

Understanding China

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The Voice from China

An CHEN on International Economic Law

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The Voice from China

An CHEN on International Economic Law

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Preface

This is a monograph entitled *The Voice from China: An CHEN on International Economic Law*. It actually collects and compiles 24 representative articles written in English by me during different stages of the past 30-odd years since the early 1980s.

As known to all, China holds one of the most ancient and glorious civilizations in the world and has contributed immensely to human civilization. Most Chinese people are very proud of this. However, since the notorious Opium War in 1840, China has suffered from aggression and suppression of the Western powers and Japan for more than a century, which is a humiliation to all Chinese people. When I was young, I was taught of the glorious civilization of China, but I was also educated by and personally experienced the sad national crisis of China. Such complex emotions gradually nurtured my strong sense of national pride and patriotism, my determination to fight against international hegemonism, and my ambition to strive for social justice and to support all other weak countries in the world.

Shortly after New China was established in 1949, since the late 1950s, China suffered from a fragile social and political situation for 20 years. During this period, the legal research and the legal academic community in China also withered. As a junior teacher in the university at that time, I had to shift my teaching field from law to other disciplines, not to mention keeping my mind abreast with the progress of modern international law.

The resolution adopted by the Third Session of the 11th National Congress of the Chinese Communist Party in late 1978 is critical. This Congress corrected social chaos and restored social order and inaugurated the state policy of reform and opening up formulated by the late leader Xiaoping Deng. Without this policy, there would have been no revival of Chinese legal community. In the spring of 1981, Prof. Jerome A. Cohen from the United States visited Xiamen and expressed in one of his lectures his concern that China might arbitrarily confiscate foreign investment and property. Based on my knowledge of relevant Chinese laws and policies, I raised some opposing ideas against his and followed with my explanations. Then, with Prof. Cohen's kind invitation, I went to Harvard Law School to study and lecture between 1981 and 1983. During that time, I read many authoritative

books of international law and international economic law written by prominent US professors, such as Prof. Louis Henkin, Prof. Andreas F. Lowenfeld, and Prof. John H. Jackson, together with many other firsthand documents and records. This experience greatly broadened my insight and provided me with a great deal of fresh knowledge. In the meantime, however, I found that these books contained some opinions with a strong sense of colonialism and economic hegemonism reflecting the US-style double standards rooted in unilateralism and utilitarianism. Such opinions not only went against the just advocate of reforming the old international economic order (OIEO) and establishing the new international economic order (NIEO), but also were against the historical tide of the modern world. I think these opinions are misleading and with major deficiencies.

For this reason, we, Chinese law scholars, should not blindly follow and completely accept these Western opinions. Rather, a correct attitude is to contemplate independently and critically in order for us to be able to distinguish right from wrong. By holding such kind of attitude, in my later three decades of research and writing, I, together with my Chinese colleagues, have always been trying to analyze, distinguish, ascertain, absorb, or reject Western legal theories while steadily taking into account the national situation of China and the common position of the weak countries. In addition to “keeping the essence while discarding the dross” of the Western legal theories, we have raised a series of our own innovative ideas and actively participated in international academic debates, which have helped us to shape our systematic theories on various important legal subjects such as South–North Conflicts and Cooperation, reformation of the OIEO and establishment of the NIEO, as well as law-making, law-enforcing, law-abiding, and law-reforming of international economic law. Our theories are significantly and substantially different and independent from some of the existing Western ones.

Personally, I tried to put forward my independent opinions in each of my papers, and here I would like to just list half of them, which the readers might wish to read through:

1. On the Marginality, Comprehensiveness and Independence of International Economic Law Discipline
2. On the Misunderstandings Relating to China’s Current Developments of International Economic Law Discipline
3. On the Source, Essence of “Yellow Peril” Doctrine and Its Latest Hegemony “Variant”—the “China Threat” Doctrine: From the Perspective of Historical Mainstream of Sino-Foreign Economic Interactions and Their Inherent Jurisprudential Principles
4. To Close Again, or to Open Wider: The Sino-U.S. Economic Interdependence and the Legal Environment for Foreign Investment in China after Tiananmen
5. The Three Big Rounds of U.S. Unilateralism versus WTO Multilateralism during the Last Decade: A Combined Analysis of the Great 1994 Sovereignty Debate, Section 301 Disputes (1998–2000) and Section 201 Disputes (2002–2003)

6. On the Implications for Developing Countries of “The Great 1994 Sovereignty Debate” and the E.C.-U.S. Economic Sovereignty Disputes
7. A Reflection on the South–South Coalition in the Last Half-Century from the Perspective of International Economic Law-Making: From Bandung, Doha and Cancún to Hong Kong
8. Should the Four “Great Safeguards” in Sino-Foreign BITs Be Hastily Dismantled?—Comments on Critical Provisions concerning Dispute Settlement in Model U.S. and Canadian BITs
9. Distinguishing Two Types of Countries and Properly Granting Differential Reciprocity Treatment: Re-comments on the Four Safeguards in Sino-Foreign BITs Not to Be Hastily and Completely Dismantled
10. What should be China’s Strategic Position in the Establishment of New International Economic Order (NIEO)? With Comments on Neo-liberalistic Economic Order, Constitutional Order of the WTO and Economic Nationalism’s Disturbance of Globalization
11. Some Jurisprudential Thoughts upon WTO’s Law-governing, Law-making, Law-enforcing, Law-abiding and Law-reforming
12. Should “the Perspective of South-North Contradictions” Be Abandoned?—Focusing on 2012 Sino-Canada BIT
13. On the Supervision Mechanism of Chinese Foreign-related Arbitration and Its Tally with International Practices

