may disagree, contending that China strongly suggested PCA arbitration in the *Jiandao* dispute and the failure to proceed should be attributed to Japan's objection. To be sure, China claimed to file a complaint concerning its sovereign rights over *Jiandao* to the PCA, yet the existing evidence shows little information about the follow-up. The preparation for filing a complaint is unknown, and the PCA also has no record concerning China's application for arbitration.[121] In addition, China's actions in certain areas appeared inconsistent with its declared policies. For example, the Qing government seemed to stay aloof from Anglo-Japanese friction,[122] alleging that "the best means of appeasing the (British)

[119] *Ibid* at 490.
[120] Note 110.
[121] "Cases" (6 September 2017), online: *PCA* <https://pca-cpa.org/en/cases/>.
[122] It is said that when Japan questioned China about its involvement in the leakage incident, the Chinese replied: "we know nothing about the disclosure and we are also unwilling to let it [Sino-Japanese negotiation] be published in the newspaper..."[translated by author], See in Wang & Wang, *supra* note 89 at 3339.

public resentment is to solve the dispute peacefully and openly." However, Morrison's diary revealed that it was the Chinese who provoked the friction. In this sense, it can be argued that China's call for PCA arbitration was a *yiyi zhiyi* strategy to win British sympathy and divide the Anglo-Japanese alliance.

There is an inconsistency in the Qing government's attitude towards international adjudication. One the one hand, it advocated a pro-adjudication policy, showing considerable interest in participating in the building of international tribunals. On the other hand, it was passive and refused to resort to the PCA for the settlement of its territorial and boundary disputes. Thus, a puzzle arises: why was Qing China both in favor of and hostile to the PCA?

A re-examination of Chinese participation at The Second Hague Conference and in China's territorial negotiations can offer us a partial explanation. It seems plausible that the Qing government, during and after the Second Hague Peace Conference, placed some hopes on international adjudication, expecting the international legal regime to help shake off the yoke of foreign domination and recover its lost sovereign rights.[123] This aspiration, however, was only held by the few open-minded, West-educated Chinese diplomats. Besides Lu, there were few other Chinese delegates voicing similar opinions during the Hague Conferences. When reviewing the available record, China's stunning performance at The Hague was more a result of Lu's individual efforts than a

[123] China's expectation can be further exemplified in the Chinese remarks on the Second Hague Peace Conference, where people paid great attention to how "Lu fought against the Great Powers at the Second Hague Peace Conference and successfully protected our judicial sovereignty". Such an approach to international law was described by Simon Chesterman and Junwu Pan as "pragmatic". Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures" (2016) 27:4 Eur J Int Law 945 at 951; Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden; Boston: Martinus Nijhoff Publishers, 2009) at 77.

concerted belief in adjudication shared among the Chinese officials. This conclusion can be further evidenced by the report in the *Diplomatic Review* which attributed China's success to Lu's patriotic deed rather than the government's collective work, and appealed for more Chinese diplomats to learn from Lu.[124] In some cases, open-minded officials, together with the Western values they held, exerted a major influence on the government's attitude. For example, Lu as the plenipotentiary delegate was conferred a large amount of power and authority to participate in the decision-making processes at the Second Hague Conference; we can even suggest that China's attitude there was actually Lu's attitude. But in other cases, the open-minded diplomats could not freely choose and make decisions on their own, as their power—together with the Western influence on China's attitude towards international adjudication—was actually restricted.

The anti-Western sentiment of the Chinese public was one major factor constraining China's embrace of international adjudication. Take the Macau dispute as an example: while Shixun Liu and Erqian Gao wished to defend China's territorial sovereignty through arbitration, the Chinese public disagreed. In its petition, the Guangdong General Association warned that China would lose control of its territory if the government consented to arbitration, because "the bias against the Chinese would permeate the proceedings". Undoubtedly, the West discriminated against China and insulted China's sovereign rights in some cases. The virulence of the West was, however, exaggerated to some extent due to the xenophobia among the common people. In the

[124] "On Mr. Lu's Performance Concerning the Revision of Convention at the Second Hague Peace Conference (论海牙第二次平和会专使力争增订公断条款事)", *Diplomat Review* (外交报) (31 October 1907).

petition, the Guangdong General Association alleged that the PCA arbitrators were "biased" and "snobbish" Westerners who "interpret the rules to suit their prejudice, create evidence to support their interpretation and do whatever they can to help the Portuguese", even though China had never participated in any PCA proceedings at The Hague before.

Here we see the split opinion in Chinese society between the elites and the rank and file concerning their attitude to Westernism. The new wave of westernization and its impact on the Chinese value cluster was previously discussed but it was not noted that this wave did not uniformly affect Chinese society. Given their limited access to education, the effects of Western knowledge on the Chinese common people—who made up almost 95 percent of the total population[125]—were much less evident.[126] Moreover, the conclusion of the Boxer Protocol, while to some extent facilitating the westernization of China, also aggravated tensions between the West and the Chinese people. To fulfill the promise to suppress and prohibit any anti-foreign societies or movements, Chinese governments, both central and local, punished many Boxers—most of whom were from the rank and file—for crimes or attempted crimes against the foreign governments or their nationals.[127] The suppression of popular anti-Westernism movements outraged the public, which in turn created leverage strong enough to impact

[125] Fairbank & Liu, *supra* note 9 at 335.

[126] For example, in 1909 around 1,560, 270 Chinese studied in the new Western-style schools. This number, though it may appear huge, accounts for only a small part of the population which was estimated to be about 347,902,565. Moreover, Western-style education resources were distributed unevenly, for most schools and students were in Beijing, Shanghai and other urban areas. See in Sung-Chiao Shen, "The Development of Modern Chinese Nationalism: with a Consideration of Two Problems Concerning Nationalism" (2012) 3 J Philos Study Public Aff 49 at 59; Fangzhong Liang (梁方仲), *The Chinese Households, Farmlands and Tax* (Beijing: Zhonghua Book Company,2008)，form 86.

[127] The Boxer Protocol further stipulated that, in all areas where foreigners were massacred or subjected to cruel treatment, the civil service examinations were to be suspended for 5 years, and provincial and local officials would personally be held responsible for any new anti-foreign incidents. See in *supra* note 40, art 2.

the government's power and authority.

Traditionalism was another restriction. Although the Qing dynasty took concrete steps to reform its administrative institutions and to re-train selected units in Westernized knowledge,[128] it nevertheless did little to hinder the long-lasting autocratic monarchy that continuously fed traditionalism.[129] While Western notions (such as democracy, sovereignty and the nation-state) were adopted and even stressed in China's politics, the *de facto* controlling power of the country was still reflected in the Confucian *sangang* social order. During his reign, the emperor as the center (and also top) of the hierarchic social order could act according to his autonomy because he was the "Son of Heaven" whose power should not be shared or limited by others (perhaps the emperor's power was only limited by his own moral code).[130]

Because of this archaic power structure, the Chinese value cluster during the Qing dynasty was essentially dominated by traditionalism, tolerating only change-within-tradition.[131] Even though Chinese diplomacy had been significantly westernized, the traditional imperial rule still persevered, as did the absoluteness of the emperor's decree in China's policy-making processes. And even though some Chinese had fostered

[128] Since 1901, to keep the dynasty in power, the Qing government implemented a series of cultural, economic, educational, military, and political reforms, known as *Xinzheng* (New Policies, 新政). The reforms aimed to change almost every aspect of Chinese society. For example, it transformed traditional Confucian academies into Western-style schools and abolished the thousand-year-long imperial examination. Moreover, in 1908, the Qing government promulgated the *Qinding Xianfa Dagang* (Outline of Imperial Constitution，钦定宪法大纲), asserting that China, like Japan, would gradually move towards a constitutional monarchy. See in Immanuel C Y Hsu, *The Rise of Modern China*, 6th ed (New York: Oxford University Press, 1999) at 408 to 412; Fairbank & Liu, *supra* note 9 at 375 to 383, 396 398.

[129] As a result of the constitutional reforms, the Qing dynasty formed its first cabinet. Although it was formed according to democratic election principles, the cabinet was still led by the imperial family and was described as "the old Grand Council under the name of a cabinet, autocracy under the name of constitutionalism." Hsu, *supra* note 128 at 412 to 417.

[130] Andrew Coleman & Jackson Nyamuya Maogoto, "'Westphalian' Meets 'Eastphalian' Sovereignty: China in a Globalized World" (2013) 3:2 Asian J Int Law 237 at 251 to 252.

[131] Fairbank, *supra* note 8 at 2.

awareness of China as a nation-state and pledged to defend China's sovereignty within the international legal framework, the autocratic, centralized power structure, with its emphasis on the traditions and teachings of Confucianism, fundamentally persisted.

Conclusion

Qing China's attitude towards international adjudication shows that the Chinese value cluster changed frequently during the late Qing dynasty, with a quickened tempo after the conclusion of the Boxer Protocol. In the decision-making process on the accession to the 1899 Convention, the Chinese participants reflected strong traditionalistic propensity, were suspicious about settling international disputes through adjudication. With the resurgence of westernization within the government's power structure in the early 1900s, Westernism again penetrated into Chinese values and altered the traditional views of the international order and international law. In the meantime, Chinese nationalism was separated from traditionalism and transformed into a sort of independent value serving the pursuit of a sovereign nation-state. This value change was concretely revealed in China's foreign policy which sought to defend all rights that accrued China as an independent sovereign state in the Western sense. As a result, China increasingly became active in participating in adjudication-related decision-making processes, such as when it voiced an opinion about the building of the new PCA in the decision-making processes at the Second Hague Peace Conference and won wide support.

But in practice, Qing China was reluctant to use PCA arbitration to settle disputes.

The marginalization of PCA arbitration in settling the *Jiandao* and Macau disputes illustrates that China—though it declared its willingness to defend its sovereignty through international law—refused to compromise its authority to the PCA in practical matters. The government's rejection of PCA arbitration in these matters can be attributed to popular anti-Western sentiment. Because of their concern over the impartiality and independence of Western arbitral institutions, the Chinese people strongly objected to cede China's authority over territorial issues to a tribunal established under the PCA. In addition to public opinion, the other obstacle to China's acceptance of PCA arbitration was mainstream traditionalism. The fact that the Confucian monarchy remained the locus of real power and controlled China's foreign policy decision-making process fundamentally weakened the power bases of the Chinese participants who sought to protect China's sovereignty and further constrained their participation in adjudication-related decision-making processes.

Unlike the older generation who yielded to traditionalism and attempted to strike a balance between Western knowledge and traditional values, many Chinese in the early 20th century concluded that the ancestral values could not be adapted to a competitive world and turned to eradicate the traditional system. Regarding the Confucian regime and its values as an impediment to a sovereign nation-state, in 1912, Chinese revolutionaries led by Sun Yat-sen overturned the Qing government. The new regime, known as the Republic of China (ROC), replaced China's thousand-year-long dynastic rule with a Western-style republic whose leader was supposed to be an elected president. With the old order gone, China began transforming into a sovereign nation-state. Given

these changes in the domestic arena, it would seem reasonable to expect a new era in China's attitude towards international adjudication. With the older, traditional system removed, new republican institutions would enable the next generation of Chinese participants, with their westernized knowledge and perspectives, to play a greater role in foreign policymaking and increase China's willingness to participate in adjudication-related decision-making processes. Would such a change happen in the Republican era? The next chapter answers this question by observing the ROC's participation in adjudication-related decision-making processes.

CHAPTER 4 THE REPUBLIC OF CHINA'S ATTITUDE TOWARDS INTERNATIONAL ADJUDICATION

Qing China collapsed in 1912 and was replaced by the ROC from 1912 to 1949.[1] The international adjudicatory regime the ROC encountered was more developed than what Qing China faced and now featured two major achievements. The first was the creation of the League of Nations and its attached court—the Permanent Court of International Justice (PCIJ). These organizations were created following the Paris Peace Conference of 1919 which ended WWI and were founded with the intention of maintaining world peace.[2] The PCIJ was the first international court in a real sense. Unlike the PCA, it had potential compulsory jurisdiction over states. Articles 36 of the PCIJ statute stipulated that states could elect to be bound by the compulsory jurisdiction of the court, either through compromissory clauses in treaties or by accepting the "optional clause."[3] Forty states accepted the compulsory jurisdiction of the PCIJ, including the ROC.[4] The second achievement happened after WWII. Under the leadership of the victorious Allied powers, a series of military trials were established to prosecute high-level political officials and military authorities for war crimes and other wartime atrocities. The best known of these were the trials of major war criminals

[1] From 1912 to 1949, the ROC was a sovereign state that encompassed the entire region commonly referred to as mainland China and several surrounding islands including Taiwan. As a result of the Second Chinese Civil War, the losing Kuo Min Tang (KMT) government, which was the then lawful representative of the ROC, retreated to its only remaining territory—Taiwan and the surrounding regions where it governs to this day. While the ROC ruled Taiwan, the CCP, which was the victor of the Civil War, established the PRC on the mainland in 1949.

[2] Based on Wilson's 14th point, the Paris Peace Conference brought into being the League of Nations on 28 June 1919. Bardo Fassbender et al, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at 64.

[3] League of Nations, "Statute of the Permanent Court of International Justice", online: *UNHCR* <http://www.refworld.org/docid/40421d5e4.html>.

[4] Jean Allain, *A Century of International Adjudication: The Rule of Law and Its Limits* (Hague: T.M.C. Asser Press, 2000) at 13.

before the International Military Tribunal (IMT, the Nuremberg Trial) and the International Military Tribunal for the Far East (IMTFE, the Tokyo Trial). The Nuremberg and Tokyo Trials had two far-reaching implications for the development of international adjudication: first, they were the first generation of international tribunals that extended jurisdiction to individuals; second, they served as models for the international criminal courts created afterwards.[5]

The chapter focuses on how the ROC perceived these two major developments and made its policies in response to the emergence of new international courts and tribunals. The ROC's attitude towards the PCIJ seems to have been positive: it accepted the compulsory jurisdiction of the PCIJ over certain kinds of disputes,[6] and maintained its membership in the PCIJ until 1945 when the International Court of Justice (ICJ) replaced the PCIJ as the world court.[7] However, as already observed, signing the jurisdiction protocol of an international tribunal or court does not necessarily mean that China embraced international adjudication in totality. Thus, this chapter examines *Belgium v China*[8], the only on-the-record PCIJ case involving China, and observes the attitudes and actions of the ROC government and its officials towards the PCIJ.

The ROC's attitude towards the postwar international criminal adjudication can be concretely demonstrated by its participation in the Tokyo Trial. As a member of the victorious Allied powers, the ROC was invited to join the IMTFE and adjudicate the

[5] Cesare Romano, Karen Alter & Yuval Shany, *The Oxford Handbook of International Adjudication* (New York: Oxford University Press, 2013) at 210.
[6] Julian Ku, "China and the Future of International Adjudication" (2012) 27 Md J Int Law 154 at 158.
[7] Fassbender et al, *supra* note 2 at 719.
[8] *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belg v China)*, Order of 25 May 1929, PCIJ (ser. A) No18.

cases against the Japanese war criminals. China's participation in the Tokyo Trials was a milestone in its approach to international adjudication, as this was China's first ever engagement in international adjudicatory activities as both a prosecutor and an adjudicator. Moreover, being a member of the IMTFE solidified China's status as a founding member of the first global effort to establish international criminal adjudication.

4.1 The ROC's Attitude towards the PCIJ in *Belgium v China*

The background of *Belgium v China* was coloured by the ROC's treaty revision campaign. To cast off the yoke of colonialism imposed by the so-called "unequal treaties" and to recover China's sovereign rights, the Republican government sent memoranda to the treaty powers from 1925 onwards, proclaiming that "since all Sino-foreign treaties had been concluded several decades ago, the circumstances had undergone 'vital changes' both in China and in the outside world; therefore, these treaties ought to be revised".[9] But China's request was rejected by Belgium on the basis of Article 46 of the Sino-Belgian Treaty of 1865, which stated that only Belgium had the right to initiate the revision issue.[10] After rounds of negotiations, no agreements

[9] The treaty revision campaign also served to pacify Chinese public opinion against unequal treaties and the wide-ranging nationalist movements and revolutions. John K Fairbank & Denis Twichett, *The Cambridge History of China: Republican China, 1912–1949, Part 1 Vol. 12* (Cambridge: Cambridge University Press, 1983) at 521; Fassbender et al, *supra* note 2 at 701; En-Han Lee, *The Nationalist China's "Revolutionary Diplomacy": 1925 - 1931* (Taibei: Institute of Modern History Academia Sinica, 1993).

[10] A Note from the Belgian Minister to China (27 April 1926), Taibei, Diplomatic Archives of Republican China (No.03-23-069-01), cited in Chi-hua Tang, "A Study of Treaty Revision Negotiations between China and Belgium, 1926-1929 (中比修约案研究）" (2009) 31 Jounral Natl Chengchi Univ 115 at 120. Article 46 of The *Treaty of Friendship, Commerce and Navigation between China and Belgium* provided that " [s]hould the Government of His Majesty the King of the Belgians in the future consider it advisable to modify certain of the clauses of this Treaty, it shall to this end be at liberty to open negotiations after an interval of ten years from the date of exchange of ratifications, but six months before the expiration of the ten years, it must officially inform the Government of His Majesty the Emperor of China of its intention to introduce modifications and of what such modification will consist. Failing such official notice, the Treaty will remain in force unchanged for a fresh term of ten years and so on for further periods of ten years." See in *Treaty of Friendship, Commerce and Navigation*, China and Belgium, 2

had been reached between the two states.[11] China thus saw Belgium's hardline stance as a sign of non-cooperation and unilaterally terminated the Treaty on 6 November 1926.[12] Belgium strongly protested this action and in response, the Belgian government brought a lawsuit to the PCIJ on 25 November, complaining that China's unilateral action had violated Article 46 of the Sino-Belgian Treaty of 1865.[13]

4.1.1 Decision-Making Process on China's Appearance before the PCIJ

On learning that Belgium had filed a formal complaint against China at the PCIJ, the Ministry of Foreign Affairs of the ROC established a Treaty Research Committee (hereafter the Committee)[14] to develop countermeasures to the forthcoming PCIJ proceedings.[15] However, in embarking on any concrete policies and strategies, the Committee had to face a pressing issue: should China respond to the Belgian claim and participate in the court proceedings?

When exploring how the Republic government decided this issue, we should once

November 1865, art 46, reproduced from British and Foreign State Papers, vol LVI at 667, see the English version of Article 46 in *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belg v China)*, Orders of 8 January, 15 February and 18 June 1927, PCIJ (Ser A/B) No 8 at 4.

[11] Actually, during the negotiations, both sides attempted to take a step backward and work out possible compromises. For instance, Belgium agreed to revise the treaty with the condition that there should have a modus vivendi to protect Belgian rights and interests in China during the revision period. However, regarding the length of modus vivendi, China claimed that it should only last for 6 months, while Belgium wanted it to exist until the conclusion of a new treaty. See in A Summary of Notes from Belgian Minister to China, Telegram to Chinese Minister to Belgium, & Memo for Belgian Minister to China (1June 1926), Taibei, Diplomatic Archives of Republican China (No. 03-23-069-02)； A Note for Belgian Embassy in Beijing (24 July 1926), Taibei, Diplomatic Archives of Republican China (No. 03-23-069-03), Five Provisional Measures for Belgian Minister to China (2 September 1926), Taibei, Diplomatic Archives of Republican China (No. 03-23-070-01); Reply from Belgian Embassy (2 September 1926), Taibei, Diplomatic Archives of Republican China (No. 03-23-070-02), cited in Tang, *supra* note 10 at 121 to 122.

[12] *Ibid* at 118 to 120.

[13] *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belg. v China)*, *supra* note 8 at 5.

[14] The members of the Committee including Weijun Gu (Wellington Koo,顾维钧), Chonghui Wang (王宠惠), Wengan Luo (罗文干), Chenling Dai(戴陈霖), Jihui Wang (王继会), Yintai Wang (王荫泰)， Zuoqian Diao (刁作谦) and Chongjie Liu (刘崇杰), Tang, *supra* note 10 at 125.

[15] *Ibid*.

again begin with an analysis of the participants in the decision-making process – namely the Ministry of Foreign Affairs and the Republican diplomats who constituted the Committee. The Republican government had inherited diplomatic institutions and personnel from its Qing predecessor. After 1912, most of the young Qing diplomats, who had emerged in the latter decades of the Qing dynasty, occupied key positions in the new government and wielded more power in China's foreign affairs. For instance, Zhengxiang Lu, who had attended the Second Hague Peace Conference on behalf of the Qing government, was appointed as ROC Foreign Minister in the first elected Republican cabinet.[16] Taking advantage of his improved power position in the bureaucracy, Lu tried to put a professional, Western-style stamp on China's foreign affairs. During his term, Lu made strenuous efforts to put the Ministry of Foreign Affairs "on a basis much like the foreign ministry of any Western nation," and to codify its scope and activities in a whole set of new laws and regulations.[17]

Chinese diplomacy was further westernized by the government's continuous recruitment and appointment of young, West-returned diplomats. According to Qixian Zhang's (张齐显) statistics, 8 of the 10 Vice Ministers who served in the Ministry of Foreign Affairs had studied abroad, and 23 of the 29 high-level diplomatic officials had received Western-style education.[18] Among them, Weijun Gu, who led the Committee, graduated from Columbia University with a PhD in international law and diplomacy.[19]

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[16] Dong Wang, *China's Unequal Treaties: Narrating National History* (Lanham: Lexington books, 2005) at 38.
[17] *Ibid* at 38 to 39.
[18] Qixian Zhang (张齐显), *A Study on the Personnel and Insitutions of the Ministry of Foreign Affairs in the Beijing Government (1912 - 1928)（北京政府外交部组织与人事研究：1912 - 1928）* (Taibei: Huamulan Culture Press, 2010) at 90 to 91.
[19] Jonathan Clements & Alan Sharp, *Wellington Koo: China* (London: Haus Publishing, 2008) at 30 to 32.

Another Committee leader, Chonghui Wang, received a Doctor of Civil Law from Yale Law School in 1905 and was called to the bar of the Middle Temple in England in 1907.[20] In this sense, a new generation of diplomatic elites had formed and developed in Republican China, known as the "foreign-affairs clique" (*waijiao xi,* 外交系).[21]

The Republican diplomats' perspectives on Chinese foreign policy were marked by a passion for defending and recovering China's sovereign rights on the basis of legal arguments. Under the banner of "revolutionary diplomacy" (*geming waijiao* 革命外交),[22] they launched a series of movements promoting the idea that China's sovereignty could be recovered by recourse to international law. For example, they believed that China should terminate the unequal treaties system and build a new one based on sovereign independence and equity.[23]

For this reason, a considerable number of the Committee members were in favor of China's appearance before the court, arguing that the ROC had accepted compulsory jurisdiction of the PCIJ and should be bound by the protocol.[24] Moreover, appearance before the court was, in the eyes of some members, an important vehicle for propagating the treaty revision campaign. Gu made this argument explicit at the second Committee meeting: "without attendance, other states would have no way of knowing the truth of

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[20] Ole Spiermann, "Judge Wang Chung-hui at the Permanent Court of International Justice" (2006) 5:1 Chin J Int Law 115 at 117. Besides Ku and Wang, many other Western trained diplomats held the top post in the Foreign Ministry: Zhengxiang Lu (1871-1949) entered the School of Foreign Language in Shanghai; Huiqing Yan (颜惠庆) (1876-1950) graduated from University of Virginia; Zhengting Wang(王正廷) (1882-1961), studied law at University of Michigan and Yale University; and Zhaoji Shi (Sao-ke Alfred Sze, 施肇基) (1876-1958) was the first Chinese graduate of Cornell University. Wang, *supra* note 16 at 38 to 39.

[21] See generally in Guangyao Jin (金光耀), "A Brief Study of the Foreign Affairs Cliques（'外交系'初探）" in Guangyao Jin & Jianlang Wang eds. *Chinese Diplomacy in Beiyang Era 北洋时期的中国外交*） (Shanghai: Fudan University Press, 2006) at 194 to 224.

[22] En-Han Lee, *supra* note 9.

[23] *Ibid* at 6.

[24] Tang, *supra* note 10 at 126 to 128.

treaty revision campaign. Should we refuse to appear, international society would take it as a confession of guilty."[25]

But other members of the Committee raised objections. Although he admitted China's *de jure* obligation of attendance, Chonghui Wang pointed out the risk of PCIJ adjudication: "participating in the proceedings could be dangerous as we have to enforce the judgment even though it would be against us."[26] According to Wang, the issue at stake was the basic principle of sovereign equality, which was so critical and political that China should not have left it to a court to decide.[27] Likewise, Wengan Luo(罗文干) suggested that it would be better to persuade Belgium to withdraw the claim and bring the case to the Assembly of the League of Nations – in his words: "a political dispute should be settled by political means".[28]

There is an interesting parallel and a sharp distinction between the split in perspectives within the foreign-affairs clique concerning China's appearance before the PCIJ and the debate within the Qing government regarding China's accession to the 1899 Convention. Both debates were on China's participation or non-participation in international adjudication, but the power dynamics in the two arenas differed. There was a power struggle between two rival camps in the Qing government: the opponents of China's accession were xenophobic Confucian gentry elites who had seized power by coup d'état, while the proponents were pro-Western *Zongli Yamen* officials who attempted to restore their power in China's foreign affairs. However, this same hostility

[25] Minute of Treaty Research Committee, Taibei, Diplomatic Archives of Republican China (No.05000-143) at 330 to 355. Cited in Tang, *supra* note 10 at 126 to 127.
[26] Note 25. Cited in Tang, *supra* note 10 at 127.
[27] Tang, *supra* note 10 at 127.
[28] *Ibid*. See also in Fassbender et al, *supra* note 2 at 708.

did not appear in the decision-making process within the Republican government, as all participants (though they held different opinions) belonged to the same camp – namely, the foreign-affairs clique. Because of their shared educational background and overseas experience, the foreign-affairs clique was highly homogeneous regarding their knowledge, values, and behavior on foreign policy.[29] Thus the virulence of the opposition to the PCIJ within the Committee should not be overestimated since a diversity of perspectives also occurred within a highly homogeneous community. Although some Committee members might be concerned about the prospect of PCIJ jurisdiction over the Sino-Belgian dispute, they cannot be equated with the xenophobic Confucian gentry – in fact, Wang was then the Deputy-Judge of the PCIJ and had exercised notable influence on the development of the Court.[30]

The homogeneity of participants resulted in them taking similar strategies to shape the outcome of the decision-making process. Diplomacy and persuasion were preferred by both sides. Zhaoshen Zhu (朱兆莘), the Chinese representative at the League of Nations, brought the Secretary-General's support for Belgium's proposal of adjudication to the Committee. "Both China and Belgium have accepted compulsory jurisdiction of the PCIJ and they are obligated to be present in court; otherwise, they could be regarded as breaching international law."[31] The League of Nations' endorsement might have boosted Gu's bargaining power, as at the fourth Committee

[29] Jin, *supra* note 21 at 197.
[30] In September 1921, at the second Assembly of the League of Nations, Chonghui Wang, who was then the Dean of the ROC *Dali Yuan* (High Court of Justice), was elected as a deputy judge of the PICJ. He served at the court during its first sessions from 1923 to 1925. Fassbender et al, *supra* note 2 at 719; Spiermann, *supra* note 20.
[31] Telegram from the Chinese Representative in the League of Nations Dated December 2 (4 December 1926), Taibei, Diplomatic Archives of Republican China (No. 03-23-073-02), cited in Tang, *supra* note 10 at 127 to 128.

meeting he again called for China's appearance, with some strategic trade-offs: "admittedly, according to the language of the treaty (the Sino-Belgian Treaty), we have no right to terminate. But how can we surrender to the unequal provisions! We should respond to Belgium's claim and expose our grievance to the world, even at the cost of losing the lawsuit and withdrawing from the League. Currently we should endeavor to convince Belgium to abandon its claim, but preparing for the litigation is necessary."[32]

Wang's influence was apparently waning due to the League's intervention in the case, since he had to admit that: "now it (non-appearance) is not only a matter between us and Belgium, but also an issue relating to the entire League of Nations."[33] But Wang did not fully retract his objection. As Gu and his followers had done, Wang attempted to seek external power to influence the debate: "we can consult with others before making the final decision."[34] Soon Gu's proposal was disapproved by most of the Chinese ministers who joined the debate at the government's request.[35] For instance, the Chinese Minister to Germany asserted that, "the treaty revision issue is a matter of sovereignty, how can we let an international court to decide our sovereignty? If it rules that China has no right to denounce an unequal treaty, our country would be colonized forever."[36]

However, international law experts who were also invited to participate in the decision-making process, were on Gu's side. Walther Adrian Schücking argued against

[32] Note 25, cited in *ibid* at 128.
[33] *Ibid.*
[34] *Ibid.*
[35] *Telegram to Chinese Ministers* (12 December 1926), Taibei, Diplomatic Archives of Republican China (No. 03-23-073-02), cited in Tang, *supra* note 10 at 128.
[36] Telegram from Chinese Minister to Germany (10 February 1927), Taibei, Diplomatic Archives of Republican China (No. 03-23-077-01).

the assertion that China's participation in the proceedings was completely unfavorable:

> In so far as I know, every international treaty should be interpreted according to *rebus sic stantibus*. The current Sino-Belgian treaty was concluded 60 years ago and now many momentous political and commercial changes have taken place in both countries during the six decades. Against this background, it is not only desirable, but also essential to the mutual interests of both parties concerned, to have the said Treaty revised and replaced by a new one. In sum, it might be too early to assert that China will win, but it is premature to regard China as the losing party.[37]

Schücking's view was echoed by Nicolas Politis in his detailed memorandum submitted to the Chinese government, where he also recommended the application of *rebus sic stantibus*. Politis further advised China to empower the Court to decide the case *ex aequo et bono* and allow the possibility of *amiable compositeur*.[38]

Hence there appeared to be a deadlock in the decision-making process, as the power bases of both sides were well matched and neither could convince the other with strategic instruments alone. While the Chinese government was torn between appearance and non-appearance, Belgium suddenly altered its stance. In his statement to the Belgian Parliament dated 22 December 1926, the Belgian Foreign Minister proclaimed that "Belgium never intends to protect unequal treaties, on the contrary, we are always gentle to China."[39] Belgium then resumed the treaty negotiation with China and suspended the lawsuit in the PCIJ.[40] In 1929, due to the conclusion of a new treaty (the Treaty of Amity and Commerce of 1928), the case was unilaterally withdrawn by the Belgian Government.[41]

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[37] Fassbender et al, *supra* note 2 at 708.
[38] A Memorandum Concerning Abrogation of the Sino-Belgian Treaty of 1865 (15 January 1927), Taibei, Diplomatic Archives of Republican China (No.03-23-74-02), cited in Tang, *supra* note 10 at 131.
[39] Grahame (Brussels), to Foreign Office (15 January 1927), FO371/12426 [F5001/37/10], cited in *ibid* at 132.
[40] Tang Chi-Hua, *Treaty Revision Campaign of the Beijing Government, 1912–1928: Out of the Shadow of the "Abrogation of Unequal Treaties"* (Beijing: Social Sciences Academic Press, 2010) at 367 to 406.
[41] Tieya Wang, *International law in China: Historical and Contemporary Perspectives* (Leiden: Martinus Nijhoff, 1990) at 346 to 347.

The outcome of *Belgium v China* should be evaluated within the international arena. In the language of the New Haven School, Belgium's withdrawal should be analyzed in the global decision-making process where China continually interacted with other states to make and remake treaties regulating their relations (i.e. China's treaty revision campaign). In this process, the great powers' participation in and also support for the treaty revision campaign contributed to Belgium's loss of power bases therein, which eventually caused its withdrawal of the case from the PCIJ. Before the commencement of the proceeding in The Hague, Belgium had attempted to elicit support from the U.S., Britain, France and Japan, with the hope of receiving their endorsement for the lawsuit.[42] However, Japan, which was also notified by China about the treaty revision, accepted the proposal and unexpectedly sent a note for negotiation, implying that it stood on the Chinese side.[43] In his report to the Secretary of State, J.V.A. MacMurray, the then U.S. Minister to China, also worried that supporting Belgium's claim would jeopardize American interests in China.[44] Considering the potential for Chinese nationalistic revolutions and the possible threat of Soviet Russia, the United States feared that suppressing the ongoing treaty revision campaign would provoke China to armed confrontation with foreigners – just as the Russians had done in the socialist revolution.[45] Britain felt the same way. In its Memorandum on China dispatched on December 16, it even suggested that all treaty powers should issue a statement setting

[42] "The Ambassador in Belgium (Phillips) to the Secretary of State" in Tyler Dennett & Joseph V Fuller, eds, *Papers Relating to the Foreign Relations of the United States, 1926, Volume I* (Washington D.C.: United States Government Printing Office, 1941) at 985 to 986.
[43] Tang, *supra* note 10 at 131; Fassbender et al, *supra* note 2 at 708.
[44] "The Minister in China (MacMurray) to the Secretary of State" in Dennett & Fuller, *supra* note 42 at 996 to 997.
[45] "The Minister in China (MacMurray) to the Secretary of State" in *Ibid*, at 1000.

forth the facts and declaring their readiness to negotiate on treaty revision.[46]

4.1.2 An Ambivalent Attitude and Chinese Nationalism in the Process of Westernization

Concerning its appearance before the PCIJ, it is fair to conclude that the Republican government's conception of international law and international adjudication was, in a crucial respect, qualitatively different from that of the Qing government. The attitude of the ROC officials towards international adjudication was essentially a product of the impact of Westernism and, in particular, of Western theories of international law and international adjudication. Although the Chinese elites had some grasp of Westernism and its importance in China's foreign affairs prior to the Republican era, Western values were not generally adopted by the Qing government or fully implemented into its foreign policy. Qing officials knew about international adjudication, however, they only noticed its political symbolism and considered it to be a strategic tool for controlling the great powers. Republican officials, by contrast, embraced the idea that states' disputes could be settled not only by force and political means but also by adjudication. When speaking of the need to appear before the PCIJ, Gu hoped to resort to the international court and international law to protect China from foreign invasion. No

[46] H.M. Charge d'Affaires, "British Memorandum on China" (1927) 6:1 Journal of the Royal Institute of International Affairs 62 . Some readers may feel surprised to learn that the great powers became "friendly" to China and allowed the Chinese government to adjust their privilege in China. Such a change of attitude was derived from the shift of power configuration in the post-WWI era. Having been weakened and exhausted by the war, the Western power bases in China progressively declined and since the 1920s, most Western states had confined themselves to the maintenance of Chinese authorities which could keep political stability and protect their established economic interests. See in Fairbank & Twichett, *supra* note 9 at 128. Even for the rising powers who benefited economically from the war, such as Japan and the United States, exploiting China too greatly was also avoided for fear of provoking Chinese hostility that could culminate in a radical revolution. As McMurray explained, this fear was especially pertinent in the wake of the Russian Revolution, when the monarchical regime was replaced by a socialist one.

longer did international adjudication mean simply a tool to justify the great powers' imperialistic discourses; rather, in the eyes of Gu and his colleagues, it presented a possible means to defend the legal rights of all sovereign states– regardless of that state's power or weakness. In this sense, the Chinese perception of international adjudication during the Republican era should not be defined in a narrowly pragmatic sense, since it also included elements of Western natural law that pointed to a higher reason (*e.g*. morality, universal principles etc.) governing international law, and the impact of Wilsonian idealism which strongly advocated the development of international law and international institutions for "the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike".[47]

Since *Belgium v China* was correlated to the treaty revision campaign, an analysis of the Chinese approach to securing full sovereignty for their country and the underlying nationalist sentiments can provide a framework for understanding changes in China's attitude towards international adjudication. What set Gu and his colleagues apart from their predecessors was not merely the degree of their acceptance of Westernism, but also their own views on nationalism. Chinese nationalism had become a powerful social force since the late 19th century and shaped nearly every facet of China's politic. Under the banner of nationalism, the rank and file converged and became active in public life,[48]

[47] Woodrow Wilson, *Address of the President of The United States, Delivered at a Joint Session of the Two Houses Of Congress, January 8, 1918* (1918).

[48] A typical example is the May Fourth Movement (五四运动), a series of anti-imperialist, cultural, and political demonstrations which originally grew out of student participants in Beijing on 4 May 1919. The movement protested against the Beijing government's weak response to the Treaty of Versailles, especially its silence on Japan's occupation of the territories in Shandong. The movement soon was extended to the working classes, sparking national protests and marking the upsurge of Chinese nationalism. Immanuel C Y Hsu, *The Rise of Modern China*, 6th ed (New York: Oxford University Press, 1999) at 531; Fairbank & Twichett, *supra* note 9 at

and nationalistic slogans were also used by various political forces—be they conservative or reformist—to legitimize their actions and gather popular support.[49] Yet the foreign-affairs clique distinguished itself from others, for it rejected blind anti-Western sentiments and xenophobia and contended that "China would only fight against the Western imperialistic incursions instead of everything or everyone Western."[50] Moreover, it abandoned the traditional violent, irrational approach to the defense of sovereignty, emphasizing instead the application of peaceful, flexible, and non-violent but persistent means, resembling "an iron fist in a velvet glove".[51]

In this way, a new paradigm of nationalism was developed during the Republican era. The recovery of sovereignty within China proper as the core mission of Chinese nationalism was largely inherited, but the way to this goal was now westernized. The struggle for equal treatment in international society and the end of foreign privilege in China were orchestrated through Western discourses – in particular, through Western knowledge of international law and broad appeals to international society for winning sympathy and external support.[52] This sort of Chinese nationalism was described by Arthur Waldron as "inexorable legalistic gradualism".[53] Westernized nationalism was effective in making the ROC—a state that was regarded as having been economically, politically and militarily weak in the early 20th century— intelligible and sympathetic to the great powers. In *Belgium v China*, the ROC obtained Belgium's withdrawal

464 to 504.

[49] Fairbank & Twichett, *supra* note 9 at 319.

[50] T*he Eastern Miscellany* (10 July 1928) 24:13, cited in En-Han Lee, *supra* note 9 at 10.

[51] *Ibid* at 11.

[52] Julia C Strauss, *Strong Institutions in Weak Polities: State Building in Republican China, 1927-1940* (Oxford: Clarendon Press, 1998) at 155 to 156.

[53] Arthur Waldron, Book Review of *China in the International System, 1918–20: The Middle Kingdom at the Periphery* by Yongjin Zhang, (1992) 131 China Q 797 at 797.

because other Great Powers, such as the United States, were sympathetic to the treaty revision campaign. Likewise, through bilateral and multilateral treaty negotiations and other rational, amicable means, China's sovereignty and policy autonomy in maritime customs, tariffs, salt monopoly revenues were secured by the early 1930s and almost two-thirds of the foreign concessions in China had been restored.[54]

However, Chinese nationalism during this period should not be understood simply as a product of westernization. Although the Chinese were generally willing to adopt Westernism as the fundamental perspective from which to formulate their resistance against foreign invasion, they were also skeptical about the reliability of Western ideas. This ambivalent mentality is well demonstrated by Wang's perspective on China's appearance before the PCIJ.

Despite his role as the Deputy-Judge of the PCIJ, Wang rejected the idea that China could defend its rights in the treaty revision campaign by recourse to international adjudication. He and his followers maintained that China's denunciation of the Sino-Belgian Treaty was essentially a political dispute inappropriate for international court.[55] This reason certainly had some kernels of truth, yet it was hardly irrefutable. Wang's reasoning was grounded on the assumption that political disputes should be resolved by political methods (e.g. diplomacy) and legal disputes by legal methods. In reality, however, almost all international disputes (including the Sino-Belgian dispute) have a mixed character; that is to say, they are both political and legal. If Wang's assumption

[54] William C Kirby, "The Internationalization of China: Foreign Relations at Home and Abroad in the Republican Era" (1997) 150 China Q 433 at 440 to 441.
[55] Note 25, cited in Tang, *supra* note 10 at 127.

is true, how then should we classify these disputes? Many cases adjudicated by international courts and tribunals feature prominent political undertones and in most situations, international adjudication is raised only when political negotiations become so hopeless and fruitless that no solution seems possible without it. In sum, the political feature of the Sino-Belgian dispute was not a legally sufficient ground for China's non-participation in the PCIJ proceedings.

Perhaps the real reason for Wang's objection was the fear that China's endeavor to restore its sovereign rights through legal means would backfire if the PCIJ proceedings ruled against China. At the Committee meeting, Wang warned his colleagues about the dispositive nature of international adjudication. In his mind, it was a zero-sum game in which any gain for one is a loss for the other; once a judgement was reached, each state had to enforce it.[56] Though the proceedings were only just beginning, there was the concern that China would lose the case. Wang's assessment of the case seems untenable from a legal point of view, as renowned international law experts later elaborated that China had a chance of winning with proper legal arguments and litigation. Yet the fact that more than a few high-ranking Chinese diplomats shared Wang's opinion that the Sino-Belgian dispute would be better settled by political means hints at the widespread disbelief that inter-state disputes could be settled by international adjudication.

The ambivalent Chinese attitude towards international adjudication during the Republican era had some similarities with that in the Qing dynasty. They both advocated diplomatic maneuvering rather than adjudication for the settlement of international

[56] John G Merrills, *International Dispute Settlement*, 5th ed (Cambridge: Cambridge University Press, 2011) at 291.

disputes. Furthermore, they were, in roughly similar ways, wary of Westernism while also applying it in practice, influenced no doubt by the desire to avoid overdependence upon Westernism and the need to keep the integrity of China and traditionalism. The existence of such parallels can be understood in the sense that the ROC faced similar external conditions as the Qing government. Although the international community had been moving towards diversity and democracy since the early 20th century, many of its rules and institutions—while based upon so-called universal principles—were still of Western social and intellectual origin.[57] The Western countries might have demonstrated a commitment to the development of the international community (for example, they established the PCIJ) but they nevertheless continued to construct the community in their own interests. In most cases, the international rules and institutions became tools that allowed them to legally exploit the rest of the world.[58] This international arena imposed a challenge on the development of non-western states like China whose ancestral cultures were not adapted to Westernism and who had only been recently drawn into the Western-centric international community. On the one hand, since the international standards and institutions were set by the West, the Chinese were aware of the necessity to protect themselves and integrate "progressive" Western standards, including knowledge, technology, ideas and institutions from the advanced Western countries; on the other hand, there was also a consciousness that Western concepts went hand-in-hand with an ambition to invade China. As such, China's

[57] Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (London: Zed Books, 1986) at 1; Fassbender et al, *supra* note 2 at 1 to 4.
[58] Fassbender et al, *supra* note 2 at 2 to 4.

sovereignty and inherent culture should be protected from the West.

On the whole, Chinese nationalism and its ties to Westernism were accompanied by deeply contradictory impulses. China actively introduced, learnt, and applied Western values and ideas, regarding them as an important means to save China. But this also involved a rejection of these same values and ideas. Partha Chatterjee has characterized this process as a two-fold ambivalence: "rejection of the alien intruder and dominator who is nevertheless to be imitated and surpassed by his own standards, and rejection of ancestral ways which are seen as obstacles to progress and yet also cherished as marks of identity."[59] As a result, it can be argued that the Sino-Western transcivilizational interaction in the ROC era consisted of superficial Western institutions and the retention of old orders. Though such largely symbolic westernization might have facilitated China garnering a certain degree of international acceptance, such borrowing would ultimately face competition from the existing indigenous culture and values. This was evident in China's attitude towards the Tokyo Trial.

4.2 The ROC's Attitude towards the Tokyo Trial

This section will examine China's attitude towards another international tribunal—the IMTFE, in which the Republican government participated as one of the victorious Allied powers—and its perception of the pursuit of international justice. However, two matters of a preliminary nature should first be mentioned.

First, the Tokyo Trial was convened to try crimes against peace, conventional war

[59] Chatterjee, *supra* note 57 at 2.

crimes, and crimes against humanity alleged to have been committed by the leaders of the Empire of Japan during the Second Sino-Japanese War from 1931 to 1945.[60] The Second Sino-Japanese War, which later merged into the greater conflict of WWII as a major front of what is now broadly known as the Pacific War, had left indelible marks on the collective consciousness of the Chinese. Before the Allied forces joined the war in 1941,[61] the Chinese had fought against the Japanese invasion more or less alone for ten years. Understandably, China suffered catastrophic losses during the 14-year-long war. The damage to Chinese property was valued at 600 billion US dollars according to the currency exchange rate in 1937 and Chinese casualties were estimated at 35 million.[62] Therefore when the Tokyo Trial was convened in 1946, the Chinese were very keen to participate in the proceedings, hoping to find justice and compensation for their enormous sacrifices.

Second, the Tokyo Trial amounted to a landmark event not only in the history of international adjudication but also in the history of China's approach to international adjudication. It was the first international trial in which China interacted with several other participants, and the first international trial which involved the participation of

[60] In China, the war is most commonly known as the "War of Resistance against Japan" (抗日战争). It was also called the "Eight Years' War of Resistance" (from 1937 to 1945), but in 2017 the Chinese Ministry of Education issued a directive stating that textbooks were to refer to the war as the "Fourteen Years War of Resistance" (from 1931 to 1945), reflecting a focus on the broader conflict with Japan going back to 1931. Xinhua News Agency, "The Ministry of Education: China is Rewriting Textbooks so Its Eight-year War of Resistance against Japan is Now Fourteen-year" (11 January 2017), online: *Xinhuanet* <http://www.xinhuanet.com//politics/2017-01/11/c_1120284611.htm>.

[61] It is widely accepted that the Allied forces joined in the war against Japanese forces after December 1941, when Japan invaded Thailand and attacked the British colonies as well as the United States military and naval bases at Pearl Harbor See generally in John Costello, *The Pacific War 1941-1945* (New York: Harper Perennial, 1982).

[62] This data is quoted from the Chinese president Xi Jinping' address at the Commemoration of the 69th Anniversary of The Victory of the Chinese People's War of Resistance Against Japanese Aggression and The World Anti-Fascists in 2014. *Xi Jinping' address at the Commemoration of the 69th Anniversary of The Victory of the Chinese People's War of Resistance Against Japanese Aggression and The World Anti-Fascist* (Beijing: Renmin Press, 2014).

