

Table of Contents

Table of Cases	15
National Legislation	35
Treaties and Other International Legal Instruments	37
Table of Abbreviations	47
I. Introduction – International Adjudication and China’s Rise	51
I.1. A New Ambition – ‘Guiding’ International Order	51
I.2. How Nations Behave – China’s Growing Impact on International Adjudication	52
II. Framework – Theoretical and Methodological Approach	55
II.1. Introduction	55
II.2. Previous Approaches and New Endeavor	56
II.3. Theory and Methodology	60
II.3.1. Theory – Conceptual Framework	61
II.3.1.1. An Interdisciplinary Approach – Questions About Both the ‘Engine’ and the ‘Driver’	61
II.3.1.1.1. Positivism – Facts of Engagement	62
II.3.1.1.2. International Law and International Relations – Reasons for Engagement	63
II.3.1.2. Neoclassical Realism – Power, Structure, and All of Those Intervening Variables	66
II.3.1.2.1. A Complicated History	67
II.3.1.2.2. Reinventing Realism	70
II.3.1.3. Image and Perception – Structure Relayed	73
II.3.1.4. The Chinese Case – Characteristics and Caveats	76
II.3.1.4.1. General Notions	76
II.3.1.4.2. Articulated Perception and Cognitive Beliefs	78
II.3.1.4.3. Published Elite Perception Since 2014	82
II.3.1.5. Final Remarks on Theory – Composite Approach	86
II.3.2. Methodology, Structure and Sources	87

III. Image – Historical Evolution of Chinese Positions on International Law	93
III.1. Introduction	93
III.2. History of Chinese Legal Thought	93
III.2.1. General Questions of Law	94
III.2.1.1. Roots – Confucianism Against Legalism	94
III.2.1.2. Imperial Era – Confucian Legal Thought	95
III.2.1.3. Modernity – Western and Soviet Influence	98
III.2.1.3.1. Late Qing and Republican Reforms	98
III.2.1.3.2. Soviet Models, Sino-Marxism and Pragmatism	99
III.2.1.3.2.1. Soviet Influence	100
III.2.1.3.2.2. Sino-Marxism	101
III.2.1.3.2.3. Pragmatism	102
III.2.1.4. Conclusion	105
III.2.2. International Law – Sovereignty, Intervention, Adjudication	106
III.2.2.1. Pre-Imperial Times – A ‘Chinese Community of Nations’?	106
III.2.2.2. Imperial Era – Hierarchical Tributary System	108
III.2.2.3. Unequal Treaties – Late Empire and Republican Period	110
III.2.2.3.1. Definitional Issues	110
III.2.2.3.2. Late Qing (1839–1911): Confrontation and Lasting Attitudes	112
III.2.2.3.3. Republic (1912–1949): Struggle for Renegotiation	115
III.2.2.4. Maoism (1949–1978)	117
III.2.2.4.1. Early Years and Soviet Legal Thought (1949–1957)	117
III.2.2.4.2. Sino-Marxism Outside the UN (1957–1971)	119
III.2.2.4.2.1. Divergence from the Soviet Path	119
III.2.2.4.2.2. Five Principles of Peaceful Co-Existence	121
III.2.2.4.3. Pre-reform PRC in the UN (1971–1978)	123
III.2.2.5. Pragmatism (1978–): Reform and Opening	125
III.2.2.5.1. A new mindset	125
III.2.2.5.2. Sources of International Law and Domestic Application	128
III.2.2.5.3. Sovereignty and Human Rights	129
III.2.2.5.4. Sovereignty and Intervention	131
III.2.2.5.5. Sovereignty and Adjudication	135
III.2.2.6. Conclusion	138

IV. Object – PRC Practice in International Adjudication	140
IV.1. Introduction	140
IV.2. Economy	140
IV.2.1. Phase One – the PRC and Investment Arbitration	141
IV.2.1.1. China's Accession to the ICSID Convention	141
IV.2.1.2. China's Evolving BIT Practice	146
IV.2.1.2.1. Introduction	146
IV.2.1.2.2. First Generation – Cautious Beginnings	149
IV.2.1.2.3. Second Generation – Access to ICSID	151
IV.2.1.2.4. Third Generation – 'Any Dispute Concerning an Investment'	154
IV.2.1.2.5. Fourth Generation – Americanization	157
IV.2.1.2.6. Comparative View – Last BRIC standing: Chinese exception to the restrictive turn	163
IV.2.1.3. Investment Arbitration with Chinese Participation	175
IV.2.1.3.1. Limited Arbitration Clauses – Interpretation and MFN Use	177
IV.2.1.3.1.1. Broad or Narrow Interpretation	178
IV.2.1.3.1.2. MFN Application to Procedural Provisions	197
IV.2.1.3.2. Temporal Issues – Successive BITs and Time-limits	204
IV.2.1.3.2.1. Ping An v Kingdom of Belgium (ICSID)	205
IV.2.1.3.2.2. Ansung v People's Republic of China (ICSID)	207
IV.2.1.3.2.3. Discussion	209
IV.2.1.3.3. Geographical Scope – Application of Chinese BITs to Hong Kong and Macao	212
IV.2.1.3.3.1. Relevant case law	212
IV.2.1.3.3.2. Discussion	215
IV.2.1.3.4. Availability of the ICSID Convention to SOEs	217
IV.2.1.3.4.1. Relevant case law	217
IV.2.1.3.4.2. Discussion	218
IV.2.1.4. Conclusions on China and Investment Arbitration	220
IV.2.2. Phase Two – the PRC and the WTO DSM	223
IV.2.2.1. China's Accession to the WTO and the WTO DSM	223
IV.2.2.2. DSM Case Law with Chinese Participation	229
IV.2.2.2.1. China as a 'rule-taker' – November 2001 to February 2006	230
IV.2.2.2.1.1. China on the Complainant Side – Safeguard Measures	232