In short, the 24 representative articles written in English by me during the past 30-odd years since the early 1980s, consecutively published mainly in some international leading journals and now being collected and compiled in this monograph, could be deemed as the products of international academic debates. They record, reflect, and embody my personal views on a lot of contemporary basic issues in international economic law and international economic order. These personal views with *Chinese characteristics* are deeply rooted in China’s specific national situation and the common position of the worldwide weak groups and are significantly and substantially different and independent from some existing *voices from Western* strong powers. That is why the book is entitled *The Voice from China: An CHEN on International Economic Law*.

According to their specific theme and content, the 24 representative articles are compiled into six parts:

1. Jurisprudence of Contemporary International Economic Law
2. Great Debates on Contemporary Economic Sovereignty
3. China’s Strategic Position on Contemporary International Economic Order Issues
4. Divergences on Contemporary Bilateral Investment Treaty
5. Contemporary China’s Legislation on Sino-Foreign Economic Issues
6. Contemporary Chinese Practices on International Economic Disputes (Cases Analysis)

The “Introduction” following the brief preface contains a related interview dialogue and a related book review. Both of them are selected from the *Journal of East Asia and International Law*¹ and set here for the convenience of readers to get an overview on my academic advocate in the recent 30-odd years.

The Annex of this Book consists of three articles and one letter, which were consecutively written by world renowned scholars, Prof. Gosovic Branislav and Prof. Lorin Weisenfeld. These articles and letter have all made profound comments on and have given objective valuation to some of my academic ideas and theoretical views. For comparison, the readers may probably wish to browse these comments and valuation. I take this chance to express my cordial thanks to both of them.

Xiamen University, Xiamen City, China
May 2013

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¹ See: *The Journal of East Asia and International Law*, Vol. 4, No. 2, Autumn 2011, pp. 477–514; 533–536.

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Xiamen University, Xiamen City, China
May 2013

An CHEN

Contents

Part I Jurisprudence of Contemporary International Economic Law

1 On the Marginality, Comprehensiveness, and Independence of International Economic Law Discipline	3
1.1 Narrow Interpretation: IEL as a Novel Branch of Public International Law.....	4
1.2 Broad Interpretation: IEL as Marginal Synthesis of International Laws and National Laws That Adjust Cross-Border Economic Relations	5
1.3 Analysis Towards the Above Two Groups of Viewpoints.....	6
1.4 Connection and Difference Between International Economic Law and Public International Law	17
1.5 Connection and Difference Between International Economic Law and Private International Law	18
1.6 Connections and Differences Between International Economic Law and Domestic Economic Law	20
1.7 Connections and Differences Between International Economic Law and International Business Practices.....	24
Annex: Schematic Diagrams of the Mutual Relation as Between International Economic Law and Other Neighboring Legal Departments.....	27
Integrated Diagram.....	27
Decomposed Diagrams	28
References.....	28
2 On the Misunderstandings Relating to China's Current Developments of International Economic Law Discipline	31
2.1 So-Called Nonscientific or Nonnormative	32
2.2 So-Called Polyphagian or Avaricious	35
2.3 So-Called Fickle Fashion or Stirring Heat	36
2.4 So-Called Duplicating Version or Importing Goods.....	38
References.....	43

3 On the Source, Essence of “Yellow Peril” Doctrine and Its Latest Hegemony “Variant”—The “China Threat” Doctrine: From the Perspective of Historical Mainstream of Sino-foreign Economic Interactions and Their Inherent Jurisprudential Principles 45

3.1 Introduction: Is “China Threat Doctrine” History or Reality, Fabrication or Truth?..... 46

3.2 Origin and Essence of “Yellow Peril Doctrine” 49

3.2.1 1870s Version of “Yellow Peril” and “China Threat” by Tsar Russia..... 51

3.2.2 1890s Version of “Yellow Peril” and “China Threat” by the German Empire..... 53

3.2.3 Primitive Version of “Yellow Peril” and “China Threat” by American Hegemonism from the Middle Nineteenth Century to the Late Twentieth Century 57

3.2.4 Revised Version of “Yellow Peril” and “China Threat” by American Hegemonism Since the Twenty-First Century, with the Inheritance from and Development to Its Predecessors..... 64

3.3 Back to Historical Truth: The Long-Standing Mainstream of Sino-Foreign Economic Interactions and Their Inherent Jurisprudential Principles 68