Chinese ranging from the elites to the rank and file. In a sense, the Tokyo Trial can provide a more dynamic understanding of the ROC's attitude towards international adjudication. Previously, China's attitude was mostly reflected in the decision-making processes occurring among the Chinese technocratic elites (e.g. the foreign-affairs clique) in the domestic arena. The Tokyo Trial, however, revealed what the larger Chinese populace thought about international adjudication as well as how the various Chinese participants communicated during the decision-making processes.

The judicial procedure applied in the Tokyo Trial was largely based on common law traditions that require the prosecutors to search evidence to prove the defendants' guilty of crimes and ask the judges to convict the defendants based on the trials.[63] Thus, the decision-making processes relating to the Tokyo Trial can be divided into two equally important parts: first, the decision-making process concerning the prosecution of prominent members of the political, military, judicial and economic leadership of Japan, who allegedly planned, carried out, or otherwise participated in war crimes; and second, the decision-making process at the trials of these individuals before the IMTFE.

4.2.1 China in the Prosecutorial Decision-Making Process

The Chinese prosecutors in Tokyo—while not members of the foreign-affairs clique—shared numerous similarities with their colleagues at the Ministry of Foreign Affairs. Zhejun Xiang (Hsiang Che-chun,向哲浚), the Chinese chief prosecutor at the International Prosecution Section (IPS) for the investigation of Japanese war crimes in

[63] Ru'ao Mei, *International Military Tribunal for the Far East (远东国际军事法庭)* (Beijing: Law Press, 1988) at 59.

China,[64] graduated from George Washington University Law School, where he studied international law and obtained his JD.[65] Before leaving for Tokyo, Xiang had already worked as a prosecutor for the Shanghai higher circuit.[66] Xiang's education and working experience indicated that he was an ideal candidate for the prosecution of international crimes, and the reality proved that he indeed fulfilled his duty.

The Chinese team, which contained only two representatives,[67] was relatively small, especially in comparison to other participants, such as the Soviet Union who fielded a delegation composed of more than thirty members.[68] The small size of the Chinese delegation should be partly attributed to the Republican government.[69] The government did not attach much importance to preparing for the prosecution, assuming that "…It is as clear as daylight that the Japanese had invaded China and slaughtered the Chinese…the trial is a mere formality…obviously the Japanese criminals would be properly punished…we don't need much specific evidence or detailed investigation."[70] Consequently, the manpower they sent proved to be insufficient. Ru'ao Mei（Mei Ju-ao, 梅汝璈）, the Chinese judge at the IMTFE, wrote in his personal diary that "Zhejun Xiang was experiencing a tough period of making criminal indictment, because few

[64] The International Prosecution Section (IPS) was subordinated to the Supreme Commander for the Allied Powers (SCAP). It was in charge of investigating and prosecuting Japanese war crimes. See detail in *ibid.* at 76 to 85.
[65] Longwan Xiang & Marquise Lee Houle, "In Search of Justice for China: The Contributions of Judge Hsiang Che-chun to the Prosecution of Japanese War Criminals at the Tokyo Trial" in Morten Bergsmo, Wui Ling Cheah & Ping Yi, eds, *Hist Orig Int Crim Law Vol 2* (Brussels: Torkel Opsahl, 2014) at 145 to 149.
[66] *Ibid* at 149.
[67] At the time of the initial preparation for trial, Xiang had only one secretary. *Ibid* at 156.
[68] It is said the Soviet Union planned to send no fewer than 70 people for the trials. After taking the advice of the SCAP, they reduced the number to 47. See in Guangjian (广建) Liu（刘）, *The Nationalist Government and Tokyo Trial* (Master Thesis, Nanjing Normal University, 2013) [unpublished] at 19; Zhiyong Song, "Tokyo Trials and China (东京审判与中国)" (2001) 41:3 J Stud Chinas Resist War Jpn 144 at 159.
[69] The then-Republican government was also known as the Nationalist government or the Nanjing government led by the KMT.
[70] Zhengyu Ni, *Composure and Peace in The Hague (淡泊从容莅海牙)* (Beijing: Law Press, 1999) at 106.

Chinese prosecutorial staff are capable to help him collect and translate evidence."[71] The situation appeared to improve after the arrival of an advisory group of four jurists led by Zhengyu Ni (倪征曀), [72] an eminent Chinese lawyer and intellectual with a doctorate degree from Stanford University.[73]

In addition to the lack of manpower, the prosecutors experienced numerous differences between themselves and their fellow countrymen in terms of perspectives when participating in the investigation process – notably with regards to the gathering of evidence in China. Mei in his subsequent historical treatises on the Tokyo Trial recalled that, when the Chinese team needed to confirm the number of deaths in the Nanjing Massacre, the Republican government was slow to respond.[74] The government was inefficient partly because there was very little evidence. Dechun Qin (秦德纯), the KMT head of the war crimes investigation committee,[75] said that the "Chinese military rarely paid attention on evidence during the actual wars – after all, no one had thought to expect a trial for war crimes, let alone the preservation of evidence."[76] Even among the few Chinese military with an awareness of the potential for prosecution, the image of "evidence" in their conception was far from the Chinese team's expectation. When Qin—who was an acting commander during the wartime—was cross-examined as a witness before the court, his ambiguous and exaggerated statements, such as that the

[71] Ru'ao Mei, *The Tokyo Great Trial: Dairy of Mei Ru'ao, Judge of The International Military Tribunal for the Far East (东京大审判：远东国际军事法庭中国法官梅汝璈日记)* (Nanchang: Jiangxi Education Press, 2005) at 97.
[72] The Advisory Group included Ni Zhengyu, E Sen (鄂森), Wu Xueyi（吴学义）and Gui Yu (桂裕). Mei, *supra* note 63 at 82 to 83; Ni, *supra* note 70 at 104 to 107.
[73] Ling Yan, "In Memoriam: Ni Zhengyu" (2004) 3 Chin J Intl L 693 at 694.
[74] Barak Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (Cambridge: Harvard University Press, 2015) at 83.
[75] *Ibid* at 81.
[76] *Ibid* at 82.

Japanese killed every Chinese and burned everything when they arrived in a place, was disregarded and obviously was not considered as qualified evidence.[77]

The lack of a clear consensus concerning evidence among the Chinese participants signaled a lack of the legal capital necessary to fully participate in the prosecutorial decision-making process. In the New Haven language, this could also be regarded as a sign of weak power bases. And this power continued to be weakened when the Japanese government and military were found to have destroyed evidence that might have assisted in the prosecution of any Japanese for war crimes in the aftermath of the surrender.[78] The outbreak of the Chinese Civil War also made matters worse. The Civil War disrupted regular domestic rail travel, causing the Chinese team working on amassing evidence to tarry in northern China.[79] In retrospect, Ni himself had to confess that they could hardly collect the necessary evidence for the charges of Japanese war crimes.[80] Ni may be accurate on this point, as the statistics show that among the 2391 pieces of evidence submitted by the IPS, China only contributed 99.[81]

Without sufficient power bases, China was vulnerable in its confrontation with the Japanese defendants. The Japanese side took full advantage of the adversarial mechanism and employed various strategies to weaken the Chinese prosecution,[82] such as prolonging the trial, lessening the defendant's charges, and attacking the

[77] Ni, *supra* note 70 at 106; Kushner, *supra* note 74 at 81.
[78] By the time that the surrender was formally signed in Tokyo Bay on September 2, 1945, Dr. Edward Drea, the director of Japan's Military History Archives of the National Institute for Defense Studies, estimates that 70 percent of the records pertaining to war crimes and the culpability of Japan's leaders (including the emperor) had been destroyed. Edward John Drea, *Researching Japanese War Crimes Records: Introductory Essays* (Washington D.C.: Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, 2006) at 9 to 11.
[79] Kushner, *supra* note 74 at 82.
[80] Ni, *supra* note 70 at 647.
[81] A Confidential Memo from the Chinese Prosecutor Office in the International Military Tribunal for the Far East to Foreign Minister Wang Shijie, Taibei, Important Cases of International Military Tribunal for the Far East, cited in Song, *supra* note 68 at 157.
[82] Xiang & Houle, *supra* note 65 at 155 to 156; Kushner, *supra* note 74 at 81.

interrogation and the evidence provided by the prosecutors.[83] Qin recalled that the questions concerning his testimony in court were so fierce that he was torn with worries throughout those days: "that (the Tokyo Trial) looks like a trial for China rather than for Japan."[84]

The power dynamics in the decision-making process thus became skewed. Even though China was the "victorious party" that was supposed to possess more bases of power to prosecute the Japanese participants, it was actually at a disadvantage in the trials. Having realized this,[85] the Chinese team decided to adopt strategies to reverse the power imbalance. First, it developed new litigation strategies to respond to the Japanese defense team's attacks, such as "asking questions that served Chinese interests and submitting the retorts into evidence".[86] Second, it regrouped the way to take evidence. While Xiang and his colleagues returned home to collect more evidence, the Chinese team sought external assistance.[87] The Chinese team collaborated with the Philippine team to reduce its workload and requested access to the closed Japanese archives, which were in the hands of the Allied trial team, for new evidence.[88]

In these circumstances, China's participation in the prosecution process was arguably only a partial success. During the trials, China became known for persuading the tribunal to prosecute Japanese war crimes dating back to the Huanggutun Incident in

[83] Mei, *supra* note 63 at 94 to 98.
[84] Kushner, *supra* note 74 at 82.
[85] Ni described the situation as "we hope for a calm time but the wind never ceases to blow" (*dongji sijing*, 动极思静), which implied his awareness of the vast gap between China's expectations for the trials and the reality in which it found itself. Xiaming (夏鸣) Yang (杨) & Xianwen (宪文) Zhang(张), *Collection of the Historical Materials of the Nanjing Massacre: Vol 7 Tokyo Trials (南京大屠杀史料集)* (Nanjing: Jiasu People Press, 2005) at 1109; Kushner, *supra* note 74 at 81.
[86] Song, *supra* note 68 at 161; Kushner, *supra* note 74 at 82 to 83.
[87] Yang (杨) & Zhang(张), *supra* note 85 at 1109 to 1110.
[88] Kushner, *supra* note 74 at 83.

1928.[89] Another significant accomplishment China made was establishing that the Japanese were guilty of committing the notorious "Nanjing Massacre".[90] Considering that the Nanjing Massacre was among the most severe episodes of mass murder and mass rape by Japanese troops against civilians during WWII, the Republican government founded a special committee to gather relevant evidence.[91] The IPS also engaged in the investigation: the chief IPS prosecutor Joseph Berry Keenan even flew to China and met witnesses in person.[92] As a result, the prosecutors vigorously collected oral and material evidence and even successfully brought 15 competent witnesses to Tokyo,[93] most of whom testified against the Japanese defendants in the trials. However, the flaws in China's prosecution were also plain to see. For example, the prosecution did not charge Emperor Hirohito of Japan—who, after all, had declared the war and acted as the supreme commander of the army[94]—and the Chinese team also failed to provide evidence that the use of chemical weapons had been authorized by the Imperial General Headquarters.[95]

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[89] Xiang & Houle, *supra* note 65 at 160 to 162.

[90] The Nanjing (spelled then as Nanking) Massacre (also known as the Rape of Nanjing), was an episode mass murder and mass rape by Japanese troops against the residents of Nanjing (then capital of the ROC) during WWII. The massacre occurred over six weeks, beginning on December 13, 1937, the day that the Japanese captured Nanjing. During this period, soldiers of the Imperial Japanese Army murdered an estimated 40,000 to over 300,000 Chinese civilians and disarmed combatants, and perpetrated widespread rape and looting. See *e.g.* in Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (New York: Basic Books, 2012) at 4.

[91] "A Summary of Nanjing Provisional Council's Investigation on Nanjing Massacre (November, 1946)" in Yang (杨） & Zhang(张), *supra* note 85 at 1720.

[92] "Order Issued by The National Government Military Commission on the evidence collection for the International Military Tribunal for the Far East (April 9, 1946)", in *ibid* vol 19 at 21.

[93] See detail in "David Nelson Sutton's Report in Nanjing", in *ibid* vol 29 at 22.

[94] Bing Bing Jia, "The Legacy of the Tokyo Trial in China" in Yuki Tanaka, Timothy LH McCormack & Gerry Simpson, eds, *Victors Justice Tokyo War Crimes Trial Revisit* (Leiden: Brill, 2011) 207 at 212. Jia argues that the ROC followed the U.S. political directives and then dropped the charge. The United States saved Hirohito from trial as a war criminal, because it believed the occupation of Japan would be greatly facilitated if the Emperor—who was regarded as the God of Japan—could remain on the throne.

[95] *Ibid* at 213.

4.2.2 China in the Adjudicatory Decision-Making Process

This section will now focus on China's participation in the adjudicatory decision-making process by concentrating on the lone Chinese judge's interaction with his peers at the IMTFE during the course of the trials. Like Xiang, Ru'ao Mei (the sole Chinese Justice of the IMTFE) was intellectually well-suited to fill this position. He studied at the University of Chicago Law School and obtained a JD in 1928. Before representing China as a judge at the IMTFE, Mei taught law in several Chinese universities and concurrently served in the Republican government.[96]

Mei's participation included not only providing his knowledge and perspective on the adjudication of Japanese war crimes but also representing the new image of China in the international arena. Having a Chinese judge at the IMTFE signaled a fresh era for China in foreign affairs. Because the Chinese people's bitter resistance against Japan contributed significantly to the Allied victory in the Asian-Pacific battlefield,[97] the ROC emerged from the war nominally a great military and political power and it was recognized as one of the Big Five of Allied forces.[98] For the first time, the Chinese could feel "they were truly party of a global coalition" rather than the subjects of Western powers.[99]

Therefore, Mei found he had to behave properly and fight for Chinese dignity during the trials, regardless of form or substance. One episode reflecting this

[96] Longwan Xiang, *The Tokyo Trial: Chinese Prosecutor Hsiang Che-chun* (Shanghai: Shanghai Jiao Tong University Press, 2010) at 244 to 245.
[97] John K Fairbank & Albert Feuerwerker, *The Cambridge History of China: Volume 13, Republican China 1912-1949* (Cambridge: Cambridge University Press, 1986) at 528.
[98] *Ibid*.
[99] *Ibid*.

perspective was Mei's endeavor to earn his rightful place in the judges' seating plan. Before the commencement of the trials, the judges from eleven countries discussed the order in which they would enter the courtroom to take their seats on the dais in front of the public. The chief judge Sir William Webb suggested the judges would enter and sit according to the following order: first the presiding judge, then followed by the U.S. judge, the British judge, and others.[100] This proposal was fervently opposed by Mei, for he claimed that the seating plan should be organized based on the order of signatures on the Japanese Instrument of Surrender (where China was adjacent to the United States).[101] Mei's position on this issue was tough and uncompromising – he even threatened to leave the tribunal if Webb insisted on the original arrangement.[102] In Mei's eyes, the place he sat at the tribunal would have a pronounced bearing on China' international status, which was dearly purchased by the great economic losses and casualties during the war:

> In this war against Japanese aggression, China has suffered the most and fought the longest and the hardest…It is unthinkable that China's place in this trial should be relegated to a spot below Britain…If I agree to this arrangement, I will be insulting my country. I'd be insulting all my countrymen's suffering, sacrifice and perseverance in resisting the Japanese aggression! Everything![103]

Eventually, the seating order was decided as Mei wished.[104] The Chinese were pleased with the new seating chart, considering it to be an acknowledgement of China's preeminent status in the international community. In a report on the first day of the trials, the *Central Daily News* emphasized, with a tone of pride, that "our judge Ru'ao Mei

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[100] Mei, *supra* note 63 at 63; Kushner, *supra* note 74 at 79.
[101] Kushner, *supra* note 74 at 79; Mei, *supra* note 63 at 65.
[102] Regarding the seating order of the tribunal, Mei wrote "the tribunal's seating order would be known to the Chinese people. In their eyes, the order relates to their country's position in the WWII. If I am found sitting in a corner, they will label me as a coward." [Translated by author]. Mei, *supra* note 63 at 64 to 65.
[103] *Ibid* at 64.
[104] *Ibid* at 65.

was seated only second to the United States."[105] This issue may seem minor, but it provides us with a glimpse of the Chinese sensitivity to any perceived slight or inequality in the international community – a sensitivity that might trace back to the traditional Sino-centric worldview and hierarchic *sangang* order. In his conclusion about the seating plan event, Mei stated: "at any international occasion, an open or secret struggle for seating or any other form is inevitable. This struggle often concerns a state's status, honor and dignity…Even though China has emerged as one of the Big Five of Allies after WWII, it still faces with discrimination and oppression, and its rights are often infringed…we should defend our rights."[106]

The perspective that the Tokyo Trial was not simply a "trial" in the Western sense penetrated Mei's interaction with the judges from other states in the decision-making processes. Perhaps the most quintessential example was the decision-making process concerning conviction and sentencing of the Japanese defendants. Reading the published separate opinion, concurring opinion and dissenting opinions, it can be concluded that the judges had heated debates concerning the result and the appropriate penalties. Questioning the reliability of evidence, Justice Radhabinod Pal (India) was of the opinion that no war crime had been proved and leaned towards acquitting the defendants of all charges.[107] Justice Henri Bernard (France) likewise concluded that a guilty verdict could not be a valid one since certain vital defects of procedure had occurred throughout trials – for example, the defendants had been prejudiced by the

[105] "The International Military Tribunal for the Far East Held Hearing Yesterday", *The Central Daily News* (4 May 1946) A3.
[106] Mei, *supra* note 63 at 66.
[107] Solis Horwitz, "The Tokyo Trial" (1950) 28 Intl Concil 475 at 562.

fact that they had not been given the "opportunity to endeavor to obtain and assemble elements for the defense."[108] Even within the majority who found the defendants guilty of committing war crimes, considerable disagreements existed. Justice Webb, Justice Myron C. Cramer (U.S.), Justice Mei, Justice Edward Stuart McDougall (Canada) and Justice Delfin Jaranilla (the Philippines) leaned towards applying severe sanctions on the defendants who had committed the most heinous crimes against peace and humanity.[109] But Justice Bert Röling (the Netherlands) wanted to reduce the sentences. He also concluded that Koki Hirota, who was sentenced by the majority to death, had not been proved guilty of any charge.[110]

At this moment, Mei found himself under considerable pressure stemming from a discrepancy between China's relatively insufficient legal capital in the Tokyo Trial (as discussed in the previous section) and its desire to achieve its preferred outcome – namely, imposing severe penalties on the Japanese defendants. The Tokyo Trial produced a sort of equal justice through the parity between the prosecution and the defendant, as each Japanese defendant at the Tokyo Trial was represented by a defense team of Japanese and American lawyers.[111] Rather than making it a mere formality, the defense lawyers skillfully utilized litigation tactics and rigorously defended the Japanese defendants at the trials.[112] As already noted, the Chinese were caught off

[108] "Bernard Dissenting Judgment" in Robert Cryer & Neil Boister, eds, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford: Oxford University Press, 2008) at 682; Horwitz, *supra* note 107 at 505.
[109] Röling disagreed with the idea that there was a large-scale conspiracy. Partially on this basis, he would have acquitted Hirota. Robert Cryster, "Justice Röling (The Netherlands)" in Yuki Tanaka, Tim McCormack & Gerry Simpson, eds, *Beyong Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011) 109 at 122 to 123.
[110] Richard H Minear, *Victors' Justice: Tokyo War Crimes Trial* (New Jersey: Princeton University Press, 2015) at 163; Cryer & Boister, *supra* note 108 at 780.
[111] Mei, *supra* note 63 at 88.
[112] Kushner, *supra* note 74 at 81.

guard by the structure of the Tokyo Trial, as they had not prepared much admissible evidence nor given much thought to the prosecution. Consequently, the Chinese judge, even though he was an expert in international law, could not argue persuasively for China's preferred outcome. Mei in his secret telegraph to the Chinese government complained that the evidence China had presented was "extremely weak" and that, apart from the evidence about the Nanjing Massacre, there was little effective proof to demonstrate the Japanese atrocities in China, which substantially hindered the conviction of the Japanese defendants.[113]

This situation, combined with the complexity of the legal issues, the differences among judges, the length of the charges, the number of charges involved, and the effort to provide competent translation, all made the conviction and sentencing process limp forward. This disappointed the Chinese public. They wrote to the Ministry of Foreign Affairs and even to Mei himself, clamoring for the imposition of severe penalties on the Japanese defendants as soon as possible.[114] In the meantime, the Chinese government also secretly urged Mei to give the defendants (especially Kenji Doihara) the toughest sentences possible in order to quell public anger.[115] Justice Mei, who regarded himself as a representative of China and a fighter for Chinese interests in the international arena, felt a strong sense of accountability to persuade other judges to convict the Japanese defendants. Mei wrote in his diary that "if the IMTFE is unable to reach a convincing judgment, it would be too ashamed for me to go back home and face

[113] Confidential Telegram from Judge Mei Ru'ao to the Ministry of Foreign Affairs, Taibei, Important Cases of International Military Tribunal for the Far East (No.1664), cited in Song, *supra* note 68 at 165.
[114] *Ibid* at 164.
[115] Confidential Telegram from The Ministry of Foreign Affairs to Judge Mei Ru'ao, Taibei, Important Cases of International Military Tribunal for the Far East (No.1103), cited in *ibid*.

our fellows – the only solution is to offer our apologies with death."[116] In a secret telegram, he promised to the Chinese government: "I will render what trifling service I can to voice our concern in this unprecedented international adjudication."[117]

Instead of legal arguments, Mei's strategy focused on emotions and inter-personal relations. In the discussion he steered judges' attention to China's suffering and sacrifices in receiving the brunt of Japan's imperial aggression in the war.

> If neither Japan nor the war criminals receive the severest punishment, who can be sure that they will never wage war again? Who can be sure that Japan will never invade other countries? Who can be sure that the Japanese militaristic spirit will never reappear? We can vote now for all those who died in the war...for closing eyes in death. Think it over.[118]

The IMTFE ultimately sentenced seven defendants to death by hanging, including Hideki Tojo, Kenji Doihara and Koki Hirota, and condemned another sixteen to life in prison.[119] This outcome indicates that China's demands and expectations for maintaining its power and interests in the post-war international community had been at least partially gratified.

4.2.3 Perceptional Clashes on Criminal Adjudication and Lingering Traditionalism

China's attitude towards the Tokyo Trial seems perplexing in the eyes of Western observers. Barak Kushner considered it odd that the Chinese government had initially dispatched only a few representatives to Tokyo for the trials, since it had long asserted

[116] Chaorong Mei ed., *The Chinese Who Sent Hideki Tojo to the Gallows* (Wuhan: Wuhan University Press, 2006) at 164.
[117] Confidential Telegram from Judge Mei Ru'ao to the Ministry of Foreign Affairs, Taibei, Important Cases of International Military Tribunal for the Far East (No.7633), cited in Song, *supra* note 68 at 165.
[118] Confidential Telegram from Judge Mei Ru'ao to the Ministry of Foreign Affairs, Taibei, Important Cases of International Military Tribunal for the Far East (No.10715), cited in *ibid*.
[119] Cryer & Boister, *supra* note 108 at 598 to 628.

its central role in the battle against Japanese war crimes.[120] Indeed, even though China—which arguably suffered the most from Japanese war crimes—had an overwhelming passion for punishing the Japanese defendants and somehow had achieved this goal, the country's overall engagement in the prosecution and trials was relatively insufficient and inexperienced.

China's relatively insufficient and inexperienced engagement in the Tokyo trial can be attributed to many causes. Mei in his memoir blamed U.S. interference, insufficient staff, and the Republican government's nonfeasance.[121] Kushner believed that the complicated politics in Chinese domestic society, in particular the outbreak of Civil War between the KMT and the CCP, profoundly shaped Chinese policies towards the Tokyo Trial.[122] And according to Zhiyong Song, the Republican government's pro-American foreign policy during the postwar era had a far-reaching impact on China's attitude.[123] Although observers have noticed how the underlying social and political context constrained China's capacity to participate in the Tokyo Trial, the issue has rarely been analyzed from a more nuanced perspective, namely the different perceptions of the approach to justice between China and the West. Like the Nuremberg Trial, the Tokyo Trial adopted the Western judicial model, centering on a procedural, positivist concept of justice relying on a bureaucracy that can operate the mechanical structure for achieving justice and a sophisticated adversarial system requiring the prosecutor to prove the defender guilty. Such a system reflects a principle of justice in which "justice

[120] Kushner, *supra* note 74 at 80.
[121] Mei, *supra* note 63.
[122] Kushner, *supra* note 74 at 87 to 102.
[123] Song, *supra* note 68.

must not only be done, but must be seen to be done".[124] Even though Chinese society and its people had been westernized for decades and it agreed to join in this judicial model, China did not in fact fully internalize this approach to justice. The westernization of values and cultures takes longer than the westernization of institutions in the ROC. The latter can be quickly achieved by radical revolutions and reformations, but changes in traditional values and cultures, which are rooted in people's mind and passed on from generation to generation, lagged behind. According to how the Chinese behaved and what they felt in the Trial, their traditional approach to the pursuit of justice differentiated from, and even collided with, the entire Trial which was built on Western legal values.

The difference between China and the West regarding the pursuit for justice preliminarily lies in the gap between the two's approaches to conviction. In the West, one's guilt is legally determined through a formal judicial proceeding that requires the prosecutor to present compelling evidence and the adjudicator to decide the case based on rules, actual evidence and testimony presented before the court.[125] The Chinese traditional view of conviction, as is found in the *Gou Yu* case discussed in chapter 2, leant towards *li* and advocates "guilt by intention"(*lunxindingzui*, 论心定罪).[126] "Guilt by intention" means guilt should not be proven on "the facts of the matter but follow the intent of the person involved: if the intent is good, then breaking the law is

[124] *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259.
[125] Nancy L. Rosenblum, "Justice and Experience of injustice" in Martha Minow & Nancy Rosenblum, eds, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton, N.J: Princeton University Press, 2003) at 82.
[126] Weizheng Zhu, "Confucian Statecraft in Early Imperial China" in Carmen Meinert, ed, *Traces of Humanism in China: Tradition and Modernity* (Bielefeld: Transcript Verlag, 2010) at 34.

excused; if the intent is bad, then even keeping to the law is punished".[127] Under this principle, the determination of a crime should be subject to motive, *li* and other factors rather than the written rules. Accordingly, conviction is not merely an outcome of fact that is supported by evidence and confirmed by trials scrupulously conducted according to fair rules and due process; rather, it is arguably a product of the adjudicator's discretionary power grounded on his own moral sense, humane points of view, and other non- or extra-legal factors.[128] This does not mean the Chinese watered down justice – only that they approached justice from a more moral perspective. But this judiciary is imperfect in Western terms: in exchange for the fulfillment of moral code, it causes the judicial proceedings to be relatively vague and arbitrary.

The lingering "guilt by intention" principle in the Chinese mind caused some of the mistakes made by China in the Tokyo Trial. The first mistake was the misunderstanding of the significance of judicial proceedings and the burden of proof. While the Tokyo Trial was constructed on the presumption of innocence and was devoted to parity between prosecution and defense, China had already prejudged the outcome, asserting that "[i]t is as clear as daylight that the Japanese had invaded China and slaughtered the Chinese". In addition, compared to the trial itself, China was deeply concerned about how its appearance in the Trial could be used to display its new, improved status in the international order. This mentality is evident in the Chinese judge's insistence on the

[127] "春秋之治狱，论心定罪。志善而违于法者免；志恶而合于法者诛", translation is cited in Charles Sanft, "Dong Zhongshu's Chunqiu Jueyu Reconsidered: On the Legal Interest in Subjective States and the Privilege of Hiding Family Members' Crimes as Developments from Earlier Practice" (2010) 33:34 Early China 141 at 152.
[128] See e.g. Max Weber, *The Religion of China, Confucianism and Taoism*, 1st ed (Illinois: The Free Press, 1951) at 149; Hyung I Kim, *Fundamental Legal Concepts of China and the West: A Comparative Study* (Port Washington, NY: Associated Faculty Pr Inc, 1981) at 12; Yu Zhang & Nicholas Lovrich, "Portrait of justice: The Spirit of Chinese law as Depicted in Historical and Contemporary Drama" (2016) 1:4 Glob Media China 372.

order in which he sat on the bench.

Because the Chinese government had mistakenly assumed from the outset that the trial would be "a formality", it was caught off guard by the Allied lawyers who were diligently "helping" the Japanese to defend the cases against them. Of course, we cannot say China was wrong and the Japanese defendants were innocent. The function of the presumption of innocence lies in the distribution of the burden of proof, namely, "the burden of proof is on the one who declares, not on one who denies".[129] In other words, the Tokyo Trial required that, if China claimed the Japanese defendants were guilty, it should gather and provide evidence to prove that. However, with its advance presumption of guilt, the Chinese perspective actually reversed the burden of proof – that China should not devote itself to investigation and seeking evidence, for "obviously the Japanese criminals would be properly punished" unless they were proven innocent. This perspective likely answers Kushner's perplexity as to why the Chinese government only sent a few representatives to participate in the Tokyo Trial.

The second is the poor quality of evidence. Given that Chinese legal traditions paid little attention to judicial procedure, knowledge of evidence and sophisticated evidence rules—such as the procedure for collecting evidence—was largely absent. Even in contemporary times, China continues to have few evidentiary laws that can effectively prevent alleged misconduct by police and prosecutors in their investigations.[130] As a result, most Chinese, as Qin said, were unaware of the issue of evidence in a practical

[129] Kenneth Pennington, "Innocent until Proven Guilty: The Origins of a Legal Maxim" (2003) 63 Jurist 106.
[130] Nanning Zhang & Douglas Walton, "Recent Trends in Evidence Law in China and the New Evidence Scholarship" (2010) 9:2 Law Probab Risk 103 at 105 to 107.

sense – and their image of "evidence", which was highly vague and largely subjective (such as Qin's testimony before the court), fell short of the Western standards of admissibility and relevance.

The Sino-Western perceptional clash culminated in the decision-making process about conviction and punishment of the Japanese defendants. Based on the published opinions of some judges, the disputed points were not only about whether and how the Japanese should be sentenced, but also about the process, about whether the rights of the accused were sufficiently protected and whether the punishment was proportionate. The judges' concern over the fairness of adjudicatory procedures revealed their understanding of justice – that is, the pursuit of procedural justice. The notion of procedural justice is especially influential in the Western views of law. John Rawls argued in his *A Theory of Justice* that the outcome of perfect procedural justice included not only an independent criterion for what constitutes a fair or just outcome of the procedure but also a procedure that guarantees that the fair outcome will be achieved.[131] A fair procedure is supposed to contain two components. The first is referred to as the quality of the decision-making process. The decision makers (e.g. judges) who adjudicate the process must give participants sufficient opportunities to express their points of view, behave in a professional and unbiased manner, and be competent in the way he or she reaches decisions.[132] The second component focuses on the quality of treatment and notably whether the decision maker has treated the participants with

[131] John Rawls, *A Theory of Justice*, revised ed (Cambridge: Harvard University Press, 1999) at 73 to 78.
[132] John W Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (New Jersey: L. Erlbaum Associates, 1975) at 72 to 77.

dignity and respect.[133] Both components need to be satisfied for procedural justice to be delivered.

However, on the Chinese side, the quality of procedure was thought to be less important than the final outcome. The Chinese reaction to the conviction and sentencing of the Japanese defendants—including the reaction of the general public, the Chinese government and Justice Mei—manifested the form of justice that China wished to pursue through the Tokyo Trial – that is, the actual harms suffered in the wartime should be awarded legal recognition and the "bad guys" should be severely punished (preferably with death penalty). To an extent, the Chinese version of justice is outcome-oriented, emphasizing the quality of outcomes generated by procedures and whether satisfying outcomes can be successfully detached from the procedural framework. In other words, compared to just procedure, the Chinese vision of justice in the Tokyo Trial focused more on the need for the ultimate judgement to be just. And what is considered just? According to Mei's reaction to the Chinese public opinion, justness seems to be dictated by the degree to which the wrongdoer would be punished and how satisfied the public is with the punishment. In some sense, the Chinese pursuit of justice also carries elements of populism.

Here one can again find the enduring influence of traditionalism on the Chinese pursuit of justice. The concept of justice in Chinese traditional culture should be understood within the context of Confucianism. Confucian justice placed a clear priority on the maintenance of social harmony.[134] As was alluded to in Chapter 2, social

[133] *Ibid*.
[134] Kim, *supra* note 128 at 11 to 17.

harmony according to Confucianism means the achievement of *Sangang* order, and since ancient times, law together with *li*, have been used as an instrument to maintain this order.[135] A harmonious *Sangang* society, according to Confucianism, consists of a wise emperor, virtuous officials, and obedient people.[136] In this society, each member of this arrangement should clearly understand his or her own responsibility and obligation to the greater collective—even at the cost of individual rights and interests—and individuals who fail to do so should be punished.[137] Understandably, in the Chinese traditional legal culture, justice serves the greater collective, concentrating on whether the wrongdoers gets what they deserved and whether the punishment could comfort the public and maintain a stable social order.[138]

Essentially, while some of the other trial judges considered due process in deciding the accused's guilt or innocence and sentencing, the Chinese judge considered the administration of retributive justice, because in his eyes their guilt was a foregone conclusion. Mei's overriding concern was the possibility that the defendants would be able to rely on the violations of procedural justice standards to escape punishment. Therefore, instead of asking the other judges to evaluate competing claims to the "truth," Mei's fervent speech attempted to stoke their moral outrage and impress on them that a truly virtuous judge would simply declare the defendants guilty and punish them – as

[135] *Ibid* at 11.
[136] Zhang & Lovrich, *supra* note 128 at 373.
[137] For instance, crimes against the emperor or the imperial family were considered so heinous that even one found guilty of premeditation without actual commission would be subjected to the death penalty. Kim, *supra* note 128 at 12.
[138] Amnon Reichman, "The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse" (2007) 17 Cal Interdisc LJ 457; Stephen McIntyre, "Courtroom Drama with Chinese Characteristics: A Comparative Approach to Legal Process in Chinese Cinema" (2013) 8 E Asia Rev 1 at 9; Zhang & Lovrich, *supra* note 128 at 374.

all other actions would betray "all those who died in the war".

The last but not least point about the Sino-Western perceptional clashes in the Tokyo Trial centers on one of the major Chinese participants: Justice Mei. Mei represented the Republican elites who endured a hidden war between their Chinese and Western selves when facing international adjudication. As a graduate of the University of Chicago Law School, Mei had received Western legal training, and surely knew how to work independently and impartially as a legal professional. Yet nationalism loomed large in his behavior in Tokyo. In some cases, his struggle for China's sovereign rights and interests could be orchestrated through Western discourse – such as with the seating plan. But the struggle also involved traditionalism as Mei's insistence on seating precedence protocol seems to resemble a Confucian gentry's commitment to *li*.

With regard to the conviction and sentencing of the Japanese defendants, Mei's two selves, as we have seen, were conflicted. Although Mei never explicitly clarified what had persuaded him to sentence the Japanese to death, his postwar synopsis—which criticizes the lack of Chinese prosecutorial staff and the overall poor Chinese performance at the Trial[139]—implies that his insistence on the application of capital punishment was not entirely the result of his free evaluation of the evidence. Rather, it can be argued that it derived from his lingering connection with traditionalism. Mei in many respects demonstrated his adherence to "justice" in the traditional sense. For example, he wrote in the diary that "[i]f the IMTFE is unable to reach a convincing judgment, it would be too ashamed for me to go back home and face our fellows" and

[139] Mei, *supra* note 63 at 66.

even pledged to "offer our apologies with death". Mei's emotional plea for the death penalty in the tribunal, especially the rhetoric such as "[w]e can vote now for all those who died in the war...for closing eyes in death" also reinforced his image as a good judge in the traditional Chinese legal culture – unbending, virtuous, and committed to avenging Japan's crimes against the Chinese people.

Conclusion

This chapter has demonstrated how the Chinese during the Republican era perceived international adjudication through their communications with others in the case of *Belgium v China* and the Tokyo Trial. The ROC's attitude towards international adjudication continued to be nationalistic, taking sovereign independence and equality as their primary goals. Yet the ROC was more willing than the Qing government to accept international adjudication. This is marked in the decision-making process about China's appearance before the PCIJ in *Belgium v China* and China's participation in the Tokyo Trial. Compared to the Qing officials, the Chinese participants in the Republican era were more prepared to appear before the international courts and tribunals. In particular, at the Tokyo Trial, China fully engaged in the decision-making processes, ranging from prosecution to trials, for the first time in its history. In addition to their mere appearance, the Chinese participants voiced their perspectives and behaved in many situations (e.g. the seating plan issue) as a partner of more than a supplicant to the great powers, implying a change in the power dynamics behind the decision-making processes. Ultimately, China had moved from the object of colonization to a fully-

fledged member of the international community.

Of course, China's progress in participating in adjudication-related decision-making processes should be mostly credited to westernization. After the traditional institutions were destroyed, the Western-educated elites, who wielded enormous power in the Republican government, embarked on their state-building with Western knowledge and values. Different from the Qing government that tolerated only change-within-tradition, Western civilization—including some of its values and cultures—permeated and penetrated the Chinese value cluster. This change can be seen in the ways the Chinese felt, spoke, behaved and interacted in the Sino-Belgian dispute and the Tokyo Trial. To some extent, it can be concluded that China was embracing the Western concept of international law as well as valuing the "rule of law".

However, there were also traces of traditionalism and nationalistic resistance against Westernism. Similar to that in the Qing dynasty, the westernization movement in the Republican era had an Achilles' heel: Western values only prevailed among a small group of cosmopolitan and well-educated elites, most of whom had obtained degrees from renowned Western universities and valued popular participation less than they did strong leadership. Furthermore, the Republican elites, consciously or not, maintained a lingering attachment to traditionalism, which made their perception and acceptance of Westernism superficial at best. As a result, the tension between Westernism and traditionalism continued to exist in the Chinese value cluster and the perceptional clashes between China and the West in the pursuit of justice in the Tokyo Trial have clearly exemplified this. In a sense, the Republican elites were still unable to balance

their borrowing of Westernism for state-building with their desire to maintain their "Chineseness." Perhaps Non-western states like China should search for a "regeneration of the national culture adapted to the requirement of progress, but retaining at the same time its distinctiveness".[140] However, soon after the Tokyo Trial, the Republican government was defeated in the Civil War and fled to the island of Taiwan, leaving the task to its successor, the PRC. Under the new regime (which was informed by a diametrically different ideology than the one before), it remains to be seen if China's acceptance of Marxism can facilitate the regeneration of its values and culture or hinder it.

[140] Chatterjee, *supra* note 57 at 2.

CHAPTER 5 THE PEOPLE'S REPUBLIC OF CHINA'S ATTITUDE TOWARDS INTERNATIONAL ADJUDICATION IN THE MAO ERA[1]

The Mao era coincided with decades of ideological tension between the capitalist powers in the Western Bloc (the United States and its allies) and the socialist powers in the Eastern Bloc (the Soviet Union and its satellite states). Although there was no large-scale open conflict between the two sides, hostility was largely expressed through proxy wars, notably taking the form of competitions over military technology, the manipulation of international affairs, and ideological propaganda campaigns.[2] Colored by the Cold War politics, international adjudication featured ideological divisions as well. A prominent example of this would be the development of the ICJ. Like its predecessor the PCIJ, the ICJ had been committed to settling inter-state disputes since its inception in 1946, though its actual effectiveness was limited. States were reluctant to submit cases to its jurisdiction and by 1973, only 46 out of 132 parties to the ICJ Statute had accepted the compulsory jurisdiction of the ICJ,[3] most of which were from the Western Bloc.[4] Anxious to broaden its caseload and influence, the Court

[1] Historians often divide the history of the PRC into the 'Mao era' and the 'post-Mao era'. The Mao era lasted from the founding of the PRC on 1 October 1949 to Deng Xiaoping's (*邓小平*) consolidation of power and policy reversal at the Third Plenum of the 11th Party Congress on 22 December 1978. The Mao era focuses on Mao Zedong's (*毛泽东*) socialist movements, including land reform, the Great Leap Forward and the Cultural Revolution. See e.g. in John King Fairbank & Merle Goldman, *China: A New History, Second Enlarged Edition* (Massachusetts: Harvard University Press, 2006) at 343 to 456.

[2] The competition between the two Blocs was manifested in a series of regional military conflicts or crisis - the Korean War, the Cuba Missile Crisis and the Vietnam War being all prominent examples. In addition, the United States and the Soviet Union pursued nuclear rearmament and developed long-range weapons with which they could use to strike the other's territory and which initiated the space race. For instance, In August 1957, the Soviets successfully launched the world's first intercontinental ballistic missile and in October, it launched the first Earth satellite, Sputnik. This race culminated in the U.S. Apollo Moon landings. See details in W. LaFeber, *America, Russia, and the Cold War* (New York McGraw-Hill Higher Education, 1987) .

[3] 1972-1973 I.C.J.Y.B. 33 (1973).

[4] Ruth Mackenzie et al, *The Manual on International Courts and Tribunals*, 2d ed (Oxford ; New York: Oxford University Press, 2010) at 35; Anthony Giustini, "Compulsory Adjudication in International Law: The Past, the Present, and Prospects for the Future" (1985) 9 Fordham Intl LJ 213 at 237.

unwittingly accepted jurisdiction in highly politicized and contentious advisory cases that played into certain political agendas.[5] This tainted the image of the ICJ in the eyes of some states (especially those from the Eastern Bloc), resulting it being perceived as little more than a tool for political gain rather than an independent and impartial adjudicatory institution.[6]

The PRC's approach to international adjudication in the Mao era was inseparable from Cold War politics. As a socialist regime grouped into the Eastern Bloc, the PRC was isolated by the Western Bloc. Because the West refused to recognize it as the legitimate representative of China, the PRC was only admitted to the United Nations in 1971.[7] Understandably, the PRC did not accept the compulsory jurisdiction of any international courts/tribunals or have any direct interaction with the international adjudicatory regime. For instance, it never brought cases to the ICJ, or appeared before the Court as a respondent, or participated in proceedings as a third party.[8] Nor did It accept judicial settlement by the ICJ in treaties to which it was a party.[9]

But it cannot be said that the PRC in the Mao era were indifferent towards international adjudication. A prominent example was the PRC-led trials of Japanese war criminals. The previous chapter studied China's attitude towards the adjudication of Japanese war crimes through its participation in the Tokyo Trial. This chapter studies

[5] An advisory opinion is a function of the ICJ open only to specified United Nations bodies and agencies. The ICJ's advisory jurisdiction has often been controversial, as cases were often political disputes brought before the Court. One such well-known case is the ICJ Advisory Opinion on Western Sahara. Robert Y Jennings, "The International Court of Justice after Fifty Years" (1995) 89:3 Am J Int Law 493 at 493 to 503.
[6] Mackenzie et al, *supra* note 4 at 37.
[7] The United Nations General Assembly passed Resolution 2758, which authorized the resumption of the PRC's membership in the United Nations. See "Restoration of the Lawful Rights of the People's Republic of China in the United Nations", United Nations General Assembly, 26th Sess, A/RES/2758(XXVI) (1971).
[8] "List of Contentious Cases by date of introduction" (accessed 20 June 2018), online: *International Court of Justice* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>.
[9] Julian Ku, "China and the Future of International Adjudication" (2012) 27 Md J Int Law 154 at 160.

the Chinese Communist trial of Japanese war criminals. The Communist trial is worth mentioning because it represented significant changes in China's attitude towards Japanese war crimes, even though it, like the Tokyo Trial, employed the same legal instrument (i.e. adjudication) to pursue justice. Moreover, the PRC-led adjudication of Japanese war crimes demonstrated an early Chinese endeavor to create a new Chinese value system with a Marxist character, known as the Sinfication of Marxism.[10]

At the end of the previous chapter, it was pointed out that China needed to regenerate its values and culture in order to resolve the inherent tension between Western civilization and Chinese civilization. It seems that the Chinese communists did exactly that in their trials against Japanese war criminals, making Marxist thought—which is an essentially Western ideology—adapt and integrate into China's indigenous society and culture. The PRC-led adjudication of Japanese war crimes was merely the beginning: in the decades that followed, the Chinese Communists continued their Sinification of Marxism and their exploration of the Chinese socialist approach to the international legal regime –even as they were increasingly isolated by the international community due to the escalating Cold War. The 1962 Sino-Indian border conflict and the subsequent negotiation with India provide a glimpse into how Communist China perceived international adjudication and the possibility of applying ICJ adjudication to settle the dispute.

[10] Marxism was initially imported to China between 1900 and 1930 and facilitated the establishment of the CCP. In the late 1930s, Mao Zedong began to develop his own Sinified version of Marxism that was independent from the classical theories. Mao's Sinification of Marxism had remained the dominant ideological paradigm in China since 1949 when the Chinese Communists founded the PRC. See John K Fairbank & Albert Feuerwerker, *The Cambridge History of China: Volume 13, Republican China 1912-1949* (Cambridge: Cambridge University Press, 1986) at 789 to 870.

5.1 The PRC's Attitude towards International Criminal Adjudication

The international community in the aftermath of the Nuremberg and Tokyo Trials witnessed numerous similar war crimes trials. This sort of international criminal adjudication, which became known as a part of "transitional justice",[11] founded and developed many judicial and non-judicial measures (such as criminal prosecution and reparations programs) to redress the legacies of human rights abuses from WW II, leading to a global focus on human rights and the progressive rise of an international criminal legal regime.[12] While many scholarly studies on postwar transitional justice have concentrated on the trials and de-Nazification programs in the West, there has been much less academic analysis on what was happening meanwhile in the East – and the socialist world, in particular. In the early years of the PRC, the Chinese Communists, like their European counterparts, were also committed to handling the legacies of war crimes and trying war criminals who remained detained in mainland China.[13]

5.1.1 The PRC's Decision-Making Process on the Adjudication of Japanese War Criminals

At first glance, the PRC-led trials of Japanese war criminals were extraordinary. In the Tokyo Trial and in trials in other venues, very few Japanese defendants admitted

[11] See e.g. in Ruti Teitel, "Transitional Justice: Postwar Legacies" (2005) 27:4 Cardozo Rev 1615.
[12] Ruti G Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).
[13] In the 1950s, there were approximately 1,100 Japanese war criminals in the PRC, 969 of whom were imprisoned by the Soviet Union in Siberia and transferred as a "gift" to the PRC. Among these criminals were high ranking Japanese officers who managed the puppet Manchukuo Empire, including the former Director of the General Affairs Bureau of the Manchukuo State Council Takebe Rokuzō. Barak Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (Cambridge: Harvard University Press, 2015) at 258.

their crimes voluntarily, but in the PRC-led trials almost every single Japanese defendant did so. Pu Yi (溥仪), the last Chinese emperor, in his memoir recalled his experience of being a witness at the PRC trial and the Tokyo Trial respectively: "after I finished my testimony, Tadayuki Furumi (one of the Japanese defendants) bowed low and tearfully said 'what the witness said was all true'…this scenario reminds me of the Tokyo Trial, where the Japanese defendants, through their counsels, attacked the witnesses and attempt to hide their crimes…"[14] From this comparison we can infer that the PRC might have adopted special policies to treat and try the Japanese defendants – this might explain why the defendants' performances at the PRC trials were so different from those at the Tokyo Trial. Yet what were these special policies and how did they come into being? The following pages try to resolve this issue through exploring the participants, perspectives, bases of power, strategies, arenas and outcomes of the PRC's decision-making process in the adjudication of Japanese war criminals.

