Thomas S. Eder

China and International Adjudication

Caution, Identity Shifts, and the Ambition to Lead

Nomos

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

Thomas S. Eder

China and International Adjudication

Caution, Identity Shifts, and the Ambition to Lead

Nomos

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

a.t.: Wien, Univ., Diss., 2020

ISBN 978-3-8487-7108-0 (Print)
978-3-7489-2562-0 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-7108-0 (Print)
978-3-7489-2562-0 (ePDF)

Library of Congress Cataloging-in-Publication Data
Eder, Thomas S.
China and International Adjudication
Caution, Identity Shifts, and the Ambition to Lead
Thomas S. Eder
589 pp.
Includes bibliographic references and index.

ISBN 978-3-8487-7108-0 (Print)
978-3-7489-2562-0 (ePDF)

Onlineversion
Nomos eLibrary

1st Edition 2021
© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2021. Overall responsibility for manufacturing (printing and production) lies with Nomos Verlagsgesellschaft mbH & Co. KG.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

Acknowledgments

In considering the plentiful support I have received, I want to start with my wonderful wife Jaryna. Thank you for keeping me going throughout, inspiring me and always pushing me forward. I am grateful to my brother Andreas for being a fellow traveler who understands, and to my parents for initially setting me on this path and for their unconditional support.

I am greatly indebted to Irmgard Marboe, whose patience and guidance made this book possible. James Fry and Jerome Cohen provided me with important insights and allowed me to continue my research at Hong Kong University and NYU. I am grateful to Ursula Kriebaum, Friedl Weiss and Hans-Peter Neuhold for thoughtful comments on earlier versions of the text. All Mainland Chinese academics who graciously agreed to be interviewed by me gave this study a depth that it could not have otherwise attained. Finally, I am grateful to the University of Vienna and the Institute of Human Sciences (IWM) in Vienna for supporting my research abroad and writing phase financially.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

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

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

VI. Conclusion – China's Behavior in International Adjudication

VI.1. Imperatives of Greatness – of What 'Has to Be Done'

This study has demonstrated that extensive debates among Chinese international law scholars preceded and informed a series of steps towards gradual PRC engagement with international adjudication.[2580] Modes of engagement have been continually refined and adjusted, with academic debates addressing both very technical micro-level issues and broad questions of overall guidance and 'mission.'

Indeed, before President Xi Jinping arrived at his 2017 call for China to 'guide' global governance that was noted at the beginning of this book,[2581] influential Chinese international law scholars had tightly connected the country's re-emergence as a great power with influence on the international legal order.

Drawing historical comparisons, He Zhipeng argued that influence on and high-level performance within international law was a clear mark of every modern great power and the most important aspect of what he defines as 'soft power.' Citing – inter alia – the Netherlands, Grotius and freedom of the seas, the British Imperial system and colonialism, as well as the post-WWII system of international rules and organizations established under US-leadership, he considered the latter the most effective and also cheapest system of leadership and one for China to learn from. Only the reduction in threat perceptions and long-term influence achieved by 'international law powers' would make China a 'genuine' power.[2582] This chimes with Yi Xianhe's notion that China will not be able to consolidate its successes in the economic and political realm, if it does not also think and act as a 'leader country' in international law.[2583]

2580 See Chapters IV and V.

2581 See Chapter I.1.

2582 Zhipeng He, 'Becoming a Great Power in International Law' (n 2) 148–150, 151, 153, 154. On the importance of both skillful use of and compliance with international law for crucial soft power gains see also Han Yichou, 'Study on China's Strategy' (n 2007) 123–136.

2583 Yuefeng Qi (n 2).

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

Among supposed preconditions for becoming an 'international law power,' one can find improving international law education, building a strong talent pool of theorists and practitioners, and developing one's own international law theories. Practical abilities would have to be sufficiently strong for active engagement in every field of international law – including maritime and territorial delimitation – and not only in law making, but also in adjudication. Such engagement in international adjudication, in turn, would be necessary to maintain the image of a 'responsible,' 'rule of law power'; and image something crucial in times of global public opinion pressures.[2584]

China's approach could be cautious but it had to be active, it could include refusals to take part in individual cases at certain points in time (ie the South China Sea arbitration) but needed to include a steady move towards more participation – considered clearly preferable to 'out-of-court,' 'indirect,' 'lagging' responses.[2585] This was to say that a nation's life was long; international law behavior creating a good image and keeping cooperation and development opportunities open was key, while the importance of individual cases should not be overestimated.[2586] Yi maintained that China should adopt a dialectical view on international adjudication. Indeed, several WTO cases were lost, but the Chinese economy soared. Even with disputes on territorial or maritime delimitation at the ICJ – eg *Cameroon v Nigeria* – a country may lose on one issue and win on another, while a 'fair' outcome would still be relatively likely. Expectations would have to be realistic, the outlook mature.[2587]

Exclusive reliance on political negotiations and language alone has been deemed problematic – from trade to territorial disputes – in times of an increasingly legalized and judicialized international society. All other means, from political to economic to military, have been classified as mere tempo-

---

2584 See Zhipeng He, 'Becoming a Great Power in International Law' (n 2) 151; Zhipeng 志鹏 He 何, '国际司法的中国立场' (China's position in international justice) [2016] (2) *Fashang Yanjiu* 45, 52–53.