3.3.1 China’s Present National Policy of Opening Up Is the Flourish and Development of Its Fine Traditions in History 68

3.3.2 Ancient China’s External Economic Interaction and Its Jurisprudential Principles..... 70

3.3.3 Semicolonial and Semifeudal China’s External Economic Interaction and Its “Jurisprudential” Principles..... 81

3.3.4 Socialist China’s External Economic Interaction and Its Jurisprudential Principles..... 85

3.3.5 China’s Peaceful Rising and Its Long-Term Peaceful Foreign Policy Are Historically Inevitable 91

3.4 Concluding Remarks: Respecting Historical Truth and Reaching Consensus..... 97

References..... 98

Part II Great Debates on Contemporary Economic Sovereignty

4 The Three Big Rounds of US Unilateralism Versus WTO Multilateralism During the Last Decade: A Combined Analysis of the Great 1994 Sovereignty Debate Section 301 Disputes (1998–2000) and Section 201 Disputes (2002–2003)..... 103

4.1 Introduction..... 104

4.2 Ignition of the Section 201 Disputes: US Unilateralism and Sovereignty..... 107

- 4.3 Conflicts of Sovereignties in the Formation of the WTO System.. 111
- 4.4 The Refraction of Such Conflicts in the United States:
“The Great 1994 Sovereignty Debate” 113
 - 4.4.1 Away with the “S” Word: [Sovereignty
of Other States!] 114
 - 4.4.2 Never Away with the US “S” Word: [“Sovereignty”
(Hegemony) of the United States!] 115
 - 4.4.3 The “Contradiction” and Coordination Between
“Spear” and “Shield” 121
 - 4.4.4 Some Discussions on “Double Standards,” etc. 122
- 4.5 “The Great 1994 Sovereignty Debate” and Section 301 125
- 4.6 The US–EU Economic Sovereignty Disputes Caused
by Section 301: Origin and Prelude 128
 - 4.6.1 US–Japan Auto Disputes..... 129
 - 4.6.2 US–E.C. Banana Disputes..... 130
 - 4.6.3 US–E.C. Section 301 Dispute 133
- 4.7 The US–EU Economic Sovereignty Disputes Caused
by Section 301: Claims and Rebuttals 135
 - 4.7.1 The Claims of the E.C. Representatives..... 135
 - 4.7.2 The Rebuttals of the United States..... 138
- 4.8 The WTO/DSB Panel Report on the Section 301 Case 140
- 4.9 The Equivocal Law-Enforcing Image Concluded from
the Panel Report 142
 - 4.9.1 The Panel Creates a Limit for Its Own Duty, Is Overly
Cautious, Dares Not to Transgress the “Mine Bounds,”
and Is Irresponsible for Its Duties 143
 - 4.9.2 The Panel Hovers Between the “Two Powers”
in Its Attempt to Ingratiate Itself with Both Sides 144
 - 4.9.3 The Panel Leaves the Offender at Large, Criticizing
Pettily While Doing It Great Favor 146
 - 4.9.4 The Panel Is Partial to and Pleading for Hegemony
and Thus Leaves a Lot of Suspicions
and Hidden Perils 147
- 4.10 The Remaining Suspicions and Latent Perils Entailed
by the Panel Report 148
 - 4.10.1 The First Suspicion and Latent Peril 148
 - 4.10.2 The Second Suspicion and Latent Peril 150
 - 4.10.3 The Third Suspicion and Latent Peril 151
 - 4.10.4 The Fourth Suspicion and Latent Peril..... 153
- 4.11 Conclusion..... 156
- References..... 158
- 5 On the Implications for Developing Countries
of “the Great 1994 Sovereignty Debate” and the EC–US
Economic Sovereignty Disputes 159**
 - Reference 163

Part III China’s Strategic Position on Contemporary International Economic Order Issues

6 What Should Be China’s Strategic Position in the Establishment of New International Economic Order? With Comments on Neoliberalistic Economic Order, Constitutional Order of the WTO, and Economic Nationalism’s Disturbance of Globalization 167

6.1 Introduction: International Economic Order, International Economic Law, the Global South–North Contradiction, and China’s Strategic Position 168

6.2 China’s Self-Positioning in History 170

6.2.1 Self-Positioning of Ancient China 170

6.2.2 Self-Positioning of Modern China 171

6.2.3 Mainstream National Consciousness Developed from Post-Opium War for More Than 160 Years and Its Influence on China’s Self-Positioning..... 172

6.3 China’s Self-Positioning in the Future: To Be One of the Driving Forces and Mainstays for the Establishment of the NIEO 174

6.4 Comprehensive and Accurate Understanding of Deng Xiaoping’s 28-Word Foreign Policy Is a Must for Scientifically Establishing China’s Position..... 176

6.5 Brief Comments on Theories of Contemporary International Economic Order and China’s Positioning 190

6.5.1 Neoliberalistic Economic Order..... 190

6.5.2 Constitutional Order of the WTO 196

6.5.3 Economic Nationalism’s Disturbance of Globalization..... 200

6.6 Conclusions 203

References..... 204

7 A Reflection of the South–South Coalition in the Last Half Century from the Perspective of International Economic Lawmaking: From Bandung, Doha, and Cancún to Hong Kong 207