The Chinese Communists who participated in the adjudication of Japanese war criminals were remarkable, especially when compared to their counterparts at the Tokyo Trial. In the first place, despite emerging victorious in the Chinese Civil War, they were novices at international adjudication, as most of them hailed from rural areas and had little knowledge about international legal theories and relevant practice.[15] Mao Zedong, for one, grew up as the son of a wealthy Chinese farmer and received his education in China, which stands in sharp contrast to his Republican counterparts who studied abroad and obtained law degrees from renowned Anglo-American

[14] Puyi Aixinjueluo, *The First Half of My Life* (Beijing: DongFang Press, 1999) at 516.
[15] Kushner, *supra* note 13 at 255.

universities.[16] Second, as staunch followers of Marxism, the Chinese Communists had little desire to embrace and adopt Western modes to handle China's foreign affairs. Of course, while Marxism itself essentially stemmed from the West, it nevertheless criticizes the Western bourgeois social order that had developed from the 17th century onwards and attempts to overcome the values associated with Western capitalism.[17] Accordingly, the Chinese Communists disagreed with the path the West had set for international criminal adjudication. In their eyes, the Western bourgeois rule of law—notwithstanding its fairness and transparency in procedure—could never lead to a just outcome, because procedural justice was a mere formality and "even the major war criminals convicted by the International Military Tribunal may be set free at will if approval of a majority of the member states of the Military Tribunal is obtained."[18]

Instead, the Communists' overall perspective on war crimes and international criminal adjudication featured Marxist principles that were distinguished from the Western "bourgeois" discourse. Attributing the responsibility for crimes to individuals, the Western pursuit of justice focuses on the punishment of individual criminals. By contrast, Marxism centers on the class character of criminals, claiming that crimes are dictated by social forces (e.g. capitalism) and remain to some extent beyond the control of individuals.[19] In other words, Marxism argues that not only are individual criminals

[16] Some Communist leaders, such as Zhou Enlai (周恩来) and Deng Xiaoping, went to Europe on work-study programs. But given financial issues and their devotion to political activities, most of them withdrew eventually and returned China to become communist revolutions. See in Shaoqing Chen, "A Re-examination of the Acceptance of Marxism by Self-Supporting Student Laborers" (2018) 7 J Chin Communist Party Hist Stud 37.
[17] See *e.g.* Karl Marx, "Wage Labour and Capital" (1847), online: *Marx Internet Arch* <https://www.marxists.org/archive/marx/works/1847/wage-labour/>.
[18] Jerome Cohen & Hungdah Chiu, *People's China and International Law, Volume 2: A Documentary Study* (Princeton: Princeton University Press, 1974) at 1587.
[19] Paul Q Hirst, "Marx and Engels on Law, Crime and Morality" (1972) 1:1 Econ Soc 28 at 42.

but also the social institution (or class) to which they belong responsible for crime.[20] This was implicit in Mao's analysis of the Sino-Japanese War found in his article "On Protracted War" which was later regarded as a guiding document for addressing the issue of Japanese war criminals.[21] Mao in this article asserted that the fundamental problem of the Japanese army lay in "its superstitious belief in the Mikado and in supernatural beings, its arrogance, its contempt for the Chinese people and other such characteristics, all of which stem from long years of indoctrination by the Japanese warlords and from the Japanese national tradition".[22] From Mao's point of view, it appears that a war criminal was neither a devil nor an irredeemable class enemy that had to be destroyed violently; rather, he was institutionalized by Japanese society where he acted as the warlords' tool for committing atrocities. In this way the Communists had successfully transformed the notion of war crime into a remnant of class exploitation. To them, the Japanese war criminals were no different from the proletariat who were likewise deceived and used by the exploiting class at home in China. Hence the essence of the struggle against war criminals turned out to be a class war. The pursuit of justice was not prosecuting and punishing war criminals, but "liberating" them from being oppressed by the Japanese warlords and raising their consciousness.[23] Finally, reeducating war criminals with socialism became the keynote feature of the Communist version of transitional justice. Mao reportedly pointed out that "most enemies who had

[20] Steven A Barnes, *Death and Redemption: The Gulag and the Shaping of Soviet Society* (Princeton: Princeton University Press, 2011) at 14.
[21] Guixiang Zhou & Ryuji Ishida, "Educational Reform among Japanese War Criminals at the Fushun War Criminal Management Center - With a Focus on Studying Mao Zedong's On Protracted War" (2017) 8 CPC Hist Stud 109.
[22] *Ibid* at 116.
[23] *Ibid*.

laid down their arms are reformable with right policy and measures…We cannot force them (to reform), we should make them accept reeducation voluntarily."[24] In 1952, Chinese Prime Minister Zhou Enlai who presided over the issue of Japanese war criminals issued a similar order, requesting the comrades to treat adjudication as a way to reeducate Japanese war criminals and to foster the Japanese understanding of their crimes.[25]

But other Communist participants were uncomfortable with the perspective that Japanese war criminals should be treated leniently and reeducated with socialism.[26] Their very participation in the Japanese invasion of China made them "guilty" and "evil" at least initially in the opinion of many Chinese Communists.[27] Yuan Jin (金源), then a warden of Fushun War Criminal Prison, admitted in his memoir that "at first I was unwilling to take care of the Japanese prisoners; I felt suffering about staying with them, especially when I remembered how they killed my siblings and tortured me."[28] Not only Jin but many other Communists who shared similar personal experiences disagreed with the reeducation plan: "I cannot understand. Why do we need to educate the Japanese who have killed thousands of our fellowmen?"[29] Reports issued by the Sentencing Research Small Group (*liangxing yanjiu xiaozu* 量刑研究小组) confirmed

[24] Zedong Mao, "On the People's Democratic Dictatorship: In Commemoration of the Twenty-eighth Anniversary of the Communist Party of China" (30 June 1949), online: *Selected Works of Mao Tse-tung* < https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm>.
[25] Kushner, *supra* note 13 at 271.
[26] Adam Cathcart & Patricia Nash, "'To Serve Revenge for the Dead': Chinese Communist Responses to Japanese War Crimes in the PRC Foreign Ministry Archive, 1949–1956" (2009) 200 China Q 1053 at 1067 to 1068; Justin Jacobs, "Preparing the People for Mass Clemency: The 1956 Japanese War Crimes Trials in Shenyang and Taiyuan" (2011) 205 China Q 152 at 157.
[27] Kushner, *supra* note 13 at 265.
[28] Yuan Jin, *Memoir of A Chinese Prison Education Warden* (Beijing: Chinese People Liberal Army Press, 1999) at 38.
[29] *Ibid*.

that there was widespread indignation towards the policy of leniency.[30]

It can again be seen that even within a highly homogenous group of participants there may exist a substantial divergence of perspective. Doubts about leniency towards Japanese war criminals could be attributed to the powerful anti-Japanese sentiments in Chinese postwar society. After all, only a few years had passed since the Japanese committed atrocities in China. And ironically, even Mao and his followers had fiercely attacked the Republican government's magnanimity in dealing with Japanese war criminals not long ago. In the propaganda campaign between the CCP and the KMT during the civil war, Mao asserted that "the people of the whole country, all the democratic parties and people's organizations and also the patriots in the reactionary Nanking Kuomintang governmental system must rise at once to oppose the criminal act of that government in betraying the national interests and collaborating with the Japanese fascist militarists."[31] Arousing the Chinese memory of suffering at the hands of Japanese and provoking their determination to wreak vengeance on Japanese war criminals might have been a useful tool for the CCP to win more public support in the competition with the KMT. However, when the party defeated its political rival and took over the country's domestic and foreign affairs, the popular anti-Japanese sentiments turned out to be a major obstacle towards its new Japan policy.

Not only were the Chinese Communists incredulous about socialist reeducation but so too were the Japanese prisoners, who were important participants in the decision-

[30] Jacobs, *supra* note 26 at 157.
[31] "On Ordering the Reactionary Kuomintang Government to Re-Arrest Yasuji Okamura, Former Commander-in-Chief of the Japanese Forces of Aggression in China, and to Arrest the Kuomintang Civil War Criminals — Statement by the Spokesman for the Communist Party of China" (January 28, 1949) in Mao Tse-Tung, *Selected Works of Mao Tse-tung* (Amsterdam: Elsevier, 2014) vol 4.

making process. Initially, some were suicidal and believed that they would be executed by the Chinese Communists,[32] while others resisted being judged by the Communist government, insisting that they were not war criminals but prisoners of war and thus should be released. Fujita Shigeru, for example, is said to have claimed that "we are militaries faithful to the Emperor. Following the Emperor's order, we come here and try to reconstruct China. We are not war criminals but prisoners of war, who should be sent back to Japan after the war according to international law."[33]

The various participants' different and even conflicting perspectives left Mao and his followers in a predicament. On the one hand, they needed to pacify the anti-Japanese sentiments within the party in order to maintain public support of the young Communist regime; but on the other hand, they needed to show magnanimity in the treatment of the hostile and stubborn Japanese war criminals. Ultimately, Mao and his colleagues did not abandon their reeducation plan.[34] Perhaps the reason for this was not only their firm belief in the Marxist ideology but also their recognition of the underlying power relationship between the PRC and Japan in the international arena. The Japanese war criminals were in a weak position within the Chinese domestic context, but Japan (whom they represented) was hardly weak in the power configuration of the international context. After the rise of the Cold War, the United States used Japan as a bulwark against communism in the Pacific and since the early 1950s had delivered massive aid to help restore its economy from the wartime trauma.[35] Regaining its

[32] Kushner, *supra* note 13 at 269 to 270.
[33] Jin, *supra* note 28 at chap 9.
[34] Cathcart & Nash, *supra* note 26 at 1067 to 1068.
[35] See *e.g.* Kushner, *supra* note 13 at 293 to 299; Cathcart & Nash, *supra* note 26; Dick Kazuyuki Nanto, *The United States' Role in the Postwar Economic Recovery of Japan* (Massachusetts: Harvard University Press, 1976).

power bases with U.S. assistance, Japan also believed that it had the right to retrieve its overseas compatriots – and especially the Japanese who were imprisoned in the PRC.[36] With evocative language that depicted the would-be repatriates as missing children, influential newspapers (e.g. Mainichi shinbun), civil groups and politicians in Japan tried to win international support and push the PRC to repatriate all Japanese prisoners from China.[37]

At this time, the PRC found it difficult to reject Japan. Regardless of the century-long resentment between the two countries and the huge physical and psychological damage Japan had brought to the Chinese people, the Chinese Communists had to recognize the strategic role Japan played in its foreign relations. Even though Japan had wreaked havoc on China, the new-born Communist regime could not remain stable and safe with an increasingly hostile and anti-Chinese neighbor – at least during the years while the PRC was fighting against the United States in the Korean War.[38] Thus, on many occasions the Chinese Communists took the issue of Japanese war criminals as an opportunity to repair the Sino-Japanese relationship. It was said that at the Bandung Conference,[39] Zhou Enlai met with then Japanese Prime Minister Takasaki and discussed the repatriation of Japanese war criminals.[40] A report from the CCP prosecutor's office made it even clearer:

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[36] Adam Cathcart & Patricia Nash, "War Criminals and the Road to Sino-Japanese Normalization: Zhou Enlai and the Shenyang Trials, 1954 – 1956" (2009) 34:2 Twent-Century China 89 at 92.
[37] *Ibid*.
[38] The Korean War was a conflict fought between North and South Korea from 25 June 1950 to 27 July 1953, in which a United Nations force led by the United States fought for the South, and China fought for the North. The fighting ended with a creation of the Korean Demilitarized Zone separating North and South Korea. However, no peace treaty has been signed, and the two Koreas are technically still at war. See details in Roderick MacFarquhar & John K Fairbank, *The Cambridge History of China: Volume 14, The People's Republic, Part 1, The Emergence of Revolutionary China, 1949-1965* (New York: Cambridge University Press, 1987) at 270 to 279.
[39] The Bandung Conference was a meeting of Asian and African states, most of which were newly independent. The Conference took place on April 18–24, 1955 in Bandung, Indonesia.
[40] Kushner, *supra* note 13 at 260.

> Dealing with Japanese war criminals was not just a legal matter, there were also considerations that related to the international political struggle. In light of the current international situation and our foreign policy toward Japan we assess that we should legally pursue a minority of Japanese war criminals and have a policy of benevolence while releasing the majority.[41]

In light of this, Mao and his followers believed that they should proceed with the reeducation plan. However, considering the internal and external criticism of such a plan, the implementation had to be both careful and skillfully undertaken.[42] Therefore, instead of copying the Soviet Gulag, where prisoners were required to reform through labor to foster their socialist minds,[43] the Chinese developed a series of moderate strategies which would reeducate the Japanese as well as to assuage any doubt about their magnanimity.

The first was the benevolent treatment of the Japanese prisoners. Yuan Jin in his memoir described the conditions at the Fushun prison where he worked quite positively: "upon the arrival of the Japanese, the prison had been equipped with comfortable facilities, such as tatami and Japanese-style baths".[44] There were adequate medical services in the prison and frequent cultural and recreational activities; the food was also of decent quality, with a regular supply of rice, bread, vegetables and meat.[45] Being treated with civility, the Japanese, who had previously been tortured by brutal Soviet camp personnel, harsh Siberian winters and exhausting labor,[46] were deeply moved and

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41 Cited in *ibid* at 261.
42 Cathcart & Nash, *supra* note 26 at 1066 to 1068.
43 The Gulag, or "Main Administration of Corrective Labor Camps and Settlements", was the government agency in charge of the Soviet forced labor camp system that was created under Vladimir Lenin's reign and reached its peak during Joseph Stalin's rule. The camps housed a wide range of convicts, from political prisoners to prisoners of war. See *e.g.* in Aleksandr Isaevich Solzhenitsyn, *The Gulag Archipelago, 1918-1956: An Experiment in Literary Investigation I-IV; Translated from the Russian by Thomas P. Whitney* (New York: Harper & Row, 1974).
44 Jin, *supra* note 28 at 38.
45 Kushner, *supra* note 13 at 269; Jin, *supra* note 28 at 38 to 40.
46 Some Japanese prisoners, who used to serve in the former puppet kingdom of Manchukuo, were actually captured by the Soviet Union in 1945 and kept in penurious conditions as laborers in Siberia before arriving in China. Kushner, *supra* note 13 at 251 to 252.

alleviated their hostility towards the PRC. "I tried at first to hide the brutalities I committed, but the Chinese people treated me with such humanity that I thought deeply over my past and eventually felt bitter remorse for my crimes",[47] said Hiraku Suzuki later in the Shenyang Trial.

After settling into the prison, the Japanese prisoners were asked to accept the reeducation program and reflect on their transgressions. Jin in his memoir provided the details of the program:

> We categorized the Japanese war criminals according to their military rank, social status, personal experience and ideological tendency. We requested junior military officers, many of whom came from underprivileged homes and lived miserable life in Japan, to review their past and expose the evildoing of Japanese militarism…60% of these Japanese war criminals gradually softened their hatred of China and accepted the messages of socialist reform…ultimately some Japanese even opened their hearts to us.[48]

For those who had showed their willingness to be reeducated, the staff created study groups and had them read books about Japanese imperialism, Marxist theories and the CCP development in China.[49] After theoretical studies, the Japanese were encouraged to review their invasion activities from a socialist perspective.[50] Some prisoners were even sent to tour various Chinese cities and sites that had suffered from Japan's invasion. There, they met not only victims of Japanese atrocities, but local villagers, urban residents and others who were devoted to socialist modernization.[51] As a result, Jin observed that many Japanese had begun to critically rethink Japan and the war:

> In the past the Japanese considered the Emperor was the God, whom they blindly worshipped and sacrificed for. And previously they even attributed their suffering in Japan to an unkind fate. After reviewing their personal experience and Japanese

[47] "Japanese War Criminals Tried in Shenyang", cited in Cohen & Chiu, *supra* note 18 at 1693.
[48] Translated by author. Jin, *supra* note 28 at 65 to 66.
[49] Kushner, *supra* note 13 at 271 to 277; Cathcart & Nash, *supra* note 26 at 1067.
[50] Jin, *supra* note 28 at 66 to 67.
[51] Cathcart & Nash, *supra* note 36 at 100.

> history, they realized the roots of oppression and exploitation, the evil of wars, and the debt they owed to China. They now know that their blind obedience had resulted in a disastrous rule.[52]

After the reeducation program, the prisoners became more willing to confess and repent for the crimes they committed. It was reported that some Japanese published their apologies in *Xinhua's Daily*, one of the CCP official newspapers.[53] These apologies were personal pleas to the Chinese people begging forgiveness. The authors repented of their individual wartime behavior, explaining that the consuming culture of militarism in which they had been raised essentially trained them to take part in Japan's imperialist aggression.[54] Some Japanese even railed against imperialism, militarism and capitalism, behaving like true Marxists.[55]

Having already obtained many prisoners' confessions, the PRC began the investigation, prosecution and trials of Japanese war criminals. When the prosecutors arrived in Fushun in March 1954, the Japanese had already admitted 2,980 crimes and submitted 637 written confessions.[56] During the two month investigation, virtually all of the Japanese prisoners confessed their crimes, resulting in more than 4,000 testimonies admitting approximately 14,000 charges.[57] The Japanese prisoners' cooperative attitude towards the adjudication seemed to justify Mao's lenient policy. In April 1956 the thirty fourth session of the First National People's Congress Standing Committee passed the *Decision on How to Deal with Japanese War Criminals in*

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[52] Translated by author. Jin, *supra* note 28 at 67 to 68.
[53] Jian Gao, "Study on New China's Adjudication on Japanese War Criminals" (2014) 3 J Stud Jpn Aggress China 41 at 44; Cathcart & Nash, *supra* note 26 at 1067.
[54] Cathcart & Nash, *supra* note 26 at 1067.
[55] Gao, *supra* note 53 at 44; "A Brief Report on the Japanese War Criminals in Custody and Thoughts on the Situation" (26 April 1956–17 May 1956), Beijing, PRC Ministry of Foreign Affairs Archives (Document 105-00502-07, cited in *ibid*.
[56] Shemin Zhao & Guoxiang Meng, "A Review of Chinese Communists' Adjudication of Japanese War Crimes", (2009) 8 Social Science in Nanjing at 101.
[57] *Ibid*.

Detention. The decision stipulated that:

> These criminals should have been punished severely for their crimes. But in view of the changes in the conditions in the past ten years since the Japanese surrender and Japan's present position, in view of the growth of friendly relations between the Chinese and Japanese peoples in recent years, and in view of the fact that most of these Japanese who committed crimes during the war have shown differing degrees of repentance while in custody, it is hereby decided that that these Japanese shall be dealt with severally in accordance with the policy of leniency.[58]

As a result, the PRC only indicted 51 Japanese incarcerated in China, and the remainder (about 1,000), who had committed only minor crimes or who had repented openly, were released and repatriated to Japan in three subsequent waves.[59] Even for those who were tried, the sentences were lenient – none were sentenced to death or life imprisonment.[60] At the court, many Japanese defendants reportedly cried, bowed and even kneeled, accusing themselves of being sinners and demanding the death penalty to repent of their sins.[61] In his final statement to the court, Shigeru Fujita said: "now I have come to realize that the war was not only a horrible crime committed against the Chinese people but also brought unprecedented disaster to the Japanese people…I pledge to give up my past evil ways and accept the judgment of the court."[62] Hideo Sakakibara similarly admitted that he had violated international law and was "ready to bear the severest punishment of the court."[63] Soon after the trials, the Supreme People's Procuratorate released the pardoned Japanese prisoners and made

[58] "Decision on How to Deal with Japanese War Criminals in Detention", see in Cohen & Chiu, *supra* note 18 at 1590.
[59] Enlai Zhou, *Selected Military Papers of Zhou Enlai (Zhou Enlai Junshi Wenxuan)* (Beijing: People Press, 1997) vol 4 at 372.
[60] Kushner, *supra* note 13 at 281 to 283.
[61] Cohen & Chiu, *supra* note 18 at 1590 to 1593; Gao, *supra* note 53 at 46.
[62] "Japanese War Criminals Tried in Shenyang", in Cohen & Chiu, *supra* note 18 at 1593.
[63] *Ibid*.

arrangements for their return journey to Japan.[64]

It seems that the outcome of the decision-making process was satisfied for both the Chinese and Japanese participants. A brief comment on the trials by a PLA legal office stated that the Chinese public was proud to have been finally able to try the Japanese war criminals. Some officers were even pleased that China was no longer dependent on international tribunals to deal with its foreign affairs.[65] Moreover, the PRC-led trials and the Communist leniency towards Japanese war criminals seems to have opened up a new channel for communications between the Chinese and the Japanese people. Zhou, in his meeting with a Japanese mission, affirmed that completing the matter with the war criminals could "end the unhappy past between China and Japan and begin our friendly cooperation [with Japan] in all areas."[66] Harboring gratitude to China, the prisoners who returned to Japan reportedly formed a lobby and education group called the "Liaison Group of Returnees from China (中国归国者联络会)" and committed to promoting Chinese Japan policy in Japanese society.[67] In the name of "people's diplomacy", the Communist government had also been welcoming Japanese cultural and economic delegations and promoting friendship—if not a rapprochement—between the two nations since the early 1950s.[68]

5.1.2 Pretrial Socialist Rehabilitation and Marxist Traditionalism

The Chinese socialist reeducation program and its related measures can be

[64] Kushner, *supra* note 13 at 293.
[65] H Arthur Steiner, "Mainsprings of Chinese Communist Foreign Policy" (1950) 44:1 Am J Int Law 69 at 1068.
[66] Enlai Zhou, *Selected Diplomatic Papers of Zhou Enlai* (Beijing: Zhongyang Wenxian Press, 1990) at 169.
[67] Kushner, *supra* note 13 at 264.
[68] *Ibid* at 272; Cathcart & Nash, *supra* note 26 at 1068.

characterized as an early rehabilitation program. To be certain, rehabilitation is not new to modern penology. In many states, alternatives to imprisonment such as community service are encouraged to help convicted persons re-integrate back into society.[69] But the Chinese version of rehabilitation was unique in three aspects. First, unlike conventional rehabilitation which usually takes place after conviction, the Chinese rehabilitation was carried out in advance of the formal trials. When the Shenyang and Taiyuan special military courts began their work in 1956, the Japanese had been detained and reformed for at least 7 years (1949 to 1956). Second, in addition to the re-integration into society of a convicted person, the Chinese rehabilitation was essentially a socialist transformation driven by a desire to heal the criminals and to engineer new socialist souls. Third, instead of reforming the individuals through heavy physical labor—like in the Soviet Union—moral education such as self-reflection, persuasion and confession was the primary means to reform the Japanese prisoners. Moreover, the Japanese were treated with humanity. They were healthy and lived comfortably, and most of them were released from prison after years of education.

Many factors contributed to the creation and development of the pretrial socialist rehabilitation program (notably Marxism), but the Chinese insistence on the use of moral education in penology did not stem from Marxist theories. Karl Marx had not emphasized much of a connection between morality and law; and on the contrary, he regarded both law and morality as parts of the superstructure derived from the

[69] Rehabilitation is a widely recognized process in numerous states. For instance, in *Vinter and Others v. the United Kingdom*, the ECtHR stated that a prospect of release is necessary because human dignity requires that there must be a chance for a prisoner to atone for his offence and move towards rehabilitation. *Vinter and Others v the United Kingdom*, No 66069/09, 130/10 and 3896/10, [2013] ECHR 786.

underlying economic bases, implying that morality and law were separate.[70] It is argued that many of the ideas in Chinese socialist rehabilitation, including moral education, were inspired by the Chinese traditional view of law, which was *li*-based and moral-oriented. In chapter 2 it was stated that traditional Chinese law mixed rules with *li* – that is, law contained not only legal rules but also other kinds of social rules such as morality, customs, and etiquette. Accordingly, the contents of justice in the traditional narrative included not only adjudication and punishment of crimes based on legal rules, but also moral educational reform with *li*.[71] Of course, rules and punishment were vital in the pursuit of justice in traditional China—as observed in China's performance at the Tokyo Trial—yet they were generally considered subordinate to the cultivation of *li* and moral education in Chinese cultures.[72] The reason for this preference was eloquently explained by Confucius: if the people are guided by rules, and order among them is enforced by means of punishment, they will try to evade the punishment and become crafty, with no sense of shame; but if they are guided by virtue, and order among them is enforced by *li*, they will be aware of shame and decency, and hence lead to autonomous harmony in society.[73] Therefore, since the very ancient Zhou (周) dynasty (1046-256 BCE), the ideal judicial system had been envisioned as a means to reform the criminal offenders by moral persuasion without physical punishment, pain

[70] Hirst, *supra* note 19 at 35 to 36; Christopher Ford, *The Mind of Empire: China's History and Modern Foreign Relations* (Kentucky: University Press of Kentucky, 2010) at 191.
[71] Hyung I Kim, *Fundamental Legal Concepts of China and the West: A Comparative Study* (Port Washington, NY: Associated Faculty Pr Inc, 1981) at 13.
[72] Luke T Lee & Whalen W Lai, "The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist" (1977) 29 Hastings Law J 1307 at 1310 to 1311; Chi-Yu Cheng, "The Chinese Theory of Criminal Law" (1948) 39:4 J Crim Criminol 461 at 461.
[73] Translated by author. ("道之以政，齐之以刑，民免而无耻；道之以德，齐之以礼，有耻且格"), see in Confucius, *Analects*, reprinted ed (Beijing: Zhonghua Book Company, 2006) at book 2 at chap 3.

or loss.[74]

Traditional legal values were evident in the socialist rehabilitation agenda – in particular, the emphasis on the prisoners' self-reflection. By providing the Japanese prisoners with good living conditions and treating them humanely, China portrayed itself as a moral guide that accepted its enemies with generosity, which slowly put the Japanese to shame and caused them to see the errors of their ways. This display of virtue proved effective, as prisoners like Hiraku Suzuki began to be ashamed of themselves: "the Chinese people treated me with such humanity that I thought deeply over my past and eventually felt bitter remorse for my crimes."[75]

Compared to the desire to transform the Japanese prisoners into socialists, the Chinese (according to Jin's accounts) showed more enthusiasm for helping them reflect on their crimes and cultivate virtues.[76] As a matter of fact, very few Marxist discourses are found in the prisoners' confessions; rather, what the Japanese had said revolved around the shame of committing war crimes and how they as prisoners realized the shame, indicating the central role that Confucian self-cultivation of virtues played in their rehabilitation. This is further confirmed in Jin's observation about the psychological changes of the Japanese prisoners: "[i]n the past the Japanese considered the Emperor was the God, whom they blindly worshipped and sacrificed for… after reviewing their personal experience and Japanese history…They now know that their blind obedience had resulted in a disastrous rule."[77]

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[74] Kim, *supra* note 71 at 13.
[75] "Japanese War Criminals Tried in Shenyang", cited in Cohen & Chiu, *supra* note 18 at 1693.
[76] Jin, *supra* note 28 at 67 to 68.
[77] *Ibid* at 68.

The voluntary confessions of guilt by the Japanese in adjudicatory proceedings best demonstrates the effects of the Confucian moral education embedded within the socialist rehabilitation. It has already been observed in relation to the Tokyo Trial that the Chinese investigation and prosecution of Japanese war crimes faced difficulties due to the lack of evidence and Japan's non-cooperation. However, this problem never appeared in the PRC-led adjudication, as the Japanese who had undergone rehabilitation actively surrendered themselves to the prosecutors and the scenario in court was even more dramatic. Unlike the Tokyo Trial where the two parties played a tit-for-tat game, the PRC-led trials principally concentrated on hearing and recording testimony from the victims and then witnessing the Japanese defendants confess and apologize for their crimes.[78] Even after they returned to Japan, none of them withdrew their confessions nor claimed that their confessions were made under coercion; rather, the Japanese prisoners reportedly continued to apologize to China.[79] The "Liaison Group of Returnees from China (中国归国者联络会)" was committed to publishing Japanese wartime atrocities and improving Sino-Japanese relations,[80] truly epitomizing good citizens in Confucian terms.

Through socialist rehabilitation, it appears that the Communists had broken new ground in the pursuit of postwar transitional justice. Following the path the Allies had set with the Nuremberg and Tokyo Trials, the mainstream view of postwar transitional justice centered on the adjudication of criminals, establishing tribunals and proceedings

[78] Gao, *supra* note 53 at 46.
[79] C. Martin Wilbur, "Japan and the Rise of Communist China", in Hugh Borton *et al*., eds, *Japan Between East and West* (New York: Council on Foreign Relations, 1957) at 214;Jacobs, *supra* note 26 at 154.
[80] Kushner, *supra* note 13 at 264.

to "demonstrate a public commitment to acknowledging and punishing the wrong".[81] The Chinese Communist viewpoint, however, focused on the reeducation of criminals, working on the improvement of each criminal's internal morality. While the Communist reeducation project borrowed many ideas from traditionalism, it was also closely associated with the perceived class struggle against capitalism and the promotion of socialism, both which are at the very core of Marxism. From this point of view, the PRC-led trials can also be considered as an early attempt to reconcile Chinese traditions and Marxist principles in China's foreign policy.

Was this effort towards Sinification mustered by traditional values or Marxism? Perhaps even the Communists themselves did not know. Mao rejected describing Marxism in China as "neotraditionalism with Marxist character";[82] instead, he believed that the Sinification of Marxism was done to enrich Marxist theories with ideas and values drawn from Chinese traditions and culture.[83] However, the Chinese adoption of a powerful strain of moralism in the rehabilitation process suggests this was not entirely true. Rather, to the extent that transforming the prisoners into moral persons became a key instrument of achieving justice, the adherence to traditionalism is even more obvious.

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[81] Nancy L Rosenblum, "Justice and the Experience of Injustice" in *Break Cycles Hatred Mem Law Repair* (Princeton and Oxford: Princeton University Press, 2002); Jacobs, *supra* note 26 at 155.
[82] Roderick MacFarquhar & John K Fairbank, *The Cambridge History of China: Volume 15, The People's Republic, Part 2, Revolutions within the Chinese Revolution, 1966-1982* (New York: Cambridge University Press, 1991) at 2.
[83] *Ibid*.

5.2 The PRC's Attitude towards the ICJ in the 1962 Sino-Indian Border Dispute

The 1962 Sino-Indian conflict stemmed from a disputed Himalayan border between China and India. Since the mid-19th century, sovereignty over two separate pieces of territory on the border has been contested between China and India. The first is Aksai Chin on the west border; the other, now called Arunachal Pradesh, is a disputed territory that lies south of the McMahon Line.[84] From 1959 onwards, skirmishes intermittently broke out along the disputed border. In 1961, India initiated a Forward Policy in which it placed outposts along the border, including along the eastern portion of a Line of Actual Control proclaimed by Chinese Premier Zhou Enlai in 1959.[85] Due to the failure to reach a consensus on the disputed territory, the PRC launched simultaneous offensives in Ladakh and across the McMahon Line on 20 October 1962.[86] After the ceasefire of 20 November 1962, Sino-Indian negotiations re-opened at the initiative of the Ceylon (Sri Lanka) government.[87] However, the negotiation process soon stalled, as the resolution proposals (namely the Colombo Proposals) requested a Chinese withdrawal of 20 kilometers from the McMahon line but exempted India from any reciprocal obligation. As such, it was unfair in the eyes of

[84] The McMahon Line is a border line drawn by Sir Henry McMahon, who was the foreign secretary of the British-run Government of India and the chief negotiator of the Simla Accord. Under his guidance, Great Britain, China, Tibet and India signed the Simla Accord in 1914 and settled the status of Tibet. It is the *de facto* boundary between China and India, although its legal status is disputed by the Chinese government. Neville Maxwell, *India's China War* (New Delhi: Natraj Publishers, 1997) at 39.

[85] *Ibid* at 171.

[86] For details of the border war, see *ibid* at 293 to 326.

[87] *Ibid* at 415. The representatives of six Afro-Asian countries (Ceylon, Burma, Cambodia, Indonesia, United Arab Republic and Ghana) met in Colombo from 10 to 12 December 1962 to seek some compromise which might bring China and India to the conference table. The conference was not intended for adjudicating the Sino-Indian dispute; instead, its intention was to create the necessary climate for a renewed Sino-Indian relationship. Shri Ram Sharma, *India-China Relations, 1947-1971: Friendship Goes with Power* (New Delhi: Discovery Publishing House, 1999) at 65.

the Chinese.[88] Jawaharlal Nehru, the then Indian Prime Minister, proposed in his letter to the Zhou Enlai that the PRC and India could make a special agreement and refer the boundary dispute to the ICJ.[89]

5.2.1 Decision-Making Process on the Use of the ICJ in the Sino-Indian Dispute

In this situation, China had to once again decide whether the ongoing dispute should be submitted to an international court for settlement or resolved independently. The instances explored in this dissertation mainly focused on the domestic arena, such as examining how Chinese officials from different factions interacted with one another and influenced the government's final decision. But in this case, the research focus will be shifted more towards the international arena where the Chinese government communicated with the Indian government to decide whether to use the ICJ in settling their dispute. The reason for this is because the decision-making process in the domestic arena had largely featured strongman politics since the 1960s and the participants were highly homogeneous. Chinese foreign policy during this period was often directly determined by strong Communist leaders – notably, Mao Zedong and a small group of

[88] The conference laid down two substantial proposals: (1) in the western sector, the Chinese forces would carry out their 20 km withdrawal from those military posts as had been proposed by the Chinese premier on 21 and 28 November 1962; (2) the Indian government would keep their existing position reached as a result of the war. In terms of the two proposals, the PRC made a reservation: China would withdraw in the 20 km zone on its side of the actual line of control, but neither Indian troops nor civilians could re-enter the area. Sharma, *supra* note 87 at 67.

[89] "Letter from the Prime Minister of India to the Prime Minister of China, 1 January 1963", in Government of India Ministry of External Affairs, ed, *Notes, Memoranda and Letters Exchanged and Agreements Signed Between the Governments of India and China: White Paper 8 (October 1962-January 1963)* (New Delhi: Government of India Press, 1963). Although the PRC was not a party to the ICJ Statute, it can still have the ICJ decide its disputes with others on the basis of a special agreement. The ICJ can obtain jurisdiction in three main ways: by special agreement, by treaty, and by unilateral declaration under the optional clause. Jurisdiction by special agreement arises when the disputing states agree to submit their dispute to the ICJ. The ICJ, in special agreement cases, serves as an elaborate arbitration device. See in "Basis of the Court's jurisdiction", online: *Int Court Justice* <https://www.icj-cij.org/en/basis-of-jurisdiction>.

his close colleagues such as Zhou Enlai.[90] Of course, while other officials (such as those from the Ministry of Foreign Affairs) also played a vital behind-the-scenes role in the process, it was Mao and Zhou who remained the final arbiters. Ning Lu, a former PRC diplomat, wrote that, "the most important characteristics of China's foreign-policy decision-making are that it is highly centralized and that in terms of key decisions it is very much personalized."[91] In the Mao era, Mao and his senior colleagues reportedly "dominated China's foreign-policy formulation and decisions", and their role in China's foreign policy "is illustrative of the centralized and personalized nature of these decisions".[92] The highly centralized decision-making mechanism guaranteed China's efficient response to international affairs; however, it also brought strong subjectivism and arbitrariness to China's foreign policy and in many cases, the Chinese government's attitude was equivalent to the Chinese Communist leaders' thoughts.

In the previous section it was noted that the Chinese Communists were somewhat swayed by anti-Western sentiments in their foreign policy making. This tendency intensified in the 1960s. When China's domestic economy deteriorated after the Great Leap Forward[93] and the Cold War escalated, China's belief in an external threat—as a response to its domestic and international crisis—rose to an all-time high and rapidly turned anti-Western sentiments into xenophobia. Claiming to fight against imperialism

[90] Stuart Harris, *China's Foreign Policy* (Cambridge: Polity, 2014) at 25.
[91] Ning Lu, *The Dynamics of Foreign-policy Decisionmaking In China*, 2d ed (London: Routledge, 2018) at 83.
[92] *Ibid* at 84.
[93] The Great Leap Forward (GLF) was an economic and social campaign led by the CCP from 1958 to 1961. The GLF's impetus came from the CCP's recognition in late 1957 that China's copy of the Soviet development model was inefficient. Considering China's massive population and its enormous potential, Mao believed that motivating the Chinese people to undertake rapid industrialization and agricultural collectivization could be a fast approach to achieving socialization. Having overexploited the labor force and nature resources in a short time, the GLF resulted in economic regression and great famine, indicating that Mao's policy eventually failed. Frank Dikötter, *Mao's Great Famine: The History of China's Most Devastating Catastrophe, 1958-1962* (UK: Bloomsbury Publishing, 2010) at 333; Fairbank & Goldman, *supra* note 1 at 410.

and capitalism, the PRC terminated diplomatic relations with almost all western capitalist states – for instance, the United States was asked to withdraw all diplomatic representation from the Communist-controlled mainland.[94] In the meantime, the Sino-Soviet socialist alliance gradually broke down, in part due to divergences over the two states' approaches to the West. The PRC criticized the Soviet Union for appeasing the capitalist West and perceived it as Marxist revisionism.[95] Having come to odds with the Soviet Union, Mao and his colleagues saw themselves as the sole orthodox inheritors of Marxism and envisaged world revolution with Beijing at the center.[96] In the blueprint for the world revolution, the Communists not only inspired their own people to fight against Western capitalism, but also attempted to lead the revolutionary consciousness for the rest of the world.[97]

India, the other major participant in the decision-making process under discussion, had since its independence been regarded as a champion of pacifism and pioneered the policy of non-alignment, professing neutrality between two the Western and Eastern Blocs.[98] With the hope of acting as an intermediary to bridge the gulf between the two rival blocs, Indian Prime Minister Nehru sought to establish good relations with China in the 1950s. In 1950, India recognized the Chinese Communist government and

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[94] Christopher Ford, *The Mind of empire: China's History and Modern Foreign Relations* (Lexington: University Press of Kentucky, 2010) at 194.
[95] See in MacFarquhar & Fairbank, *supra* note 38 at 513 to 515.
[96] Anne-Marie Brady, *Making the Foreign Serve China: Managing Foreigners in the People's Republic* (Maryland: Rowman & Littlefield, 2003) at 144.
[97] A Xinhua (the CCP's official press) report stated that "China's Great Proletarian Cultural Revolution ha[d] strengthened the world's people's determination for revolution; it [was] a great encouragement for the revolutionary people of the whole world in their fight against U.S. imperialism, modern revisionism and all reactionaries. *Ibid*.
[98] India was a founding member of the Non-Aligned Movement (NAM), a self-proclaimed neutral bloc that arose with a firm rejection of associating with either the US-led West or the Soviet-led East. "The Non-Aligned Movement: Background Information" (21 September 2001), online: *The Non-Aligned Movement* < http://www.nam.gov.za/background/index.html>.

established diplomatic relations with the PRC.[99] In 1954, India signed a bilateral treaty with China regarding the disputed territories of Aksai Chin and South Tibet,[100] stating that the two countries should obey Five Principles of Peaceful Coexistence in their settlement of border issues.[101] Although the PRC and India were friendly in theory, neither side was overly smitten with the other, especially after the late 1950s when Chinese foreign policy grew increasingly assertive. In 1959, the Nehru government unprecedentedly invited the U.S. President to visit India, which was thought to strengthen Indian–American relationship in the face of further Chinese Communist aggression.[102] In the same year, India granted asylum to the 14th Dalai Lama who had fled Lhasa after a failed Tibetan uprising against the Communist rule[103]– even though in the 1954 treaty it had pledged not to interfere in China's internal affairs. India's sympathy for the Dalai Lama was perceived by the PRC as a sign of expansionism in Tibet, and this impression was reinforced during the 1960s when xenophobia gradually came to dominate Chinese foreign policy. In this period China and India had a series of violent border incidents, culminating in the 1962 Sino-Indian War.[104]

The Indian government's perspective on the use of ICJ adjudication in the settlement of the Sino-Indian border dispute seemed to be in a constant state of fluctuation and

[99].MacFarquhar & Fairbank, *supra* note 38 at 259.
[100] *Agreement on Trade and Intercourse between the Tibet region of China and India*, the PRC and India, 29 April 1954, UNTS 299 at 57 to 81(entered into force 3 June 1954).
[101] The Five Principles of Peaceful Coexistence later become the PRC's cornerstone for its foreign policy. The Principles include "mutual respect for each other's territorial integrity and sovereignty, "mutual non-aggression", "mutual non-interference in each other's internal affairs", "equality and cooperation for mutual benefit" and "Peaceful co-existence". The Principles were widely known through a speech made by Zhou Enlai at the 1955 Bandung Conference. See in "China's Initiation of the Five Principles of Peaceful Co-Existence", online: *Minist Foreign Aff Peoples Repub China* <https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml>.
[102] "It's been love-hate across presidents" (21 January 2009), online: *The Times of India* <https://timesofindia.indiatimes.com/world/us/Its-been-love-hate-across-presidents/articleshow/4009093.cms?referral=PM>.
[103] MacFarquhar & Fairbank, *supra* note 38 at 511.
[104] Maxwell, *supra* note 84.

adaptation. Previously Nehru, in his statement to the Parliament, had categorically ruled out any adjudication or arbitration on the settlement of the boundary dispute: "Arbitration was not considered a suitable method for settlement of the dispute over 51,000 square mile of Himalayan border land facing Tibet".[105] He was also said to reaffirm on multiple occasions that arbitration or any form of adjudication was not suitable for disputes over sovereignty.[106] But after being defeated by the PRC in the 1962 border war, Nehru appeared to reverse his stand. He reportedly told the Lok Sabha[107]: "I am prepared when the time comes, provided there is approval of Parliament, even to refer the basic dispute of the claims on the frontier to an international body like the International Court of Justice at The Hague."[108]

Nehru's sudden change can be attributed to India's steadily deteriorating position in the Sino-Indian power dynamics. Militarily, Chinese troops had advanced over Indian forces in the war, occupying all claimed territory in the western sector.[109] Although the war ended with a ceasefire, China gained the upper hand and it was China which called a truce on 20 November 1962. It was also China which simultaneously returned captured Indian military supplies and soldiers to express its sincerity about the resumption of peace talks.[110] In addition to holding effective power, China seemed to have the advantage over the symbols of authority as well, for the simultaneous return

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[105] *Ibid* at 432."Letter from Premier Chou En-lai, to the Prime Minister of India", 20 April 1963, Government of India Ministry of External Affairs, ed, *Notes, Memoranda and Letters Exchanged and Agreements Signed Between the Governments of India and China: White Paper 9 (January 1963-July 1963)* (New Delhi: Government of India Press, 1963).
[106] "Letter from Premier Chou En-lai, to the Prime Minister of India", 20 April 1963, in *ibid*.
[107] The Lok Sabha (House of the People) is the lower house of India's bicameral Parliament, with the upper house being the Rajya Sabha.
[108] Lok Sabha Debates (10.12.62), Vol. XI, col. 5092, cited in Maxwell, *supra* note 84 at 433.
[109] *Ibid* at 409.
[110] *Ibid* at 428 to 429.

of Indian soldiers gained it credit among the Afro-Asian countries as a "genuine attempt to return the dispute to the negotiating table".[111] India thus felt itself under pressure in the struggle with China, and attempted to reverse its downturn by recourse to a third party –the ICJ and the underlying international community.

But Nehru faced strong opposition from domestic society and soon had to yield his position. The Lok Sabha's refused to allow India's territory to be decided by international adjudication, and so Nehru immediately watered down the ICJ proposal: "what I said was that if and when the time came for it, if the House agrees, if Parliament agrees, we might perhaps think of it."[112] However, in his letter to Zhou Enlai dated 1 January 1963, Nehru's determination to refer the dispute to the ICJ again became clear, and it seemed to imply that the Indian parliament had endorsed this position:

> We firmly believe in peaceful methods and we shall always try to seek every avenue of peace to settle any problem or dispute…I have even suggested to our Parliament that, if necessary, we would be prepared to refer these questions for decision on the merits to the International Court of Justice at The Hague, which is an impartial world tribunal.[113]

India's double-faced strategy was relatively safe, because the PRC, which was occupied with its hatred of Western capitalism and passion for the world revolution, was unlikely to settle a dispute concerning its sovereignty by resort to an allegedly Western-led court or tribunal. As was expected, in his reply dated 3 March 1963, Zhou expressed the PRC's strong preference for bilateral negotiations: "the Chinese Government's stance for direct Sino-Indian negotiations will not change. However, if the Indian Government, owing to the needs of its internal and external politics, is not

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[111] *Ibid* at 429.
[112] Lok Sabha Debates (10.12.62), Vol. XI, col. 5215, cited in *ibid* at 433.
[113] "Letter from the Prime Minister of India to the Prime Minister of China, 1 January 1963", in Government of India Ministry of External Affairs, *supra* note 89.

yet prepared to hold such meetings, the Chinese Government is willing to wait with patience."[114]

But Nehru continued to play his double game. In his second letter to Zhou, he tried to convince the PRC to consider ICJ adjudication: "There could be no fairer and more reasonable approach than this proposal for peaceful resolving of our differences, once the appropriate climate is created."[115] Nehru's position was subsequently reaffirmed by the Indian Ministry of External Affairs in its note to the Embassy of China in India, where it proposed five "constructive steps" to solve the *status quo* with international adjudication as a last resort.[116] By doing so, India seemed to create an impression that it was anxious to explore every avenue for a peaceful settlement.