IV.2.2.2.1.2. China on the Respondent Side – National Treatment	236
IV.2.2.2.1.3. Conclusion	238
IV.2.2.2.2. China as a ‘rule-shaker’ – March 2006 to August 2008	238
IV.2.2.2.2.1 China on the Complainant Side – Countervailing & Anti-Dumping Duties	241
IV.2.2.2.2.2. China on the Respondent Side	242
IV.2.2.2.2.3. Conclusion	253
IV.2.2.2.3. China As a ‘Rule-Maker’ – Since September 2008	254
IV.2.2.2.3.1 Using the Accession Protocol Against China – Export Restrictions	255
IV.2.2.2.3.2 Reversal of Obligations – Using the Accession Protocol in China’s Favor	262
IV.2.2.2.3.3 Double Remedies	269
IV.2.2.2.3.4 Countervailing Duties	276
IV.2.2.2.3.5 Anti-dumping Duties	277
IV.2.2.2.3.6 Remaining Cases – National Treatment, MFN & Non-discriminatory Administration of Quantitative Restrictions	281
IV.2.2.2.3.7 Cases at the Consultation Stage	284
IV.2.2.2.3.8 Market Economy Status – ‘D-Day’ Gone Wrong & China’s Controlled Frustration	285
IV.2.2.2.3.9 Conclusion	289
IV.2.2.2.4. Comparative View – BRICS Lessons: Some Learn, Some Don’t	293
IV.2.2.2.4.1. Introduction	293
IV.2.2.2.4.2. Brazil	295
IV.2.2.2.4.3. India	298
IV.2.2.2.4.4. South Africa	300
IV.2.2.2.4.5. Russia	302
IV.2.2.2.4.6. Concluding Remarks on BRICS Experiences in the WTO DSM	303
IV.2.2.2.5. Conclusion – China and the WTO DSM	306
IV.3. Territory	309
IV.3.1. Chinese Territory and the People’s Republic of China	309
IV.3.1.1. Land Borders	310
IV.3.1.2. Maritime Borders	313

IV.3.2. Ongoing Territorial and Law of the Sea Disputes	314
IV.3.2.1. South China Sea – Of Rocks and Frontiers	314
IV.3.2.1.1. Background to the Dispute	314
IV.3.2.1.2. Significance and Limits of Jurisdiction	320
IV.3.2.1.3. Respective Claims and Legal Steps Taken	324
IV.3.2.2. East China Sea – Same, Same, But Different	330
IV.3.2.3. Sino-Indian Border Disputes – Himalayas from Kashmir to Arunachal Pradesh	333
IV.3.3. Interactions With Dispute Settlement Bodies Below the Threshold of Contentious Proceedings	334
IV.3.3.1. Advisory Proceedings	336
IV.3.3.1.1. ICJ Advisory Opinion on Kosovo	336
IV.3.3.1.2. ITLOS Advisory Opinion on Activities in the Area	338
IV.3.3.1.3. ITLOS Advisory Opinion on Illegal Fishing	340
IV.3.3.1.4. ICJ Advisory Opinion on Chagos	343
IV.3.3.2. Engagement with the CLCS	344
IV.3.4. The First Case – Philippines v China on the South China Sea	349
IV.3.4.1. Background	349
IV.3.4.2. Award on Jurisdiction and Admissibility	351
IV.3.4.2.1. China's Non-Participation	351
IV.3.4.2.2. The Tribunal's Jurisdiction	353
IV.3.4.2.3. The Chinese Government's Reaction	357
IV.3.4.3. Award on the Merits	357
IV.3.4.3.1 China's Non-participation	358
IV.3.4.3.2 Historic Rights and the Nine-Dash Line	358
IV.3.4.3.3 Status of Maritime Features	361
IV.3.4.3.3.1 Low-tide Elevations	361
IV.3.4.3.3.2 'Islands' or 'Rocks'?	362
IV.3.4.3.4 Lawfulness of Chinese Actions	364
IV.3.4.3.5 Aggravation of the Dispute and Future Conduct	368
IV.3.4.4. Implications and Aftermath	369
IV.3.4.4.1. Political Reactions and Outlook	369
IV.3.4.4.2. Criticism, Evaluation, and Legal Implications	372
IV.3.4.4.2.1. Criticism Relating to Jurisdiction	372
IV.3.4.4.2.2. Criticism Relating to the Merits	378
IV.3.4.4.2.3. Criticism Relating to the International Rule of Law	380
IV.3.4.4.2.4. Legal Implications	381
IV.3.4.4.3. Conclusions – the Way(s) Forward	382