7.1 Introduction 207

7.2 From Bandung to Hong Kong: The South–South Coalition Progresses Unevenly 209

7.2.1 The Bandung Conference Among the South–South Countries: The First Asian–African Conference 209

7.2.2 The Group of 77 Among the South Countries 210

7.3 The Fresh Countenance and Forthcoming Obstacles of the South–South Coalition in the Doha–Cancún Process 214

7.4 The Status Quo and Prospects for the South–South Coalition from Cancún to Hong Kong 218

7.4.1 The Multilateral Negotiations Are in Stagnation After the Cancún Deadlock 218

- 7.4.2 The Prospect of the South–North Multilateral Negotiation Grows Brighter..... 219
- 7.4.3 The South–North Multilateral Negotiation Again Dims 220
- 7.4.4 The Positive Fruits of the Hong Kong Conference with Heavy Negative Comments: Shown Up After Numerous Appeals but Still Half-Masked..... 227
- 7.4.5 New Highlights in the South–North Conflict: Judicial Breakthrough in Recently Litigated WTO Agricultural Disputes 232
- 7.5 Assessment of the Trend After the Hong Kong Conference in the Light of the Historical Track of the South–South Coalition During the Last 50 Years..... 233
 - 7.5.1 The Historical “6C” Track of South–North Conflicts and Its Characteristics..... 233
 - 7.5.2 To Doha Round’s Success: No Way Except Through the Tenacious South–South Coalition..... 235
- References..... 238

8 Some Jurisprudential Thoughts upon WTO’s Law-Governing, Law-Making, Law-Enforcing, Law-Abiding, and Law-Reforming ... 241

- 8.1 China’s Age in the WTO Having Reached Full 9 and Entered 10..... 242
- 8.2 WTO and Its Related International Economic Relationships Must Be Governed by Law 242
- 8.3 “6C Rule” Embedded in the Law-Making Process of IEL for the Past 60 Years..... 243
- 8.4 Relationships Among Law-Making, Law-Abiding and Law-Reforming of the WTO and Its “Rules of Game” 245
 - 8.4.1 Should International Weak Groups Wholly Deny or Entirely Accept Existed WTO and Its “Rules of Game” at All?..... 246
 - 8.4.2 Is Law-Reforming of the WTO and Its “Rules of Game” Nothing but a “Political Challenge”?..... 246
- 8.5 Is the WTO’s Law-Enforcing Body DSB “Bao Qingtian” in the Field of International Economy?..... 248
 - 8.5.1 The “Congenital Deficiency” of the WTO’s Law-Enforcing Body DSB..... 249
 - 8.5.2 The “Postnatal Imbalance” of the WTO’s Law-Enforcing Body DSB 252
- 8.6 To Attain Goodness and Avoid Harmfulness in Law-Abiding and Law-Adapting, to Promote Law-Reforming and Strengthen Up Weak Through South–South Coalition..... 254
- 8.7 Rugged and Tough Path for Weak Groups to Promote Law-Reforming and Strengthen Themselves Up, yet a Bright Prospect Through Advancing with Time 258

- 8.7.1 Rugged and Tough Path for Weak Groups to Promote Law-Reforming and Their Accumulated Achievements During 1947–2000 258
- 8.7.2 Rugged and Tough Path for Weak Groups to Promote Law-Reforming During 2001: Present and Their Bright Future 264
- 8.8 Brief Conclusions..... 267
- References..... 268

Part IV Divergences on Contemporary Bilateral Investment Treaty

9 Should the Four “Great Safeguards” in Sino-foreign BITs Be Hastily Dismantled? Comments on Critical Provisions Concerning Dispute Settlement in Model US and Canadian BITs 273

- 9.1 The Provisions Concerning Dispute Settlement in the Chinese BITs and Their Correspondence with Relevant Provisions in the ICSID Convention..... 274
- 9.2 Essential Provisions Concerning Dispute Settlement in US and Canadian Model Bits 279
- 9.3 China Should Not Hastily Accept the Above US and Canadian Provisions or Their Variations When Negotiating and/or Concluding BITs..... 282
 - 9.3.1 Such Provisions Deviate from the Rights Authorized to Host Countries by International Conventions..... 282
 - 9.3.2 Such Provisions Do Not Match China’s Current Circumstances..... 288
 - 9.3.3 Such Provisions Ignore the Bitter Lessons of Some Bits Harming Weak Countries: The Warning from Argentina’s Dilemma 295
 - 9.3.4 Such Provisions Ignore the Latest Legislative Track-Shift in Two Host Countries: Argentina and the United States 298
- 9.4 Suggestions for Future Sino-foreign BIT Negotiations 302
 - 9.4.1 Strengthening Investigation and Research on Recent Developments in BIT Practice and Acting with High Caution..... 302
 - 9.4.2 Using Well the Authorizations of Relevant Conventions and Firmly Holding onto the Four Great Safeguards 303
 - 9.4.3 Insisting on “Never Repeat” and Timely “Mending the Fold After Some Sheep Have Been Lost” 304
- References..... 306

10 Distinguishing Two Types of Countries and Properly Granting Differential Reciprocity Treatment: Re-comments on the Four Safeguards in Sino-Foreign BITs Not to Be Hastily and Completely Dismantled..... 309