In his letter dated 20 April 1963, Zhou peremptorily refused the Indian proposal and accused India of dishonesty and of having no intention whatsoever of holding bilateral negotiations:

> The Chinese Government is of the opinion that complicated questions involving sovereignty, such as the Sino-Indian boundary question, can be settled only through direct negotiations between the two parties concerned, and absolutely not through any form of arbitration…you (here refer to Nehru) stated in the Indian Parliament that "Arbitration was not considered a suitable method for settlement of the dispute over 51,000 square miles of Himalayan border land facing Tibet". After that you stated more than once that arbitration is not suitable for disputes over sovereignty. But now… you have suddenly changed your attitude by describing arbitration as the fairest and reasonable approach. This sudden change of attitude is plainly an attempt to cover up the fact that the Indian Government refuses to negotiate.[117]

Actually, both sides had been well aware that there was no possibility of submitting

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[114] "Letter from Premier Chou En-lai to Prime Minister of India, 3 March 1963", in Government of India Ministry of External Affairs, *supra* note 105.
[115] "Letter from the Prime Minister of India, to Premier Chou En-lai, 5 March 1963", *ibid*.
[116] "Note Given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 3 April 1963", *ibid.*
[117] "Letter from Premier Chou En-lai to the Prime Minister of India", 20 April 1963, *ibid.*

any sovereign-related dispute for international adjudication. But Nehru insisted on his ICJ proposal, with a skillful response to China's concern over the sovereignty issue: "the Sino-Indian boundary dispute, however, involves differences on interpretation of treaties, agreements, maps and the factual data relating to exercise of administration in the boundary areas under dispute. These differences are matters which are justiciable and capable of judicial interpretation either by the International Court of Justice at The Hague".[118] Regardless of China's rebuff, the Indian Ministry of External Affairs in notes dated 26 June 1963, 15 July 1963, and 6 September 1963 continuously urged the PRC to consider ICJ adjudication or any other sort of international adjudication.[119] In a sense, India's desire to settle the dispute with ICJ adjudication was souring and turned out to be a deliberate provocation.

The image of an assertive and belligerent Communist China was established by the Chinese Foreign Minister Note to India dated 9 October 1963, where the PRC restated its rejection in a brusque tone:

> The Sino-Indian boundary dispute is an important issue involving the sovereignty of both countries, and the territory involved totals more than 100,000 square kilometers. It goes without saying that this issue can be settled only through direct negotiations between the two parties, and absolutely not through any form of international arbitration… The Indian Government was clearly aware that the Chinese Government could not agree to refer the Sino-Indian boundary question to international arbitration and that the International Court of Justice at the Hague is an organ of the United Nations, among whose judges there is an element of the Chiang-Kai-shek clique.[120] Nonetheless it continues to propose to refer the Sino-Indian boundary dispute to the International Court or other organs of international arbitration. This is nothing but a clumsy attempt to disguise its unreasonable stand of dodging direct negotiations.[121]

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[118] "Letter from the Prime Minister of India to Premier Chou En-lai, 1 May 1963", Government of India Ministry of External Affairs, *supra* note 105.
[119] "Note given by the Ministry of Foreign Affairs, Peking, to the Embassy of India in China, 26 June 1963", *ibid*.
[120] This refers to the KMT government led by Chiang-Kai-shek.
[121] "Text of Chinese Foreign Ministry Note to India"(October 9 1963), NCNA-English. Peking (Oct. 12, 1963), in

Some phrases in the above note, such as "[i]t goes without saying", "absolutely not" and "any form of international arbitration", were regarded by India as a sign of hegemony:

> The Chinese Government has not only stated that it could not agree to referring the Sino-Indian boundary question to the International Court of Justice at the Hague but has categorically stated that this issue can be settled "only through direct negotiations between the two parties and absolutely not through any form of arbitration." The rejection by China in advance and in absolute terms of the internationally accepted practice of settling by arbitration differences between nations which cannot be resolved bilaterally, leaves only one of the two alternatives; acceptance of Chinese dictates backed by military force, or continuance of the conflict. No independent country can, consistently with its honor and dignity, accept dictates backed by military force.[122]

Although the two sides were unable to reach a special agreement for submitting the dispute to the ICJ owing to the stalled negotiations, it appears that this favored India, who through its ongoing references to ICJ adjudication successfully presented itself as the law-abiding, aggrieved party and the Chinese as aggressive and recalcitrant, and in turn won considerable international sympathy in the process. Hence, the power positions in the decision-making process were eventually reversed. In the aftermath of the dispute, the United States promptly responded to India's need, denouncing China and offering India weapons and other assistance.[123] The American intention behind the aid was clear: during a period of unease between the Western Bloc and the Eastern Bloc, supporting India provided a springboard for infiltrating Asia as well as isolating Communist China.[124] Due to the split between Moscow and Beijing, India's falling-

SCMP, no. 3081: 26 - 29", in Cohen & Chiu, *supra* note 18 at 1441 to 1442.

[122] "Note given by the Ministry of External Affairs, New Delhi, to the Embassy of China in India, 16 October, 1963", in Government of India Ministry of External Affairs, ed, *Notes, Memoranda and Letters Exchanged and Agreements Signed Between the Governments of India and China: White Paper 10 (July 1963-January 1964)* (New Delhi: Government of India Press, 1964).

[123] Jeff M. Smith, "A Forgotten War in the Himalayas" (14 September 2012), online: *the Yale Global Online* <http://yaleglobal.yale.edu/content/forgotten-war-himalayas>.

[124] To prevent the spread of communism abroad, the United States and its allies in the Cold War actively adopted a

out with China fell in line with the Soviet Union's wishes and they also endorsed India.[125] Unlike the substantial American military assistance to India, the Russians claimed to remain "strictly neutral" in the Sino-Indian dispute. However, that neutrality worked against China and in favor of India. In a verbal notification, the Soviet Union informed the CCP that its behavior was an expression of "a narrow nationalist attitude" and that New Delhi, "which is military [sic] and economically immeasurably weaker," could not "really launch a military attack on China and commit aggression against it."[126] The PRC's seemingly arrogant and aggressive performance in the process of negotiations, especially the hostile attitude towards the ICJ, harmed its relations with Third World countries as well. According to the estimate of Prof. Chaowu Dai, at least 75 countries took the side of India, most of which were from the Afro-Asian world.[127] In Africa, for instance, Sudan condemned the Chinese "military aggression" of India, the Foreign Ministry of Tunisia alleged that the PRC had violated the so-called Five Principles of Peaceful Coexistence, and Uganda even asserted, "Unless peacefully settling the Sino-Indian border dispute, no country would vote for the PRC's return to the United Nations."[128]

containment policy toward the PRC. Broadly speaking, the containment policy was a response to a series of moves by the Soviet Union to enlarge communist influence in Eastern Europe, China, Korea, Africa, and Vietnam. The China containment policy asserted that the United States needs a weak, divided Communist China to continue its influence on Asia. This is accomplished by the United States establishing military, economic, and diplomatic ties with countries adjacent to China's borders, frustrating China's own attempts at alliance-building and economic partnership. The efforts to improve relations with India were evidence of the containment policy. For the content of the containment policy, see in George F Kennan, "The Sources of Soviet Conduct" (1946) 25 Foreign Affairs 566 .

[125] MacFarquhar & Fairbank, *supra* note 38 at 509 to 513.

[126] *Ibid* at 513.

[127] Chaowu Dai, "Indian Diplomatic Policy, Powers Relations and 1962 Sino-Indian Border Conflicts" (26 September 2011), online: *Qiushi Theory* < http://www.qstheory.cn/special/2011dd/.htm>.

[128] *Ibid*. See also in International Department of Xinhua News Agency, *Relationships between China and African States (Areas)*, (Beijing: Xinhua News Agency, 1965) at 16, 30, 42, 60 to 61, 115,129, 166.

5.2.2 The PRC's Hostility to the ICJ and the Efforts to Develop a Chinese Socialist Approach

Regardless of whether India really wanted to resort to the ICJ to settle its dispute, the PRC's rejection of ICJ adjudication was clear and discernable. Of course, it was not the first time that China had refused to resort to an international court or tribunal to settle disputes with other states. The PRC's ongoing doubts about the impartiality of the ICJ and its assertions towards the inviolability of its sovereignty paralleled the Qing government's rebuff of Portugal's request to refer the Macau-related boundary disputes to the PCA in 1909 and the Republican government's ambivalence about appearing before the PCIJ in 1926 concerning the dispute over China's denunciation of the Sino-Belgian Treaty. However, in comparison with its predecessors, the Communist government exhibited an even greater hatred of international courts and tribunals, reflected in the emotionally charged and somewhat radical tone of its diplomatic exchanges with India. For instance, it asserted that "the Sino-Indian boundary question can be settled only through direct negotiations between the two parties concerned, and absolutely not through any form of arbitration…This is nothing but a clumsy attempt to disguise its [Indian] unreasonable stand of dodging direct negotiations".[129] Given such rhetoric, it is no wonder that India accused the PRC of disrespecting the "practice of settling by arbitration differences between nations which cannot be resolved bilaterally".

To be sure, the Communists' belligerence to the ICJ in the present case owed a great

[129] "Text of Chinese Foreign Ministry Note to India"(October 9 1963), NCNA-English. Peking (Oct. 12, 1963), in SCMP, no. 3081: 26 - 29", in Cohen & Chiu, *supra* note 18 at 1441 to 1442.

deal to India's provocation and its assertive foreign policy, but the true roots lay in the PRC itself – in particular, the rapid socialist transformation that had swept across the country's politics, economy, society and culture since the 1950s.[130] Under the influence of the socialist transformation, no aspect of an individual's mind, no policy of the government and no region of the country was immune from Marxism. The import of Marxism into Chinese minds thus resulted in a substantial "revolution" in the Chinese value cluster. Previous chapters have observed that the Chinese gradually embraced the Westphalian worldview in modern times. With the introduction of Marxist theories, the Chinese vision of the Westphalian state during the Mao era included new connotations. Though the world was still made up of several co-existing states, its power dynamics were thought to be a grand struggle between the Eastern Socialist Bloc and the Western Capitalist Bloc.[131] In the eyes of the Communists, this struggle was not only for specific states' interests, but also for the well-being of the world's people, with a claim that the people in most Asian, African and American countries were still conquered and oppressed by "wicked" Western imperialism.[132] Thus, it was necessary to "export" the communist revolution, in the form of material and spiritual aid to emancipate all mankind.[133]

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[130] MacFarquhar & Fairbank, *supra* note 38 at 92 to 122.

[131] An indicator of this was the PRC's application of the "lean to one side" foreign policy, which portrayed itself as a part of the "progressive" socialist camp against the "backward" capitalist camp. This policy was implicitly reflected in Article 11 of the Common Program of The Chinese People's Political Consultative Conference, where stated "[t]he People's Republic of China shall unite with all peace-loving and freedom-loving countries and peoples throughout the world, first of all, with the USSR, all Peoples' Democracies and all oppressed nations." The Common Program of the Chinese People's Political Consultative Conference, 1949, Art.11. The document served as the *de facto* Constitution for the PRC from 1949 to 1954. See also in Steiner, *supra* note 65 at 80 to 81.

[132] Mao Zedong's perception of the relationship between New China and the developing countries in Africa, Asia and Latin America was fully reflected in his talks with the African, Latin American and Iran guests in 1960. See in Tse-tung Mao, *Long Live Mao Tse-tung's Thought* (Beijing: Chinese Red Guard Publication, 1967) .

[133] In the 1960s, the PRC openly or secretly funded and supported at least 23 political parties, militias, and states in Asia, Africa and Americas, and notably Vietnam. The PRC claimed that its economic and military aid to North Vietnam and the Viet Cong totaled $20 billion during the Vietnam War, including 5 million tons of food and 320,000 troops. "China Admits 320,000 Troops Fought in Vietnam", *Toledo Blade* (16 May 1989); Denny Roy,

A prominent feature of the new Chinese view on the world and the international order is that the fight against capitalism paralleled a longstanding anti-Western sentiment. This could also be seen as a Chinese modification of Marxism. Classic Marxism advocates proletarian internationalism, regarding capitalism as a world system and a common enemy of the world's proletarians rather than exclusively belonging to the West.[134] But the Chinese frequently equated capitalism with the West, interchanging "western" and "capitalist" on many occasions.[135] Connecting capitalism with the West might have its roots in the fact that most of the western powers which historically had invaded China were capitalist countries.

As such, the Sinification of Marxism also contained nationalistic elements. Although the Chinese Communists had followed many Communist and traditional traits, they also shared common historical experiences with the Republican elites. One of the most significant was that both the Chinese Communists and the Republican elites were of the generation born during the late Qing dynasty and grew up during the turbulent Republican era when the Western invasion of China intensified.[136] Faced with the fact that Chinese sovereignty was increasingly impaired by Western powers, an all-consuming sense of patriotic duty, together with dissatisfaction with the present, jointly created the nationalist consciousness in this generation of Chinese, which subsequently

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China's Foreign Relations (Maryland: Rowman & Littlefield, 1998) at 27.

[134] Karl Marx & Friedrich Engels, *The Communist Manifesto (1848)* (London: Penguin, 1967).

[135] A typical example is Mao's writings and speeches that usually made "West" synonymous with capitalism (or bourgeoisie). At the Supreme State Conference dated 28 January 1958, he stated that "if the West wanted to rid itself of bourgeois ideology, who knows how long it would take!" At a speech on 17 May 1958, he used the "west wind" as a metaphor for capitalism, alleging that "If it is not the east wind (socialism) prevailing over the west wind, then it is the west wind prevailing over the east wind." See in Mao Tse-Tung, *Selected Works of Mao Tse-tung* (Amsterdam: Elsevier, 2014) vol 8.

[136] Fairbank & Feuerwerker, *supra* note 10 at 789 to 790.

drove them to fight against the West, albeit in somewhat opposite ways.[137]

Yet, the Communists distinguished themselves from the Republican elites as they incorporated radical anti-Western discourse, coated in Marxism, into the larger nationalist discourse. Of course, the Republican elites (as demonstrated in the previous chapter) were also wary of Westernism, but their attitude was generally moderate. They were able to accept, negotiate, accommodate and bargain with the West, as they still held that Westernism—especially its liberal and democratic spirit—was beneficial for developing China. The Chinese Communists' hatred of Westernism was greater, especially after combining the humiliating history of being invaded by Western capitalist states with Marxist theories about the irreconcilable tension between the proletariat and the bourgeoisie. Under Marxist influence, the long-existing Sino-Western tension was rapidly transformed into a deep-rooted, irreconcilable class conflict on a national scale. Western countries were monolithically characterized as imperialists and exploiters who should be blamed for China's backwardness and the misery of its people.[138] Perceiving the West as capitalist opponents without any neutral ground, the Communists believed that the only means to develop China was through a merciless class struggle with the West.[139] Therefore, instead of negotiation, accommodation or bargaining, confrontation was assumed to be the only appropriate mode of dealing with Westernism. From the 1960s to the 1970s, the Communists destroyed the massive Western cultural heritages and institutions which remained in

[137] *Ibid* at 789 to 866.
[138] Steiner, *supra* note 65 at 78 to 84.
[139] *Ibid* at 80 to 81.

mainland China, and motivated the public to wall off so-called Western "capitalist" matters from China and push the socialist course forward.[140]

Inevitably, the PRC's view of international law was characterized by anti-Westernism. The existing international legal regime, which was created by the West and developed along with capitalism, was described as Western bourgeois international law, "a theoretical instrument to defend the aggressive or colonial policy of the strong capitalist countries, to do its best to maintain the capitalist 'world order'…"[141] To make a clear break with "evil" Western Capitalism, the Communists claimed that there existed two mutually opposed systems of international law in international society: one was the Western-led bourgeois international law; the other was socialist international law that reflected the economic base of socialist societies and served the interests of the proletariat.[142] Between the two systems, there were no uniform rules of international law binding both sides equally; rather, the struggles in terms of an "ideological standpoint, understanding of the question, etc." were common and continuous.[143]

The PRC's ideological struggle with the Western bourgeois and their international law loomed large in their opposition to the involvement of the ICJ in the Sino-Indian dispute. In the Note to India dated 9 October 1963, the PRC characterized the ICJ as

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[140] When implementing the GLF, Mao put forward the idea of self-reliance, which rejected foreign expertise and minimized trade during this period. In the early 1960s, the turnkey project importation, according to Michael Yahuda, was only worth $200 million compared to more than ten times that amount in the early 1950s and 1970s. See in Michael B Yahuda, *Towards the End of Isolationism: China's Foreign Policy after Mao* (London: Macmillan, 1983) at 77 to 78; Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden ; Boston: Martinus Nijhoff Publishers, 2009) at 111.

[141] Ho Wu-shuang and Ma chun, "A Criticism of the Reactionary Viewpoint of Ch'en T'i-ch'ang on the Science of International law" in Jerome Alan Cohen & Hungdah Chiu, *People's China and International Law, Volume 1: A Documentary Study* (Princeton: Princeton University Press, 1974) at 34.

[142] Xin Lin, "A Discussion of the Post World War II Systems of International Law" (1958) 1 Teaching and Research 34 at 34 to 38.

[143] Lin Hsin, "On the System of International law after the Second World War" in Cohen & Chiu, *supra* note 141 at 55 to 60.

"an organ of the United Nations, among whose judges there is an element of the Chiang-Kai-shek clique".[144] Of course, the reference to the "element of the Chiang-Kai-shek clique" highlighted the power struggle between the Communist government on the mainland and the Republican government on Taiwan Island with respect to the representation of China in the international community. But it also represented the Communists' deep discontent with Western capitalists who supported Taiwan and which they believed dominated international courts and tribunals. This mentality was made especially clear in the Communist comments on the case of the Corfu Channel, where the ICJ was blamed for "serving the interests of imperialists".[145]

In many areas, the PRC rejected any attempt to expand or to even provide a liberal understanding of the role of the ICJ.[146] In theory, only treaties and custom could be considered by Communist legal scholarship as sources of international law. Awards or decisions of international tribunals such as those from the ICJ were excluded, for "the ICJ interpretations of international law merely reflected the bourgeois and imperialist nature of international law",[147] unless these awards or decisions had been or have since been recognized in treaties or through customs.[148] In practice, as demonstrated in the Sino-Indian dispute, the PRC categorically refused any direct interaction with the ICJ.

Having criticized and rejected the old, Western bourgeois approach to international

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144 "Text of Chinese Foreign Ministry Note to India"(October 9 1963), NCNA-English. Peking (Oct. 12, 1963), in SCMP, no. 3081: 26 - 29", in Cohen & Chiu, *supra* note 18 at 1441 to 1442.
145 James Chieh Hsiung, *Law and Policy in China's Foreign Relations: a Study of Attitudes and Practice* (New York: Columbia University Press 1972) at 310.
146 Meng Kong, "A Criticism of the Theories of Bourgeois International Law Concerning the Subjects of International Law and Recognition of State" (1960) 2 International Studies 44 at 48 to 49.
147 *Ibid* at 49.
148 Phil CW Chan, *China, State Sovereignty and International Legal Order* (Leiden: Brill Nijhoff, 2015) at 95; Hungdah Chiu, "Chinese Attitudes toward International Law in the Post-Mao Era" (1988) 1988:1 Md Ser Contemp Asian Stud 1 at 15 to 16.

law, the Chinese sought to construct a new, Chinese socialist theory of international law. But the available Marxist resources were inadequate, for Marx and his heirs had written relatively little about specific theories of international law.[149] The Communists thus turned their attention to traditionalism. Though they claimed to be Marxist, Mao Zedong and his Communist colleagues were notably—and sometimes explicitly—influenced by China's long history and classical traditions when they engaged with the world. With regard to the construction of a socialist international order, the PRC leadership, as native-born Chinese,[150] seemed to be profoundly shaped by the *tianxia* system. Notwithstanding the impossibility of recreating a real *tianxia* system, the elements of *tianxia*— for example a Sinocentrim that assumed a unique role for China's revolutionary virtue in championing a global struggle against imperialist powers—were clearly evocative of ancient virtue-based Sinocentric Chinese antecedents. However, as the global political and economic paradigm had changed drastically and moved towards diversity, the PRC's efforts to lead the world revolutionary movement and to transform the existing international order into a Sinocentric one seemed to attract little external support. In 1963, Zhou Enlai and Foreign Minister Chen Yi embarked on a tour of African countries, with Chinese officials trumpeting what they described as China's role as champion for the emancipation of colonial peoples, but their impact was meagre.[151]

[149] Cohen & Chiu, *supra* note 141 at 47.

[150] Mao Zedong, for one, grew up in rural China and was educated within the value systems of Confucianism. Even though he later attended modern Chinese schools, he never studied or spent any considerable time abroad. Though Mao appeared in many ways to be a staunch anti-Confucian, a brief review of his writings and speeches suggests that he made numerous analogies between the present and ancient times. See in Ford, *supra* note 70 at 190.

[151] The "Zongheng" Book Series Editorial Board, *People's Republic of China's Diplomatic Record* (Beijing: Chinese Literature Press, 2003) at 297

Marxism and traditionalism were proving to be less useful and apparently less persuasive in their application to international law than the Chinese Communists had hoped. In their exploration of other theories, the Communists found their construction of a so-called socialist international law ultimately had to rely on certain Western international legal principles, despite these having been repeatedly criticized during the anti-Western and anti-capitalist campaigns. One paradox of the Communist policy on the Sino-Indian dispute is that, while rejecting ICJ adjudication because of its "Western bourgeois" nature, the PRC itself actually applied many international legal principles and norms stemming from "Western bourgeois" international law. In the letter to Nehru dated 20 April 1963 and the Note to India dated 9 October 1963, China clearly employed the concept of sovereignty and the principle of nonintervention in internal affairs to justify its objection to ICJ adjudication: "[t]he Sino-Indian boundary dispute is an important issue involving the sovereignty of both countries, and the territory involved totals more than 100,000 square kilometers. It goes without saying that this issue can be settled only through direct negotiations…"[152]

It is ironic that the so-called socialist approach to international law kept faithful to Marxism and objected to "Western bourgeois" international law, but at the same time employed some very "Western bourgeois" international legal principles to advance Chinese interests. A cardinal principle of Marxist legal theory is that law—as a part of the superstructure of a society—reflects the economic base of this society. Since a socialist society shares no common economic base with a capitalist society, it is logical

[152] "Text of Chinese Foreign Ministry Note to India"(October 9 1963), NCNA-English. Peking (Oct. 12, 1963), in SCMP, no. 3081: 26 - 29", in Cohen & Chiu, *supra* note 18 at 1441 to 1442.

to conclude that socialist law, including international law, should make a sharp distinction with bourgeois law. Indeed, classical Marxist theories disagreed with many bourgeois international legal concepts, such as sovereignty and the principle of nonintervention. This was expounded in the *Communist Manifesto*, where Marx considered the modern state "is but a committee for managing the common affairs of the whole bourgeoisie" and sought to rally the working classes of all nations to act together to replace it with stateless communism.[153] However, in the Cold War era when Communism was surrounded and threatened by strong capitalist states, the PRC found it necessary to invoke the concept of sovereignty and the extensive protection sovereignty provided. Almost from its inception, the PRC had declared the Five Principles of Peaceful Coexistence as bases upon which it should establish its diplomatic relations with other states.[154] From a theoretical perspective, the Five Principles did not reveal a novel socialist view of international law; rather, their contents (such as rules of reciprocity, sovereign equality, and the duty of non-intervention) reflected the typical patterns of "Western bourgeois" international law.

The problem then arises as to whether Chinese socialist international law shared principles, theories and norms with Western bourgeois international law. Chu Ch'i-wu advanced the notion of "inheritable character", holding that all the progressive international law norms and institutions which had been formed in human society—including western capitalist society—can be accepted, reformed and absorbed on a

[153] Marx & Engels, *supra* note 134, pt 1.
[154] Tieya Wang, *International Law in China: Historical and Contemporary Perspectives*, *Collected Courses of the Hague Academy of International Law* (Leiden: Martinus Nijhoff, 1990) at 264.

socialist basis.[155] Chu's theory provoked debates among scholars like Yang Chao-lung, Chu Li-lu and Lin Hsin.[156] Chu Li-lu put forward the notion of a general international law, saying that besides socialist international law and bourgeois international law, there existed a type of general international law which was binding and applicable to all states, such as respect for state sovereignty.[157] But scholars like Xin Lin (林欣) were of the opinion that, even though all states could share some international legal principles or norms like the principle of sovereign equality, in their application, "there always exists a struggle between the viewpoint of bourgeois international law and socialist international law. This struggle is reflected in the different, and sometimes even completely contrary, interpretations of international law."[158]

Since most Communist scholars argued in favor of the existence of at least some generally accepted international legal principles and norms, it follows that they had made some concessions to Westernism in the building of Chinese socialist international law. It seems that these scholars attempted to strike a balance between Westernism and Marxism in their continuing efforts to develop a socialist theory of international law, with the hope of providing the Communist regime with the tools necessary to interact with the international community while still retaining the regime's socialist nature. These are of course laudable efforts, yet due to the ensuing Cultural Revolution, such a

[155] Chu Ch'i-wu, "Looking at the Class Character and Inheritable Character of Law from the Point of View of International Law, Kuang-ming Jih-pao (May 13, 1957), p.3" in Cohen & Chiu, *supra* note 141 at 50 to 52.
[156] See e.g. Yang Chao-lung, "On the Class Character and Inheritable Character of Law," Hua-tung cheng-fa Hsueh-pao, no.3:30 (1957); Chu Li-lu, "Refute Ch'en T'i-ch'iang's Absurd Theory Concerning International Law, JMJP (Sept. 18, 1957), p.3" in *ibid* at 54 to 60.
[157] Chu Li-Lu, "Refute Ch'en T'i-ch'iang's Absurd Theory Concerning International Law, JMJP, (Sept. 18, 1957)", in *Ibid* at 54 to 55.
[158] Lin Hsin, "On the System of International Law after the Second World War, CHYYC, no. 1:34, 36, 37-38 (1958)" in *Ibid* at 54 to 57.

new, balanced approach to international law did not develop evenly. During that time, a large number of international lawyers, diplomats, and international legal scholars were purged and international legal research and education in the PRC was entirely abolished.[159]

Conclusion

The PRC's participation in the adjudication-related decision-making processes throughout the Mao era demonstrates that Sino-Western transcivilizational interaction did not necessarily result in the wholesale adoption or borrowing of western civilization, nor did it project purely traditional ideas. Rather, it proceeded through a process of mutual adaptations and localizations – perhaps what Chatterjee described as "a regeneration of the national culture adapted to the requirement of progress, but retaining at the same time its distinctiveness".[160] In the Chinese Communist regime, Marxism, which was originally a Western ideology, did not provide a road map to understand the government's every action and policy. Marxism did not operate in a vacuum in China. Instead, the success of Marxism in China depended largely on the extent to which it was compatible with Chinese conditions and the degree to which it could meet the new needs that arose.

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[159] Mao's loss of power and prestige after the failure of GLF led him to launch the Cultural Revolution in 1966. To re-emphasize his authority in China and to purge remnants of capitalist and traditional elements from Chinese society, Mao spread the Cultural Revolution to the military, urban workers, peasants and even the CCP leadership itself. In the revolution, widespread factional struggles were carried out in all walks of life, with a large number of party leaders, cadres and intellectuals being purged. The Chinese political, economic, cultural, social and education system was entirely disordered. Teaching and research materials were designed under the guidance of Mao's thoughts. All students were required to study Mao's work. Many academic authorities were characterized as "five black categories", meaning the landlords, rich peasants, counterrevolutionaries, bad elements, and rightists. They were themselves then placed under guard and restrictive surveillance and repudiated at mass meetings. MacFarquhar & Fairbank, *supra* note 82 at 544 to 556.

[160] Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (London: Zed Books, 1986) at 2.

The Sinification of Marxism actually suggests a neo-traditionalist disposition. The categories in which the regime labelled itself were Marxist, but these were also mixed with Chinese traditional attributes, such as those found in the PRC-led adjudication of Japanese war crimes, where the Chinese participants adopted strategies in line with traditional morality-oriented and *li*-based legal thinking. Moreover, Chinese nationalism—and in particular the long held anti-Western sentiment—also played a role in the Sinification process. In the Chinese rebuff towards the use of international adjudication in the Sino-Indian dispute, there is a clear expression of nationalistic language concerning the class struggle against capitalism.

The Sinification of Marxism in the Mao era was nevertheless insufficient in addressing the role of Westernism in the Chinese value cluster. To be sure, the Sinification process criticized and excluded Westernism in order to protect its perceived ideological purity, but even after purging Westernism it was unable to find any alternative theories or values that could rebuild the Chinese value cluster as was seen fit, forcing the Chinese Communists had to resort to Westernism. For example, though the party insisted that "the acknowledgement of the existence of international law…did not indicate that the PRC had accepted the so-called 'western international law'", the principles of nonintervention and the inviolability of sovereignty was used to justify and regulate its contact with other states.[161]

How then should we understand the position of Westernism in the Chinese value cluster? The adoption of Westernism in the Sinification of Marxism certainly raised

[161] Pan, *supra* note 140 at 77.

new and challenging issues for the Chinese Communists. In the aftermath of Mao's death in 1976, some Communist leaders and scholars began to reinterpret the essence of the Sinification of Marxism. Fuming Hu in his influential article titled "Practice is the Sole Criterion for Testing Truth" contended that: a staunch Marxist was not one who understood and explained Marxism merely by reference to the classic tenet; rather, too great a reliance on purely abstract Marxist ideas yielded nothing but dogmatism, for integrating theory with practice was one of the fundamental principles of Marxism; as a result, Marxism should be adapted to the economic and social reality of China and be modified as changes occur and new factors or experiences enter into the context.[162] This perspective seems to justify and permit the entrance of Westernism into the development of the Chinese socialist approach to international law, paving a new path for China's attitude towards international adjudication in the future. But how can Marxism accommodate Westernism which it used to oppose? How can they be integrated into a synthesis to produce a new Chinese value cluster? In the next chapter, this issue will be investigated by examining the PRC's attitude towards international adjudication in the post-Mao era.

[162] Fuming Hu, "Practice is the Sole Criterion for Testing Truth", *Guangming Dly* (11 May 1978) 1. Many Communist leaders such as Deng Xiaoping later debated the criteria of truth by reasserting Marxist principle of seeking truth from facts. In a talk at the All-Army Conference on Political Work dated 2 June 1978, Deng stated: "Concrete analysis of concrete conditions is the living soul of Marxism…We must, however, integrate them (Marxist principles) with reality, analyze and study actual conditions and solve practical problems. Guidelines for our work must be set in conformity with actual conditions. This is a most fundamental approach and method of work, which every Communist must cleave to…" See in Xiaoping Deng, "We Shall Expand Political Democracy and Carry Out Economic Reform (15 April 1985)" in Xiaoping Deng, *Sel Works Deng Xiaoping 1982–1992* (Beijing: People's Press, 1993) at 114 to 115.

CHAPTER 6 THE PEOPLE'S REPUBLIC OF CHINA'S ATTITUDE TOWARDS INTERNATIONAL ADJUDICATION IN THE POST-MAO ERA[1]

Mao Zedong's death and the rise of Deng Xiaoping as the new paramount leader of the CCP marked the beginning of the post-Mao era. The post-Mao era overlapped with the post-Cold War era (from the dissolution of the Soviet Union in 1991 to the present day), when East-West hostility ended and brought about the declassification of technologies which had formerly been off limits to the public, innovations in communications and interactions among the people, economies and governments of different countries: a phenomenon commonly referred to as globalization.[2] With the growth of global interactions in terms of trade, ideas, and culture came the proliferation of international institutions, including international adjudicatory bodies. It is estimated that, by the end of 2013, there were nearly two dozen operational permanent international courts and tribunals in the world.[3] Among these are conventional courts and tribunals, such as the ICJ and the PCA; specific tribunals with a focus on certain issues or regions, such as the WTO Dispute Settlement Mechanism (DSM), the International Tribunal for the Law of the Sea (ITLOS), and the European Court of Justice (ECJ); and new-style tribunals and courts with jurisdiction that extends to non-

[1] The post-Mao era here refers to the period from 1978 when Deng Xiaoping's consolidated power and reversed Mao's policy. The PRC during this period is successively ruled under five generations of CCP leaders, namely the second generation with Deng as the paramount leader, the third generation with Jiang Zemin (江泽民) as the core, the fourth generation with Hu Jintao (胡锦涛) as the prominent leader, and the fifth generation (current) with Xi Jinping (习近平) as the paramount leader.

[2] In 2000, the International Monetary Fund (IMF) identified four basic aspects of globalization: trade and transactions, capital and investment movements, migration and movement of people, and the dissemination of knowledge. International Monetary Fund. (2000). "Globalization: Threats or Opportunity." 12 April 2000: IMF Publications.

[3] Cesare Romano, Karen Alter & Yuval Shany, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014) at 65.

state actors, such as the International Criminal Court (ICC), the European Court of Human Rights (ECtHR), and the arbitral tribunals constituted under the International Centre for the Settlement of Investment Disputes (ICSID). These latter "new-style" tribunals and courts represent groundbreaking developments in the role of non-state actors in international law and have a significant impact on the overall Westphalian system.[4] Under the Westphalian system individuals and other non-state actors have long been considered subordinate to states. Thus, the emergence of the ICC, ECtHR and arbitral tribunals under the ICSID is unprecedented because these international institutions allow natural and legal persons a broad right of access to claim that states have violated their rights.

In response to this changing international background, the PRC has adjusted its hostile stance and adopted a new policy towards international courts and tribunals. Indeed, beginning in the early 1970s when the PRC resumed its diplomatic relations with the United States and assumed its seat in the United Nations, the Chinese Communists had begun to rethink Sino-Western relations in the Marxist context.[5] After years of exploration, Communist leaders in the post-Mao era created "Socialism with Chinese Characteristics"(*zhongguo tese shehuizhuyi*, 中国特色社会主义),[6] which

[4] See generally in Gary B Born, "A New Generation of International Adjudication" (2012) 61 Duke Law J 775; Cedric Ryngaert, "Non-State Actors: Carving out a Space in a State-Centred International Legal System" (2016) 63:2 Neth Int Law Rev 183; A Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: a Crisis of Legitimacy" (2001) 27:2 Rev Int Stud 133.

[5] Roderick MacFarquhar & John K Fairbank, *The Cambridge History of China: Volume 15, The People's Republic, Part 2, Revolutions within the Chinese Revolution, 1966-1982* (New York: Cambridge University Press, 1991) at 469 to 472.

[6] In the party's official narrative, Socialism with Chinese characteristics is Marxism–Leninism adapted to Chinese conditions and a product of scientific socialism. The theory stipulated that China was in the primary stage of socialism due to its relatively low level of material wealth and needed to engage in economic growth before it pursued a communist society described in Marxist orthodoxy. See in Jintao Hu, "Firmly March on the Path of Socialism with Chinese Characteristics and Strive to Complete the Building of a Moderately Prosperous Society in All Respects" (16 November 2012), online: *China.org.cn* <http://www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27137540.htm>.

reconciles Marxism with Western capitalism in China. The new theory concentrates on Marxist social and economic discourse, postulating that "communist society is a society in which there is overwhelming material abundance. Socialism is the first stage of communism; it means expanding the productive forces…"[7] Accordingly, since the late 1970s, nationwide ideological campaigns have been downgraded in importance and the policy emphasis has gradually shifted to economic development. "Socialism with Chinese Characteristics" also advocates political pragmatism. Claiming that Marx could not be expected "to provide ready answers" to questions that arose years after his death, the Chinese maintained that "there are not and cannot be fixed models" to implement Marxism; thus China must build socialism according to its own conditions and culture.[8] This flexible approach to Marxism was famously (and vividly) described by a phrase Deng put forward: "it does not matter whether the cat is white or black, so long as it catches mice".[9] Deng's aphorism means that any method, no matter what ideology it represents, can be applied, as long as it is efficient and capable of developing the Communist regime. However, this does not mean the Communist regime will move towards capitalism. In the development process, China is allowed to adopt certain elements of Western capitalism (such as market economics) to increase productivity, but the Communist party is required to retain both its formal commitment to achieve communism and its monopoly on political power in order to retain China's socialist

[7] Deng Xiaoping, "We Shall Expand Political Democracy and Carry out Economic Reform (15 April 1985)" in Xiaoping Deng, *Sel Works Deng Xiaoping 1982–1992* (Beijing: People's Press, 1993) at 121.
[8] Xiaoping Deng, "Let Us Put the Past behind Us and Open up a New Era (16 May 1989)" in *ibid* at 284 to 285.
[9] Deng raised his "cat theory" for the first time in 1962 when he talked about the restoration of agriculture, but this theory became popular after 1978 when he held the reins of the CCP. Xiaoping Deng, "Restore Agricultural Production (7 July 1962)" in Xiaoping Deng, *Selective Works Deng Xiaoping (1938 to 1965)* (Beijing: Foreign Language Press, 1992) at 293.

nature.[10]

The Communists' new way to Sinicize Marxism, especially the downplaying of ideological divisions, indicates their willingness to borrow so-called Western "bourgeois" values and ideas to contribute to China's state-building. This open-ness laid the foundations for China's current readiness to participate in international adjudication. The most obvious change in China's attitude towards international adjudication was manifested by its accession to the WTO in 2001 and its acceptance of the WTO DSM as a formal way to settle disputes over issues arising out of the WTO legal system. Given its decades-long insistence on the principle of non-intervention and limited interest in international tribunals and courts,[11] the PRC's move in the WTO was a dramatic departure from its past policy and represented an initial shift towards more general involvement in the international adjudicatory regime.[12] Not only has China participated in WTO adjudication, but it has also shown increasing interest in international adjudication in other fields, notably investor-state arbitration (ISA). China's growing embrace of ISA is evident in its international investment agreements (IIAs), where it has incrementally liberalized investors' access to ISA. While China has been expanding its engagement with international adjudication on economic issues, it

[10] Hu, *supra* note 6.

[11] A prominent example is the PRC's reluctant attitude towards the ICJ. Even after restoring its position in the United Nations, the PRC continued to avoid international adjudication. In a letter to the ICJ of 5 September 1972, China stated that it "does not recognize the statement made by the defunct Chinese Government on 26 October 1946 … concerning the acceptance of the compulsory jurisdiction of the Court". See in Report of the International Court of Justice, 1 August 1972-31 July 1973, 28 GAOR, Supp. (No. 5), UN Doc. A/9005 (1973), at 1. As a Permanent Member of the Security Council, China did not nominate any candidate to the bench of the ICJ between 1971 and 1984, largely due to its rejection of any international tribunal as an appropriate forum to settle disputes between states. It was not until 1984 that China nominated Ni Zhengyu to be the Chinese judge in the ICJ. Phil CW Chan, *China, State Sovereignty and International Legal Order* (Leiden: Brill Nijhoff, 2015) at 100.

[12] Marcia Don Harpaz, "China and International Tribunals: Onward from the WTO" in Lisa Toohey, Colin B Picker & Jonathan Greenacre, eds, *China in the International Economic Order: New Directions and Changing Paradigms* (New York: Cambridge University Press, 2015) at 43.

is still wary of international adjudication concerning maritime boundaries, territory, human rights and criminal law, as can be discerned in its recent rejection of the South China Sea Arbitration. Why is the PRC by turns enthusiastic and hostile towards international adjudication? How did this bifurcation come into being? Is it because of constant Sino-Western tensions derived from transcivilizational interaction? This chapter attempts to explain this bifurcation with an investigation of the PRC's participation in the decision-making processes relevant to (1) the WTO dispute settlement system; (2) investor-state dispute settlement; and (3) the South China Sea Arbitration.

6.1 The PRC's Attitude towards WTO Adjudication

Most adjudication-related decision-making processes described above, such as the Tokyo Trial, are single stage decision-making processes,[13] where participants with different or even conflicting perspectives communicated and interacted only once, striving to achieve their preferred outcomes without much concern for further repercussions beyond the case. Yet the decision-making process in WTO adjudication is a markedly different system. In the WTO dispute settlement system, participants frequently resort to WTO panels. While each individual dispute can be described as a single stage decision-making process, as long as WTO adjudication is empowered, the number of repetitions of the single stage decision-making process is infinite. Thus,

[13] The terms such as single stage decision-making process and repeated decision-making process are created on the basic game theory. In game theory, the single stage game is a 2-person game where two players try to obtain more pay off through strategies and calculation. A repeated game consists of a number of repetitions of single stage games. Martin J Osborne, *An Introduction to Game Theory* (Oxford University Press New York, 2004).

participants are deterred from exploiting their short-term advantage by threats of punishment that might reduce a longer term payoff. For example, a state might decide to compromise in a single stage decision-making process in order to receive a future payoff. This means that China's attitude towards WTO adjudication is not confined to its participation in a specific case or its policy towards certain issues. Rather, its attitude should be regarded as a flow of participation in a decision-making process that consists of a number of repetitions of one single stage decision-making processes. In this process, when faced with a dispute, China will determine its preferred strategy or policy by taking into account the circumstances of previous (and probably future) cases. Also, since each participant will often act in a similar manner, China's attitude will be affected by the attitudes of other states over time, and therefore must consider possible changes in the attitudes of other states when making decisions. In this regard, the study of China's attitude in this section classifies WTO adjudication as a repeated decision-making process and analyzes the evolution of the PRC's participation in it.

6.1.1 China's 18 years in the WTO Adjudicatory Decision-Making Process

In terms of both age and of experience, most Chinese who have participated in the WTO adjudicatory decision-making process are to some degree witnesses and victims of the radical ideological struggles that characterized the Mao era. The socialist movements of that era (most notably represented by the Cultural Revolution) not only paralyzed China politically and economically, but were also traumatizing. The Cultural Revolution brought China's education and academic research to a virtual halt. Most

colleges and universities were closed until 1970;[14] the national college entrance examination was cancelled after 1966 and was not restored until 1977.[15] Many intellectuals, even noted academics, scientists and educators, were persecuted for their Western knowledge or their previous overseas background, and suffered a wide range of abuses including public humiliation, arbitrary imprisonment, torture, hard labor, seizure of property and sometimes execution.[16] Meanwhile, a large segment of young Chinese people were forced to leave school and were exiled to remote, rural areas of China for socialist education: a programme known as the Down to the Countryside Movement.[17] Arguably, the entire generation of Chinese who underwent the Cultural Revolution were tormented by ideological divisions and were inadequately educated.

Having repressed their thirst for knowledge and interaction with the outside world for decades, the Chinese people were ready to abandon the struggle for ideological dominance: this historical backdrop explains why Deng's "reform and opening-up" policy soon gained widespread support and was extremely successful in developing the country. A significant feature of the Chinese Communists in the post-Mao era is that making foreign policy has become less dependent on radical ideology and more pro-Western. Deng, having suffered from decades of ideological struggles, articulated the framework of China's foreign policy by abandoning words such as "socialist", "Communist" and "bourgeois",[18] and shifted China's position in international affairs

[14] MacFarquhar & Fairbank, *supra* note 5 at 572.
[15] *Ibid* at 572 to 573.
[16] See e.g. in *ibid* at 611 to 612.
[17] Patricia Ebrey, *China: A Cultural, Social, and Political History* (Boston: Wadsworth Publishing, 2005) at 294.
[18] In 1985, during a talk with a Japanese delegation, Deng Xiaoping for the first time publicly abandoned Mao's revolutionary perception of the international order and otherwise asserted that "the two really great issues confronting the world today, issues of global strategic significance, are: first, peace, and second, economic development." Deng Xiaoping," Peace and Development Are the Two Outstanding Issues In the World Today (4

towards pragmatism. Early in the 1990s, Deng put forward a "24-Character" principle to guide Chinese foreign policy: "observe calmly; secure our position; cope with affairs calmly; hide our capacities and bide our time; be good at maintaining a low profile; and never claim leadership."[19] In this way, Deng suggested that the Chinese should take a compromise position and accommodate the West in its support of China's domestic reform and economic development, regardless of the differences in political systems and values. Deng's principle has been continuously implemented and has been a central tenet among Chinese Communists for decades. It led to a new wave of "learning from the West" and to China's increased integration into the international community from the 1980s through the 2010s.

China's accession to the WTO is widely seen as a landmark move for its economic development and integration into the international community. The WTO brought China into a broader global market with lower tariffs and a freer flow of investment, trade, technology and services.[20] While it viewed the WTO as something of a hallowed mechanism that could bring benefits to China's economy, Chinese knowledge of other aspects of the WTO, for example the challenges of settling trade disputes by means of adjudication, was relatively insufficient. Given that China had isolated itself from the international legal regime for decades, its impression of WTO adjudication came not from its own prior experience but from commentaries, books and academic literature.[21]

March 1985)", in Deng, *supra* note 8.

[19] Honghua Men, '"Keeping Low Profile and Striving to Make Achievements" Strategy and China's Diplomacy in 1990s' (2016) 56 Jilin University Journal Social Sciences Edition 81.

[20] "China: Louder Drumbeat of Opening, Reform after WTO Accession", *Peoples Dly* (11 November 2001) 1.

[21] Wenhua Ji & Cui Huang, "China's Path to the Center Stage of WTO Dispute Settlement: Challenges and Responses" (2010) 5 Glob Trade Cust J 365 at 368.