IV.3.5. Comparative View – Last BRIC to Be Touched, Three Choices Ahead	387
IV.3.5.1. The BRICS Experience – Stocktake and Comparison	387
IV.3.5.2. Relevance for China’s Future Path	396
IV.3.6. Conclusions – Territorial and Law of the Sea Disputes	397
V. Perception – Academic Debates on Engagement with International Adjudication: Chinese International Law Scholars	400
V.1. Introduction	400
V.2. Economy	401
V.2.1. Participation in the WTO DSM	401
V.2.1.1. General Attitude – From Stockholm Syndrome to Confident Offense	401
V.2.1.2. Criticism – Jurisdictional Issues, Protection of Developing States and Implementation	408
V.2.1.2.1. General Points of Criticism	408
V.2.1.2.2. Phase-Dependent Criticism – From Defense to Offense	413
V.2.1.3. Policy Recommendations – The Art of War	417
V.2.1.3.1. Observe, Study, Shape – General Approaches and Early Recommendations from the WTO Accession 2001 to 2006	417
V.2.1.3.1.1. Research, Training and Cautious Engagement	417
V.2.1.3.1.2. Demonstrating Compliance	420
V.2.1.3.1.3. Participating in Reform Negotiations	422
V.2.1.3.1.4. Using China’s Position As a Developing State	423
V.2.1.3.1.5. The Role of Individuals	424
V.2.1.3.2. Engage, Defend, Shape – Recommendations Since the Shift to Active Participation in 2006	425
V.2.1.3.2.1. Confidence, Pragmatism and More Active Participation	425
V.2.1.3.2.2. Continued NME Treatment and Chinese Responses	430
V.2.2. Participation in Investment Arbitration	434
V.2.2.1. General Attitude – March Towards Liberalism	435
V.2.2.2. Criticism – Ambiguous Jurisdiction, Imbalances and ‘Legitimacy Crisis’	438
V.2.2.2.1. Supposed Ambiguities and Interpretation Issues	439
V.2.2.2.2. Nature and Legitimacy of Investment Arbitration	444

V.2.2.3. Recommendations – Identity Shift: From Host State to Home State	447
V.2.2.3.1. Pre-Engagement – Chinese Views on International Investment Arbitration Ahead of the First Case in 2007	447
V.2.2.3.2. Walking a Tight Rope – Chinese Views on International Investment Arbitration as Threat and Protection from 2007	449
V.2.2.3.2.1. Research and Progress – Steady As She Goes	449
V.2.2.3.2.2. Reforms and Influence – Making the Case	449
V.2.2.3.2.3. Identity and Engagement – on What Has Changed	458
V.2.3. Preliminary Conclusions	462
V.3. Territory	465
V.3.1. General Attitude – From Imperialist Oppressor to Guarantor of Peaceful Dispute Resolution	468
V.3.2. Criticism – The Roots of Caution	472
V.3.2.1. General Criticism – Surprising Similarities	472
V.3.2.2. The South China Sea Arbitration – Recent Flare-up	477
V.3.2.2.1. General Criticism and Jurisdictional Matters	477
V.3.2.2.2. Criticism on the Merits	484
V.3.3. Policy Recommendations – How to Tame a Dragon	487
V.3.3.1. General Recommendations – Prepare Yourself and the Arena	487
V.3.3.1.1. Master the Rules – Research & Training	488
V.3.3.1.2. Have a Seat at the Table – Reform & Influence	494
V.3.3.2. Recommendations on Engagement – A Contested Field	498
V.3.3.2.1. Negotiations & Joint Development	499
V.3.3.2.2. Adjudication & Arbitration	503
V.3.3.2.2.1. Criticism of Political Declarations, Negotiations & Joint Development	503
V.3.3.2.2.2. General Preconditions for and Significance of Engagement	505
V.3.3.2.2.3. Engaging to Refute Jurisdiction	509
V.3.3.2.2.4. Advisory Opinions	510
V.3.3.2.2.5. Trial Balloons: Conciliation, Arbitration & Adjudication – New Mechanisms & Special Separate Tribunals	511
V.3.3.2.2.6. Full Embrace – Tackling the Issues Head On	512
V.3.4. Preliminary Conclusions	515

VI. Conclusion – China’s Behavior in International Adjudication	519
VI.1. Imperatives of Greatness – of What ‘Has to Be Done’	519
VI.2. China and International Adjudication – Different Speeds, Same Direction	521
VI.2.1. Round One – Trade Law	521
VI.2.2. Round Two – Investment Law	523
VI.2.3. Round Three – Law of the Sea and Territorial Disputes	525
VI.3. Comparison and Outlook	527
VI.3.1. A Chinese Path – Not Your Ordinary BRIC	527
VI.3.2. The Way Forward – Engaging to Rise	528
References	531