- 10.1 Background 310
- 10.2 Major Viewpoints in “The First Comments” 313

- 10.3 Some New Thoughts for Future Sino-Foreign BIT Negotiations 315
 - 10.3.1 Strengthening Investigation and Research on Recent Internal and External Developments and Acting with High Caution 315
 - 10.3.2 Using Well the Authorizations of the Relevant Conventions and Firmly Uphold the Four Great Safeguards 316
 - 10.3.3 Distinguishing Two Kinds of Countries, Granting Differential Reciprocity, Excluding or Limiting the Application of MFN to International Dispute Settlement Procedures 317
- 10.4 The Theoretical Grounds and Practical Precedents for Adopting Differential Treatment Based on the Distinguishing Two Types of Countries 324
 - 10.4.1 Differential Treatment Conforms to the Universal Philosophy of “Analyze Issues Under Their Concrete Situations” 324
 - 10.4.2 Differential Treatment Conforms to the Basic Jurisprudence of “Equity and Mutual Benefit” 324
 - 10.4.3 Differential Treatment Conforms to the Basic International Law Principle of Supremacy of State Sovereignty 326
 - 10.4.4 Differential Treatment Conforms to the Evolution of the Principle of MFN Treatment 327
 - 10.4.5 Differential Treatment and Exclusion or Limitation of the Application of MFN Treatment to the Dispute Settlement Procedures Conforms to the Latest Repeated Warnings from UNCTAD 329
 - 10.4.6 Differential Treatment Conforms to the Current International Arbitration Practices 330
 - 10.4.7 The Precedents of Granting Differential Treatment and Excluding or Limiting the Application of MFN Clause 332
- 10.5 Conclusion 333
- References 334

- 11 Queries to the Recent ICSID Decision on Jurisdiction Upon the Case of Tza Yap Shum v. Republic of Peru: Should China–Peru BIT 1994 Be Applied to Hong Kong SAR Under the “One Country, Two Systems” Policy? 337**
 - 11.1 Introduction: Summary of the Dispute 338
 - 11.2 Main Issues and Basic Academic Views 339
 - 11.2.1 Main Issues 339
 - 11.2.2 Basic Academic Views 340
 - 11.2.3 Three Aspects of Queries 340

11.3	Queries upon Applicability of China–Foreign BITs to Chinese Nationals with the Right of Abode in Hong Kong.....	341
11.3.1	Historical Overview of Hong Kong Before and After Its Return to China.....	341
11.3.2	The China–British Joint Declaration.....	342
11.3.3	The Joint Liaison Group.....	343
11.3.4	The Basic Law of the Hong Kong Special Administrative Region	344
11.3.5	Applicability of the China–Peru BIT 1994 to Hong Kong Residents	352
11.4	Queries upon Scope of the Arbitration Provision in the China–Peru BIT 1994	353
11.4.1	Historical Overview of China’s Accession to the ICSID Convention.....	353
11.4.2	China’s Policy on the Resolution of Investment Treaty Disputes	356
11.4.3	Scope and Nature of the Dispute Resolution Provision in the China–Peru BIT 1994	363
11.5	Queries upon the Twisted Interpretation Against Articles 31 and 32 of the Vienna Convention of Laws of Treaties	365
11.5.1	How Did the Tribunal Twistingly Interpret Articles 31 and 32 of VCLT?	365
11.5.2	What Scientific Approaches Should Be Used to Find True and Correct Interpretation on Articles 31 and 32 of VCLT per se and the Peru–China BIT 1994?	367
11.5.3	With Respect to Key Instruments Such as Joint Declaration and Basic Law	367
11.5.4	With Respect to Rules of International Law Applicable in the Relations Between the Parties	369
11.5.5	With Respect to Specific Circumstances of the Conclusion of Peru–China BIT 1994.....	369
11.6	Conclusion: ICSID’s Decision on Case No. Arb/07/6 Is Incorrect, Unreasonable, and Unacceptable.....	371
	References.....	371
12	Should “The Perspective of South–North Contradictions” Be Abandoned?: Focusing on 2012 Sino-Canada BIT.....	373
12.1	China’s Scientific Position: Still a Developing Country, Belonging to the South Camp	375
12.2	The Source and Stream of South–North Contradictions.....	377
12.2.1	The Essence of Modern BIT: A Product of South–North Contradiction.....	379
12.2.2	Conclusion of South–North BIT: A Process of Benefits Exchange and Mutual Compromise, Not Necessarily a Process in Pursuit of “Universal Values”	380

- 12.3 2012 Sino-Canada BIT as a Typical Example of South–North Benefits Exchange and Mutual Compromise: Focusing on the “Expropriation and Compensation Clause” 381
 - 12.3.1 South–North Divergence on “Compensation Standard” 383
 - 12.3.2 South–North Divergence on “Compensation Evaluation” 384
 - 12.3.3 A Recent South–North Compromise on Compensation for Expropriation and Its Valuation Criteria..... 387
- 12.4 2012 Sino-Canada BIT as a Typical Example of South–North Benefits Exchange and Mutual Compromise: Focusing on the “Dispute Settlement Clause” 388
 - 12.4.1 South–North Divergence and Compromise on MFN Treatment Exception 389
 - 12.4.2 South–North Divergence and Compromise on Financial and Prudential Carve-Out 391
 - 12.4.3 South–North Divergence and Compromise on Taxation Carve-Out 392
 - 12.4.4 South–North Divergence and Compromise on the Exception of Exhaustion of Local Remedies 394
 - 12.4.5 South–North Divergence and Compromise on the National Security Exception..... 396
- 12.5 Doha Round: Clear Evidence that Perspective of South–North Contradictions Should Not Be Abandoned in the Construction of International Economic Rules..... 397
- 12.6 Concluding Remarks 399
- 12.7 Annex: Interpretation of China–Canada Bilateral Investment Protection Agreement by an Official from the Department of Treaty and Law of MOFCOM 400
 - 12.7.1 What Are the Main Contents of the Agreement? 400
 - 12.7.2 What Is the Significance of Signing the Agreement? 402
- References..... 402