The DSM is often recognized as the jewel in the crown of the WTO. In a majority of studies, WTO adjudication is considered to be well-developed as it operates in accordance with the rule of law and any member can use it to safeguard their own interests in a rule-based system.[22] China's general perspective on the DSM before and shortly after its accession to the WTO reflected more optimistic and ideal features: people warmly celebrated the accession to the WTO, and greater attention was given to how China could use this system from an offensive position, including maximizing possible benefits.[23]

But China's first experience with the WTO case, i.e., the *United States - Definitive Safeguard Measures on Imports of Certain Steel Products* ("*US-Steel Safeguards*"),[24] caused it to reconsider its initial positive impression of the DSM. One of the Chinese representatives of that time, Guohua Yang (杨国华), recalled his memories of the consultation. While representatives from other WTO members shook hands and greeted each other, those from China were very serious. They "glanced at the seats of the United States, the respondent of that case, with a sense of hostility. The United States restricted the import of steel products, including those from China, and hence it was a 'rival' to China in the case".[25] When Yang sat down, he found "documents and materials were

[22] See e.g. Robert E Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years" (1999) 8 Minn J Glob Trade 1; Alan Wm Wolff, "Reflections on WTO Dispute Settlement" (1998) 32:3 Int Lawyer 951; John H Jackson, "Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects" in Anne O Krueger, ed, *WTO Int Organ* (Chicago and London: The University of Chicago Press, 1998); Thomas J Schoenbaum, "WTO Dispute Settlement: Praise and Suggestions for Reform" (1998) 47:3 Int Comp Law Q 647; John H Jackson, Robert E Hudec & Donald Davis, "The Role and Effectiveness of the WTO Dispute Settlement Mechanism [with Comments and Discussion]" (2000) Brook Trade Forum 179.

[23] Ji & Huang, *supra* note 21 at 369.

[24] *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (Complaint by China)* (2003), *WTO* Doc WT/DS252. This case is about the U.S. 3-year-long definitive safeguard measures (No. Proclamation 7529) on 10 categories of imported steel products. The European Community (now the EU) firstly initiated the DSM and requested the consultation on 26 March 2002, then Brazil, China, Japan, Korea, New Zealand, Switzerland and Norway joined in and sued against the United States concerning the safeguard measures.

[25] Guohua Yang, "China in the WTO Dispute Settlement: A Memoir" (2015) 49:1 J World Trade 1 at 1.

full on the tables of the people from all the other eight members",[26] on the contrary, "only a few pieces of paper… were in front of [his] Chinese colleagues".[27] Yang described his following days in the consultation as "suffering" and "awkward".[28] Because they were familiar with the Report of the United States International Trade Commission (USITC), other complainants kept asking the U.S. delegation facts and legal issues about the safeguards imposed against steel imports. However, the Chinese remained silent because they neither "knew to bring a copy of the USITC Report" nor "understood what they (the other WTO members) were talking about."[29] Yang himself eventually admitted that, "[w]e did not know that the consultation was a perfect opportunity to have the U.S. to clarify the measure which we claimed to be inconsistent with the WTO rules, and that it would greatly facilitate the following procedures to resolve the dispute".[30] In fact, China, "[a]s one of the joint complainants, could not contribute much to this case".[31]

The large gap between China and other WTO members in terms of familiarity with the prescriptive norms that undergird behavioral routines in the WTO adjudicatory decision-making process illustrates an imbalance in the power bases for participating in WTO adjudication. A WTO member's participation in the decision-making process represents its ability to process knowledge of trade injuries and their relationship to WTO rights.[32] Experienced members, such as the United States, have developed

[26] *Ibid* at 2.
[27] *Ibid*.
[28] *Ibid.*
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.
[32] Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, Towards a Development-Supportive Dispute Settlement System in the

professional and sophisticated mechanisms to identify trade injuries, to prioritize them according to their impacts, and to mobilize resources for initiating WTO claims.[33] The resources they can mobilize for trade litigation are also rich. They have developed interagency coordination and networking with private sectors, they can train and hire lawyers who specialize in WTO law, they are able to bear the burden of high litigation costs and they can handle many complicated legal and non-legal matters based on the accumulated knowledge gained from previous proceedings and close relations with the WTO bureaucracy.[34] In contrast to experienced members, the accumulated expert knowledge held by the PRC was relatively scant. China's long-term commitment to ideological struggles had generated a temporary incapacity to participate in WTO adjudication in terms of both knowledge and personnel. Through the 1980s to 1990s the PRC only had a handful of scholars addressing WTO matters, few law firms or governmental departments knowledgeable about WTO law, and no Chinese indigenous lawyers who could independently represent China in WTO cases.[35] In fact, trade law was not even taught in China until the 1980s: China's first textbook on international economic law was written by Professor Liu Ding of Renmin University and published in 1984.[36] Further, given that the official working languages of the WTO are English, French and Spanish,[37] the Chinese must work in a foreign language in WTO judicial

WTO ICTSD Resource Paper 5 (2003) at 27.

[33] *Ibid*.

[34] Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington D.C.: Brookings Institution Press, 2003) at 19 to 64.

[35] P L Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building" (2010) 13:4 J Int Econ Law 997 at 1000 to 1025.

[36] Liu Ding, *International Economic Law* (Beijing: China Renmin University Press, 1984).

[37] "WTO Guide to Documentation", online: *World Trade Organ* <https://docs.wto.org/gtd/Default.aspx?pagename=WTOLanguages&langue=e>.

proceedings, resulting in a significant language and cultural barrier for Chinese participants.

Once it understood this huge knowledge gap, China adopted what some scholars call a "learning and socialization" strategy.[38] Domestically, China started to improve its WTO legal capacity. Believing that WTO litigation would be greatly facilitated with the assistance of experienced international lawyers, since 2002 the Chinese government has sought and hired foreign law firms to represent it in panel proceedings. For example, in 2002 Chinese officials flew to Washington D.C. and visited law firms capable of handling WTO cases.[39] A series of conferences, classes and programs were organized to train Chinese legal practitioners. In a special seminar involving a case study of *US-Steel Safeguards*, two international trade lawyers, one of whom acted as counsel in the case, were invited to give lectures regarding WTO litigation skills to Chinese officials, law professors and private lawyers.[40] By 2006, the Ministry of Commerce of the People's Republic of China (MOFCOM) had sent over 100 officials, scholars and lawyers for training in the United States and Geneva on WTO affairs.[41] After 2002, the Government established an internal case handling mechanism named QUARD (*siti liandong*, 四体联动).[42] The QUARD mechanism is operated by the Department of Treaty and Law (DTL) at the MOFCOM, relevant Chinese departments,

[38] See e.g. in Xiaojun Li, "Understanding China's Behavioral Change in the WTO Dispute Settlement System" (2012) 52:6 Asian Surv 1111 at 1113; Marcia Don Harpaz, "Sense and Sensibilities of China and WTO Dispute Settlement" (2010) 44:6 J World Trade 1155; Stuart Harris, *China's foreign policy* (Cambridge: Polity, 2014) at 130.

[39] Guohua Yang & Xiaoli Shi, *Womenzai WTO Daguansi (We are Litigating in WTO，我们在 WTO 打官司)* (Beijing: Zhishi Chanquan Press, 2015) at 281.

[40] *Ibid* at 280.

[41] Li, *supra* note 38 at 1126.

[42] The literature meaning of QUARD is four bodies' cooperation. Yang, *supra* note 25 at 6.

and international trade lawyers (both Chinese and foreign):[43] If China is involved in a WTO case, a QUARD team will be formed to work on the merits and procedural issues relating to China, such as investigating China's degree of loss, identifying relevant WTO rules and drafting submissions.

Initially, China took a prudential strategy to its involvement in WTO adjudication as either complainant or respondent. It brought very few cases to the WTO. Rather, non-adversarial, diplomatic exchanges such as bilateral negotiations were frequently employed to resolve trade disputes.[44] For instance, to avoid damaging the Sino-EU relationship in a year that marked the 30th anniversary of the normalization of bilateral relations, China refrained from suing the EU in a case concerning polyester staple fibers and settled the dispute out of court.[45] In handling cases brought by others against China, the Chinese were said to be "anxious" and "scared".[46] Chenggang Li(李成钢), the Assistant Minister of the MOFCOM, reminisced about the government's reaction to *China — Value-Added Tax on Integrated Circuits*[47]: "we treated the multilateral trade mechanism with awe, preparing every proposal under the supervision of ministers."[48] However, during this time China actively observed and participated in many WTO cases as a third party. By 2006, it had been involved in 54 cases as a third party, which surpassed the number of times many developing countries that had joined the WTO much earlier than China had involved themselves with other cases.[49] Yang explained

[43] *Ibid*.
[44] Harris, *supra* note 38 at 130; Li, *supra* note 38 at 1130.
[45] Li, *supra* note 38 at 1130.
[46] Yang & Shi, *supra* note 39 at 1.
[47] *China - Value-added tax on Integrated Circuits (Complaint by the United States)* (2005), *WTO* Doc WT/DS309.
[48] Yang & Shi, *supra* note 39 at 4.
[49] "Disputes by Member" (20 June 2018), online: *World Trade Organ* <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.

why China took that approach:

> China as a member and a major trading partner had substantial interests, either in the relevant industries or in a systemic way, in those cases, so its voice needed to be heard. And, of course, third party cases were opportunities for us to become familiar with the procedures of the panel and Appellate Body.[50]

2006 was a watershed year for China's engagement in the DSM, as China revamped its former image as a passive observer. In March 2006, the Chinese Government Work Report announced that China would "employ the multilateral dispute settlement mechanism to properly handle trade disputes in the future".[51] Meanwhile, the MOFCOM issued its Provisions on Responding to Antidumping Cases concerning Export Products, requesting that Chinese enterprises "actively respond to foreign anti-dumping investigations with the government's assistance".[52]

This strategic shift was first revealed in *China-Measures Affecting Imports of Automobile Parts* (*Auto Parts*).[53] Instead of settling the dispute out of court as it had often done previously, the Chinese government refused to concede at the consultation stage and submitted the case for adjudication: "China would defend its position and interests before the panel and remained confident that China's relevant measures were consistent with its accession commitments and the relevant WTO rules…"[54] In July 2008, the panel held that China had discriminated against imported car parts, which represented China' s first legal defeat at the WTO as a respondent state. China appealed against certain elements of the panel's report, but the appellate body (AB) upheld the

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[50] Yang, *supra* note 25 at 7.
[51] Wen Jiabao, "Government Work Report*"* (5 March 2006), online: *China Daily* <http://www.chinadaily.com.cn/china/2006-03/15/content_538753.htm>.
[52] Hsieh, *supra* note 35 at 1032.
[53] *China – Measures Affecting Imports of Automobile Parts (Complaint by Canada)* (2009), *WTO* Doc WT/DS342.
[54] WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 26 October 2006), WTO Doc WT/DSB/M/221 at para. 53. Cited in Harpaz, *supra* note 38.

panel's findings. Although it eventually lost the case, the MOFCOM was happy to accept the result, explaining that China was successful in the sense that the proceedings, especially the first-ever appeal to the AB, had offered it valuable experience in managing WTO cases.[55]

The *Auto Parts* case paved the way for China to change its conciliatory strategy in defensive cases. China refused to back down a second time in *China — Intellectual Property Rights*.[56] On hearing that the United States had challenged the Chinese policy on the protection and enforcement of intellectual property rights in the WTO, Yi Wu (吴仪), then Vice Premier, declared that China would fight until the end: "the United States completely ignored what we have achieved in the protection of intellectual property rights… Chinese Government is extremely dissatisfied about this, but we will proactively respond the U.S. claim according to the related WTO rules..."[57] Although the United States ultimately won the case, its request to lower China's threshold for criminal prosecution of copyright infringement—seen by the industry as the most vital issue—was dismissed by the panel due to China's arguments in defense of its position.[58]

After 2006, China also began to submit complaints to the WTO against foreign measures. In September 2007, China filed its first WTO case as an independent complainant,[59] and by 2018 it had lodged 20 complaints.[60] After years of participation

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[55] Li, *supra* note 38 at 1134.
[56] *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Complaint by the United States)* (2010), *WTO* Doc WT/DS362.
[57] "Wuyi's Attitude towards the Sino-US Intellectual Rights Dispute: We will Fight till the End*"* (24 October 2007), online: *People* < http://ip.people.com.cn/GB/136672/136683/145088/145091/8828515.html>.
[58] Hsieh, *supra* note 35 at 1031.
[59] *United States - Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China (Complaint by China)* (2007), *WTO* Doc WT/DS368.
[60] Note 49.

in the WTO, China, through its "learning and socialization" strategy, has grown into a seasoned complainant. When Yang recorded his attendance at the *U.S.-Poultry* consultation in 2009, he said:

> …we asked a series of questions on the measure…I had all the related documents in front of me, i.e., the paragraph from the act, the legislative history, the background of the congresswoman who introduced the bill, the study on its WTO consistency, and above all, the question list we sent to the U.S. one week before this consultation, with the follow-up questions marked in my copy…When I walked out of the DVC room in late that night, I saw the roadmap ahead of me very clearly and knew how to work on the case.[61]

Another significant outcome of the years of participation is China's embrace of the spirit of "the rule of law". This is evident in a MOFCOM official's reflection on China's policy towards the DSM:

> We came to the WTO having a lot of reservations about using the dispute settlement system. We made a lot of commitments in the negotiations leading up to the signing of the [accession] agreement and do not want to be seen as breaking our promises. That's why we only adjudicated when we felt 100% sure that we were going to prevail, such as in the U.S. Steel case. As we became more familiar with the system by learning and observing actual disputes, however, we found that our reservation was totally unnecessary. Countries as large as the U.S. win and lose WTO cases all the time and it's all part of the game. China needs to be playing the same game.[62]

A similar shift in perception is also seen in the Chinese delegation's behavioral changes in WTO litigations. Nowadays, when the Chinese meet their "opponents" in the WTO meeting rooms, they are no longer serious and hostile. Rather, as Yang wrote, "we greeted each other and shook hands like friends…There were disputes between our countries, but they could be settled in a friendly way. We were not rivals and we did not need to have to act with a sense of hostility toward each other."[63]

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[61] Yang, *supra* note 25 at 2 to 3.
[62] Li, *supra* note 38 at 1132.
[63] Yang, *supra* note 25 at 9.

6.1.2 The PRC's Socialization in the DSM and Pragmatic Westernism

The above section demonstrates how China has participated in the WTO adjudicatory decision-making process and how it embraces the regime as normal operating procedure in international trade governance. This attitudinal shift occurred through what some scholars call "socialization". In a broad sense, China's socialization in the DSM can be defined as a process of inducting China into the norms and rules of the WTO legal regime, which is largely based on Western civilization.[64] In other words, socialization has also been a sort of westernization. In a narrow sense, China's socialization can be deconstructed, according to Alastair Iain Johnston, by three micro-processes: (1) mimicking, a process of imitating other members' language, habits, and actions as a safe, first reaction to a novel environment—I do this because everyone does this; (2) social influence, a process of understanding a group's social values through rewards and sanctions—I do this because I will benefit from doing this; and (3) persuasion, a process of internalizing social values, considering them normal, given and normatively correct—I should do this because it is normal for me to do this.[65]

China's willingness to mimic perhaps derives from its embarrassing experience with the *US-Steel Safeguards* consultation. While other WTO members behaved in a relaxed and friendly manner, the Chinese were somber, taking the United States as their enemy and glancing at the Americans with a sense of hostility; while other members were well

[64] Jeffrey T Checkel, "International Institutions and Socialization in Europe: Introduction and Framework" (2005) 59:4 Int Organ 801 at 804.
[65] Alastair Iain Johnston, *Social States: China in International Institutions, 1980-2000* (Princeton, NJ: Princeton University Press, 2007).

prepared for the consultation, with full sets of documents on the table, the Chinese forgot to bring a copy of the USITC Report. This sharp contrast in the performance in WTO adjudication brought frustration to China: as Yang admitted, the Chinese were unable to have much impact on the case. But frustration would not have been enough to stimulate China to mimic the behaviour of other states. Another driving force might have been the potential reward China saw that it might win from staying in the WTO, namely a free global market constructed by the WTO regime that could bring China huge economic benefits.

Copying what other members were doing in WTO adjudication is the main format of China's mimicking process. The copying model includes the massive introduction of external information and resources, demonstrated by hiring foreign international lawyers for WTO cases, inviting legal experts to train the Chinese, sending the Chinese abroad to learn litigation experience and establishing Sino-foreign collaboration (the QUARD) in handling cases. It also includes China's acting as a third party participant. Interestingly, during its early years in the WTO, China was a conciliatory defendant and a reluctant complainant, but was extremely active as a third party. Being a third party, as Yang explained, is an "opportunity for us to become familiar with the procedures of the panel and Appellate Body".[66] Indeed, China's third-party strategy was a cost-effective way to mimic: on the one hand, China as a third party could obtain access to other states' (especially the parties') submissions and learn their litigation skills and strategies; on the other hand, a third party participant is not required to submit

[66] Yang, *supra* note 25 at 7.

as many materials as the parties do. Instead, China needed far less preparation time and spent much less on the litigation. For example, China presented only oral submissions at hearings in all of the 2008 and 2009 appellate cases in which it acted as a third participant.[67]

After 2006, China entered the "social influence" process. 2006 is a critical point in time, for it marks the expiration of the *de facto* five-year transition period in which China could not be challenged at the WTO.[68] Thus, WTO members started to frequently submit claims against it.[69] In a sense, China's shift in its attitude towards WTO adjudication after 2006 was due to its fear of "punishment" arising from a flood of complaints: if the large number of trade disputes could not be properly settled, they would threaten the long-term viability of China's economy and its status in the WTO.[70] It is noted that the concepts of "rewards" and "punishments" cannot be defined only on the basis of gains and losses in litigation. A prominent example is the *Auto Parts* case, where China failed in the litigation but regarded the failure as a success. China's sense of "success" in this case was not from a victory on the legal merits or other material gain, it was from psychological well-being derived from conformity with the rule of law value advocated by WTO adjudication. In other words, the spirit of "fight until the

[67] Hsieh, *supra* note 35 at 1028 to 1029.

[68] In the negotiations about its WTO accession, China reached compromises—mainly with the European Communities (EC) and the United States —to delay the implementation of certain commitments concerning some important industries. These transitional periods were to last between three and five years. There was no explicit clause that forbids WTO Members to bring a complaint against China immediately after its accession. To respect the commitments subject to transitional periods, however, most potential complainants chose to wait until the end of that period – this is the so-called *de facto* five-year grace period following China's accession. Wei Zhuang, "An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010" (2011) 4:1 Law Dev Rev 218 at 219 to 220.

[69] Wei Zhuang has calculated that in the period between 2006 and 2010, China was a respondent in almost a quarter of all WTO disputes, receiving complaints roughly four times per year. see in *Ibid* at 221. Guohua Yang also points out that China from 2009 to 2010 even overtook the United States to become the most frequent respondent, see in Yang & Shi, *supra* note 39 at 2.

[70] Li, *supra* note 38 at 1130.

end" that China had demonstrated in the case seems to have proved to the world that China, as a WTO member, could settle its trade disputes with others through effective use of the DSM. Besides psychological well-being, China identified other potential rewards for participating in WTO adjudication. Kristie Thomas has noted that, after the *Auto Parts* case, China found it "could benefit from keeping the disputed measures in place" whilst the "panel process was ongoing" and therefore might take advantage of this adjudicatory loophole to defend and push for its trade interests in the future.[71]

However, evidence for the "persuasion" process is scant and less clear. There are some signs of gradual internalization of WTO adjudication in officials' discourses regarding their participation in WTO litigation. For example, Yang reports that handling WTO cases is no longer "suffering" work for the Chinese. Rather, it has become normal work: the Chinese and delegates of other member states "greeted each other and shook hands like friends",[72] approaching their participation in the litigation with greater ease and assurance. The Chinese now "kn[o]w how to work on the case": in the adjudicatory proceedings, they "ask a series of questions on the measure", with "all the related documents in front of [them]".[73] The persuasion process is also revealed in the Chinese changing opinion about WTO adjudication. As the MOFCOM official's reflection implies, some Chinese started to separate legal disputes from politics, and to recognize that adjudication is a common practice for WTO members of all sizes and ideologies and that China can also be a player in the game.

[71] Kristie Thomas, "China and the WTO Dispute Settlement System: from Passive Observer to Active Participant" (2011) 6 Glob Trade Cust J 481 at 484.
[72] Yang, *supra* note 25 at 9.
[73] *Ibid* at 2 to 3.

Some scholars thus have concluded that, through the socialization process, China is "demonstrating its faith in western legal norms and institutions as well as its respect for international rules…China is showing that it shares these values (e.g. the rule of law), that it is part of a community."[74] However, as the next two sections will demonstrate, this thesis makes a more limited claim: that, after decades of socialization in the WTO, Chinese participants are internalizing Western norms and values, but China has neither been fully convinced by Westernism nor has it fundamentally changed its attitude towards international adjudication. Arguably, the Chinese embrace of WTO adjudication is an exception to this position. Strong evidence for this claim is demonstrated by a comparison between China's attitude towards the DSM and its attitude towards other international courts and tribunals. While China has recognized the compulsory jurisdiction of the WTO DSM without reservation and has actively used it in practice, it has rejected, or only accepted limited jurisdiction of other international judicial bodies. China has refused to accept the compulsory jurisdiction of the ICJ and the ICC.[75] Moreover, when acceding to certain other conventions (especially those of a political nature) China still makes reservations to adjudication clauses and prefers to rely on bilateral negotiations for dispute settlement.[76] So far, the DSM has been the only international adjudicatory institution China has fully accepted and frequently resorted to.

To some extent, China's accession to the WTO and its socialization in the DSM is

[74] Harpaz, *supra* note 38 at 1186.
[75] Chan, *supra* note 11 at 100; Lu Jianping & Wang Zhixiang, "China's Attitude towards the ICC" (2005) 3:3 J Int Crim Justice 608.
[76] Muthucumaraswamy Sornarajah & Jiangyu Wang, eds, *China, India and the International Economic Order* (New York: Cambridge University Press, 2010) at 318 &323.

likely the result of pragmatism rather than free choice. Given that China in the post-Mao era has shifted its priority from class struggle to "reform and opening up", its foreign policy also set a new goal: fostering opening-up and economic development. For this purpose, China has set aside differences in political systems and values and has taken a compromise position to accommodate the West in support of its own domestic reform and economic development.

Centering on economic development motivated China's entrance into the WTO and its actions in that forum. Arguably, China joined the WTO because it anticipated economic benefits from the world market, and because its moves and strategies in WTO adjudication are consciously formed to realize these benefits. As the mimicking and social influence processes show, China's interaction with WTO adjudication is designed to maximize the utility that can increase its economic interests in the WTO. In the case of mimicking, China copies others in order to survive in the WTO system. In the case of social influence, it was actively involved in WTO litigation because the DSM has been found to be an effective tool to defend and advance China's trade policies. This pragmatic mentality can be further demonstrated by China's self-identity in the WTO. Acknowledging that WTO norms and institutions are "a product of Western civilization", China sees itself as a novice entering the "game" that has been designed by others.[77] Thus, the Chinese try their best to adhere to terms set by the West.[78] Since

[77] Zhipeng He in his newly published book *Chinese Theory of International Law* has pointed out that Western scholarship leads the tendency of international law and this fact to some extent contributes to the backwardness of international legal research in China. Zhipeng He & Lu Sun, *Chinese Theory of International Law (国际法的中国理论)* (Beijing: Law Press, 2017) at 53 to 54.

[78] Xiaohong Su owed China's reluctant approach to international adjudication to the incompatibility of cultures, for "when China as a novice entries the 'game' that has been designed by others, it is inevitably marginalized by the 'game rules"' See in Xiaohong Su, *International Adjudication in the Changing World (变动世界中的国际司法)* (Doctoral Thesis, East China Normal University, 2004) [unpublished] at 130.

China's WTO accession, most Chinese indigenous scholars have been keen on introducing Western theories and applying them to China's practice on the international stage.[79] For them, the study of WTO adjudication is essentially prescription-oriented: Western theories and legal practice set a standard, and legal advice is given to improve China's capability to meet the standard.[80]

The PRC's pragmatic approach to Westernism is consistent with "Socialism with Chinese Characteristics", which combines the move to a market economy and into the international arena with maintaining the existing Communist regime and Chinese culture. The PRC's approach to Westernism resonates with the theory of *Zhongti Xiyong* (Chinese substance and Western application, 中体西用), which adopts Western matters as *yong* (application) and takes Marxism and Chinese traditions as *ti* (substance). However, this might be merely the Communists' aspired vision. Just as the Western *yong* undermined Chinese traditions and society in the late 19th century, will the accession to the WTO similarly undermine the existing Communist regime in the future?

One should consider China's developing sense of "rule of law" after its accession to the WTO as a manifestation of the Western *yong*'s penetration into *ti*. *Auto Parts* is the first case where China permitted an international court to intervene in its domestic affairs and determine the international legality of its domestic policy.[81] China's enforcement of WTO rulings in cases it has lost is another sign. After its failure in the

[79] A Chinese scholar describes the scenario as an utilitarian study of international adjudication, see Shibo Jiang, "Complex of Power and the Academic Mind-set in the Studies of International Law: Penetrating from the Negative Attitude of China to International Justice" (2009) 2009:2 Shandong Soc Sci 33.
[80] See.e.g. Julia Ya Qin, "Pushing the Limits of Global Governance: Trading Rights, Censorship, and WTO Jurisprudence – A Commentary on the China-Publications Case" (2011) 10:2 Chin J Int Law 62.
[81] Harpaz, *supra* note 38.

Intellectual Property Rights case, China adhered to the time limits set by the WTO and amended its Copyright Law (though the United States was unsatisfied with China's implementing actions).[82] Moreover, as will be discussed in the next section, China's increasingly liberal approach to ISA signals its tendency to accept international adjudication in other areas. But we cannot overestimate and oversimplify the role Westernism plays in the Chinese value cluster, which continues to be called "Socialism with Chinese Characteristics". Perhaps it is safer to argue that the Chinese value cluster is in transition, struggling between Westernism and traditionalism: Westernism makes the PRC adopt characteristics of a "Western" state, but any such move must be limited, for this will threaten the country's Chinese essence. And this struggle is especially complex when it takes place in a communist regime.

6.2 The PRC's Attitude towards Investor-State Arbitration

Like WTO adjudication, ISA as a whole can be regarded as an infinitely repeated decision-making process where participants interact and communicate over discrete time periods. Each investment dispute is a single-stage decision making process, where the participants initiate, defend and adjudicate claims concerning specific matters of international investment. Yet the study of China's attitude towards ISA cannot rely on the evolution of China's participation in concrete cases decided by an international investment adjudicatory institution. One reason for this is that there is no standing international investment adjudicatory institution like the DSM. Investment arbitration

[82] Timothy Webster, "Paper Compliance: How China Implements WTO Decisions" (2013) 35 Mich J Intl L 525 at 557 to 561.

is essentially a decentralized mechanism. While multilateralism has dominated participants' relations in the trade adjudicatory decision-making process through the establishment of the WTO legal regime, there is no multilateral, organized investment legal regime. Instead, international investment law is enshrined in over 3,000 bilateral, regional and sectoral investment treaties,[83] and the settlement of international investment disputes relies on arbitration panels either constituted *ad hoc* or constituted under the auspices of an institution such as the ICSID or the PCA. The other reason is that, given the relatively few times that China has participated in investment arbitration, the relevant information about its participation is scant. For instance, as of January 2019, only 7 ICSID cases involving China or Chinese investors had been publicly reported, two of which are still pending.[84] While there might be a few unreported cases, it is unlikely that there is a significant number.

Perhaps the evolution of China's attitude towards ISA can be better observed in the relevant clauses (ISA clauses) included in China's IIAs with other states. The overall international investment legal regime might be fragmented because it is enshrined in thousands of bilateral, regional and sectoral investment treaties that contain various (or even conflicting) provisions regarding the settlement of investment disputes, but the

[83] The data is from "International Investment Agreements" (22 January 2019), online: *Invest Policy Hub* <https://investmentpolicyhub.unctad.org/IIA>.

[84] Four cases were filed by Chinese investors, they are: *Tza Yap Shum v Republic of Peru* (2007), ARB/07/6 (ICSID) (Arbitrators: Judge Dominique Hascher, Donald M. McRae, Kaj Hobér); *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium* (2012), ARB/12/29 (ICSID) (Arbitrators: Lord Collins of Mapesbury, Philippe Sands, David A.R. Williams); *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen* (2014), ARB/14/30 (ICSID) (Arbitrators: the Honourable Ian Binnie C.C, Zachary Douglas, John M. Townsend); *Sanum Investments Limited v. Lao People's Democratic Republic (II)* (2017), ADHOC/17/1 (ICSID) (Arbitrators: J. E. Kalicki, K. Reichert, L. Boisson de Chazournes).China as a host state was sued in three cases: *Ekran Berhad v People's Republic of China* (2015), ARB/11/15 (ICSID) (settled by agreement); *Ansung Housing Co., Ltd. v. People's Republic of China* (2014), ARB/14/25 (ICSID) (Arbitrators: Lucy Reed, Michael Pryles, Albert Jan van den Berg); *Hela Schwarz GmbH V. People's Republic of China* (2017) ARB/17/19(ICSID) (Arbitrators: Sir Daniel Bethlehem, Campbell McLachlan, Roland Ziadé).

IIAs governing China's investment relations are relatively consistent and create a relatively uniform and predicable regime for investment arbitration related to China.[85] Moreover, although China and Chinese investors have been reluctant to participate in arbitration, ISA clauses are common in China's IIAs, which provide a wealth of information for the study of China's attitude towards ISA. Thus, this section examines China's evolving decision-making process regarding the types of ISA clauses it includes in its IIAs.

6.2.1 The Evolving Decision-Making Process on ISA Clauses

In the last chapter it was noted that the participants in the Chinese foreign policy-making process in the Mao era were few: only the supreme CCP leaders and a small group of senior colleagues had ultimate authority over almost all foreign policy decisions. The leadership's tight control of foreign affairs was gradually relaxed in the post-Mao era, as Deng re-institutionalized China's foreign policy-making process.[86] Following Deng's reforms, strongman politics have given way to a more collegial and professionalized decision-making mechanism: apart from crises or decisions about certain key strategic issues (such as those surrounding the United States, Russia, Japan and the United Nations), decisions about the extensive range of other foreign affairs do not necessarily need the paramount leaders' approval. Instead, they are the daily work of specialized departments such as the Ministry of Foreign Affairs of the People's

[85] It is well recognized that the evolution of China's IIAs can be divided into three generations. See in Manjiao Chi & Xi Wang, "The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications" (2015) 16:5–6 J World Invest Trade 869; Axel Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making" (2015) 16:5–6 J World Invest Trade 843.
[86] Harris, *supra* note 38 at 24 to 25.

Republic of China (MOFA) and the MOFCOM.[87]

However, allowing more participants' involvement in the process leads to more competitions and, as is the case in any country, struggles for power and resources are waged between Chinese government departments. It is reported that in the investment treaty negotiations between China and the United States, Beijing has been hesitant about the jurisdictional scope of ISA because of a debate within the government. Whilst some Chinese officials—represented by those from the MOFCOM—were generally in favor of a more liberal approach to ISA, the conservative National Development and Reform Commission disagreed with this approach.[88] This disagreement, on the face of it, reflects differences within the Chinese government about the appropriate direction of investment dispute settlement.[89] However, given that Chinese society is growing more diverse after its integration into the international community, the disagreement is actually more complicated than it appears. It now involves underlying struggles among interest groups, such as investors, the party and the government. As will be shown below, the Chinese ISA policy decision-making process is gradually evolving into an intricate web that includes various participants who bargain for values, power and resources.

The making process of China's ISA clauses can be divided into three periods:[90] the pre-ICSID era, which started from 1982 (when China signed its first BIT with Sweden);

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87 *Ibid*.

88 Axel Berger & Lauge N Skovgaard Poulsen, "The Transatlantic Trade and Investment Partnership, Investor-State Dispute Settlement and China" (2015) Columbia FDI Perspectives No 140.

89 Berger, *supra* note 85 at 866.

90 China began to negotiate IIAs with other states in the late 1970s, shortly after the adoption of the "reform and opening-up" policy. Since the conclusion of the first bilateral investment treaty (BIT) with Sweden in 1982, China has concluded 149 IIAs, almost all of which contained clauses about ISA. Chi & Wang, *supra* note 85 at 870; "International Investment Agreements by Economy", (2019), online: *Invest Policy Hub* <https://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>.

the ICSID era, which started in 1993 (when China ratified the ICSID Convention which made it possible to submit investment disputes to ICSID); and the NAFTA-ization era, which started in 2008 (China in this year began to borrow language from the North American Free Trade Agreement (NAFTA)[91] to articulate its ISA clauses).

The Pre-ICSID Era

When China first started negotiating investment treaties, its reluctance to include ISA was obvious. In the China – Sweden BIT (1982), the China – Finland BIT (1984) and the China – Thailand BIT (1985), ISA clauses were not included. China's inclusion of ISA started in the mid-1980s, marked by the China – BLEU (Belgium-Luxembourg Economic Union) BIT (1984):

> **Article 10**
> …a dispute which arises from an amount of compensation for expropriation, nationalization or other similar measures and has not been settled within six months from the date of notification may, as the investor prefers referred for settlement either to:
> (1) a judicial body of the Contracting Party accepting the investment, or,
> (2) an international arbitration without resort to any other means. [92]

ISA was gradually included in IIAs concluded after the China – BLEU BIT, though it was limited in scope. Most disputes were to be referred to the courts of the host states; and investment tribunals would have only limited jurisdiction over a dispute regarding the amount of compensation for expropriation. China usually encouraged investors to seek local or other remedies instead of ISA. ISA would be available if they failed to resolve the dispute amicably within a certain period. This may be common in many

[91] The North American Free Trade Agreement came into force on January 1, 1994 and is expected to be replaced by the United States–Mexico–Canada Agreement (USMCA) once it is ratified.
[92] *Agreement between the Government of the People's Republic of China and the Belgian-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments*, BLEU and China, 4 June 1984, art 10 (entered into force 5 October 1986).

IIAs, but in some agreements involving China, the period can be as long as one year.[93] A typical clause might be: "If it [dispute] is not resolved within one year after the complaint is filed, the competent court of the Contracting Party taking the expropriation measures or the investment arbitral tribunal may upon the request of the investor, resolve the amount of compensation".[94] Sometimes the reference to local remedies goes beyond courts. In the China – Netherlands BIT (1985) and the China – Malaysia BIT (1988), parties are entitled to file their cases with the host state's competent administrative agencies.[95]

Chinese avoidance of ISA is understandable, if we review the power relationship between the "investor" and the "state" in the pre-ICSID era. ISA is not traditional state-state adjudication; rather, it is a mechanism where individuals (e.g. foreign investors), who are often seen as subordinate to states, can submit claims against their "superior" (states) on equal terms in international arbitral tribunals to settle their investment disputes. The very nature of ISA puts investor and state on an equal footing, but the likelihood that a state will be a respondent in a given case can vary, depending on whether the state is a capital importer or capital exporter. In the Chinese context in that era, given that the PRC since the 1980s had been a typical net capital importer whose

[93] See e.g. *Agreement between the Government of the People's Republic of China and the Government of the Polish People's Republic on the Reciprocal Encouragement and Protection of Investments*, China and Poland, 7 June 1988 art 10 (1) (entered into force 8 January 1989); *Agreement between the Government of the People's Republic of China and the Government of Malaysia Concerning the Reciprocal Encouragement and Protection of Investments*, China and Malaysia, 21 November 1988, art 7(1) (entered into force 31 March 1990); and *Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan on the Reciprocal Encouragement and Protection of Investments*, China and Pakistan, 2 December 1989, art 10(entered into force 30 September 1990).

[94] See e.g. *Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan on the Reciprocal Encouragement and Protection of Investments*, art 10.

[95] *Agreement on Reciprocal Encouragement and Protection of Investments between the People's Republic of China and the Kingdom of the Netherlands*, China and Netherlands, 17 June 1985, art 2(a) (terminated); *Agreement between the Government of the People's Republic of China and the Government of Malaysia Concerning the Reciprocal Encouragement and Protection of Investments*, art 7(3).

development largely relied on foreign direct investment (FDI),[96] its risk of being on the receiving ends of claims was relatively high, whereas Chinese investors, who engaged in less outward investment during that period, would be unlikely to take advantage of their ability to submit claims against China's treaty partners. China's concern—in terms of whether it should include strong obligations and unfettered ISA in its agreements—was that it could lose its policy autonomy in using foreign capital for Chinese economic development. Hence, China wanted to restrict the investor's rights and powers, for example by limiting access to international arbitration. At its heart, the fear might have been that ISA would deprive China of its jurisdiction over foreigners doing business in China. Limiting ISA permitted China to preserve its power over foreign investors.

The ICSID Era

China ratified the ICSID Convention in 1993, thus making reference to ICSID Convention arbitration possible in treaties negotiated with other Member States. However, during its early years after accessing to the ICSID Convention, China continued to avoid the inclusion of ISA. In the China – Lao People's Democratic Republic BIT (1993), the China – Georgia BIT (1993), the China – Croatia BIT (1993), the China – Azerbaijan BIT (1994), the China – Egypt BIT (1994), China – Indonesia BIT (1994), the China – Oman BIT (1995), and the China – Cuba BIT (1995),[97] China did not provide the possibility of investors using ICSID Convention arbitration; rather,

[96] Stephan W Schill, "Tearing Down the Great Wall: the New Generation Investment Treaties of The People's Republic of China" (2007) 15 Cardozo J Intl Comp L 73 at 79.

[97] It is noted that, amongst the mentioned contracting countries, Georgia, Azerbaijan, Egypt, and Indonesia had already joined in the ICSID Convention when signed BITs with China. See in "Database of ICSID Member States", online: *ICSID* <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>. Even for those non-member states, China did not promise to consider ICSID arbitration in the future treaty revision.

it offered only *ad hoc* arbitration and then only on a limited basis. Even in some ISA clauses permitting recourse to ICSID Convention arbitration, investors' access was limited, as "the Chinese Government would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation and nationalization".[98]

The turning point in the Chinese perspective on ISA appeared in some BITs concluded after 1998. In the China – Barbados BIT in 1998, investors' access to ISA was liberalized, as the treaty states:

> 1. Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the investor and the other Contracting Party.
> 2. If any dispute referred to in paragraph 1 of this Article cannot be settled within six months following the date on which the written notification of the dispute has been received by one party from the other party to the dispute, the investor shall have the right to choose to submit the dispute for resolution by international arbitration to one of the following fora:
> (a) the International Centre for Settle of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington, March 18, 1965,or
> …
> 3. Provided that the Contracting Party may require the investor to exhaust the local administrative review procedure before the submission of the dispute to international arbitration. The provision of this Paragraph shall not apply if the investor has resorted to the procedure specified in Paragraph 2 of this Article…[99]

From the provisions, we can see that China had removed the jurisdictional hurdle, as the admissibility requirements of ICSID Convention arbitration changed from compensation-relevance to what Manjiao Chi and Xi Wang call "investment-

[98] Christoph H Schreuer, *The ICSID Convention: a Commentary* (Cambridge University Press, 2009) at 342; Wenhua Shan & Jinyuan Su, *China and International Investment Law: Twenty Years of ICSID Membership* (Leiden: Martinus Nijhoff Publishers, 2014) at 349.

[99] *Agreement between the Government of Barbados and the Government of the People's Republic of China for the Promotion and Protection of Investments*, China and Barbados, 20 July 1998, art 9 (entered into force 1 October 1999).

relevance".[100] Another similar example is the China-Netherlands BIT concluded in 2001, which allows "disputes which might arise … concerning an investment" to be submitted to the ICSID or *ad hoc* arbitration.[101] Later, a different description of the type of admissible claim available under a treaty—the "legal nature" requirement—was introduced.[102] For instance, Art. 8(1) of China-BLEU BIT (2005) stipulates: "[w]hen a legal dispute arises between an investor of one Contracting Party and the other Contracting Party, either party to the dispute shall notify the other party to the dispute in writing."[103] The "legal nature" clause is believed to further loosen the limitation on ISA, for it gives access to arbitration for any legal dispute arising from treatment the investors receive from the host state.[104]

China's incentive to change its (rather skeptical) attitude towards ISA came from the increase in Chinese enterprises who began investing abroad in the 2000s. Since the adoption of "reform and opening-up", Chinese companies, especially private companies, have grown fast. As an example, Huawei, a Chinese private company, has become the world's largest telecommunications equipment manufacturer and the second largest smartphone manufacturer. Chinese companies started to rapidly invest overseas after 1999, when the government encouraged the Chinese enterprises to go out and compete in the global market.[105] Chinese investors expanded globally in the wave

[100] Chi & Wang, *supra* note 85 at 884.
[101] *Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands*, China and the Netherlands, 26 November 2001, art 10 (1) (entered into 1 August 2004).
[102] Chi & Wang, *supra* note 85 at 885.
[103] *Agreement between the Government of the People's Republic of China and the Belgian-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments*, BLEU and China, 6 June 2005, art 8(1) (entered into force 1 December 2009).
[104] Chi & Wang, *supra* note 85 at 886.
[105] The General Office of the State Council of the People's Republic of China, "Notice on Encouraging Chinese Firms to Develop Overseas Processing on Supplied Materials and Assembly Business" (1999), online: *the Central People's Government of the People's Republic of China* <http://www.gov.cn/fwxx/bw/swb/content_449812.htm>.

of "going out": for instance, in 2005, Lenovo purchased IBM's personal computer business and became the third-largest personal computer company in the world.[106] The fact that China was exporting capital brought about a significant change in the investor-state power relationship: with Chinese investors were increasing and growing stronger, the desire of China to protect its interests and rights arising from overseas investment with ISA increases accordingly, as do the demands of Chinese investors who urge that the government exercise its powers to enhance the protection.

Specifically, Chinese investors that demanded access to ISA had two practical reasons for doing so. First, the risks of Chinese outbound foreign direct investment (OFDI) were usually high, as most investments were in developing countries in South-East Asia, South Asia, West Asia, Latin America, West Africa, and Southern Africa,[107] countries which were often plagued by conflicts, corruption and political instability. Even in more stable and developed states, Chinese investors' interests could also be infringed by governmental intervention.[108] Second, with the obsolete and limited ISA clauses found in most Chinese investment treaties, Chinese investors who suffered from local political instability or government intervention would find it hard to obtain effective legal protection. The treaty clauses which restrict ISA might have worked in China's favor when China was a net capital importer primarily interested in defending its interests as a host state, but they made little sense when China was becoming a

[106] "Company History | Lenovo US", online: *Lenovo* <https://www.lenovo.com/us/en/lenovo/company-history/>.
[107] Wang Duanyong, *China's Overseas Foreign Direct Investment Risk: 2008–2009*, SAIIA Occasional Paper 73 (South African Institute of International Affairs, 2011) at 21.
[108] In 2009, Aluminum Corporation of China spent $ 19.5 billion to acquire Rio Tinto Company of Australia, but it failed ultimately because of the Australian government's intervention See e.g. Jian-Cong Chang, "Assessment of the Key Political Risks of China's Overseas Direct Investment" (Paper delivered at the International Conference on Economic Management and Trade Cooperation, 2014) [Published by Atlantis Press].

capital exporter with an interest in protecting its overseas investors. In the *Ping An* case, an ICSID case brought by a Chinese investor against Belgium, the Chinese investor was penalized by restrictive ISA clauses.[109] Ping An's claim was ultimately dismissed on jurisdictional grounds: according to the China – BLEU BIT (1984), "all disputes" are under exclusive domestic jurisdiction, and international arbitration could only be invoked to determine the amount of compensation for expropriation or nationalization.[110] The Chinese investor's loss in this case was the tip of the iceberg. Given that most of its IIAs were concluded in the 1980s and 1990s when China granted limited jurisdiction to investment tribunals (generally limiting their authority to determine the amount of compensation for expropriation or nationalization),[111] it could be readily foreseen that, without upgrading the ISA clauses, Chinese investors would endure tremendous risks in the near future.

However, arguments from Chinese investors could not completely alter China's pro-state bias in ISA. Few countries were in as difficult a position as China in determining its new policy towards ISA in the late 2000s. On the one hand, the PRC continued to be one of the top recipients of FDI, a position it had held since the 1980s. On the other hand, since 1999, China had been an important source country of FDI.[112] As a host

[109] *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium* (2012), ARB/12/29 (ICSID) (Arbitrators: Lord Collins of Mapesbury, Philippe Sands, David A.R. Williams). This case originated from the controversial "Fortisgate" where the Belgian government sold Belgian subsidiary of Fortis Group to BNP Paribas (a French bank) without the approval of stakeholders. To protect their interests, Fortis stakeholders resorted to a multitude of local legal remedies but some legal proceedings were reported to be threatened and effected by external pressure. Therefore the Chinese investor Ping An Group, who was Fortis' largest stakeholder, sought compensation from Belgium over its losses in front of the arbitral tribunal at the ICSID.

[110] *Ibid*, Award, at ¶ 209.

[111] The statistics show that China has signed 93 BITs before 2000, amounting to 62% of its total IIAs. "International Investment Agreements by Economy" (5 September 2018), online: *Invest Policy Hub* <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>.

[112] Schill, *supra* note 96 at 99.

country of massive FDI inflows, China's interest was in safeguarding its domestic economic interests and policy autonomy. At the same time, the rapid expansion of China's FDI outflows had required it to create a transparent, friendly and safe investment environment for Chinese investors operating abroad. The fact that China had high stakes on both sides in the investor-state relationship made it evolve from a firm defender of state interests to a potential bridge between two sides in the debate over how to settle investor-state disputes.

The NAFTA-ization Era

To balance the investor-state relationship, after 2008 China introduced detailed and complicated language in its ISA clauses. The new provisions usually appear as a special section (or part) of an IIA, which is broadly similar to Chapter 11 of the NAFTA. For instance, Part C of the China – Canada BIT (2012), which covers aspects such as consent to arbitration, the submission of a claim to arbitration, the appointment of arbitrators, and the enforcement of an award, resembles the structure of Section B of Chapter 11 of the NAFTA. Some wording of Part C also echoes the NAFTA.[113] This NAFTA-ization pattern also emerges in the ISA clauses of the China – Mexico BIT (2008), the ASEAN-China Investment Agreement (2009), the China - Japan - Korea, Republic of Trilateral Investment Agreement (2012) and the China – Australia Free

[113] Article 20 provides that an investor may submit a claim arising from breaches of certain provisions of the treaty to arbitration and he/she is entitled to request for loss or damage "by reason of, or arising out of, that breach" as well, which is in line with the scope of consent to arbitration set up under Article 1116 NAFTA. *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, China and Canada, 9 September 2012, art 20 (1) (entered into force 1 October 2014).

Trade Agreement (FTA) (2015).