Part V Contemporary China’s Legislation on Sino-Foreign Economic Issues

- 13 To Open Wider or to Close Again: China’s Foreign Investment Policies and Laws** 407
 - 13.1 The 1982 Constitution..... 407
 - 13.2 Current Policies 408
 - 13.2.1 Coordination with China’s Economic Aims 409
 - 13.2.2 Just Rights and Legal Profits 410
 - 13.2.3 Full Decision-Making Power 411
 - 13.2.4 Attraction of Foreign Investors 412

- 13.3 Substantive Laws..... 415
 - 13.3.1 Joint Venture Law 415
 - 13.3.2 Law of Special Economic Zones..... 432
 - 13.3.3 Economic Contract Law..... 437
 - 13.3.4 Sino-Foreign Economic Contract Law..... 439
 - 13.3.5 Trademark Law 439
 - 13.3.6 Patent Law..... 442
- 13.4 Procedure Laws..... 446
 - 13.4.1 Civil Procedure Law..... 446
 - 13.4.2 Arbitration Rules..... 448
- 13.5 Conclusion..... 451
- References..... 452
- 14 To Close Again or to Open Wider: The Sino-US Economic Interdependence and the Legal Environment for Foreign Investment in China After Tiananmen..... 453**
 - 14.1 Washington: Most Favored Nation ≠ Most Favorite Nation..... 454
 - 14.2 Beijing: MFN-China, United States in the Same Boat 455
 - 14.3 Quiet Swallows Sensitive to Climate 457
 - 14.4 Six New Facets Added to the Legal 459
 - 14.4.1 Joint Ventures Law Amended 460
 - 14.4.2 Land-Tract Development Measures Promulgated..... 461
 - 14.4.3 Pudong: A Heart-Side Area Widely Opened 462
 - 14.4.4 Tax Law for Foreign Investors Being Unified and Made More Preferential..... 463
 - 14.4.5 Administrative Procedure Law Enforced 464
 - 14.4.6 ICSID System Accepted 465
 - 14.5 The Baby and the Bath Water 465
- 15 Should an Absolute Immunity from Nationalization for Foreign Investment Be Enacted in China’s Economic Law? 467**
 - 15.1 Reasons for Raising the Question 467
 - 15.2 Two Different Views 468
 - 15.3 The Writer’s Personal Views..... 471
 - References..... 480
- 16 China’s Special Economic Zones and Coastal Port Cities: Their Development and Legal Framework 483**
 - 16.1 Theoretical Debates..... 484
 - 16.2 Practical Development 486
 - 16.3 Baby and Dirty Water: Maturation of the Policy 491
 - 16.3.1 The Yang Yibang Case..... 492
 - 16.3.2 The Zhou Zhirong Case 493
 - 16.3.3 The Wang Zhong Case..... 495
 - 16.4 Legal Framework 503
 - 16.4.1 Preferential Tax Treatments in SEZs, ETEDEZs, COPOCs, and CEOAs 504

16.4.2	Labor and Wages in SEZs, ETEDEZs, COPOCIs, and CEOAs.....	515
16.4.3	Land Use and Management in the SEZs, ETEDEZs, COPOCIs, and CEOAs	518
16.4.4	Enterprise Registration in the SEZs, ETEDEZs, COPOCIs, and CEOAs	521
16.4.5	Technology Imports into the SEZs, ETEDEZs, COPOCIs, and CEOAs	525
16.4.6	Foreigners Entering and Leaving China’s SEZs	528
16.4.7	Economic Combination Between the SEZs et al. and Inlands	529
16.5	Latest Incentives.....	531
16.5.1	Lower Taxes	536
16.5.2	Lesser Fees	538
16.5.3	Cheaper Labor.....	539
16.5.4	More Preferences	540
16.5.5	Greater Autonomy.....	541
16.5.6	Simpler Formalities	542
	References.....	546
17	Why Some Sino-foreign Economic Contracts Are Void and How Voidness Can Be Prevented.....	547
17.1	Contracts Must Be Observed and Illegal Contracts Are Void	547
17.2	The “Eel Fry” Incident: A Series of Illegal Contracts	550
17.3	Contracts with Unqualified Parties Are Void	554
17.3.1	A Noncorporate Body Cannot Be a Party to a Foreign Economic Contract	555
17.3.2	A Corporation That Is Prohibited by Law Cannot Be a Party to a Foreign Economic Contract.....	555
17.3.3	A Corporation Cannot Be a Party to a Sino-foreign Economic Contract That Is Outside Its Registered Business Scope.....	556
17.3.4	At Present, Chinese Citizens Cannot Generally Act in Their Individual Status as Parties to Sino-foreign Economic Contracts	558
17.4	Contracts with Illegal Contents Are Void	560
17.5	Two Contracts Involving Hong Kong	568
17.6	Preventing the Formation of Invalid Contracts and Handling These Contracts	575
	Reference	579
18	On the Supervision Mechanism of Chinese Foreign-Related Arbitration and Its Tally with International Practices.....	581
18.1	Introduction.....	581
18.2	Promulgation of the Arbitration Law	582

- 18.3 A Comparison Among China’s Trial Supervision, Domestic Arbitration Supervision and Foreign-Related Arbitration Supervision, and Some Pending Issues..... 584
- 18.4 A Discussion on the Reasonableness of China’s Separate Legislation for Domestic and Foreign-Related Arbitration Supervision..... 591
 - 18.4.1 The Issue on Tallying Provisions Concerning Foreign-Related Arbitration Supervision of Arbitration Law with Those of Civil Procedure Law 592
 - 18.4.2 The Issue on Tallying Provisions Concerning Foreign-Related Arbitration Supervision of Arbitration Law with Those of International Treaties 596
 - 18.4.3 The Issue on Tallying Provisions Concerning Foreign-Related Arbitration Supervision of Arbitration Law with Those of Advanced Practices in Current Arbitration Enactments of Other Countries 600
 - 18.4.4 The “Uniqueness” of China’s Foreign-Related Arbitration Supervision and the Necessity of Tallying Its Supervision Mechanism with International Treaties and Practices..... 608
- 18.5 Some Ideas on How to Strengthen the Current Chinese Foreign-Related Arbitration Supervision Mechanism 618
- References..... 621

- 19 Is Enforcement of Foreign Arbitral Awards an Issue for Establishment and Improvement in China?..... 623**
 - 19.1 1949–1978 (About 30 Years): Related-Legislation Blank 623
 - 19.2 1979–1994 (15 Years): Domestic Legislation Established and International Conventions Acceded..... 624
 - 19.2.1 Promulgating PRC’s Civil Procedure Law (For Trial Use)..... 624
 - 19.2.2 Acceding to the New York Convention of 1958 624
 - 19.2.3 Acceding to the Washington Convention of 1965..... 625
 - 19.2.4 Promulgating PRC’s Civil Procedure Law (Formal) 625
 - 19.2.5 Promulgating PRC’s Arbitration Law 626
 - 19.3 1995–Present: Judicial Explanations Added..... 627
 - 19.3.1 Obstacles from “Local Protectionism”..... 627
 - 19.3.2 “Double Report System” Preliminary Established: To Overcome the “Local Protectionism” 628
 - 19.3.3 “Double Report System” Strengthened: To Overcome the “Local Protectionism” 630
 - 19.4 Domestic Legislations Need to Be Further Improved..... 630

Part VI Contemporary Chinese Practices on International Economic Disputes (Cases Analysis)

20 The Truth Among the Fogbound “Expropriation” Claim: Comments on British X Investment Co. Versus British Y Insurance Co. Case 635

20.1 Summary of the Case 635

20.2 Questions for Answers 637

20.3 Expert’s Views and Opinions 638

20.3.1 In the CJV Contract Dated on 25 December 1996, Which Aimed to Establish C Power Company, the Provisions of Article 15 on Distribution of Profit Were in Compliance with the Laws at That Time and Have Been in Compliance with the Laws 638

20.3.2 For the “Circular [1998] No. 31” of the State Council on Strengthening the Administration and Carrying on Check of the Foreign Exchange and Foreign Debt Issued in September 1998, Its Legal Force Is Not Complete 639

20.3.3 The “Circular [1998] No. 31” Has No Legal Effect of Retroactivity 641

20.3.4 Actually, the Aforesaid Prohibitive Provisions in the “Circular [1998] No. 31” Have Been Amended Again and Again in 2002 and 2004 643

20.3.5 “Circular [2002] No. 43” Is Not an “Expropriation Decree”; New Agreements on 11 March 2003 Are Not “Behaviors of Expropriation” 646

20.3.6 Provisions in the Foreign Investment Regulations and “Bilateral Investment Agreement Between PRC and UK” Concerning the Expropriation of Foreign Investment 650

20.4 Conclusion 652

21 The Approach of “Winning from Both Sides” Used in the “Expropriation” Claim: Re-comments on British X Investment Co. Versus British Y Insurance Co. Case 655

21.1 [Q1] and [A1] 655

21.2 [Q2] and [A2] 657

21.3 [Q3] and [A3] 657

21.4 [Q4] and [A4] 658

21.5 [Q5] and [A5] 659

21.6 [Q6] and [A6] 660

21.7 [Q7] and [A7] 661

21.8 [Q8] and [A8] 662

21.9 [Q9] and [A9] 663

21.10 [Q10] and [A10]..... 663

21.11 [Q11] and [A11]..... 664

21.12 [Q12] and [A12]..... 665

21.13 [Q13] and [A13]..... 669

21.14 [Q14] and [A14]..... 669

22 On the Serious Violation of Chinese Jus Cogens: Comments on the Case of Importing Toxic Brazilian Soybeans into China (Expert’s Legal Opinion on Zhonghe Versus Bunge Case) 675