However, China has not merely "copied and pasted" from the NAFTA model. The main difference from the NAFTA is the addition of a "domestic administrative reconsideration procedure". To promote and protect international investment, the NAFTA states that the parties can submit disputes for arbitration if they have consented to arbitration in accordance with certain procedural requirements.[114] However, in the BIT with Canada, China requires the Canadian investors to go through "domestic administrative reconsideration procedure" before resorting to arbitration against China:

> Upon receipt of the Notice of Intent or at any time prior, China shall require that an investor make use of the domestic administrative reconsideration procedure. If the investor considers that the dispute still exists four months after the investor has applied for the administrative reconsideration, or where no such remedies are available, the investor may submit its claim to arbitration.[115]

The "domestic administrative reconsideration procedure" seems to be a strategy China employs to balance the different interests and concerns of both sides of the investor-state relationship. On the one hand, it provides Chinese investors with more liberal access to ISA. On the other hand, through the four-month long administrative reconsideration procedure, China tries to resolve disputes domestically, or at the least, to delay any potential arbitration involving the Chinese government. The Chinese administrative reconsideration procedure is set as a precondition for foreign investors' resort to ISA not only in the China – Canada BIT, but also in many other IIAs, such as the China - Japan - Korea, Republic of Trilateral Investment Agreement (2012).[116]

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[114] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*] art 1112.

[115] *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, Annex C.21 (1).

[116] *Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment*, China, Japan and

Of course it would be ideal for China to strengthen Chinese investor's access to ISA whilst avoiding making itself susceptible to being sued before international tribunals. Yet this is not a realistic resolution for balancing the interests of both Chinese investors and the Chinese government, because the ISA provision is supposed to be reciprocal: if China allows its investors to take contracting states to an international arbitral tribunal under certain conditions, it has to permit the investors of those contracting states to submit claims against it under the same conditions. Perhaps China can enjoy some non-reciprocal rights like the domestic administrative reconsideration procedure in the China-Canada BIT. But it is impossible for China to have non-reciprocal rights in all IIAs, notably in the multilateral treaties which contain several contracting states with multilevel interests and needs.[117]

This may explain why China has no ISA model to use as a basis for regional cooperation or Mega-RTA negotiations. In the Belt and Road initiative, there is no agreed mechanism or institution for settling China's investment disputes with contracting countries, though the project has been carried out since 2014.[118] It is also reported that the Ministers have agreed in principle to include an investment dispute settlement system in the Regional Comprehensive Economic Partnership (RCEP),[119] but there is as yet no consolidated text and China's position on whether it will table different ISA proposals or concept papers remains unknown.

Republic of Korea, 13 May 2012, art 15 (7) (entered into force 17 May 2014).

[117] For example, the ongoing RCEP negotiations involve 16 countries including Indonesia, Malaysia, Laos, Cambodia, Japan, South Korea, New Zealand, India, Australia and China.

[118] Min Ye, "China and competing cooperation in Asia-Pacific: TPP, RCEP, and the New Silk Road" (2015) 11:3 Asian Secur 206 at 211.

[119] Heng Wang, "The RCEP and Its Investment Rules: Learning from Past Chinese FTAs" (2017) 3:2 Chin J Glob Gov 1.

6.2.2 A Spiral Approach to ISA and the Struggle between Traditionalism and Westernism

A brief review of the decision-making process on the design of ISA clauses suggests that China's attitude towards ISA has evolved from complete rejection to gradual acceptance. But the evolution of China's attitude is not linear; rather, the trajectory is more properly viewed as a spiral. The process has often taken the form of one big step forward followed by a small step backward, though the main direction still moves toward acceptance (albeit prudential). This path is evident when we re-examine the contents of ISA clauses in different IIAs during different periods.

China's reluctance to accept ISA was clear almost from the inception of the decision-making process. In its ISA clauses concluded during the pre-ICSID era, investor's access to arbitration was restricted through a "fork in the road clause". For example, the text of the China-BLEU BIT states: "the investor prefers referred for settlement **either** [emphasis added] to: (1) a judicial body of the Contracting Party accepting the investment, **or** [emphasis added] (2) an international arbitration without resort to any other means". In other IIAs the language of the "fork in the road" could appear in forms like "the provisions of this Paragraph (arbitration provision) shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2 of this Article (domestic judicial procedure)".[120]

The spiral approach to ISA emerged in the first half of the ICSID era. China's

[120] See e.g. *Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments*, China and Sir Lanka, 13 March 1986, art 13 (3) (entered into force 25 March 1987).

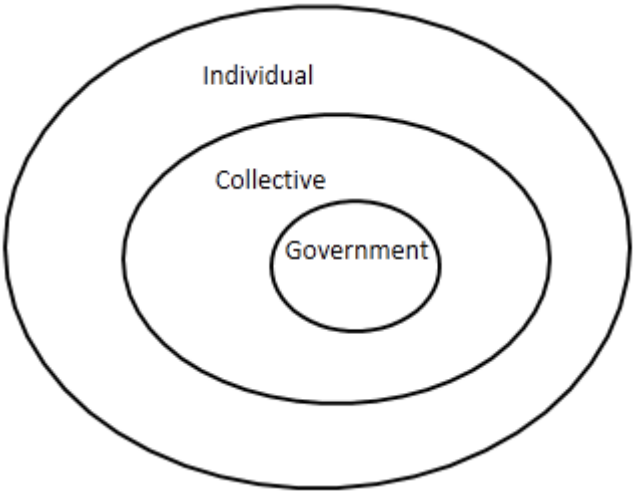
ratification of the ICSID Convention seemed to pave the way for a liberal approach to ISA, but in the meantime, it narrowed the path by stating in treaties that "the Chinese Government would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation and nationalization".[121] It seems that, after the second half of the ICSID era, the PRC removed some hurdles to ISA, as jurisdiction was extended to disputes of investment-relevance and law-relevance. True, this marks significant progress in China's liberalization of access to ISA, but the progress was still accompanied by restraints: notably, setting resort to a domestic administrative procedure as a precondition for arbitration. This mechanism had already appeared in the China – Barbados BIT: "[p]rovided that the Contracting Party **may** [emphasis added] require the investor to exhaust the local administrative review procedure before the submission of the dispute to international arbitration."[122] Even after the PRC applied the NAFTA model to its IIAs concluded after 2008, domestic administrative reconsideration procedure as one of the conditions precedent to arbitration was still preserved – as seen in Annex C.21 of the China – Canada BIT (2012).

Of course, the twists and turns in China's policy towards ISA can be interpreted as a manifestation of the power dynamics within the investor-state relationship, but in the context of China and, more specifically, in the context of China under the period of "reform and opening-up", a deep understanding of investor-state power dynamics cannot be separated from the study of a fluid and fragmenting Chinese society with the

[121] Schreuer, *supra* note 98 at 342; Shan & Su, *supra* note 98 at 349.
[122] *Agreement between the Government of Barbados and the Government of the People's Republic of China for the Promotion and Protection of Investments*, art 9.

impacts of a westernization tidal wave.

No doubt the post-Mao move to a market economy and openness to the outside world increased national wealth and provided the Chinese access to a liberal and diverse life, but this also has caused more far-reaching social changes. Notably, the traditional Chinese state-individual relationship faces strong challenges in the context of economic globalization. The Chinese view of the relationship between the state and individuals has its origin in the longstanding *sangang* social order. Chapter 2 has elaborated that, within the *sangang* social order, the emperor, with his government, occupied the most central and the highest position in Chinese society, while individuals were thought to be inferior. Admittedly, absolute monarchy has vanished after several waves of revolution and reformation, but the unitary, centralized state power structure that derives from the traditional *dayitong* value still exists. Essentially, the PRC's socialist system is a modern variant of the *sangang* order: the state (usually represented by the government) holds a monopoly on land and natural resources, and the operation of society largely relies upon the policies of and guidance from the government. As is shown by the image below, in modern China, the state (government) is at the top of social hierarchy, acting in the role of "Emperor" and individuals are expected to give their loyalty to the state, which is represented by the government and the collective.



The absolute subordination of individuals to the state has a profound influence on the contemporary Chinese conception of law. Law is thought to be based on a system of norms under which the state is regarded as the supreme and primary entity to be served, while the individual is of secondary importance and his or her full worth can only be achieved in service to the larger collective entity.[123] Accordingly, domestic law and international law have their own specific jobs. While domestic law works to maintain the stability of the state and disciplines its people to carry out the state's policies, international law—according to Tieya Wang (one of the leading authorities on international law in China of his day) – is "the sum of principles, rules, regulations and systems which are binding and which mainly regulate inter-state relations."[124] Wang's definition demonstrates that, in the eyes of the Chinese, the basis for the legal effect of international law can only be attributed to states themselves: individuals are excluded from international law. In some cases, the international protection of individual rights, for example in the area of human rights, is regarded by China as a Western pretext for

[123] Gary L Scott, *Chinese Treaties: the Post-Revolutionary Restoration of International Law and Order* (New York: Oceana Publications, 1975) at 42.
[124] Tieya Wang, *International Law* (Beijing: Law Press, 1981) at 2; Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden: Martinus Nijhoff Publishers, 2009) at 78.

infringing state sovereignty.[125]

Hence, when viewed against this historical backdrop, an individual's ability to challenge China within the international legal regime is intolerable, especially when the former confronts the latter in international adjudication. Here, it is useful to briefly discuss the shame of adjudication in the Chinese legal culture. Compared to *li* and moral persuasion, rules and adjudication in ancient China were often regarded as the last resort of social control, equaling moral bankruptcy, loss of reputation and criminal punishment.[126] For a thousand years, anything related to adjudication was assumed to have the goal of deterring potential evildoers instead of contributing to the common good.[127] Therefore the ancient Chinese feared litigations and judicial institutions: if they were sued, they knew that they had seriously violated imperial law and would be punished, but they barely had a sense that they might use adjudication to protect their rights and interests. Even if the modern Chinese people have some trust in courts and judges, given the traditional legal culture, they still find it difficult to disentangle adjudication from reputation-linked concerns, viewing the initiation of legal disputes in international courts and tribunals as an international loss of face.[128]

Of course China's fear of international adjudication has somewhat lessened since its accession to the WTO, as its engagement with WTO adjudication has improved Chinese understanding of international adjudication. Moreover, through participating in WTO

[125] For example, China its *1991 White Paper on Human Rights in China* maintained that "[i]t is neither proper nor feasible for any country to judge other countries by the yardstick of its own mode or to impose its own mode on others." See also in Wang, *supra* note 124 at 267; Chan, *supra* note 11 at 121 to 126.
[126] Christopher Ford, *The Mind of Empire: China's History and Modern Foreign Relations* (Kentucky: University Press of Kentucky, 2010) at 237 to 238.
[127] Pan, *supra* note 124 at 76.
[128] Li, *supra* note 38 at 1130.

adjudication, China has embraced some Western legal principles (e.g. the rule of law) and applied litigation techniques and international norms that are the same as those which would be employed by Western States. But WTO adjudication is still state-state dispute settlement, and China's acceptance of it does not necessarily result in challenges by individuals to the Chinese government in the international arena. To some extent, the WTO and its institutions serve principally as instruments for enhancing states interests instead of protecting individual rights.

But ISA is different, for it allows foreign investors to be on an equal footing with the Chinese government in international adjudication.[129] The challenges that ISA poses to the Communist regime are greater than that of WTO adjudication. Being sued or losing cases in the WTO is related to the gain and loss of interstate relations, which is common in the international community. However, being sued or even defeated by foreign investors could threaten the stability of the domestic polity: if individuals openly defy their superiors and start a "rebellion", the government's political authority would be placed in doubt or even undermined. Thus, Guiguo Wang has observed that:

> In the event of the submission of an investor-state dispute to an international tribunal, the government would be seen as having failed to effectively manage its own affairs. If a case were to be lost, moreover, the career of the officials concerned might be seriously affected or, at the least, should they be considered in the future for promotion, their competitors would have something against them.[130]

Yet, in similar terms to what happened in the late Qing dynasty, openness to the

[129] Of course within domestic fora there exists the administrative adjudication between the government and individuals. However, the government and individuals in the administrative adjudication do not have equal status, for the Chinese courts are not independent and the judicial proceedings are often influenced by the government. Peerenboom, Randall, "Judicial Independence in China: Common Myths and Unfounded Assumptions" (2008) La Trobe Law School Legal Studies Research Paper No. 2008/11.

[130] Guiguo Wang, "Chinese mechanisms for resolving investor-state dispute" (2011) 1:1 Jindal J Int Aff 204 at 224.

outside world and the massive import of Western ideas has inevitably caused far-reaching social changes which eat away the old, centralized order. Many decades after the launching of "reform and opening-up", economic forces other than socialist state-owned enterprises (SOEs)—foreign investors, the self-employed, collectives, small- and large-scale private enterprises—proliferated. As they contribute to the growth of social wealth, their pursuit of powers and interests increase accordingly. Perhaps small-scale merchants remain subservient to the government, but large-scale entrepreneurs—foreign or Chinese—have boldly asserted their own interests and challenged the government, as they have acquired more wealth and grown less reliant on state resources. Their influence to shift the power balance from the public to the private sector can be viewed in many places, such as the formation of informal alliances between governmental officials and non-state entrepreneurs, known as *de facto* patron-client factions.[131] Patron-client factions engaged in corruption and clientelism, but they also facilitated other more constructive progress, such as liberalizing access to ISA in new IIAs, which thereby furthered the entrepreneurs' own interests. Along with this social change appears a new social order which was divorced from the state-centric *sangang* system and moved towards a blend of traditional society characterized by the primary leadership of the state and a Western-like civil society characterized by the assertion of individual interests and rights.

The rise of a Western-like civil society calls for many changes in Chinese policy, especially the extensive protection of individual rights by the rule of law. Indeed, as

[131] John King Fairbank & Merle Goldman, *China: A New History, Second Enlarged Edition* (Massachusetts: Harvard University Press, 2006) at 435.

China has moved towards a Western-like state in its economy, it should, like many Western developed states, advocate the international rule of law to encourage the free flow of investment and protect individual investment interests against the possible failure of the state to respect treaty standards. However, because the introduction of the Western market economy has not been accompanied by a Western values framework or westernization in the polity, the Communist government still remains superior in the relationship between states and individuals. Although the private sector has greatly increased in size and scope since the 1990s and the government's power has been *de facto* eroded by the forces unleashed by opening up and economic reforms, the government does not—and will not—want to thereby abandon its power and authority over the Chinese economy and society.[132] In a sense, as long as socialism remains dominant in China, maintaining the traditional subordinate relationship between state and individuals is always going to be the uppermost priority in Chinese policy, and any attacks made by individuals, be they foreign investors or Chinese investors, will always be viewed as a threat to the socialist regime.

To conclude, the investor-state power dynamic in the Chinese context has been endowed with multiple meanings. On the surface, it is about the loss or gain of an individual's right to submit claims to international tribunals; but underneath it reflects the tension between a rising civil society and the powerful government, the tension between the newly imported Westernism which promotes civil rights and the remaining traditionalism which still preserves *sangang* social order, and perhaps the tension

[132] Article 7 of the PRC Constitution firmly states that "[t]he State-owned economy, that is, the socialist economy under ownership by the whole people, is the leading force in the national economy".

between the expansion of Western capitalism into China and China's determination to keep its socialist nature. How the Communist government in general has addressed these tensions will be discussed at length in the next section.

6.3 PRC's Attitude towards the South China Sea Arbitration

The South China Sea, an area carrying tremendous strategic importance in shipping, fisheries, oil and gas reserves and natural resources, has been coveted by several neighboring states.[133] As early as the 1970s, the PRC, Brunei, Indonesia, Malaysia, the Philippines, and Vietnam began to claim islands and various zones in this area.[134] Chinese claims in the South China Sea are delineated in part by a U-shaped nine-dash line.[135] First indicated by the Republican government in 1947,[136] the nine-dash line, though vaguely located, defines the major part of the South China Sea as Chinese territory and has been contested by the Philippines, Vietnam, Malaysia, Brunei and Indonesia, whose claims overlaps with the area covered by the nine-dash line.[137] The territorial disputes among these claimants culminated in 2013, when the Philippines filed an arbitral request against the PRC under Annex VII of UNCLOS concerning the maritime rights over the South China Sea.[138]

Surprisingly, Chinese determination to reject the arbitration was firm and consistent.

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[133] Enrico Fels & Truong-Minh Vu, eds, *Power Politics in Asia's Contested Waters: Territorial Disputes in the South China Sea* (New York: Springer, 2016) at 4.
[134] Added to these claims by adjacent states, the United States and other states also have copious security and economic interests in the region and therefore insist on the freedom of navigation. See details in *ibid* at 25.
[135] The area delimited by the nine-dash line includes the Paracel Islands, the Spratly Islands, and various other areas. See details in Zhiguo Gao & Bingbing Jia, *The Nine-Dash Line in the South China Sea: History. Status and Implications* (Beijing: Ocean Press, 2014).
[136] Zhiguo Gao & Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications" (2013) 107:1 Am J Int Law 98 at 102.
[137] Fels & Vu, *supra* note 133 at 41 to 45.
[138] *The Republic of the Philippines v the People's Republic of China* (2016), Case No.2013-19 (PCA) (Arbitrators: Judge Thomas A. Mensah, Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Alfred H. Soons, Rüdiger Wolfrum).

Immediately after the Philippines unilaterally initiated the Arbitration, China declared that it would not participate in the proceedings.[139] In 2014, the Chinese government challenged the Arbitral Tribunal's jurisdiction over the dispute and reaffirmed its non-participation.[140] Although the jurisdictional challenge was dismissed by the *Award on Jurisdiction and Admissibility* published in 2015, China continued to reiterate its non-participation, non-acceptance position throughout the arbitration proceedings.[141] On 12 July 2016, the tribunal issued a final award in favor of the Philippines.[142] Considering the award to be null, the Chinese government stressed that its attitude towards the arbitration is "No Acceptance, No Participation, No Recognition, and No Implementation" ("4 Noes").[143] The government's 4 Noes attitude gained a wide degree of public support. Soon after the announcement of the award, a picture stating "won't accept, won't participate, won't recognize" was shared more than 400,000 times on Sina Weibo (China's biggest microblog) with more than 50,000 endorsements.[144]

China's 4 Noes policy is reminiscent of its attitude towards the ICJ in the Mao era. A previous chapter shows that China's rejection of international adjudication in the Mao

[139] "Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea" (12 July 2016), online: *South China Sea Issue* <http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm>.

[140]. "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (7 December 2014), online: *Minist Foreign Aff Peoples Repub China* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

[141] On October 30 of 2015, China issued the Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines ("2015 Statement"), declaring that the Award on Jurisdiction and Admissibility was null and void, and that it is not binding on China. *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (Beijing: Ministry of Foreign Affairs of the People's Republic of China, 30 October 2015).

[142] *The Republic of the Philippines v the People's Republic of China*, Award [2016] PCA Case No 2013-19.

[143] See generally in "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea" (13 July 2016), online: *Minist Foreign Aff Peoples Repub China* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml>.

[144] "South China Sea: Chinese social media urges mango boycott" (13 July 2016), online: *BBC News* <http://www.bbc.com/news/world-asia-china-36780967>.

era can be attributed to its ideological struggles and strongman politics. However, in the post-Mao era, when ideological divisions have been downplayed and integration into the international community has resulted in a gradual acceptance of the rule of law, why do the Chinese Communists still maintain a hardline position in their rebuff of certain kinds of international adjudication? And further, how can a fragmenting Chinese society nevertheless uphold the Communists' assertiveness in foreign policy? To answer these questions, the section below will discuss the decision-making process vis-à-vis the development (or even reinforcement) of the 4 Noes policy, namely how the Chinese participants, even within the diversified social context, could become so homogeneous and assertive in their rejection of the arbitration.

6.3.1 Decision-Making Process on the Development of 4 Noes Policy

Unlike former generations, the generation of Chinese living or growing up in the post-Mao era has witnessed the abandonment of radical Marxism, the inauguration and development of "reform and opening-up", and rapid westernization across all walks of Chinese life. Because the Western-style market economy has proved effective in sparking China's economic dynamism, few Chinese people of this generation still believe in the tenets of Marxism, though they are still invoked by the government on official occasions.[145] Instead, their value systems have been diversified and liberalized due to the massive inflow of foreign political ideas and new thoughts through books, travel, telephone, films, radio and television, and more recently through e-mail, the

[145] Fairbank & Goldman, *supra* note 131 at 410.

Internet, cell phones, advertising and other popular culture artifacts from abroad.

Albeit heterogeneous, this generation does share a common feature: most of them still carry a strong strain of nationalism, which has been fostered through decades of patriotism education. In 1985, China restored the "Five-Love Education" program (love the motherland, love people, love work, love science, and love socialism),[146] and in the 1990s the program was merged into a campaign of patriotism education. Since then, primary schools, secondary schools and universities have been instructed to use history classes to make students "remember historical lessons, and not to forget imperialist invasion or Chinese people's heroic resistance."[147] To attain this goal, the history curriculum centers on conflicts between the Chinese nation and those foreign nations (especially Japan) that invaded China in the past hundred years (known in China as the "century of humiliation").[148] In this narrative, China is simultaneously portrayed as a glorious country whose civilization once occupied a leading place in the world, as a backward country whose territory was stolen over time by greedy foreign nations, and as a strong country whose people consistently fought against foreign invaders.[149]

In addition to the history curriculum, many tourist sites such as museums, memorials, historical (especially revolutionary) venues, cultural relics, and even local community centers have been designated as patriotic history education bases for the Chinese

[146] Jun-Hyeok Kwak and Melissa Nobles, eds. *Inherited Responsibility and Historical Reconciliation in East Asia* (Abingdon: Routledge, 2013) at 110.
[147] Yinan He, "History, Chinese Nationalism and the Emerging Sino–Japanese Conflict" (2007) 16:50 J Contemp China 1 at 7.
[148] The century of humiliation (simplified Chinese: Bianian Guochi) refers to the period of intervention and imperialism by Western powers and Japan in China between 1839 and 1949. See Alison Adcock Kaufman, "The 'Century of Humiliation', Then and Now: Chinese Perceptions of the International Order," (2010) 25:1 Pacific Focus 1.
[149] See general in Suisheng Zhao, "A State-led Nationalism: The Patriotic Education Campaign in Post-Tiananmen China" (1998) 31:3 Communist Post-Communist Stud 287.

people.[150] Students are organized to visit these locations for patriotism education, to listen to reports on the Chinese people's resistance and to tour various museums with exhibitions on the "century of humiliation". Focusing on foreign nations' wrongdoings and China's fierce resistance creates two impressions for the Chinese in the post-Mao era: first, that in many international disputes, China is a victim, and second, that an aggressive, emotional and violent response to disputes, such as armed struggles, is permitted or even encouraged. This consciousness has profoundly shaped China's collective historical memory for generations, unifying people into a powerful national force determined to redeem past humiliations and restore national glory.

The patriotism education embedded in the post-Mao generation's minds has contributed to the formation of a victimized discourse related to the South China Sea disputes. When justifying the 4 Noes policy, Chinese commentators frequently mention history, using arguments such as "sovereignty and relevant rights in the South China Sea were formed throughout the long course of history and have been maintained by the Chinese Government consistently",[151] and "the activities of the Chinese people in the South China Sea date back to over 2,000 years ago".[152] China also has referred to the history of foreign invasion, alleging that it has been historically wronged by neighboring countries and other states who have invaded China and deprived it of the South China Sea islands. For instance, the governmental statement articulated that, in the 1930s and 1940s, "France and Japan invaded and illegally occupied by force some islands and reefs

[150] *Ibid* at 295.
[151] "Briefing by Hong Xu, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines" (12 May 2016), online: *Foreign Ministry of People's Republic of China* <www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1364804.shtml>.
[152] Note 137 at para 3; note 139.

of China's Nansha Qundao (Spratly Islands)",[153] and the Philippines has been raising illegal territorial claims over these places since 1950s.[154]

This victimization discourse was also manifested in the Chinese perspective on the arbitral proceedings. In a press conference held by the State Council Information Office, Zhengming Liu, the Vice Minister of the Ministry of the Foreign Affairs, blamed the arbitration for "intend(ing) to deny China's territorial sovereignty and maritime rights and interests in the South China Sea".[155] In support of his assertion, Liu argued that the establishment of the Tribunal was deficient, because the process was manipulated by Japan. "The other four (arbitrators) were appointed by the then President of ITLOS, a Japanese judge Shunji Yanai",[156] who also "played a big role in assisting [Japanese Prime Minister] Abe to lift the ban on Japan's right to collective self-defense, which challenges the post-war international order".[157] According to Liu, Many pieces of evidence have "proved that he [Yanai] manipulated the composition of the Arbitral Tribunal and continued to exert influence on the operation of the tribunal".[158] Moreover, the composition of the Tribunal was said to be flawed. Given that all of the Tribunal members are from or living in Europe, Liu questioned the representativeness and impartiality of the Tribunal. He said:

> In the ICJ and ITLOS, there are Chinese judges…But in this Arbitral Tribunal, none of the five judges come from Asia, not to say China. Do they really know about Asia, about Asia's culture, about the issue in the South China Sea? And

[153] Note 137 at para 23.
[154] *Ibid* at para 58 to 61.
[155] "Vice Foreign Minister Liu Zhenmin at the Press Conference on the White Paper Titled China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea", (13 July 2016), online: *South China Sea Issue* <http://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1381980.htm>.
[156] *Ibid.*
[157] *Ibid.*
[158] *Ibid.*

about the complex geopolitical situation in Asia and the history of the South China Sea? On what ground can they make a fair judgment?[159]

To be sure, adjudicatory proceedings can be rejected or challenged,[160] but generally the rejection or challenge should have certain legal grounds,[161] which, according to the New Haven terminology, can be also regarded as a participant's power bases in a decision-making process. However, some of the allegations made by China, for example its so-called historic rights over the South China Sea islands, are weak in terms of such power bases. In international law, it is well acknowledged that territory can be acquired through occupation, accretion, cession, conquest (subjugation) and prescription.[162] It seems that the historic rights claim is similar to the principle of effective occupation, because it mentions that the South China Sea islands "have been maintained by the Chinese Government consistently". [163] While governmental administration can be regarded as an important indicator of effective occupation, the party who claims it should provide concrete evidence such as: "judicial proceedings, local ordinances regarding the handling of corpses, levying taxes, licensing commercial boats, registering deeds to real property, and conducting census enumerations and customs affairs" to prove that its government exercised exclusive, explicable,

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[159] *Ibid.*

[160] For example, in the Nicaragua case, the United States refused to participate in the proceedings after the ICJ ruled it had jurisdiction to hear the case. *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 146.

[161] For instance, the parties in international arbitration are allowed to challenge the award for reasons such as the violation of due process, the impartiality of arbitrator, and the arbitrability of issues. See in *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention"), 10 June 1958 (entered into force 7 June 1959).

[162] Ian Brownlie, *Principles of public international law*, 6th ed (New York: Oxford University Press Oxford, 2003) at 127.

[163] "Briefing by Hong Xu, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines" (12 May 2016), online: *Foreign Ministry of People's Republic of China* <www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1364804.shtml>. Theory and practice agree nowadays upon international law that occupation is effected through taking possession of and establishing an administration over, the territory in the name of, and for, the acquiring state. Lassa Oppenheim, *Oppenheim's International Law: Peace*, vol. 1, 7th ed. (UK: Longman, 1993) at 509.

continuous and peaceful acts in the disputed area.[164] It appears that such supportive evidence is unclear and insufficient in China's claim, as the concept of "occupation", according to the Chinese narrative, is more relevant to "the activities of the Chinese people in the South China Sea". [165] Arguably, it seems that the challenges made by China to the Tribunal were based on lingering prejudice rather than on facts supported by rules and real evidence. The doubts about the impartiality of the European arbitrators were essentially consistent with the traditional images of international adjudicators seen through the eyes of Chinese Communists: similarly, in the Sino-Indian dispute, the PRC objected to resort to the ICJ because "there [was] an element of the Chiang-Kai-shek clique" among the ICJ judges.[166]

However, playing the history card and portraying itself as the aggrieved party of the South China Sea dispute did not help China win general sympathies in the international community. The United States had been building diplomatic pressure in the West and Asia on China to abide by the decision.[167] John Kerry, then the U.S. Secretary of State, declared that the United States "did not take a position on the dispute, but believe[d] the rule of law must be upheld."[168] The European Union stated that it "acknowledge[s] the Award rendered by the Arbitral Tribunal" and urged all South China Sea claimants to resolve disputes through peaceful means and "pursue them in respect and in

[164] ICJ Reports 1953 at 65 to 69.
[165] Note 137 at para 3.
[166] "Text of Chinese Foreign Ministry Note to India"(October 9 1963), NCNA-English. Peking (Oct. 12, 1963), in SCMP, no. 3081: 26 - 29", in Jerome Cohen & Hungdah Chiu, *People's China and International Law, Volume 2: A Documentary Study* (Princeton: Princeton University Press, 1974) at 1441 to 1442.
[167] For instance, the Asahi Shimbun Daily reported the United States has made an unofficial request to South Korea to express its position on the arbitration case before the ruling. Asahi, "US Asked Seoul to Express Support for Ruling on Beijing-Manila Sea Dispute" (3 June 2016), online: *KBS* <http://world.kbs.co.kr/english/news/news_In_detail.htm?No=119474>.
[168] "Time to Turn New Page on South China Sea, Says John Kerry*"* (27 July 2016), online: *South China Morning Post*< http://www.scmp.com/news/china/diplomacy-defence/article/1995184/time-turn-new-page-south-china-sea-says-john-kerry>.

accordance with international law, including the work in the framework of UNCLOS."[169] The Group of Seven wealthy nations (G7) called on all states to fully implement decisions binding on them in courts and tribunals provided under the UNCLOS.[170] Compared with this restrained and ambiguous official rhetoric—some even avoided direct reference to China—critiques by Japan were more explicit. As an early supporter of the arbitration, Japan said both China and the Philippines should abide by the outcome. By emphasizing the importance of the rule of law at bilateral and regional venues, Japan framed China's performance in the South China Sea disputes as posing a great risk to the international community.[171]

Given these weaknesses, the Chinese government adopted multiple strategies to justify and reinforce its 4 Noes attitude. In the domestic arena, the public's emotions of self-pity and anger towards the arbitration were easily fueled by all-pervading propaganda. Barely an hour after the release of the award, *People's Daily*, an official newspaper of the CCP, published an editorial headlined: "S. China Sea Arbitration: A U.S. led conspiracy behind the farce," criticizing the United States for wrongdoings such as "playing China and Association of South East Asian Nations ("ASEAN") countries against one other". [172] China's social media exploded with responses to the arbitration. After the award was announced, Sina Weibo's hashtag "South China Sea

[169] "Declaration by the High Representative on behalf of the EU on the Award rendered in the Arbitration between the Republic of the Philippines and the People's Republic of China" (15 July 2016), online: *European Council Council of the European Union* < http://www.consilium.europa.eu/en/press/press-releases/2016/07/15-south-china-sea-arbitration/>.

[170] "G7 Leaders' Communiqué, June 2014 – Foreign Policy" (4 June 2014), online: *Minister of Foreign Affairs of Japan* < https://www.mofa.go.jp/ecm/ec/page24e_000049.html>.

[171] In Japan's latest Defense of Japan Annual White Paper, it takes China's behavior in the South China Sea as 'active maritime advancement and attempts to change the status quo in the East and South China Seas'. "Ministry of Defense: DEFENSE OF JAPAN 2016", (2016), online: *Minist Def* <http://www.mod.go.jp/e/publ/w_paper/2016.html>.

[172] The English version can be found in Xiaohui Wang, "S. China Sea Arbitration: A US-led Conspiracy Behind the Farce" (12 July 2016), online: *China Orgcn* <http://en.people.cn/n3/2016/0712/c90000-9085051.html>.

Arbitration" became number one in its topic list, carrying more than 170,000 posts with supportive comments on the 4 Noes policy.[173] Quite a lot of Chinese celebrities, notably pop idols, reposted a map of China with a phrase reading "China: not even a bit can be left behind" on Sina Weibo and Instagram accounts to voice their support.[174] On Taobao, China's largest e-shopping platform, some vendors uploaded pictures containing the South China Sea dispute and pledged to boycott Filipino products by launching tags like "This Is Really Chinese Style Dried Mango Not from the Philippines."[175] Propaganda might be characterized by bias and manipulation, but it is successful in advertising the government's position, attracting people to follow (known as the bandwagon effect),[176] and finally dominating public opinion.[177] This publicity has had a snowball effect on fostering nationalist sentiment: with the impression that favoring the government's position is the mainstream. With more people blindly supported it through sharing news, posting comments and reposting pictures on social media became orthodox, as if not to do so would result in isolation or even condemnation.[178]

Also, the government launched legal debates and legal studies on the South China Sea issues in Chinese academic circles, encouraging academics to argue in favor of its

[173] See "Chinese celebrities voice opposition against the South China Sea Arbitration: China not even a bit can be left behind" (14 July 2016), online: *Sina Weibo* < https://www.weibo.com/ttarticle/p/show?>.
[174] These celebrities include well-known pianist Lang Lang, actresses Fan Bingbing, Yao Chen, singer Victoria Song and actors Huang Xiaoming, Hu Ge. See *ibid*.
[175] The BBC News reported that after the Tribunal ruled against China and in favor of the Philippines, Chinese netizens used social media to call for a boycott of Philippine fruits, as well as to make their feelings known through other memes and pictures. "South China Sea: Chinese Social Media Urges Mango Boycott", (13 July 2016), online: *BBC News* <http://www.bbc.com/news/world-asia-china-36780967>.
[176] Catherine Marsh, "Back on the bandwagon: The effect of opinion polls on public opinion" (1985) 15:01 Br J Polit Sci 51.
[177] According to Julian G. Ku, only one Chinese born and educated scholar has offered a dissenting opinion: Professor Bing Ling of the University of Sydney. Julian Ku, "China's Legal Scholars are Less Credible after South China Sea Ruling" (14 July 2016), online: *Foreign Policy* <foreignpolicy.com/2016/07/14/south-china-sea-lawyers-unclos-beijing-legal-tribunal/>.
[178] On the Chinese social media, some web users threatened persons who buy the Pilipino products – "Buy this if you support the Philippines, I will track your address and let's see what will happen." See in note 175.

claims. The China Law Society, an organization representing all Chinese legal academics, published a statement alleging that the Arbitral Tribunal had abused its authority and had willfully expanded the scope of its jurisdiction.[179] More remarkably, many Chinese scholars were encouraged to analyze the case with written essays, published books and attendance at international conferences. Zhiguo Gao and Bingbing Jia from the China Institute for Marine Affairs authored China's first book on the nine-dash line over the South China Sea, in an attempt to articulate the Chinese perspective on defining this area.[180]

In the international arena, China eased its tensions with neighboring states to reduce the regional backlash. Notably, through personal relations and financial help, China successfully convinced the new Philippine President Rodrigo Duterte to adopt a cooperative position toward China regarding the South China Sea disputes. At a news conference held on 17 December 2016, Duterte said that "[i]n the play of politics, now, [he] will set aside the arbitral ruling. [He] will not impose anything on China".[181] The Philippines' move seemed to signal a change in the aggressive tone ASEAN states used towards China. Two days after its Prime Minister's visit to China, Vietnam allowed Chinese warships to enter Cam Ranh Bay (a deep water bay located at an inlet of the

[179] "China Law Society Issues Statement on South China Sea Arbitration Initiated by the Philippines - Xinhua | English.news.cn", (25 May 2016), online: *Xinhua* <http://news.xinhuanet.com/english/2016-05/25/c_135387933.htm>.

[180] In 2014, Gao Zhiguo and Jia Bingbing released a book titled 'The Nine-Dash Line in the South China Sea: History. Status and Implications', with an aim to clarify the status of nine-dash line in international law. It is for the first time Chinese scholars systematically analyse China's long-term ambiguous nine-dash line claim. Zhiguo Gao & Binbin Jia, *The Nine-Dash Line in the South China Sea: History, Status and Implications (论南海九段线的历史、地位和作用)* (Beijing: Ocean Publisher, 2014).

[181] See "Philippines to 'Set Aside' South China Sea Tribunal Ruling to Avoid Imposing on Beijing" (17 December 2016), online: *The Guardian* < https://www.theguardian.com/world/2016/dec/17/philippines-to-set-aside-south-china-sea-tribunal-ruling-to-avoid-imposing-on-beijing >.

South China Sea) for the first time.[182] Malaysian Prime Minister Najib Razak became the third Southeastern Asian leader (after the Philippines and Vietnam) who traveled to Beijing and courted China. During his visit, China and Malaysia signed a defense deal and agreed to cooperate on maritime affairs.[183] Meanwhile, China put considerable diplomatic efforts into co-opting other states to support its 4 Noes attitude. Russia was China's most prominent supporter, for it described the arbitration as an "attempt to internationalize the South China Sea disputes".[184] Xinhua News Agency reported that, in the aftermath of the Arbitration, there were about 70 countries, principally those from Africa, the Mideast and Central Asia, expressing support for China's attitude.[185]

The attitudinal changes of other states, notably the attitudinal changes of the ASEAN countries, have had dual effects on China's 4 Noes attitude. On the one hand, they (to some extent) justify China's 4 Noes attitude, but on the other hand, given that many countries appeared to seek China's favor in a departure from their initial more confrontational approach, China — privately, at least — has less reason to maintain its hostility towards the arbitration and to underline its claim to the islands militarily. On 28 October 2016, the Philippines Defense Secretary Delfin Lorenzana said that the Chinese vessels had left Scarborough Shoal, a disputed ridge in the South China Sea that has been occupied by China since 2012.[186] The Chinese ships' departure means

[182] Ankit Panda, "3 Chinese Navy Ships Visit Vietnam's Cam Ranh Bay" (24 October 2016), online: *The Diplomat* < http://thediplomat.com/2016/10/3-chinese-navy-ships-visit-vietnams-cam-ranh-bay/>.
[183] Jushua Berlinger, "Malaysia reaches 'significant' defense deal with China, takes shot at West" (2 November 2016), online: *CNN* < https://www.cnn.com/2016/11/02/asia/malaysia-china-agreement/index.html>.
[184] "Russia Opposes Internationalizing South China Sea Issue: Medvedev" (15 July 2016), online: *Xinhuanet* < http://news.xinhuanet.com/english/2016-07/15/c_135516298.htm>.
[185] "Wider Support for China's South China Sea Stance" (13 July 2016), online: *China Daily* < http://www.chinadaily.com.cn/world/2016-07/13/content_26070440.htm>.
[186] Manuel Mogato, "Philippines Says Chinese Vessels Have Left Disputed Shoal" (28 October 2016), online: *Reuters* < https://www.reuters.com/article/us-philippines-southchinasea-china/philippines-says-chinese-vessels-have-left-disputed-shoal-idUSKCN12S18B>.

that China has allowed the Philippine coast guard and fishing boats to enter the area, which could be reviewed as *de facto* compliance with the award. However, China's 4 Noes attitude is still maintained in public. In 2018, under the direction of the Chinese government, the Chinese Society of International Law published an extraordinary 500 page legal study of the South China Sea Arbitration in the *Chinese Journal of International Law*. Having examined almost every issue raised in the case, the study concluded that "these awards are not conducive to solving the dispute between China and the Philippines in the South China Sea… They have impaired the integrity and authority of [UNCLOS], threaten to undermine the international maritime legal order, run counter to the basic requirements of the international rule of law, and also imperiled the interests of the whole international community".[187] From this point of view, it can be concluded that the 4 Noes policy permits China to maintain a twofold approach: China publicly has an unyielding position on the validity of the arbitration, but it also has restrained engaging in hostilities so avoid damaging China's image as a peaceful and responsible player in the international community.

6.3.2 Assertiveness in the Arbitration and Systemized Chinese Nationalism

As is mentioned in section 6.2.2, the economic growth generated by "reform and opening-up" has had a contradictory impact on China. On the one hand, it proves the Communist government's capacity to rule China and further enhances the CCP's authority, but on the other hand, it boosts the rise of civil society and eventually could

[187] Chinese Society of International Law, "South China Sea Arbitration Awards: A Critical Study" (2018) 17:2 Chin J Int Law 207 at 218.

threaten the Communists' control over China. Not only the government's control over China, but also the dominance of Marxist ideology in China is challenged by the influx of Western influences in the post-Mao era. Although the construction of "Socialism with Chinese Characteristics" allows the import of Western capitalist models into China, the models China has borrowed, notably the market economy and the underlying liberal democratic values, in turn undermine Marxist ideology and erode the CCP's ability to ensure absolute obedience to its policies.[188] The resulting ideological crisis forces the Communist government to seek a new way to re-Sinicize Marxism so that it can strengthen the CCP's authority and guarantee that policies will be obeyed willingly. This has led to the new development of Chinese nationalism in the post-Mao era.

Systemization is the most significant feature of Chinese nationalism in the post-Mao era. Since its inception, Chinese nationalism has been a driving force in Chinese society and has penetrated almost every single aspect of Chinese politics, but never before the establishment of the PRC had any Chinese political entities systemized Chinese nationalism and used it as a source of authority. In the preamble of the constitution of the PRC,[189] the CCP, China's ruling party, presents itself as the embodiment of heroic anti-imperialist nationalism who led the Chinese people to break the yoke of foreign exploitation, take control of state power and become the masters of the country.[190] This perception is also reflected in the CCP's Party Constitution, which states that "the Party

[188] A prominent example is the 1989 Tiananmen Square protests (also known as the June Fourth Incident), where the Chinese people challenged the one-party political system and called for democracy, greater accountability, freedom of the press and freedom of speech. Fairbank & Goldman, *supra* note 131 at 427 to 429.
[189] The current version was adopted by the 5th National People's Congress on December 4, 1982, with further revisions in 1988, 1993, 1999, 2004 and 2018.
[190] Constitution of the People's Republic of China, 1982, Preamble.

should always represent the development needs of China's advanced social productive forces, always represent the onward direction of China's advanced culture, and always represent the fundamental interests of the broad masses".[191] Through this text, we can see that party, government, and state are integrated into one, implying that the people's love of China is equivalent to love of the Chinese government and the CCP.

Chinese nationalism was further systemized through the patriotism education campaign led by the CCP in the 1990s. In 1991, a "Circular on Fully Using Cultural Relics to Conduct Education in Patriotism and Revolutionary Traditions" was issued by the CCP Central Propaganda Department, marking the beginning of the campaign.[192] Two years later in 1993, the State Education Commission issued the "Program for China's Education Reform and Development", which laid out patriotism as a guiding principle for China's educational reform.[193] To expand the 1993 program, in June 1994, a national conference on education adopted a document titled "Guidelines for the Patriotic Education" and disseminated it to educational institutions ranging from kindergartens to universities. As a result, for the first time in China, patriotism education courses such as Chinese modern history were added to all educational institutions' curriculum.[194] The patriotism education campaign reached a high point when the CCP Central Committee issued a central document called "The Outline for Conducting Patriotic Education" in 1994.[195] In order to "boost the nation's spirit,

[191] Constitution of the Communist Party of China, General Program.
[192] The CCP Central Propaganda Department, *Circular on Fully Using Cultural Relics to Conduct Education in Patriotism and Revolutionary Traditions* (Beijing: the CCP Central Propaganda Department, 1991).
[193] Ministry of Education of People's Republic of China, *Program for China's Education Reform and Development* (Beijing: Ministry of Education of People's Republic of China, 1993).
[194] Zhao, *supra* note 149 at 292 to 293.
[195] The CCP Central Propaganda Department, *Guidelines for the Patriotic Education* (Beijing: The CCP Central

enhance its cohesion, foster its self-esteem and sense of pride…and direct and rally the masses' patriotic passions to the great cause of building socialism with Chinese characteristics", this document explicitly required patriotism education to emphasize Chinese history, China's characteristics and realities, China's differences from the West, the CCP legend and the CCP's great achievements.[196] Through patriotism education, the government tries to convince its people that the best way to love and defend the nation is to love and defend the state under the leadership of the CCP. Since coming to power in late 2012, Chinese President Xi Jinping has further developed this narrative and integrated it into his signature "Chinese Dream" slogan which advocates a "great rejuvenation" of China from the ashes of a foreign-inflicted "Century of Humiliation."[197]

Besides education, mass media is also utilized to systemize nationalist sentiment. For a long time, the Chinese media has been owned and run by the government to disseminate state policies, decisions, and actions to the public. Even though economic reform has liberalized the media to some extent, the government still exercises control through administrative bureaus such as the State Administration of Press, Publication, Radio, Film and Television.[198] With respect to the Internet, China announced in 2000 that "the Internet which are following the traditional media are still the tongue of the

Propaganda Department, 1994).

[196] *Ibid*.

[197] William A Callahan, "History, Tradition and the China Dream: Socialist Modernization in the World of Great Harmony" (2015) 24:96 J Contemp China 983.

[198] This administration directly controls state-owned media at the national level such as China Central Television, film and television studios and other non-business organizations. See "State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China" (4 September 2014), online: *State Counc Peoples Repub China* <http://english.gov.cn/state_council/2014/09/09/content_281474986284063.htm>.

party",[199] and inaugurated the State Internet Information Office as the major institution to monitor websites, online services and network forums.[200] The control of media and censorship system guarantees the "right" direction for Chinese mass media and provides the necessary conditions for leading the nationalist sentiments. This is the case in terms of the Chinese reaction to the South China Sea Arbitration. Barely an hour after the release of the award, *People's Daily* published an editorial and blamed the United States for manipulating the South China Sea Arbitration.[201] Following the path the CCP had set for mass communication on the arbitration, the Chinese media, including social media, hyped the 4 Noes attitude with text posts or comments, digital photos or videos, and data generated through all online interactions. Due to the antipathy towards foreign states that strongly emphasised in the patriotism education, the Chinese public became very receptive to negative narratives about the arbitration and anti-arbitration heroism flooded society with sometimes exaggerated and childish slogans such as "This Is Really Chinese Style Dried Mango Not from the Philippines."[202]

No doubt media manipulation facilitates social mobilization and solidifies popular allegiance to the government, but it also polarizes public opinion, resulting in a narrow-minded and irrational public mood.[203] Sometimes this mood goes so far that radical public reactions to foreign affairs could quickly turn into cynicism about the

[199] Lan Su Tseng, *Chinese Media Control and Nationalism: A Perspective from the Globalization Theory* (New Orleans, LA, 2010) at 7.
[200] *Ibid.*
[201] Wang, *supra* note 172.
[202] Note 175.
[203] He, *supra* note 147 at 17.

government's foreign policy, as people believe that the government only condemned the arbitration verbally and acted too softly in response the South China Sea disputes. Some indications of this trend can be gleaned from looking at the *Tianya*, China's biggest online forum, where the need to go to war over the South China Sea was argued long and earnestly.[204] Moreover, to express their hatred of the arbitration, some Chinese citizens even started to call on people to boycott foreign products: for example, as a symbol of the United States, Kentucky Fried Chicken (KFC) outlets in various cities were targeted by protests.[205] The resistance was widespread and gained public support when a protest poster outside a KFC outlet was circulated thousands of times online.[206] If the government were able to decide the direction, content and intensity of nationalism, the consequences would be constrained within a limited domestic sphere. After all, since the ASEAN states have softened their positions in the South China Sea dispute, China no longer needs to keep its hostility, which may disrupt its diplomatic efforts. However, if Chinese nationalism goes beyond its control, what will the government do then?

The systemized Chinese nationalism described above and the forces unleashed by it might be viewed as causing a new struggle between the government and the rising civil society. The scenario is more complicated than ever before within China today, where

[204] On the *Tianya* forum, posts such as 'How does China fight in the South China Sea' gain the most supports – the number of comments are more than 20,000, "World Look（国际观察）", online: *Tianya BBS* <http://bbs.tianya.cn/list.jsp?item=worldlook&order=10&k=%E5%8D%97%E6%B5%B7>.
[205] Shen Lu and Ben Westcott, "South China Sea: Beijing Calls KFC, Apple Protests 'Irrational'" (21 July 2016), online: *CNN* <http://www.cnn.com/2016/07/20/asia/china-nationalism-south-china-sea-ruling/index.html> ; Austin Ramzy, "KFC Targeted in Protests Over South China Sea", (19 July 2016), online: *New York Times* <https://www.nytimes.com/2016/07/20/world/asia/south-china-sea-protests-kfc.html>.
[206] *Ibid.*

social problems like growing income inequalities breed diverse groups (e.g. discontented urban workers, affluent business people, and vast numbers of rural poor) representing various needs and interests. Among the channels for openly airing grievances and advancing political agenda, advocating nationalism is the safest way for these groups to express their dissatisfaction. The government certainly has the power to ease extreme nationalist sentiments, as demonstrated in the KFC protest where the censors deleted the pictures and subsequently criticized "irrational patriotism".[207] Yet, using that power can be politically risky, because it contradicts the government's claim to be the foremost defender of national interest and pride.

Here, we find the potential for backfire in the systemization process of Chinese nationalism. Originally the government and the CCP, through the use of patriotism education and propaganda, played a leading role in forming public consciousness of nationalism, with the direction of influence being top down (State → Man). However, with the rise of civil society and its engagement in the policy-making process, the direction of influence is reversing: popular nationalist sentiment influences the Chinese government's foreign policy, disseminating it in a "bottom-up" way (Man → State). In this sense, there arises a chicken-or-egg question of causation: to what extent is Chinese nationalism the officially fostered product of the government's 4 Noes attitude, and to what extent is the government's assertiveness in the arbitration the result of strong Chinese nationalism?

[207] CNN, *supra* note 205.

Conclusion

Along with market economic reforms and openness to the outside world, China's approach to international courts and tribunals in the post-Mao era is changing from total rejection to selective acceptance. The selective acceptance of international adjudication is revealed by the bifurcation in China's participation in various forms of adjudication-related decision-making processes. China is embracing and even expanding its engagement with international adjudication on economic issues. Since 2001, it has actively participated in WTO adjudication. So far it has been a respondent in 40 disputes (the third highest number of all 164 members), a complainant in 20 cases (top 10 initiators of cases before the WTO), and a third party in 145 cases.[208] Regarding the settlement of investment disputes, China has included ISA in most of its international investment agreements, though the investor's recourse to arbitration is limited in the earlier treaties. However, China is still wary of international adjudication concerning territorial and boundary disputes, represented by the 4 Noes attitude towards the South China Sea Arbitration.

The bifurcated attitude towards international adjudication reflects a deep disparity between the PRC's liberal policy towards socio-economic matters and its nationalistic policy towards political matters, especially those relating to state power and sovereignty. Essentially, this policy disparity is the Communists' reaction to Sino-Western tension arising from their construction of "Socialism with Chinese Characteristics". On the one hand, they adopt Westernism to maximize access to the international community and

[208] Note 49.

promote economic development, but on the other hand, by developing Chinese nationalism, they maintain the traditional unitary, centralized state power structure and reinforce the Communist regime's authority over China. In short, as Erica Downs and Phillip Saunders have concluded, the Communist government in the post-Mao era has taken economic performance and Chinese nationalism as the two pillars of its policy-making process.[209]

Making strong appeals to nationalism while simultaneously developing the economy seems to be an ideal tactic to balance the introduction of Western influences and the maintenance of the traditional power structure. Yet there are also some constraints preventing China from implementing the tactic.[210] For example, as observed in the example of the South China Sea Arbitration, although nationalism can motivate people's obedience to the government's policy, it can also—if is not properly handled—threaten China's international image and affect the willingness of other states to trade with and invest in China.

Attaching importance to both Chinese nationalism and economic performance is an unsustainable strategy because the Chinese, consciously or not, ignore the essence of Sino-Western tension. Essentially, the Sino-Western tension in the post-Mao era is the contradiction between the increasingly liberal economy and the still-extant authoritarian rule. Marx claimed that when the social substructure (namely the economic base) changes, the superstructure (namely the value systems and culture, institutions, political

[209] Erica Strecker Downs & Phillip C Saunders, "Legitimacy and the Limits of Nationalism: China and the Diaoyu Island" (1998) 23:3 Int Secur 114.
[210] *Ibid* at 121.

power structures derived from the systems) must also change.[211] But the current "Socialism with Chinese Characteristics" does not follow this logic. Although the market economy and openness to the outside world demand more political decentralization and personal freedom, China continues to be ruled by a highly centralized governmental structure. Therefore, the greatest challenge for the CCP may not come from Western influences, but from itself, from the party's capability to adjust "Socialism with Chinese Characteristics" and to regenerate the Chinese value cluster that can adapt to the requirement of progress, but still retain elements of both Chinese-ness and Marxism.

[211] Marta Harnecker, *Elementary Concepts of Historical Materialism* (Sydney: University of Sydney, 1971) at 32 to 35.

PART IV PREDICTION AND EVALUATION

Now that the historical trend of China's attitude towards international adjudication has received preliminary study, and the development of the Chinese value cluster has been examined, the next step is to move towards the prediction and evaluation of China's attitude towards international adjudication in the future.

Of course, China's future attitude cannot be precisely profiled. However, it can be extrapolated from considering the continuities and changes in China's interactions with international courts and tribunals to date. History is useful in this respect for two reasons. First, history bequeaths knowledge about many substantive issues on China's future foreign policy-making process. The vast majority of perspectives, strategies and power bases that every Chinese government has employed in making its policy on international adjudication (for example, sensitivities about the settlement of territorial disputes) have come into being through decades of exploration, crystallization and consolidation. Second, history affects Chinese participants' perspectives when they interact with others in future adjudication-related decision-making processes, as they will "draw lessons from past experience or invoke analogical reasoning that compares the country's current circumstances to those it faced before".[1]

The analysis of historical trends is not only a conclusion of China's experience with

[1] Avery Goldstein, "Parsing China's Rise: International Circumstances and National Attributes" in Robert S Ross & Feng Zhu, eds, *Chinas Ascent: Power Security and the Future of International Politics* (Ithaca and London: Cornell University Press, 2008) 55 at 74.

international adjudication, but is also a comprehensive overview of the broad social context in which all China's decision-making processes relating to international adjudication are effected, and in which each decision-making process take place. Hence, the first step of prediction and evaluation is an extrapolation based on an overview of the succession of participants, perspectives, arenas, bases of power, strategies and outcomes in China's decision-making processes relating to international adjudication since the 19th century.

Yet, the future cannot be realistically projected in terms of a simple-minded extrapolation of history and historical trends. China's future attitude also depends on the configuration of many variables that may or may not support the continuation of one historical trend. This is the conclusion reached by Lasswell and McDougal in their elaboration of projective thinking within the New Haven School context: "future is 'probable', not 'inevitable'…Not the particular instance but the broad trend is the distinctive subject-matter of projective thought".[2] Therefore, the second step taken is to offer and evaluate possibilities based on an extrapolation of the known facts. Since it has been argued that China's attitude towards international adjudication reflects Sino-Western transcivilizational interaction, the possibilities offered mainly revolve around the development of Westernism, traditionalism and Chinese nationalism and their roles in determining China's future attitude.

[2] Harold Dwight Lasswell & Myres Smith Macdougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy, Vol.2* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992) at 974 to 975.

CHAPTER 7 A RISING CHINA AND ITS FUTURE ATTITUDE TOWARDS INTERNATIONAL ADJUDICATION

Considering China's future attitude towards international adjudication first requires an analysis of the broad international context in which China's interaction with international adjudication will take place. The international community in the 21st century is facing transitions. One is the transition of power configurations marked by the rise of non-Western states such as China. The last two centuries have witnessed the rise and fall of many Western powers and their means of constructing, reconstructing and maintaining the international order. Western dominance of international power structures started to decline in the latter half of the 20th century, when third world countries became more powerful both economically and politically after gaining independence, and has been continuing to wane since 2000 when, after rapid economic ascent, China emerged as a contending power followed by other non-Western states such as India and Brazil. Another transition is the rise of non-state actors and their threat to the Westphalian system. Increasingly, complex interdependencies among the world's countries bring about new phenomena such as international flows of trade and investment, immigration, global climate changes and terrorism, as well as new actors arising from these phenomena, such as multinational corporations, intergovernmental and nongovernmental organizations and others. In these circumstances, the traditional Westphalian system, which has served as the basis of international adjudication, has experienced an erosion of power and influence.[3] The European Court of Justice's *de*

[3] Andrew Coleman & Jackson Nyamuya Maogoto, "'Westphalian' Meets 'Eastphalian' Sovereignty: China in a Globalized World" (2013) 3:2 Asian J Int Law 237 at 237 to 238; G John Ikenberry & Amitai Etzioni, "Point of

facto supranational jurisdiction, which gives it the authority to review actions brought by a Member State or an institution for failure to comply with European Union law,[4] challenges the traditional principle of non-intervention. Moreover, non-state actors' participation in many transboundary economic, financial, political, social and cultural activities has already changed the traditional international governance model that focuses on states' roles. Thus, the participation of these new actors demands a new look at the international rule of law.[5] A recent example is the heated controversies over the inclusion of ISA in the newly negotiated international trade and investment agreements.

The foregoing discussion highlights two considerations that are relevant to predicting China's future attitude towards international adjudication. First, because of the emergence of multipolarity, the flow of global influence is changing. One prevailing presumption in the international adjudicatory regime has been that the proliferation of international courts and tribunals requires Chinese views of adjudication to be brought in line with those of the developed Western world. However, as China rises as a major power, we can no longer assume that influence flows only one way (from the West to China). More attention needs to be paid to the ways in which change is already moving in the other direction: China is engaging and will engage with international courts and tribunals not only as a rule taker but also as a rule maker. Second, with the accelerating

Order: Is China more Westphalian than the West?" (2011) 90:6 Foreign Aff 172; Sung Won Kim, David P Fidler & Sumit Ganguly, "Eastphalia Rising? Asian Influence and the Fate of Human Security" (2009) 26:2 World Policy J 53.

[4] "CURIA - General Presentation - Court of Justice of the European Union", online: *CURIA* <https://curia.europa.eu/jcms/jcms/Jo2_6999/en/>.

[5] For example, current international conflicts are often fought between states and non-state actors or even between multiple non-state actors. Interventions in these new conflicts is particularly challenging given the fact that international law and norms governing the use of force for intervention or peacekeeping purposes was primarily written in the context of the nation-state.

pace of globalization and transnational problems, Westernism will influence China in new ways and with new consequences. Previously, China encountered Western ideas of applying various forms of international adjudication in settling various kinds of international disputes, but most of these concentrated on the settlement of state-state disputes, which was within the spectrum of the Westphalian system.[6] Now the area of influence has broadened. For example, the growth of international investment and investors' increasing demands to protect their rights through international arbitration has imposed an unprecedented challenge to states' exercise of their sovereignty; their sovereignty may continue to be eroded as ISA continues to develop, if indeed it does.[7] However, the paradox is that, while the West is seeking to adjust the old Westphalian system (e.g. developing an investment court system to replace investment arbitration) to accommodate some of the new issues arising from globalization, China—which once resolutely opposed the Westphalian system—now not only supports the Westphalian system and the international legal regime based on it, but has gradually become its staunchest defender.[8]

Based on these two considerations, predicting and evaluating China's future attitude towards international adjudication is not simply a matter of discussing how traditional values and Western values will be adopted and adapted in China's approach to the international adjudicatory regime, but must also be about how China will use its

[6] Perhaps the only exception is the Tokyo Trial of which jurisdiction was extended to individuals.
[7] Recently the EU has engaged in a large-scale reform by proposing an investment court system, which combines elements of traditional ISA with judicial features, to address investor-state disputes. The first prototype of the investment court system was sketched in the context of the EU-Canada Comprehensive Economic and Trade Agreement (CETA). See e.g. Catherine Li, "The EU's Proposal Regarding the Establishment of the Investment Court System and the Response from Asia" (2018) 52:6 J World Trade 943.
[8] Ikenberry & Etzioni, *supra* note 3 at 173; Coleman & Maogoto, *supra* note 3; Kim, Fidler & Ganguly, *supra* note 3.

increasing influence to reform the regime. More specifically, we must investigate whether China will continue to support and follow new modifications of the international adjudicatory regime made by the West, or whether China, as a non-Western, socialist state, will seek to explore a new approach to the making of a future international adjudicatory regime? If China were to take a new approach, would it necessarily generate a fundamentally different, or even challenging paradigm that leads to a clash with the Western-led international regime?

7.1 Paradigm of China's Attitude towards International Adjudication and Its Shift

This section addresses the first step of prediction and evaluation: extrapolation based on a synthesis of the past and the present. Throughout the modern history of China, the country's inherent order has been destroyed and replaced by various revolutions and reformations. Correspondingly, China's attitude towards international adjudication has constantly fluctuated from the Qing dynasty's doubts about international adjudication, to a slow movement towards integration as the ROC realized international adjudication could give it bargaining leverage in negotiations and a venue in which China could fight for its lawful rights, to active participation, most notably in the Tokyo Trial, where China devoted itself to prosecuting and trying Japanese war criminals, and finally to the ups and downs of communist revolutionary fervor in the PRC, along with a confrontational approach to international adjudication. The PRC's "reform and opening-up" policy, which commenced in the 1980s and has lasted to the present day,

allowed China to relax its hostility to international adjudication and gradually integrated China—at least in trade matters—into the international adjudicatory regime.

It is too easy to be mesmerized by the changes that have swept through China's attitudes whilst ignoring some of the most general characteristics. Admittedly, many concrete circumstances that have shaped China's attitude have changed over the past century, yet these changes do not negate some continuities in the international adjudicatory regime, as well as China's role in that regime. One of the most striking of these continuities is that, since the 19th century, international adjudication has constantly remained Western-led. Connected to this is the persistent problem for China of how much traditional values and Western values should be adopted and adapted in China's approach to international courts and tribunals. Implicit in the continuity is a long-lasting paradigm in China's attitude towards international adjudication: China is a rule taker of the international adjudicatory regime and it has been asked to obey, accept and follow the norms and practices that have been created by the West.

7.1.1 The Past: China as a Rule Taker

The rule-taker paradigm is discernible if we reexamine the power bases, arenas, participants, perspectives, strategies and outcomes of adjudication-related decision-making processes from the late 19th century to the early 21st century.

Power Bases

This thesis has rejected the option of employing a Western-centric perspective to view China's attitude towards international adjudication, yet the existence of an

underlying power relationship—the fact that, over the last two centuries, Western civilization has possessed more power bases than Chinese civilization and that this imbalanced power relationship has effectively shaped China's attitude towards international adjudication—cannot be denied. The power bases in this dissertation include material resources in terms of economics, politics, military might, society, culture, but two of them are the most pertinent to adjudication-related decision-making processes.

The first form of power is Western dominance in the global power process that lies beneath the adjudication-related decision-making processes. With the increased adoption of steam transport (steam-powered railways, boats and ships) and the gradual application of technologies to manufacturing in the Second Industrial Revolution, from the early 19th century onwards European states expanded globally to seek more commercial markets.[9] Great Britain was the fastest-growing state, with expansion into vast territories in Canada, Australia, South Africa, India and countries in Africa. By the end of the 19th century, Great Britain controlled a fifth of the world's land and one-quarter of the world's population.[10] After the mid-19th century, new powers such as the United States also actively participated in global imperial expansion. By the early 20th century, the landmasses of Earth, including vast expanses of the continents of Africa and Asia, were all influenced by Western powers.

Although the global-scale total wars of the 20th century drew in almost all Western

[9] John King Fairbank & Merle Goldman, *China: A New History, Second Enlarged Edition* (Massachusetts: Harvard University Press, 2006) at 164.
[10] Angus Maddison, *The World Economy: A Millennial Perspective* (Paris: Organisation for Economic Co-operation and Development, 2001) at 98 to 242; Niall Ferguson, *Colossus: the Rise and Fall of the American Empire* (London: Penguin Books, 2004) at 15.

states and subsequently contributed to shifts in global power configuration, the West did not lose its dominance. After WW II the victorious powers—most of which are Western states— jointly founded the United Nations (UN)[11] and became the permanent members of the United Nations Security Council.[12] Western dominance in the global power process was challenged by the socialist Eastern Bloc led by the Soviet Union in the Cold War era, but it was restored to prominence after the dissolution of the Soviet Union in 1991. Western (the United States in particular) influence in the post-Cold War era has evolved in parallel with globalization. Some non-Western powers such as Russia, Japan, China and India have recently gained more power and influence, yet the West still dominates the global market and wields considerable soft power through cultural artifacts like books, films, radio, television, the Internet, advertising and popular culture. Today, Western traits can be seen in politics, the economy, academia, education, literature, arts, publishing and people's habits and daily lives.[13]

The second form of power is Western dominance in international adjudicatory discourse. Foucault observed that power is not only that which is wielded by people or groups through material domination or coercion, but is also a "scientific discourse" that pervades society.[14] Foucault used the term "scientific discourse" to signify that power

[11] Actually, in 1945 representatives of 50 countries met in San Francisco at the United Nations Conference on International Organization to draw up the United Nations Charter. But those delegates deliberated on the basis of proposals worked out by the representatives of "Big Four", namely China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks. The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, and the United States and by a majority of other signatories. See in "History of the United Nations", online: *United Nations* < http://www.un.org/en/sections/history/history-united-nations/index.html>.

[12] According to the Article 23 of the UN Charter, The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are permanent members of the Security Council. Under article24, the Security Council is in charged with the maintenance of international peace and security.

[13] Yasuaki Onuma, *A Transcivilizational Perspective on International Law* (Leiden ; Boston: Brill Academic Publishers, 2010) at 48.

[14] Michel Foucault, *The History of Sexuality: Vol. I An Introduction* (New York: Pantheon Books, 1998) at 63 to 64.

can be formed through creating accepted "true" knowledge, and can be constantly reinforced by diffusing the discourse through the education system, the media, and the flux of political and economic ideologies.[15] Foucault's theory suggests a form of "invisible" power in the international adjudicatory regime. This power operates through a discourse that defines the rules and procedures of international adjudicatory institutions and that guides the conditions of existence of participants.

Power in international adjudicatory discourse has, for a long time, been exercised by the West. In fact, the idea that inter-state disputes could be adjudicated by a third-party institution originated in Europe and the United States.[16] With the global expansion of Western civilization, adjudication since the 19th century rapidly transformed from a regional practice to truly international dispute settlement, a transformation that was marked initially by the appearance of the PCA. In addition, the progress of international adjudication from the past to the present day has been built on Western architecture. The major Western states—such as Great Britain, Germany and the United States—were responsible for constructing, reconstructing and maintaining the PCA in The Hague. Although China engaged in this building process, for example by successfully vetoing one British proposal, its role and influence was limited. The Tokyo Trial is another prominent example of Western influence. The international pursuit of justice was established on the basis of Western legal traditions: the trials of Japanese war criminals were heard in an Anglo-American adversarial justice system in which the

[15] *Ibid*.
[16] Cesare Romano, Karen Alter & Yuval Shany, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014) at 42 to 47; Bardo Fassbender et al, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at 146 to 165.

prosecutor sought to prove the defender's guilt before impartial adjudicators. Western dominance in international adjudication continues to loom large in contemporary times. Although the addition of many non-Western states has largely undermined the efective power of Western states in international courts and tribunals—a trend indicated, for example, by the 1966 election of ICJ judges where more benches were assigned to Afro-Asia states,[17] and by ICJ judgments after the 1970s that have gradually tilted in favor of non-Western states (for example the decision in the Nicaragua v U.S. case (1984))[18]—the development of international adjudication still favors Western advocacy in terms of the utilization of concepts like "market economy", "democracy", "human rights", "civil society" and the "rule of law".[19]

One might contend that, even though China has been regarded as a rule taker in the Western-led regime, its power bases are not always weak. For example, with the use of Western discourse and some pragmatic strategies, China in many cases, such as the Sino-Japanese *Jiandao* dispute, the Sino-Belgium dispute and recently many WTO cases, has successfully reversed the imbalanced Sino-Western power relationship and maximized its self-interest. Admittedly, the existing international regime led by the West has provided great value and benefits not only to Western states but also to non-Western states—perhaps that is why this regime still enjoys a certain level of global legitimacy today. Overall speaking, however, the power bases and benefits China

[17] Shabtai Rosenne, *The World Court: What It Is and How It Works (Legal Aspects of International Organization)*, 6th ed (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 2003) at 45 to 46.
[18] In this case, The ICJ rejected the U.S. challenge of its jurisdiction and held that the U.S. had violated international law by supporting the rebellion against the Nicaraguan government and by mining Nicaragua's harbors, leading to a result in favor of Nicaragua. *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v the United States of America)*, [1986] ICJ Rep 146.
[19] Onuma, *supra* note 13 at 48.

thatcan receive are nevertheless limited. As the following game theory analysis will show, in a game designed by others, all that China can do is to act within the chosen rules and maximize the assigned payoffs—sometimes it has to compromise in exchange for benefits. A typical case is China's participation in the WTO. Although its economy has significantly accelerated after joining the WTO, China is still subject to several WTO-plus obligations that impose more stringent disciplines on China than are required from other countries by the multilateral trade agreements and other "WTO-minus" commitments that reduce the rights of China as a WTO member in the trade remedies context.[20]

Arenas

Western power not only dominates the international arena, but also significantly affects China's domestic arena. There is an obvious proportional relationship between China's attitude towards international adjudication and the westernization movements in its domestic arena: the more China is westernized; the more likely China is to participate in international adjudication. Throughout the history of China's interaction with international adjudication, there are three periods when China made relatively positive gestures towards international courts and tribunals. The first period is the early 20th century when, after the westernization of Qing China's bureaucratic system (for example, the establishment of China's first Ministry of Foreign Affairs), there were some Western-educated diplomats who actively engaged in the building of the PCA in the Hague Peace Conferences and fought for China's rights and status in international

[20] Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol" (2003) 37:3 Journal of World Trade 483 at 490.

affairs. The second period is the Republican era. Abandoning the thousand-year-long imperial rule, the ROC sought to transform China into a modern nation state by adapting elements of Western civilization.[21] In this period, international adjudication began to be viewed as an instrument that could help China shake off the yoke of foreign domination and secure a respected place in the international community. In a case presented before the PCIJ concerning China's denunciation of the Sino-Belgian Treaty of 1865, the majority of the Republican government agreed with China's appearance before the court. At the Tokyo Trial, China's participation was also active and cooperative, notwithstanding the overall poor performance resulting from cultural gaps. The third period is the post-Mao era, when the PRC decided to undertake market economic reform and to open China to the West. During this period, China has been expanding its engagement with international adjudication, in particular with respect to adjudication related to economic issues. For instance, since 2001, China has actively participated in WTO adjudication.

The correlation between China's attitude and its westernization process is not a coincidence; the two are logically associated with one another in that, to some extent, international adjudication is considered to be "Western" rather than "international" in the Chinese domestic arena. International adjudication is not something indigenous to China, but rather is a Western discourse coming to China through Western scholars' translation and introduction. Since the idea of settling international disputes with adjudication came to China in the midst of Western invasion and colonization, the Qing

[21] Keping Yu, "'Westernization' vs.'Sinicization': An Ineffaceable Paradox Within China's Modernization Process" in *Cult Soc Transform Reform Era China* (Leiden: Brill, 2010) 151.

government's officials regarded it as "a Western conspiracy to hide their use of force in the wars".[22] Even in contemporary times, China still believes that international adjudication is a "Western political farce intending to undermine China's interests."[23] In a sense, China's participation in adjudication-related decision-making processes has never been an equal communication (though nominally China is a sovereign state). Rather, it is the result of penetration of the Western-led international arena into the Chinese domestic arena. Given its advantages in power and influence, the West has made China accept the "Western" international order, enter the international community constructed by "Western" discourse, and participate in "Western" adjudication.

Participants

As the international and domestic arenas became Western-led, certain new elite groups formed within the set of Chinese participants in response to the exigencies of interactions and communications in the adjudication-related decision-making processes. First were open-minded Confucian gentry-literati, notably the *Zongli Yamen* officials. Then there emerged professional diplomats: the earliest professionals were officials at the Ministry of Foreign Affairs of Qing China, and in the Republican era they gained recognition as the foreign-affairs clique because of their linguistic competence and insights into theories of international law. Similar to the foreign-affairs clique, a group of technicians specializing in international adjudication entered the PRC's decision-

[22] Translated by author."虽系遇事转圜。弭衅息争之一术。惟外国皆联为一气， 控临战时专视彼此交锋之利钝，巧为和解之谋。" See in Grand Council's Reply to Zongli Yamen: On the accession of The Convention for the Pacific Settlement of International Disputes (1899), Taibei, Archives of Modern Chinese History (No. 01-28-001-02-006).

[23] "Remarks by Chinese Foreign Minister Wang Yi on the Award of the So-called Arbitral Tribunal in the South China Sea Arbitration" (12 July 2016), online: *Foreign Ministry of People's Republic of China* <http://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1380003.htm>.

making processes in the post-Mao era: they primarily consist of the Chinese delegation at the WTO, government officials, international lawyers and international legal scholars.

These Chinese participants had (and have) various close connections with the West. Some pursued higher education abroad. Weijun Ku, one of the decision-makers in the creation of China's policy towards the PCIJ, studied international law and diplomacy at Columbia University where he received his PhD. Ru'ao Mei, who was the only Chinese judge at the Tokyo Trial, went to the United States to study after graduating from Tsinghua University in 1924, and was awarded a Bachelor of Arts from Stanford University and a Juris Doctorate from the University of Chicago Law School.[24] Some participants did not study abroad but had been educated at the new schools in China which offered Western curricula, and lived part of their lives in the West. Zhengxiang Lu, who vetoed the British proposal about the building of the PCA, graduated from the School of Foreign Language in Shanghai and served the Qing regime as Chinese delegate at the first and second Peace Conferences at The Hague (1899 and 1907), as Minister to Belgium and as Ambassador to Russia before assuming the role of Foreign Minister in the Republican government.[25] Some other participants were willing to learn from the West, notwithstanding their lack of overseas experience. For example, even though the *Zongli Yamen* officials had been trained within the traditional Confucian education system, they devoted themselves to the importation of Western knowledge, Western ideas and Western technologies. Likewise, realizing that they had lagged

[24] Barak Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (Cambridge: Harvard University Press, 2015) at 78.
[25] Dong Wang, *China's Unequal Treaties: Narrating National History* (Lanham: Lexington books, 2005) at 38 to 39.

behind the West in terms of the legal capacity in WTO adjudication, Chinese officials actively attended WTO litigations as a third party and mimicked their Western counterparts.

Due to a good grasp of Western languages, theories and practices, these Chinese participants were more often profoundly engaged in the management of Chinese policy towards international adjudication. In some cases, they were granted the responsibility of representing the Chinese attitude in the adjudication-related decision-making processes. For example, Lu was granted plenipotentiary power to participate in the building of the PCA at The Hague, and the foreign-affairs clique dominated the making of Chinese foreign policy during the Republican era. At some points throughout modern history these participants were severely marginalized, in particular during the Mao era. For instance, Mei was criticized for his service as a "running dog" of the Western bourgeois judicial system after his return to China and died in the anti-intellectual and anti-Western education waves that later ravaged the PRC.[26]

When the Chinese participants rejected Westernism, it seems that China's foreign policy went off track, resulting in the impairment of China's international image. In the 1962 Sino-Indian dispute, the Communist leaders—who kept tight control of Chinese diplomacy—divorced themselves from so-called Western bourgeois international law and refused India's proposal to settle the dispute at the ICJ, describing the Court as an organ "among whose judges there is an element of the Chiang-Kai-shek clique".[27] The

[26] Kushner, *supra* note 23 at 80.
[27] "Text of Chinese Foreign Ministry Note to India"(October 9 1963), NCNA-English. Peking (Oct. 12, 1963), in SCMP, no. 3081: 26 - 29", in Jerome Cohen & Hungdah Chiu, *People's China and International Law, Volume 2: A Documentary Study* (Princeton: Princeton University Press, 1974) at 1441 to 1442.

Communists' belligerent attitude towards the ICJ and the underlying international legal regime attracted criticism from the United States, the Soviet Union and the third world, leading to unprecedented diplomatic isolation. Deng, having learned lessons from Mao's diplomatic failure, put forward the "24-Character" principle in the post-Mao era[28] and suggested that the Chinese should take a compromise position and should relearn from the West for the sake of self-development. To some degree, the rise of pro-Western Chinese participants and their critical role in adjudication-related decision-making processes have created an impression that China's approach to international adjudication relies heavily on the degree of Chinese participants' familiarity with Western knowledge, Western theories, Western values and Western practices relevant to international adjudication.

Perspectives

Regardless of how much they have been westernized, for Chinese participants, international adjudication does not come from their autonomous discourse; it is still an alien mechanism, almost every part of which has been derived from some species of Western thoughts and values.[29] The perception that "we do not belong to the system" generates a natural barrier between China and international adjudication, and this barrier was reinforced after China had experienced a century of humiliation at the hands of the West. Some may contend that, despite the existence of this barrier, the general tendency of China's attitude is to move towards acceptance of international adjudication.

[28] Honghua Men, "'Keeping Low Profile and Striving to Make Achievements Strategy and China's Diplomacy in 1990s" (2016) 56:4 Jilin Univ J Soc Sci Ed 81.
[29] Paul A Cohen, *Discovering History in China: American Historical Writing on the Recent Chinese Past* (New York: Columbia University Press, 1984) at 29 to 30.

Qing China accepted the jurisdiction of the PCA, the ROC was a member state of the PCIJ and adjudicated Japanese war crimes at the Tokyo Trial, and since the 1980s the PRC has been engaging with the international adjudicatory regime (though its engagement is limited to the economic fields). Indeed, most of time China does not resist international adjudication, but it does not fully accept it either.

This out-of-system mentality is not characterized by hostility or resistance, instead it is characterized by instrumentalism. The illustration of this instrumentalist perspective can be seen first in the Chinese *Ti-Yong* theory. Claiming that "*Zhongxue Weiti, Xixue Weiyong*" (translated to mean "Chinese learning for the essential principles, Western learning for the practical applications", 中学为体，西学为用), the Chinese in the Qing dynasty interpreted the acceptance of Western matters as a process of learning how to take advantage of the practical benefits of Western knowledge to develop Chinese civilization.[30] In the eyes of the Chinese, Westernism—including international adjudication—is "a tool to protect and advance Chinese interests" rather than a normative mechanism to govern international disputes.[31] Inspired from the *Ti-Yong* theory, the Qing government advocated the *yiyi zhiyi* strategy in its negotiation with Japan and successfully used PCA arbitration as a tool for China to win international support for its territorial claims over the *Jiandao*. The view of international adjudication as a tool was reinforced in the Republican period. The Chinese attempted to participate in the PCIJ proceedings to propagandize its challenge to the "unequal treaties" imposed

[30] *Ibid* at 30.
[31] Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures" (2016) 27:4 Eur J Int Law 945 at 9.

during the Qing period, and Mei's struggle for his seating order at the Tokyo Trial clearly indicated that international adjudication was given given intense symbolic value in politics.

The instrumentalist approach to international adjudication continued in the Mao era. In developing Chinese socialist theory on international law, international law and its institutions were considered "one of the instruments for resolving international problems. If this tool is useful to our country, to the socialist cause or the cause of the peoples of the world, we will use it. However, if this instrument is disadvantageous to these causes, we will not use it and should create a new instrument to replace it."[32] Even in the post-Mao era when the ideological elements had been removed from international legal study, China still approached international adjudication from a cost-benefit perspective. The endless upsurge of trade restrictions against China and the growing and sometimes insurmountable difficulty of deterring and resolving these disputes through bilateral negotiations contributed to China's active participation in WTO adjudication.[33] Similarly, the development of overseas investment and the increasing number of Chinese investors were the main causes of China's recent liberalization of access to ISA. China's rejection of the South China Sea Arbitration can equally be explained with this logic. Understanding that maritime disputes are so closely associated with Chinese dignity, to the point that any loss of territory can easily stir up national anger, China tends to remain cautious in its positioning on territorial

[32] Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden ; Boston: Martinus Nijhoff Publishers, 2009) at 77; Hungdah Chiu, "Communist China's Attitude toward International Law" (1966) 60:2 Am J Int Law 245 at 245 to 248.

[33] Wenhua Ji & Cui Huang, "China's Path to the Center Stage of WTO Dispute Settlement: Challenges and Responses" (2010) 5 Glob Trade Cust J 365 at 369.

matters so as not to take any risk until success is guaranteed. Choosing international adjudication as a means to solve maritime disputes is obviously risky, for international adjudication is essentially a zero-sum game in which any gain for one is a loss for the other.[34]

Strategies

Having realized that it is an outsider and a rule taker in the international adjudicatory regime, China's strategies in decision-making processes often revolve around one theme: how a non-Western state, especially when it is weak, can enter the Western game, play it, and maximize payoffs. In early times, the Chinese frequently applied the *yiyi zhiyi* strategy. The rationale of the *yiyi zhiyi* strategy, as Jize Zeng (曾纪泽) described it, resembles a lamb in the middle of a group of tigers. Since all tigers will fight against each other over the lamb, the lamb as a third party can reap the benefits from the tussle and eventually survive.[35] Implicit in the analogy of "lamb" and "tiger" is the fact that China's national power was too weak to prevent Western powers from encroaching upon it. However, China, as Fairbank pointed out, "was also too big for any one power to swallow, and seemed too dazzling a prize for a satisfactory division of shares to be worked out".[36] Accordingly, the Chinese believed that, if they adopted proper diplomatic arts, such as playing off the powers against one another, China would advance its interests among the strong states: just like the survival of the lamb. The *yiyi zhiyi* strategy was typically reflected in the *Jiandao* dispute, where China (whether

[34] John G Merrills, *International Dispute Settlement*, 5th ed (Cambridge: Cambridge University Press, 2011) at 291.
[35] John K Fairbank & Kwang-Ching Liu, eds, *The Cambridge History of China, Vol. 11: Late Ch'ing, 1800-1911, Part 2* (Cambridge: Cambridge University Press, 1980) at 199.
[36] John K Fairbank & Denis Twichett, *The Cambridge History of China: Republican China, 1912–1949, Part 1 Vol. 12* (Cambridge: Cambridge University Press, 1983) at 128.

deliberately or inadvertently) provoked a power struggle between Japan and Britain in order to maintain its territorial claim over *Jiandao*. Lu's success at The Hague can also be attributed to his alliance with several great powers that attempted to challenge British leadership in Asia.

Another strategy that China has employed is the victimization narrative. China's victimization card, which it plays by weakening itself and emphasizing its previous suffering at the hands of other states (in particular the West), has been successfully employed since the Republican era. At the Tokyo Trial, Mei's fights for his seat on the tribunal and his subsequent pursuit of the death penalty were orchestrated through a victimization rhetoric, whereby Mei stressed how much China had sacrificed during the war in an attempt to create sympathy among the judges. The strong sense of victimization continues to affect China's attitude towards international adjudication today. Victimhood spurred the PRC into becoming ever more intransigent in rejecting the South China Sea Arbitration. Utilizing this narrative, China accused other countries, such as France and the United States, of invading the South China Sea islands at different points in the last century and of "bullying" China through "manipulating" the arbitration today.[37]

In addition to the victimization card, a strategy of compromise is also an indicator of China's position as a rule taker. The compromise strategy can be traced back to the late Qing dynasty, when the Confucian officials agreed to join the 1899 Convention and to

[37] "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea" (13 July 2016), online: *Minist Foreign Aff Peoples Repub China* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml>.

accept the PCA's jurisdiction in exchange for the recognition of China's international status. In the post-Mao era, when China shifted its policy priority from class struggle to economic development, cooperating with the West has become necessary, as the West is the best source of demand, technology and investment. Deng's "24-Character" principle, namely to "observe calmly; secure our position; cope with affairs calmly; hide our capacities and bide our time; be good at maintaining a low profile; and never claim leadership",[38] has been continuously implemented and has been a central tenet of Chinese foreign policy for decades. It has led to China's increasing integration into the international adjudicatory regime from the 2000s through the 2010s. Acknowledging that international adjudication is "a product of Western civilization",[39] China sees itself as a novice entering a "game" that has been designed by others and is trying its best to learn and to adapt to terms set by the West.[40] This is clearly manifested in China's prescription-oriented study of WTO adjudication, whereby Western legal practice is used as a standard for China to imitate and legal advice is often given to help China improve its performance in WTO cases so as to meet Western standards.[41]

Outcomes

In general terms, China has benefitted greatly from the security and economic dividends brought by being a rule taker in the international adjudicatory regime: it has become the world's second largest economy. However, its rule-taker position prevents

[38] Men, *supra* note 27.
[39] Zhipeng He & Lu Sun, *Chinese Theory of International Law (国际法的中国理论)* (Beijing: Law Press, 2017) at 53 to 54.
[40] Xiaohong Su, *International Adjudication in the Changing World (变动世界中的国际司法)* (Doctoral Thesis, East China Normal University, 2004) [unpublished] at 130.
[41] See e.g. Julia Ya Qin, "Pushing the Limits of Global Governance: Trading Rights, Censorship, and WTO Jurisprudence – A Commentary on the China-Publications Case" (2011) 10:2 Chin J Int Law 62.

China from fully engaging in the international adjudicatory regime. China's overall approach to international adjudication is changeable and selective: on the one hand it welcomes the benefits brought by some forms of international adjudication, such as commercial and trade related international adjudication. On the other hand, it rejects other forms of international adjudication, in particular those related to territory, claiming that they have developed without Chinese participation and are contrary to its interests.

Of course, this may not be very different from the approaches that many other states have taken in the international adjudicatory regime. After all, a state always determines its foreign policy based on an understanding of national self-interest, and political calculation sometimes takes precedence over the international rule of law. Yet China's dislike of international adjudication concerning territorial issues appears to be extraordinarily consistent: from the Qing dynasty to the PRC, China has never required or agreed to submit its territory-related disputes to international courts or tribunals, regardless of the subject of the dispute or the strength of China's legal arguments.[42]

China's bifurcated, or selective, approach to international adjudication merits closer observation. Historically, China had little part in the creation of modern international adjudication and did not (and still does not) fully trust in the regime led by the West, considering the norms, practices and mechanisms to be a tool essentially serving Western interest. This mentality has been manifested in the Chinese perception of many

[42] Muthucumaraswamy Sornarajah & Jiangyu Wang, *China, India and the International Economic Order* (Cambridge University Press, 2010) at 316 to 318; Weixing Hu, Gerald Chan & Daojiong Zha, *China's International Relations in the 21st Century: Dynamics of Paradigm Shifts* (University Press of America, 2000) at 185 to 182; Jielong Duan, *International Law in China: Cases and Practice* (Beijing: Law Press, 2011).

international courts and tribunals, which are often described as a Western conspiracy against China and which are made up of the so-called pro-Western adjudicators. But in the era of globalization when integrating into the Western-led international adjudicatory regime has become inevitable, China, after several decades of futile resistance, has had to re-enter the regime and participate in the Western game to achieve economic development, reflected by its acceptance of WTO adjudication and ISA clauses. Indeed, when participating in the WTO dispute settlement system and investment arbitration, China can afford to make some compromises and allow allegedly "Western" international tribunals to intervene in its domestic policy autonomy. Yet the struggle between Western influence and "Chineseness" does not accordingly stop. Maintaining "Chineseness" in the international adjudicatory regime is largely represented by China's obsession with territory integrity and complete rejection of international adjudication relating to China's territorial sovereignty. China's obsession with territorial integrity is commonly known as a product of its humiliating history at the hands of the West, exemplified by what Chinese Foreign Minister Wang Yi articulated in a newspaper article:

> In the more than 100 years after the Opium War, colonialism and imperialism inflicted untold sufferings on China. For many years, China was unjustly deprived of the right by imperialist powers to equal application of international law. The Chinese people fought indomitably and tenaciously to uphold China's sovereignty, independence and territorial integrity and founded New China…Seeing the contrast between China's past and present, the Chinese people fully recognize how valuable sovereignty, independence and peace are. China ardently hopes for the rule of law in international relations against hegemony and power politics, and rules-based equity and justice, and hopes that the humiliation and sufferings it was subjected to will not happen to others.[43]

[43] Yi Wang, "China is the Firm Supporter and Constructor of the International Rule of Law", *Guangming Dly* (24 October 2014). The translation is provided by Chesterman, *supra* note 31 at 11.

But this is not the only reason. After all, other non-Western states that similarly suffered from Western colonialism and imperialism still submit their territorial disputes to international courts or tribunals for settlement—for instance the *Temple of Preah Vihear case.*[44] In comparison to these states, it is found that China cherishes its territorial integrity to an extreme degree and rejects taking any risk of losing it in any dispute, a decision that may have roots deeply entrenched in the time-honored idea of *dayitong*. In the Chapter 2 the dissertation stated that, because of *dayitong*, the Chinese for a long term have adhered to principles of unification and centralization, and the maintenance of such a state has been their primary concern since ancient times. Perhaps in modern times the connotation of *dayitong* has changed with the addition of Westphalian sovereignty, but the pursuit of a united, centralized China is still alive in the Chinese mindset, shown in rhetoric such as "China will never give up an inch of its territory", "China is a natural territorial and cultural polity with five thousand years of history; since ancient times there is only one China and in the future China must be one."[45]

7.1.2 The Present: Rising China as a Rule Maker?

The global power process has been changing dramatically in the last decade. The rise of China and other emerging economies has meant that the flow of globalization is no longer dominated by a West to East dynamic. For example, China has begun to export

[44] *Case Concerning Temple of Preah Vihear* (Cambodia v Thailand), Merits, Judgment, [1962] ICJ Rep 6.
[45] See e.g. in "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea" (13 July 2016), online: *Ministry of Foreign Affairs of the People's Republic of China* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml>.

large sums of FDI and its role in global economy is becoming more important as has established itself as the world's major source of FDI outflow. This new context seems to create an opportunity for China to reshape its role in the international adjudicatory regime. Some may question whether, given the fact that China has profited from being a rule taker in the existing regime, why should it seek a new role?

Perhaps the question can be answered with a game theory analysis of China's role in the international adjudicatory regime. As alluded to in the last section, China is not only a rule taker but is also a strategic game player in the international adjudicatory regime. With the wisdom that comes from practice and experience with what works and what does not work, it has developed a set of strategies that can effectively employ its bases of power to achieve its preferred outcomes in the game. However, regardless how skillfully it played the game, the payoffs China could gain are always limited, for it did not play the "pregame" where adjudicatory rules, institutions and procedures were made and remade.[46] The pregame is essential because rules fundamentally determine the structure of a game in which every player interacts and constrain players' actions therein: they decide what is at stake and how a win is declared, they specify players and their roles in the game, and they govern the field of play, specifying what is allowed, prohibited and required for action.[47] In a sense, China did lose substantial benefits when it only played the adjudicatory game but did not engage in making or remaking rules.[48]

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[46] A.K. Dixit, S Skeath & D Reiley, *Games of Strategy*, 2nd ed (New York: W. W. Norton & Company, 2004) at 25.
[47] See generally in Martin J Osborne, *An Introduction to Game Theory* (Oxford University Press New York, 2004) at 1 to 2.
[48] Dixit, Skeath & Reiley, *supra* note 46 at 25.

In practice, since China is rising and will emerge as a great power in the future, it will not, sooner or later, reconcile to its current position as a rule taker. As China's economy rapidly develops and it becomes a major contributor to the global economy, the existing rules, institutions and procedures of international adjudication, which were originally designed by and for the West, will not accommodate China's increasing needs and interests. This has already been noticed by the Chinese themselves in recent writings.[49] China's identity as a major economic power also suggests that it has increasing power bases to enter the pregame and change the international adjudicatory regime. For example, it can use its economic power, such as its considerable influence on trade and investment flows, to exert more influence on the building of the overall international adjudicatory regime.[50] Moreover, China's legal capacity in participating in international adjudication has been enhanced by the successful application of "learning and socialization" strategy. Now China gradually develops its own international legal profession: some Chinese participants can now handle international cases independently. The most prominent example may be the first Chinese counsel appearing before the WTO panel, Jun Peng.[51]

There is some evidence that China is moving towards the role as a rule taker in international adjudication. The most significant sign comes from China's revision of

[49] Chinese scholars like Chongli Xu, Zhiyun Liu, and Congyan Cai consider China's interaction with international adjudication has an "outsider" mentality, and it as a new great power should relocate its interest in the international legal regime. Chongli Xu, "The 'Outsider' Mentality and the Poor Chinese International Legal Research (体系外国家心态与中国国际法理论的贫困）" (2006) 24:5 Trib Poltical Sci Law 33; Zhiyun Liu, "Redefinition China's National Interests and Its Transformation on International Law under the New Situation (新形势下中国国家利益的再定位与国际法上的转变）" (2014) 4 J Int Relat Int Law 96; Congyan Cai, "New Great Powers and International Law in the 21st Century" (2013) 24:3 Eur J Int Law 755.