22.1 Brief CV of the Expert 676

22.2 Summary of the Case 677

22.3 Questions Consulted..... 679

22.4 Expert’s Views and Opinions 680

22.5 Brief Conclusion 689

Reference 690

23 Isn’t the Strict Prohibition on Importing Toxic Brazilian Soybeans into China “Illegal”?—A Rebuttal to Lawyer Song’s Allegation 691

23.1 Procedural Unfairness 692

23.2 Partiality of Mr. Song 692

23.3 The Powers and Authority of AQSIQ 693

23.4 Whether Professor CHEN Is Qualified to Deal with English Law 711

24 Three Aspects of Inquiry into a Judgment: Comments on the High Court Decision, 1993 No. A8176, in the Supreme Court of Hong Kong 717

24.1 Introduction 717

24.2 Brief Facts 718

24.3 Query One to the Judgment: On the Jurisdiction of the Case 723

24.3.1 The Judgment Detained and Left the Jurisdiction over the Case to the Court of Hong Kong, Obliterated the Close Connections Among Contract A158, Contract B, and Contract C, as Well as Those Between Contract A158 and Bill of Exchange 10732C. It Thus Thoroughly Violated the Legal Principles of “Autonomy of Will” and *Pacta Sunt Servanda* 724

24.3.2 The Judgment Detained and Left the Jurisdiction over the Dispute of the Bill of Exchange to the Court of Hong Kong and Refused to Stay the Proceedings of the Case, Thus Thoroughly Violating the Hong Kong Arbitration Ordinance..... 729

24.3.3 The Judgment Detained and Left the Jurisdiction over the Dispute of the Bill of Exchange to the Court of Hong Kong and Refused to Stay the Proceedings of the Case, Thus Thoroughly Violating the International Treaty That Britain Has Acceded to and to Which Hong Kong Is Legally Bound 731

- 24.3.4 The Judgment Detained and Left the Jurisdiction over the Dispute of the Bill of Exchange to the Court of Hong Kong, Thus Thoroughly Violating Universally Acknowledged International Practice..... 732
- 24.3.5 The Judgment That Detained and Left the Jurisdiction over the Dispute of the Bill of Exchange to the Court of Hong Kong Is a Lack of Due Respect for Chinese Laws and Regulations That Tally with International Practice 734
- 24.4 Query Two to the Judgment: On the Recognition in Chinese Law of the “Autonomy” of the Bill of Exchange Dispute in This Case 739
 - 24.4.1 There Does Not Exist in the Laws of China Such a Strange Expression of “The Autonomy of Bills of Exchange” and Absolute “Independence” of Bills of Exchange as Extremely Esteemed by Mr. Dicks 740
 - 24.4.2 Mr. Dicks’ Citations from the Procedures for Bank Settlements of China Are Garbled and Out of Context.... 741
 - 24.4.3 When Citing Mr. Guo Feng’s Article, Mr. Dicks Has Emasculated Its Rerequisite and Garbled Its Original Meaning..... 743
 - 24.4.4 Mr. Dicks’ Opinion Runs Counter to the Generally Accepted Viewpoints of Chinese Academic Works on Bill Laws, the Stipulations of Relevant International Convention, and the Bill Law of China..... 745
 - 24.4.5 Mr. Dicks Has Distorted the Original Text When Quoting the Civil Procedure Law of PRC as Evidence for the Said “Autonomy of Bills of Exchange” 748
- 24.5 Query Three to the Judgment: On the Defendant’s Right of Defense in This Case 749
 - 24.5.1 The Reason “It Was Too Late” Is Not Tenable 750
 - 24.5.2 Denying Equal Right of Defense to the Defendant Is Against the Principle of Equity and International Practice on Litigation Procedures 751
- 24.6 Conclusion: The Judgment Based on the Presumptuously Fabricated Rules (Made by Mr. Kaplan and Mr. Dicks) Will Definitely Lose All Its Legal Binding Effect 752
- References..... 752
- Annex** 753
- Index**..... 781

Abbreviations

AB	Appellate Body
AHB	Appellant's Hearing Bundle
ASEAN	Association of South-East Asian Nations
BIT	Bilateral Investment Treaty
CARICOM	Caribbean Community and Common Market
CCCPC	Central Committee of Communist Party of China
CEOA	Coastal economically open areas
CIA	Central Intelligence Agency
COCOM	Coordinating Committee for Export Control
COPOCI	Coastal port cities
CPC	Communist Party of China
DDR	Doha Development Round
DSB	Dispute Settlement Body
ELO	Expert's Legal Opinions
ETEDEZ	Economic and technological development zones
FDI	Foreign direct investment
GATT 1947	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
IBL	International Business Law
IBP	International Business Practices
ICSID	International Centre for Settlement of Investment Disputes
IEL	International Economic Law
IELR	International Economic Legal Relation
IEO	International Economic Order
IER	International Economic Relations
ITL	International Trade Law
LDCs	Least developed countries
MIGA	Multilateral Investment Guarantee Agency
NAM	Non-Aligned Movement
NAMA	Non-agricultural market access