[50] Stuart Harris, *China's Foreign Policy* (Cambridge: Polity, 2014) at 139.

[51] "Jun Peng: The First Chinese WTO Counsel"（彭俊：首位中国籍 WTO 庭辩律师的炼成）(27 October 2015), online: *Sina Finance* <http://finance.sina.com.cn/leadership/mroll/20151027/151523594935.shtml>.

Deng's "24-Character" principle. Soon after taking his position as General Secretary of the CCP, Xi Jinping proclaimed that "the greatest dream for the Chinese now is to realize the great rejuvenation of the Chinese nation."[52] This call was later integrated into Chinese foreign policy in an address Xi made at the Central Conference on Work Relating to Foreign Affairs, where he urged China to "develop a distinctive diplomatic approach matching its role as a major country… conduct diplomacy with a salient Chinese character, a Chinese feature and a Chinese vision."[53] Seeking a "major power diplomacy with Chinese characteristics(*中国特色的大国外交*)" [54] (or the "Chinese approach" in short) indicates that China no longer wants to just accept, follow, copy and reinforce Western theories and practice of international adjudication. Rather, it evokes the exploration of a new approach to free itself from the dominant Western discourse and play a more critical role in the international legal regime in order to express its will and needs. In the Fourth Plenary Session of the 18th Central Committee the CCP stated that China should:

> [v]igorously participate in the formulation of international norms, promote the handling of foreign-related economic and social affairs according to the law, and strengthen our country's discourse power and influence in international legal affairs, use legal methods to safeguard our country's sovereignty, security, and development interests.[55]

China's recent behavior in WTO adjudication may be the most obvious reflection of

[52] "Chinese Dream" (26 March 2014), online: *China Daily* <http://www.chinadaily.com.cn/china/Chinese-dream.html>.
[53] "Xi Jinping Attended the Central Conference on Work Relating to Foreign Affairs and Made an Important Speech" (29 November 2014), online: *Xinhuanet* <http://www.xinhuanet.com/politics/2014-11/29/c_1113457723.htm> accessed 10 June 2018>.
[54] At the Symposium on the International Development and China's Diplomacy held in December 2014, Chinese Foreign Minister Wang Yi put forward the notion of "major power diplomacy with Chinese characteristics". "Wang Yi: Implement the Principle of "Major Power Diplomacy with Chinese Characteristics and Serve for the Chinese Dream" (11 December 2014), online: *Ministry of Foreign Affairs of the PRC* <http://www.mfa.gov.cn/chn//gxh/tyb/gdxw/t1218445.htm> accessed 10 June 2018>.
[55] "Decision of the CCP Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law" *People's Daily* (Beijing, 29 November 2014) 1.

its pursuit of a Chinese approach. Having familiarized itself with WTO rules and procedures, China has recently shifted to an offensive position in WTO courts. In response to the trade war initiated by the United States, China successively filed five complaints with the WTO,[56] displaying a determination to take advantage of WTO adjudication in order to defend and push for its economic and political interests both at home and abroad. This tendency is described by Saadia Pekkanen as "aggressive legalism": "the active use of the legal rules in the treaties and agreements overseen by the WTO to stake out positions, to advance and rebut claims, and to embroil all concerned in an intricate legal game……it is also deliberately meant as a way to use the legal rules as both 'shield' and 'sword'…."[57]

Also, China is seeking to elaborate, expand, or modify the existing WTO agreements with recourse to adjudication. A manifestation of this attempt is two cases China recently brought to the WTO panels, both of which concern the determination of normal value in anti-dumping proceedings regarding products from non-market economy countries, which in the past has included China.[58] Unlike other complaints made by China that address disputes about specific products, these two cases challenge the legal regime of the WTO itself: it is essentially about the definition of market economy status (MES) provided in Section (a) of China's Protocol of Accession and the interpretation

[56] *United States — Tariff Measures on Certain Goods from China (Complaint by China)* (2018), WTO Doc WT/DS543; *United States — Certain Measures on Steel and Aluminium Products (Complaint by China)* (2018), WTO Doc WT/DS544; *United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products (Complaint by China)* (2018), WTO Doc WT/DS562; *United States — Certain Measures Related to Renewable Energy (Complaint by China)* (2018), WTO Doc WT/DS563; *United States — Tariff Measures on Certain Goods from China II (Complaint by China) (2018)*, WTO Doc WT/DS565.

[57] Saadia M Pekkanen, "Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy" (2001) 24:5 World Econ 707 at 732.

[58] *United States — Measures Related to Price Comparison Methodologies (Complaint by China)* (2017), WTO Doc WT/DS515; *European Union — Measures Related to Price Comparison Methodologies (Complaint by China)* (2017), WTO Doc WT/DS516.

of Section 15(d) which seems to set an expiration date for China's non-MES.[59] China's move in the two cases is bold but also represents a landmark. For a long time it has put considerable diplomatic effort in being recognized as a market economy by individual trading partners, though the success of this effort proved to be limited after its MES request was denied successively by the United States and the European Union.[60] Aside from using tactics of diplomatic lobbying and making compromises as it had done in the past, China is now using the dispute settlement process to fill gaps in the WTO agreements and set forth new norms that may justify its MES. Its courage to counter the *status quo* in a visibly confrontational, legitimate manner appears to have astonished the United States. The U.S. Trade Representative Robert Lighthizer told the Senate Finance Committee that the MES fight "is without question the most serious litigation matter we (the United States) have at the WTO right now…a bad decision with respect to non-market economy status with China … would be cataclysmic for the WTO."[61]

Besides its pursuit of reform within the existing regime, an increasing self-awareness

[59] The Section 15 provides a China-specific rule on the measures related to price comparison in anti-dumping investigation involving Chinese products. It states that:
(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (ii) shall expire 15 years after the date of accession…
It is of no debate that if China can clearly show that there are market economy conditions in its domestic industry, then the Chinese producers have a right for any antidumping determination to be based on Chinese prices. The issue is, however, what the criteria of the so-called MES is and who has the right to evaluate the criteria. Another issue is the appropriate legal interpretation of section 15 (d), namely, does the language of (b) indicate that MES shall be granted to China automatically upon the provision's expiration?

[60] When China entered into WTO in 2001, according to a protocol, the members of WTO had to decide over MES status to China after 15 years i.e. 2016. 15 years-time was given to China to internally reform the trade laws in compliance with the WTO. But the United States and EU in 2016 argued that China still provides governmental subsidies in its market, which can distort the international trade.

[61] "Lighthizer: U.S. loss in China NME dispute would be 'cataclysmic' for WTO" (23 June 2017), online: *World Trade Online* <https://insidetrade.com/inside-us-trade/lighthizer-us-loss-china-nme-dispute-would-be-cataclysmic-wto>.

of an independent Chinese approach is also revealed in the concrete steps that China is taking to explore and construct new international orders and institutions. Since 2013, China has embarked on a development strategy involving infrastructure development and investments in countries in Europe, Asia and Africa, known as the Belt and Road Initiative (BRI).[62] Albeit in the form of infrastructure and investment projects, the BRI is said to serve as a decisive strategic maneuver for China to move from a rule taker to rule maker in the international order,[63] as China, through the BRI, becomes a major actor in initiating and developing new international institutions such as the Asian Infrastructure Investment Bank (AIIB).

When constructing the BRI regime, China also has shown interest in creating new international adjudicatory bodies. In June 2018 the Supreme People's Court of PRC (SPC) announced that in July China would establish two China International Commercial Courts (CICC) – one in Shenzhen for disputes arising from the Maritime Silk Road and one in Xi'an for disputes from the overland "Belt" – for the resolution of commercial and investment disputes arising out of projects forming part of the BRI.[64] Although the courts were initially designated as places to hear disputes between commercial parties, their establishment appears to be a strong signal of China's desire to play a more expansive role in international adjudication. Whilst China is emerging as the world's economic and political power, to the present it has only actively

[62] Xinhua News Agency, "China unveils action plan on Belt and Road Initiative" (28 March 2015), online: *The State Council of the People's Republic of China* < http://english.gov.cn/news/top_news/2015/03/28/content_281475079055789.htm>.
[63] Weifeng Zhou & Mario Esteban, "Beyond Balancing: China's Approach towards the Belt and Road Initiative" (2018) 27:112 J Contemp China 487 at 487.
[64] "China to Launch Two International Commercial Courts" (2 July 2018), online: *Xinhuanet* < http://www.xinhuanet.com/english/2018-06/28/c_137287616.htm>.

participated in WTO adjudication.

Many expectations thus have been placed on the creation of the courts. First of all, in addition to serving the BRI, the CICC are expected to become an international dispute resolution hub like those in London, Singapore and Hong Kong.[65] This ambition is obvious in the *Provisions of the Supreme People's Court on Several Issues Concerning the Creation of International Commercial Courts* issued on 27 June 2018. In the provisions, the SPC announced that the new courts will be distinct from a traditional international court or tribunal because they will effectively combine the functions of litigation, arbitration, and mediation in one court and become a one-stop center for international dispute resolution.[66] By doing so, it seems that China has demonstrated its vision of how international adjudication can operate, that is, by transferring the fragmented adjudicatory regime into a coherent one with the development of multifunctional courts/tribunals. Second, given the worldwide trend of establishing courts to hear investor-state disputes (e.g. the investment court system under the CETA), the courts are regarded as an initial step to explore whether China can do so as well.[67] This intention seems to be confirmed by an SPC official's statement at a press conference on 28 June, 2018, where he implied that the CICC might not only focus exclusively on commercial disputes arising from private sectors but also take

[65] Susan Finder, "Update on China's International Commercial Court", (11 March 2018), online: *Supreme Peoples Court Monit* <https://supremepeoplescourtmonitor.com/2018/03/11/update-on-chinas-international-commercial-court/>.

[66] *Provisions of the Supreme People's Court on Several Issues Concerning the Creation of International Commercial Courts*, 2018, art.11. The *provisions* provides that the CICC coordinates with other arbitral and mediation institutions, including the China International Economic and Trade Commission, the Shanghai International Arbitration Center (SHIAC), the Shenzhen Court of International Arbitration and other international institutions. It further establishes a pre-trial mediation as an initial procedure, which parties may opt-in before resort to litigation.

[67] Finder, *supra* note 65.

jurisdiction over cases arising out of contracts between investors and a host government.[68] From these two points of view, it appears that the creation and development of the CICC reflect China's hope to become a great judicial power and even to explore an innovative approach to international adjudication.[69]

7.2 China's Future Attitude towards International Adjudication

Will the emerging Chinese approach necessarily generate a fundamentally different, or even challenging paradigm and lead to a clash with the established Western-led international adjudicatory regime? People who ask this question tend to conceive of the established Western-led regime and the emerging Chinese approach in a mutually exclusive and conflicting manner, assuming China would abandon the existing Western paradigm and develop its own perspectives, rules and institutions for international adjudication. Admittedly, differences between the West and China exist, but they are not impossible to reconcile. Both sides are not fixed in stone; in fact, their attitudes towards international adjudication are evolving organically. The Chinese are traditionally said to be less legalistic and more prone to settle disputes out of court, but their performance in the WTO suggests that China's recourse to adjudication can be like that of the West. Similarly, even within the West where there is a strong litigation tradition, some states are also reluctant to resort to international courts and tribunals for dispute settlement. We should remember that it is Western civilization and Chinese

[68] "The State Council Information Office Held a Press Conference on the 'Opinion on the Establishment of The Belt and Road' International Commercial Dispute Settlement Mechanism and Institutions'" (28 June, 2018), online: *China International Commercial Court* < http://cicc.court.gov.cn/html/1/219/208/210/769.html>.
[69] "New Courts for the Belt and Road Initiative" (2 June 2018), online: *OBOReurope* <http://www.oboreurope.com/en/bri-courts/>.

civilization together, not only Chinese civilization, creating the Chinese attitude today. With a century of Western influence, China has internalized many Western values such as the Westphalian norm about the primacy of national sovereignty and has included them into its policy towards international adjudication. In fact, civilizations are neither totally different nor completely exclusive; instead, civilizations can transcend boundaries and impact each other[70] – some very Western values can become "Chinese" and some Chinese values can also become "Western". In this sense, it can be argued that, in the future, it is likely that China will continue Sino-Western transcivilizational interaction, transcending civilizational boundaries and absorbing both Western and Chinese civilization to form its attitude towards international adjudication.

7.2.1 Toward Westernism

When discussing Westernism in China's attitude towards international adjudication, reference must be made to the Five Principles of Peaceful Coexistence ("Five Principles"). Although China claims that it initiated "mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence" in its bilateral treaty with India in 1954,[71] the concepts underlying the Five Principles—in particular the adherence to the principles of sovereignty and non-intervention—actually derive from the basic tenets of the Westphalian system. Little did the Westerners who negotiated the

[70] Onuma, *supra* note 13 at 83.
[71] "China's Initiation of the Five Principles of Peaceful Co-Existence", online: *Ministry of Foreign Affairs of the People's Republic of China* <https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml>.

Peace of Westphalia in 1684 imagine that their vision of inter-state relations would develop into a pillar of Chinese foreign policy. When creating the Westphalian system, the Westerners considered non-Western states and their peoples to be "uncivilized" and thus did not really treat them as members of the system.[72] With guns and boats, the Western powers dragged China into the Westphalian system and simply imposed the *de jure* bilateral treaties on the Qing government to legitimize their exploitation of resources and market in China.

Ironically, even though the endeavor to incorporate China into the Westphalian system was designed to simply serve Western needs and interests, China has embraced this vision of international order and given it Chinese texture. The Westphalian system can take root in China because its connotation, such as the emphasis on state sovereignty and territorial integrity, somewhat overlaps with the Chinese long-term pursuit for a united, centralized polity, known as *dayitong*. Moreover, the notion of sovereignty maintains the Communist regime's autonomy to freely choose suitable development models without external scrutiny and interference, as well as legitimize China's interactions with different polities, different social systems, and different civilizations in international relations. [73] China's overall attitude towards international adjudication shows that China consistently puts special weight on sovereignty and rejects any third party intervention into disputes concerning its sovereignty and territorial integrity. Instead, China considers that disputes of a

[72] Malcolm Evans, *International Law*, 3d ed (Oxford ; New York: Oxford University Press, 2010) at 12 to 13.
[73] Hanqin Xue, *Chinese Contemporary Perspectives on International Law* (Leiden: Brill, 2012) at 95.

sovereign nature should be resolved through dialogue.[74] In practice, China has resolved a number of bilateral disputes involving sovereignty between it and other countries by negotiation and consultation: a typical example being the hand-over of Hong Kong and Macao as a result of negotiations between China, United Kingdom and Portugal respectively. Further, China has never —whether as a third party or as one of the permanent members of the Security Council of the United Nations—required or urged other states to resolve their sovereign-related disputes by international adjudication.[75] Even in its participation in the ICJ advisory proceedings on territorial issues (for example, in 2018 China provided a written statement on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*) Chinese adherence to bilateral negotiation for dispute settlement remained firm. In its written statement on the Chagos issue, China stated that it "encourages and calls upon States concerned to act in good faith, and seek appropriate solution to relevant issues through negotiation or any other peaceful means agreed to by both parties".[76]

It can be argued that the Five Principles and the adherence to settling sovereign-related disputes with dialogue will remain the main feature of China's attitude towards international adjudication, for at least the near future. The Five Principles have been included in the preamble of the Constitution of the People's Republic of China.[77] In his

[74] "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea"(13 July 2016), online: *Minist Foreign Aff Peoples Repub China* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml>; Pan, *supra* note 32 at 113 to 117.
[75] Sornarajah & Wang, *supra* note 42 at 318.
[76] See in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion), "Written Statement of the People's Republic of China" (1 March 2018), at 14.
[77] "…China consistently carries out an independent foreign policy and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries…" Preamble, PRC constitution.

speech at the Five Principles of Peaceful Coexistence anniversary, President Xi Jinping reaffirmed the importance of the Five Principles, stating that:

> In the new era today, the spirit of the Five Principles of Peaceful Coexistence, instead of being outdated, remains as relevant as ever; its significance, rather than diminishing, remains as important as ever; and its role, rather than being weakened, has continued to grow…Disputes and differences between countries should be resolved through dialogue, consultation and peaceful means. We should increase mutual trust, and settle disputes and promote security through dialogue…China champions and firmly observes the Five Principles of Peaceful Coexistence. Enshrined in China's Constitution, the Five Principles of Peaceful Coexistence constitute the cornerstone of China's foreign policy. China is actively involved in building the current international system.[78]

While China has internalized the Westphalian system and its principles, the West, in contrast, is deviating from them. The post-war era, especially the post-Cold War era, signifies the victory of Western liberal values and recent decades have witnessed how successfully these values, such as the rule of law, democracy, free trade, market-based economics and the universal protection of human rights, have contributed to the process of globalization and quickened the pace of multipolarity.[79] However, with increasing global wealth, Western liberalism has also been weakened by problems arising from globalization and multipolarity and from the incapability of the Westphalian international adjudicatory regime to address these problems.[80] Thus, there are calls to replace the established Westphalian regime with a post-Westphalian regime that is sufficiently open to maintain the vitality of Western liberalism in the future.[81] Actually,

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[78] "Xi's Speech at 'Five Principles of Peaceful Coexistence' Anniversary"(7 July 2014), online: *China.org.cn* < http://www.china.org.cn/world/2014-07/07/content_32876905.htm>.

[79] Coleman & Maogoto, *supra* note 3; Kim, Fidler & Ganguly, *supra* note 3; Ikenberry & Etzioni, *supra* note 3.

[80] Alter, Karen J., "Critical Junctures and the Future International Courts in a Post-Liberal World Order" in Avidan Kent, Nikos Skoutaris & Jamie Trinidad, eds, *The Future of International Courts and Tribunals: Regional, Institutional and Procedural Challenges* (London: Routledge, 2019).

[81] A main feature of the post-Westphalian system is the inclusion of non-state actors in international law. Specifically, non-state actors, including individuals and multinational corporations, should have rights or duties under international law and should participate in international adjudication as an independent party. See Mariano Barbato & Friedrich Kratochwil, "Towards a Post-Secular Political Order?" (2009) 1:3 Eur Polit Sci Rev 317; Edward Newman, "Failed States and International Order: Constructing a Post-Westphalian World" (2009) 30:3 Contemp Secur Policy 421; Eric Allen Engle, "The Transformation of the International Legal System: The Post-

an attempt to break through the Westphalian system had already taken place immediately after WWII, when the Allied powers adjudicated cases of war crimes at the Nuremberg and Tokyo Trials. Since the 1950s, certain international courts and tribunals have gradually gone beyond the state-centric model and permitted the participation of non-state actors in international adjudication.[82] In addition to the ISA, another case is the ECHR, which is allowed to hear individual applications alleging that a state party to the European Convention on Human Rights has breached prescribed human rights standards.[83] This development of a new style of international adjudication has been furthered by the establishment of the International Criminal Court, a permanent international court with jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity and war crimes based on the Rome Statute.[84] Also, recently the European Union has embarked on a project to establish an investment court system under the CETA, the EU-Singapore FTA, the EU-Vietnam FTA and perhaps the future Transatlantic Trade and Investment Partnership (TTIP).[85]

Regarding the emerging post-Westphalian international adjudicatory regime, China seems to take a conservative position and has shown reluctance to participate in. In practice, China refused to be a contracting state of the Rome Statute, claiming that the "the jurisdiction of the ICC inevitably involves a state's criminal jurisdiction and is,

Westphalian Legal Order" (2004) 23 QLR 23.

[82] Gary B Born, "A New Generation of International Adjudication" (2012) 61 Duke Law J 775 at 819 to 850.

[83] "General Presentation", online: *European Court of Human Rights* < https://www.echr.coe.int/Pages/home.aspx?p=court&c=#newComponent_1346149514608_pointer>.

[84] "About", online: *International Criminal Court* < https://www.icc-cpi.int/about>.

[85] Li, *supra* note 7 at 944 to 945.

ultimately, a matter closely related to state sovereignty".[86] We cannot easily determine China's attitude towards international adjudication relevant to human rights because there is no worldwide international human right court. However, given China's long-held opinion that sovereignty is above human rights,[87] we can predict that, in the future, China will refuse the intervention of an international court or tribunal into its human right issues. It appears that ISA is the only area in which China has accepted and participated, but China appears to place ISA more in the realm of economics/trade than in the area of sovereignty (even if this might turn out to be misguided). China's wariness of the post-Westphalian system is understandable. With some reluctance, China embraced Westphalia, with states being equal (in comparison to China being at the center). However, to hold nation states as equal to individuals might be taking one step too far.[88] Moreover, compared with the West, China is relatively lacking in efficient knowledge and experience in the emerging international courts and tribunals. For instance, due to the fact that the composition of many new international courts and tribunals remains (and will remain) Western, China still holds doubts about their impartiality and idependence.[89]

However, China's adherence to the Westphalian system and the Western promotion of the post-Westphalian system will not be a focal point of Sino-Western clash in the future international adjudicatory regime. First of all, even within the West, considerable controversies are arising over the emerging post-Westphalian system. For example, the

[86] Mingxuan Gao & Junping Wang, *Issues of Concern To China Regarding The International Criminal Court* (Beijing, 2009) at 4.
[87] Xue, *supra* note 73 at 162.
[88] Ikenberry & Etzioni, *supra* note 3 at 176.
[89] Hu, Chan & Zha, *supra* note 42 at 187.

growing number of investor claims against sovereign host states has fueled a backlash against the inclusion of investor state dispute settlement clauses in new trade agreements in many Western states which had traditionally been staunch supporters of ISA.[90] Further, recent events, such as Brexit and President Trump's "America First" policy, illustrate that even Western states can be divided on matters relevant to the post-Westphalian system and can be eager to reemphasize sovereignty in their foreign policy. Second, building a post-Westphalian adjudicatory regime does not imply the necessity to erase the existence of sovereignty or to create a world court system that supervises sovereign states, although in the short term such a court may appear to erode states' sovereignty. Instead, it is a regime that aims to strengthen the fabric of the existing international adjudicatory regime; supplementing it with new rules, new institutions and other tools that can facilitate sovereign states' management of their economic and social issues. It is important to note that the development of a post-Westphalian system relies heavily upon a stable and competent Westphalian system, and it also ultimately serves the interests of sovereign states.[91]

7.2.2 Toward Traditionalism

The historical study has demonstrated that there are many traditionalist traces in China's attitude towards international adjudication and has articulated the struggles

[90] For instance, in April 2011 the Australian Government publicly stated that: "In the past, Australian Governments have sought the inclusion of investor–State dispute resolution procedures in trade agreements with developing countries at the behest of Australian business. The Gillard Government will discontinue this practice." Australian Government, Department of Foreign Affairs and Trade, "Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity" (April 2011) at 14.

[91] Ikenberry & Etzioni, *supra* note 3 at 176.

between the absorption of Westernism and the persistence of traditionalism. However, as China's transition from a rule taker to a rule maker in future adjudication-related decision-making processes proceeds, clashes between traditionalism and Westernism raises a new question: will China project its traditional values and culture in its making of an international adjudicatory regime?

The answer seems to be in the affirmative. As a rising power attempting to "conduct diplomacy with a salient Chinese character, Chinese feature and a Chinese vision", China has recently dedicated more effort to regenerating its traditional culture and values. At the 19th CCP National Congress in 2017, President Xi placed special emphasis on the role of China's cultural power in foreign policy. "We will improve our capacity for engaging in international communication so as to tell China's stories well, present a true, multi-dimensional, and panoramic view of China, and enhance our country's cultural soft power,"[92] In 2018, at the closing meeting of the 13th National People's Congress first session, Xi reiterated the importance of traditional Chinese culture in increasing China's global influence:

> We will devote more energy and take more concrete measures in developing a great socialist culture in China, cultivating and observing core socialist values, and promoting the creative evolution and innovative development of fine traditional Chinese culture, so as to better demonstrate the influence of the Chinese civilization, and its power to unite and ability to inspire.[93]

In fact, since its inception, the PRC has tried to incorporate traditional values and practice into its approach to international adjudication. A typical case is the PRC-led

[92] Jinping Xi, "Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era"(18 October 2017), online: *Xinhua* <http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf>.
[93] "Speech Delivered by President Xi at the NPC Closing Meeting"(22 March 2018), online: *China Daily* <http://www.chinadaily.com.cn/hkedition/2018-03/22/content_35894512.htm>.

adjudication of Japanese war criminals. Unlike the Western pursuit for international justice concentrating on the organization of a public trial and the determination of criminals' responsibilities and punishment, the Chinese borrowed ideas from Confucian moral education and achieved justice through reforming criminal minds with socialist pretrial rehabilitation, thereby contributing a new path to international criminal adjudication. Of course, the actual impact of socialist rehabilitation on the entire international adjudicatory regime is very limited. In fact, most people overlook it because the PRC was marginalized by the international community. Now, the ascent of China on the world stage provides more opportunities for it to carve its own path in international adjudication, but these new opportunities also raise a new issue: *which* of its traditional values and cultures will China bring to the international adjudicatory regime?

For many states, especially those from the West, perhaps the greatest concern related to this issue is that, due to its Sino-centric diplomatic traditions, China will become a hegemonic power and will construct a new *tianxia* system in the international adjudicatory regime. This concern is not unreasonable. Immanuel C. Y. Hsu has profiled the Chinese mentality on their engagement with the international community in clear language:

> But it was only through necessity, not free choice, that China had entered into the world community. The old dream of universal empire, the glory of being the Middle Kingdom in East Asia, and the prestige of the tributary system still lingered in the Chinese mind, and their residual effects were clearly discernible. The nostalgia for the past generated a burning hope and even a strong conviction that someday China would again become strong and reassert her rightful place under the sun.[94]

[94] Immanuel Chung-yueh Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858-1880*

Chinese hostility towards the ICJ and its focus on leading the world revolution against capitalist power during the Mao era may be a reflection of this mentality. Through "exporting" communist revolutions and ideas, Mao wanted China, as Christopher Ford noted, to re-emerge as "the catalyst for, the vanguard of, and the civilizational core for a post-revolutionary global order in which All under Heaven would, as of old, turn in awestruck submissiveness toward the Celestial Empire".[95] Also, China's recent assertiveness in the South China Sea disputes and its reference to the "Chinese dream" in Chinese foreign policy seems to reinforce the mentality.[96] Moreover, the newly established international commercial courts that serve the BRI, China's mega-project linking Asia, Europe and Africa, seems to imply the reactivation of the old concept of Sinocentrism, as some observers speculate that, "if the New Silk Road does have a focal point centered on Beijing, the ordering rules and general patterns could be expected to somehow mirror 'Chinese' normative views and principled beliefs".[97]

While the seeds of Sinocentrism might lie deep in Chinese minds, the formation of a new unipolar "Sinocentric" order is rather unlikely to happen in the near future. First, the tendency of multipolarity in the international community is very likely to continue for the long term. Multipolarity means more participants, more interests, more potential

(Cambridge: Harvard University Press, 1960) at 210.

[95] Christopher Ford, *The Mind of Empire: China's History and Modern Foreign Relations* (Kentucky: University Press of Kentucky, 2010) at 192.

[96] William A Callahan, "History, Tradition and the China Dream: Socialist Modernization in the World of Great Harmony" (2015) 24:96 J Contemp China 983; Peter Ferdinand, "Westward Ho—the China Dream and 'One Belt, One Road': Chinese Foreign Policy under Xi Jinping" (2016) 92:4 Int Aff 941; Camilla TN Sørensen, "The Significance of Xi Jinping's" Chinese Dream" for Chinese Foreign Policy: From" Tao Guang Yang Hui" to" Fen Fa You Wei"" (2015) 3:1 J China Int Relat 53.

[97] Nele Noesselt, "One Belt, One Road: A New Roadmap for a Sinocentric World?" (2016), online: *Asian Forum* <http://www.theasanforum.org/one-belt-one-road-a-new-roadmap-for-a-sinocentric-world/>.

for disagreements, and potentially less common ground on which to craft a coherent regime. Power competition among China, the United States, the European Union, Russia, Japan and other emerging economies and their interference in the global decision-making process will be fiercer in the future, leading to an implicit fragmentation of the international adjudicatory regime instead of integration.[98]

Second, given that China is still weak in legal capacity compared to the United States and other Western countries, its position as a rule maker is far from stable. The West may treat China's rise as a major rule maker in the international legal regime as an irreversible trend. However, since China's focus for a century has been on how to act within the existing rules, it is possible that a Chinese attempt to remake these rules could be a long and tortuous process with potentially disastrous consequences. For example, one pressing challenge for the Chinese approach is how to build and develop the CICC. The normal trajectory for establishing an international tribunal or court is top-down: state(s) at the outset define(s) a fixed, clear, unified legal framework with pre-established rules and principles that can operate in the court/tribunal for collective management of resources and issues. However, as many observers have noted, China will have to spend a long time to provide courts with such a framework, as there are too many changes that need to be made to the existing Chinese legal system to

[98] The impasse in the WTO over the appointment of new members of the Appellate Body is just one symptom of the fragmentation in international adjudication. Because of skepticism about WTO dispute settlement, and because of a growing strategic and economic rivalry with China, the United States increasingly challenged the WTO DSM, culminating in its current block on new appointments of the members of Appellate Body. If the WTO member states cannot reach a consensus on the appointments by late 2019, the entire WTO dispute settlement system will be rendered dysfunctional. See e.g. in Robert Mcdougall, "The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance" (2018) 52:6 Journal of World Trade 867; Alex Ansong, "The WTO Appellate Body: Are There Any Viable Solutions?" (2019) 14:4 Global Trade and Customs Journal 169;

accommodate international courts.[99] For example, the Judges Law would have to be amended, because it currently prohibits foreign judges,[100] and without an international panel, how can an international court be called "international"? Another factor is the language issue, since the Chinese Civil Procedure Law provides that only Chinese can be used in proceedings.[101] Whether foreign lawyers can handle cases and appear before the court is also a problem, because the Civil Procedure Law requires foreigners and foreign enterprises to appoint Chinese lawyers to represent them in proceedings.[102]

Insofar as China is still in the period of progression from a rule taker to a rule maker, its attitude towards international adjudication will be based on the Five Principles. It is very unlikely that the PRC (at least in the near future) would seek to restore its traditional *tianxia* worldview. Admittedly, given that China has an extraordinarily long history and has existed for a long period as a relatively culturally and ethnically homogenous country, it has held a continuous and consistent hope to retain traditional cultures and values. But this hope does not require equating the dream of rejuvenating China with the sort of fundamentalism that would demand strict adherence to the ancient Sino-centric traditions. China today is a product of transcivilizational interaction rather than merely Chinese civilization. Nowadays, even the notion of the *tianxia* system in China remains opaque, since Westernization and recent globalization have also been handed down to the Chinese from generation to generation. When the *tianxia* system is articulated in the contemporary context, Western modern visions and

[99] See e.g. Finder, *supra* note 65.
[100] *Judges Law of the People's Republic of China* (Revised in 2001), art 9 (1).
[101] *Civil Procedure of the People's Republic of China* (Revised in 2017), art 262.
[102] *Ibid*, art 263.

ideas are inextricably combined in a Chinese understanding of *tianxia*.[103]

Thus, when China calls for the restoration of traditional cultures and values, it appears to be confused over the definition and scope of these true Chinese traditions. While the Chinese have begun to explore their approach to the international adjudicatory regime, they have no complete idea about what can be deemed to be a "salient Chinese character", a "Chinese feature" or a "Chinese vision".[104] For the most part, the notion of Chinese tradition only serves as a catch-all phrase to allow different groups within Chinese society to project their own ideas onto Xi's "Chinese dream" slogan.

7.2.3 Toward Chinese Nationalism

As indicated above, in its exploration of the Chinese approach to international adjudication, China has encountered an identity crisis: when making rules and new institutions for the international adjudicatory regime, how should the Chinese national identity be defined before the Chinese proposal is tabled? The traditional Chinese self-image was based on shared culture and acceptance of Confucian values,[105] which meant that, if the people consistently applied and observed the Chinese way of life and governance for years, such as practicing Confucian ethical ritual norms, they could be

[103] For instance, Tingyang Zhao (赵汀阳) argues that the political goal of *tianxia* is to create "the trinity of the geographical world (the earth), the psychological world (the hearts of all people) and the political world (the world institution)". It means an institutionally ordered world or a world institution responsible to confirm the political legitimacy of world governance as well as local governance. See in Tingyang Zhao, "Rethinking Empire from a Chinese Concept'All-under-Heaven' (Tian-xia,)" (2006) 12:1 Soc Identities 29 at 39; June Teufel Dreyer, "The 'Tianxia Trope': will China Change the International System?" (2015) 24:96 J Contemp China 1015.
[104] He & Sun, *supra* note 39 at 329 to 330.
[105] James Pinckney Harrison, *Modern Chinese Nationalism* (New York: Hunter College of the City University of New York, 1969) at 2.

deemed "Chinese".[106] In modern times, when China was defeated by the West and subjected to the Western-led international regime, Chinese people gradually assimilated the notion of the modern nation-state and subsequently developed Chinese nationalism, which distinguished between "us" and "them" with modern territorial boundaries and which strove to attain, enhance and protect Chinese sovereignty from invasion. This sovereignty-based self-image has significantly contributed to the rise of China as an independent modern state, but it is now meeting new resistance. Obstacles to this self-image are generated by the economic, social and cultural influences of globalization. While promoting the free mobility of goods, capital and labor, globalization destroys many traditional forms of social and political association, weakens the longstanding conception of the sovereign state and exposes the nation-state's inability to solve many transnational problems. In the increasingly "flat" world in which cultural and geographic divisions are giving way to international interdependence and international cooperation, Chinese nationalism is more likely to be oriented towards the defense of its homogeneous culture rather than towards the construction or defense of a sovereign state.[107]

Perhaps the first step Chinese nationalism should take in its transition process is to downplay its defensive mentality that arises from the sense of victimhood. Since the mid-19th century, China's identity as a "victimized state" has played a crucial role in

[106] The Chinese renowned philosopher Youlan Feng (冯友兰) argued that, even though in history, some alien civilizations like Mongols conquered China, the Chinese still considered the territory is theirs, for the aliens had already adopted the Chinese culture and become the "Chinese". This can be seen in the Chinese official dynastic histories, where the Mongol Empire is treated as a purely Chinese dynasty. See Yu-lan Fung, *A Short History of Chinese Philosophy* (New York: Macmillan, 1966) at 188.

[107] Manuel Castells, *Power of Identity: The Information Age: Economy, Society, and Culture* (United Kingdom: Blackwell, 1997) at 31.

the creation and development of Chinese nationalism. Having been deeply affected by Western (and later Japanese) imperial encroachment into China, the Chinese have been encouraged (from generation to generation) to imagine themselves as members of the "victimized" Chinese state and to unite to provide resistance to third-party intervention in China's sovereign issues. China's attitude towards the Tokyo Trial, the ICJ in the Sino-Indian dispute and the recent South China Sea Arbitration are among the most striking examples of this victimization narrative at play. While memories of the "century of humiliation" no doubt continue to be important, emphasis on this particular memory will impede China's progress to becoming a rule maker in the international adjudicatory regime. Implicit in victimhood is an inferior sense of self: whereby China is the weak country harmed by strong "others", and it has little power to change or prevent these harms. It is true that China used to be weak in the international community, but the situation is not always static. Today, the PRC has gained recognition as a great power through its position as a permanent member of the UN Security Council, its impressive performance in economic development and its wide engagement in international affairs. Should the sense of inferiority continue, it will be impossible for China to stand beside other states and to engage in international adjudication as a true rule maker. Some may argue that keeping the identity of a "victimized state" could bring benefits to China. For example, the victimization discourse could arouse empathy among developing countries that share colonial history with China and thereby gain widespread support for Chinese claims and proposals. Yet, there is a paradox here: to obtain these benefits, China must regard some others (mostly the West) as the superior

who harms it, but to present other states as superior is then proof that China is not qualified to be a rule maker in the international adjudicatory regime. Moreover, given that the victimization discourse always connects the harm that China has supposedly experienced with anti-Western sentiments, China—even though it forms alliance with developing countries—might provoke Western hostility and intensify the North-South tensions in the international adjudicatory regime.

Instead of continuing to appeal to a sense of victimhood, China needs to rebuild its national confidence. First, a "great nation consciousness" should be added to Chinese nationalism.[108] For a substantial period of time, both the government and the Chinese people have been reluctant to acknowledge that China is a developed great nation (*daguo*,大国).[109] This reluctance may stem from a fear that the acknowledgement of great nation status will be regarded as China's pursuit of hegemony. However, the rise of a great nation does not necessarily result in a significant threat to regional and world security.[110] Even some Chinese scholars have noticed that *daguo* is a comprehensive term, which relates to a significant size in terms of territory, population, natural resources, economic market and importance in international affairs.[111] Within a great nation, scholars like Liping Hu believe that the Chinese should build a great-nation consciousness: "The 'great nation' idea should include a kind of confidence, rationality,

[108] Hung-jen Wang, *The Rise of China and Chinese International Relations Scholarship* (Lanham: Lexington Books, 2013) at 23 to 24.
[109] A typical example is the former Chinese Prime Minister Jiabao Wen's interview with Washington Post, where he said: "China is a big country with 1.3 billion people …1.3 billion is a very big number. So if we use multiplication, any small problem multiplied by 1.3 billion will end up being a very big problem. For a very big aggregate divided by 1.3 billion, it will come to a very tiny figure. This is something that is quite difficult for foreign visitors to understand and appreciate." "Interview with Chinese Premie"(21 November 2003), online: *Washington Post* < https://www.washingtonpost.com/archive/business/technology/2003/11/21/interview-with-chinese-premie/5a451649-e60d-429f-b550-9df77ca2a099/?utm_term=.f7cc1a00e78c>.
[110] Liu, *supra* note 49 at 103 to 106.
[111] Wang, *supra* note 108 at 23.

and the heart to the average citizen, as well as gradually formed mental activities".[112] Recently, scholars such like Zhiyun Liu have suggested also that such a consciousness entails the awareness of Chinese interests, responsibilities and obligations; as long as a great-nation consciousness is fostered, the Chinese can view, control and assess China's state behavior rationally.[113]

It seems that the process of building a "great nation consciousness" is starting during President Xi Jinping's administration, reflected in the promotion of the concept "a community of shared future for mankind" (r*enlei mingyin gongtongti* 人类命运共同体). In a keynote speech delivered at the United Nations in Geneva, Xi elaborated on the meaning of "a community of shared future for mankind", that is, forging a world in which states treat each other as equals and engage in mutual consultation and understanding, and creating a security architecture that features fairness, justice, joint contribution and shared benefit. [114] To achieve this vision, Xi on many occasions promised that China, together with other countries, will promote open, innovative and inclusive development that benefits all, increase exchanges between civilizations to enhance harmony, inclusiveness and respect of differences and build an ecosystem that puts nature and green development first.[115] China's proposal of "a community of shared future for mankind" in the international arena illustrates that its foreign policy is shifting from being inward-looking to focusing on the whole of humankind, truly

[112] Liping Hu, "On the Changes of International Evironment and the Tendency of Chinese Foreign Policy: Cultivating the Great Nation Consciousness" (2002) 9 Qianyan 121. Cited in Wang, *supra* note 108 at 23.
[113] Liu, *supra* note 49 at 102.
[114] Jinping Xi, "Work Together to Build a Community with a Shared Future for Mankind" (19 January 2017), online: *Xinhuanet* < http://www.xinhuanet.com/english/2017-01/19/c_135994707.htm>.
[115] Jinping Xi, *Xi Jinping: The Governance of China*, *Vol 2* (Beijing: Foreign Language Press, 2017).

epitomizing a responsible great power in the international community. This shift is especially pertinent at the present moment, when the international order is challenged by unilateralism and protectionism and the need to improve global governance based on international cooperation is so urgent.

Second, the Chinese should cultivate a new self-image that is based on both old and new cultures. Chinese nationalism is not simply a political movement associated with the nation-state. Rather, its psychological dimensions should be recognized as well. As Anthony Giddens and Anthony Smith point out, the "homeland" is tied to a myth of origin, shared experiences and historical memories.[116] It is important to note that China's shared experiences and memories are not limited to the "century of humiliation" or the *tianxia* system; rather, they are China's spiritual and cultural heritage arising from 5,000 years of Chinese history. The country has a fundamentally distinct historical past compared to America and other Western countries, and it stands out among many of the world's old civilizations for its remarkable capacity to maintain its thousand-year-long persistence and homogeneity:[117] even in the modern era when Westernization swept across the globe, China was never really colonized or westernized. The values, ideas and practices that created such an effective, stable and balanced governance mechanism are all positive elements for China (they are also China's potential contributions to the international adjudicatory regime). However, when showcasing to the world the attractiveness and positive aspects of its unique culture and values, China should think

[116] Anthony Smith & Anthony D Smith, *Nationalism and Modernism* (London: Routledge, 2013) at 67; Anthony Giddens, *The Nation-State and Violence: Volume 2 Contemporary Critique of Historical Materialism* (Berkeley: University of California Press, 1987) at 216.
[117] John K Fairbank, *The Cambridge History of China: Volume 10, Late Ch'ing 1800-1911, Part 1* (Cambridge: Cambridge University Press, 1978) at 6.

carefully about how these messages will be perceived internationally, namely, how a nationalistic discourse should balance the old and the new. As multipolarity is now the main tendency in the international order, it is dangerous and somewhat irresponsible to present and promote Chinese policy and its underlying values through a purely Chinese lens, without consideration of the international audience whose perception is shaped by other complicated and different cultures and values. For example, China's claim in many territorial disputes, that "this place has been China's sacred territory since ancient times", has caused international controversies because of its lack of international legal basis.[118] China, in its future attitude towards international adjudication, might not try to comply with Western standards, but it should at least work towards self-examination of its policy and values and be cognizant of what other countries consider to be offensive or inappropriate.

7.3 Epilogue

Recently, attempts to thwart China's rise are increasingly evident. The United States has embarked upon a full-scale trade war with China and both sides lob threats of new trade tariffs at the other, and Chinese tech giant Huawei has met with substantial roadblocks implemented by foreign governments, including the United States and Australia. Given the current international environment, it is conceivable that China's path to becoming a rule maker in international adjudication will be long and rocky. Samuel Huntington, in *The Clash of Civilizations,* predicted that China and the West

[118] Michael Leifer, ed, *Asian Nationalism* (London: Routledge, 2000) at 32.

(as two different cultural groups) would compete for relative military and economic strength, struggle over the control of international institutions, and competitively promote their particular political, cultural and religious values.[119] Huntington's prediction parallels the longstanding "China threat" theory which believes that China, with its long-term objectives that are not compatible with the international (mostly Western) system, values and beliefs, constitutes a major threat to world peace and development.[120] Indeed, China's culture, historical development and socialist polity have created values that may be distinguished from the existing Western-led international adjudicatory regime. For example, China has shown reluctance to being heavily involved in international adjudication relating to human rights, arguing that its conception of rights prioritise collective (state sovereignty) rather than individual rights.[121]

However, Sino-Western value differences cannot represent the rigid dichotomies of good and evil, West and East, or China and the international community. Lasswell and McDougal might be overly optimistic about their articulation of a common notion of human dignity, but they are accurate to the extent that it is common for human beings to pursue values such as well-being, affection, respect, power, wealth, enlightenment, skill and others through social process including the legal process. Like the New Haven School, Confucianism also focuses on the cultivation of virtues, such as *ren*

[119] Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996) at 28 to 29.
[120] See e.g. Shaun Breslin, "China's Emerging Global Role: Dissatisfied Responsible Great Power" (2010) 30:s1 Politics 52.
[121] Raymond John Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press 1986) at 41 to 42.

(benevolence, 仁), *yi* (righteousness,义), *li* (propriety, 礼), *zhi* (wisdom, 智) and *xin* (trustworthiness,信),[122] with a social system that determines how a person should properly act. The differences between China and the West in terms of cultures and values derive from people's different realization of the common good in different circumstances and divergent ways to approach the common good.[123] In the final analysis, Sino-Western differences can be fundamentally perceived as human societies and cultures taking different paths to resolve similar social questions and to achieve common goals.[124]

In this sense, the future of international adjudication is not a battlefield for competition between different values, perspectives and approaches. In the era of globalization, when human societies are facing common problems and sharing common concerns, international adjudication should be developed not only to realize certain values, but also to promote peaceful coexistence and the cooperation of different values and belief systems in solving the problems arising from globalization.[125] The dominance of one approach, be it Western or Chinese, in the long term will hamper this mission and undermine the legitimacy of international adjudication. Non-Western states may reject the jurisdiction of an international court or tribunal that relies heavily on the Western approach because they consider it to be contrary to their interests, and *vice versa*.

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[122] Dagobert D Runes, *Dictionary of Philosophy: Revised and Enlarged* (Lanham: Rowman & Littlefield Publishers, 1984) at 338.

[123][123] Martha C Nussbaum, "Cultivating Humanity in Legal Education" (2003) 70 U Chi Rev 265 at 270.

[124] *Ibid* at 277.

[125] Andreas Paulus, "International Adjudication" in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford University Press 2010) 217.

To some extent then, Onuma's transcivilizational perspective may be beneficial for facilitating the sustainable development of international adjudication. The spirit of the transcivilizational perspective first of all encompasses a plurality of approaches to international adjudication. That is, what the international adjudicatory regime needs to focus on is not one that limits China, but rather democratizes the global decision-making process and encourages more participants, regardless of civilizations they represent, to become rule makers in the system. However, the "transcivilizational perspective" here does not merely refer to pluralism; rather, it also means a process of integration. In the increasingly diverse (and sometimes fragmented) community, civilizations, which are geographically and historically separated, transcend boundaries, come into contact with each other and jointly constitute the international adjudicatory regime, inevitably involving coercion, radical inequality, and intractable conflicts. But the integration process is not mere domination or conflicts instead, as the dissertation finds in China's long term struggle between its "Chinese" self and Western influence, it is about exchange and balance, seeking common ground while preserving differences. Even though civilizations cannot readily control what emanates from the other civilizations, they can at least discover common points therefrom, such as the shared values demonstrated above, and then determine to various extents what differences they can accept and absorb into their own.

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