2585 Zhipeng He, 'China's position in international justice' (n 2584) 53.

2586 Zhipeng 志鹏 He 何, '开放发展与国际法: 风险及应对' (Open Development and International Law: Risks and Countermeasures) (2017) 35 (3) *Zhengfa Luntan* 18–19: 'countries can win battle after battle and still lose wars'. A positive example was seen in how the US and the British Empire handled disputes in the late 19th century *Alabama Claims Arbitration*.

2587 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303; Yuefeng Qi (n 2).

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

rary tools. Meanwhile, making 'full use' of international law, working towards reform from within through norm creation and interpretation, and attaining powers of persuasion, have been judged best suited to protect China's interests in the long term.[2588] While openness and engagement would expose it to risks, such could be reduced through preparation and experience, while risks attached to rejecting engagement were systemic and much harder to overcome.[2589]

VI.2. China and International Adjudication – Different Speeds, Same Direction

This study claims that the PRC as an actor in international adjudication is best understood as a skeptical pragmatist on a historical mission. China has to become a great power again. For that to be realized and consolidated, China has to become a 'leader country' in international law. Progressively engaging more with international adjudication is part and parcel of that. The system has to be engaged as it is and shaped from within. All tools are to be used. At the same time, the Chinese scholarly community and political leadership take pitfalls, commensurate preparation and parallel legislative negotiations to prepare the ground extremely seriously. Engagement will not be rushed. This is a gradual process. Proper time is taken, and Beijing will only take the next step when it feels ready or that it has no choice.

VI.2.1. Round One – Trade Law

This century's first decade saw the PRC submit to international adjudication for the first time. Trade law was first. China joined the WTO, thus recognized the jurisdiction of the WTO DSM, and started to participate in an inflationary number of proceedings.

This was something qualitatively new for the PRC. It showed commitment to and faith in international law to a degree that let it compromise on the 'absoluteness' of sovereignty.[2590] It is a sea change that references to

2588 See Chapter V. See also Zhipeng He, 'Open Development and International Law' (n 2586) 18–19, 24.

2589 Zhipeng He, 'Open Development and International Law' (n 2586) 21–24.

2590 See also eg MD Harpaz, 'Sense and Sensibilities of China and WTO Dispute Settlement' (2010) 44 *Journal of World Trade* 1155, 1156.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

supporting norms of international law are now considered legitimate arguments in policy debates.[2591] Some have even diagnosed a new 'aggressive legalism' in East Asia overall (PRC, Japan and Republic of Korea).[2592]

However, for the first five years in the WTO, China remained a rather passive litigant, aimed at finding mutually-agreed solutions where possible ('rule-taker' phase 2001–2006).[2593] Meanwhile, Beijing heeded the two main recommendations by its scholarly community: build litigation capacity and gain influence on legal development.[2594] Capacity building entailed domestic legislative and institutional reforms, incentivizing research, training and coordination between all relevant domestic actors, and garnering experience through frequent third-party participation. Patiently building influence meant taking a more prominent role in the Doha Round (and when it later *de facto* ended, joining or (co-)initiating new multi- and plurilateral negotiations), keeping reform negotiations perpetually ongoing, securing prominent positions for Chinese citizens (eg as AB members and deputies to the WTO director-general), and trusting in the fact and consequences of China's rise in relative power.[2595]

Scholars then considered China ready for, and an expansion of experience gathering to require, ending the focus on settlements.[2596] The PRC indeed began to fight complaints all of the way to the AB and for the first time accepted defeat in international adjudication ('rule-shaker' phase 2006–2008).[2597] Soon enough, the next step was taken, and the government was encouraged to file more complaints itself, and to use the DSM to shape interpretations (especially of China's Accession Protocol) and legal development in the absence of progress in the Doha Round ('rule-maker' phase since 2008).[2598] Views of the mechanism became more whole-heartedly positive, no longer describing membership as something forced upon China, while concerns about enforcement betrayed greater confidence.[2599]

2591 See also Clarke (n 1432) 564.
2592 See eg Saadia Pekkanen, 'The Socialization of China, Japan and Korea (CJK) in International Economic Law: Assessment and Implications' (2010) 104 *Proceedings of the ASIL Annual Meeting* 529.
2593 See Chapter IV.2.2.2.1.
2594 See Chapter V.2.1.3.1.
2595 See also Chapters IV.2.2.1 and IV.2.2.2.4.6.
2596 See Chapter V.2.1.3.2.
2597 See Chapter IV.2.2.2.2.
2598 See Chapters IV.2.2.2.3 and V.2.1.3.2.
2599 See Chapter V.2.1.1.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

Cases duly proliferated, China was ever faster to levy complaints when supposed grounds arose, and it stayed the course even when basic assumptions about the trade law system were challenged in the late 2010s. The PRC government and Chinese international lawyers had qualified most complaints about the WTO system with a hopeful view to the year 2016, when a fifteen-year deadline in paragraph 15 (d) of China's Accession Protocol would kick in, and alternative anti-dumping price calculation methodologies would have to be dropped (ie so-called 'non-market economy'-treatment would end). This was seen as a grand caesura, whereafter, Chinese trust in the system would grow further, and case statistics would become more balanced. When the US and EU viewed the supposed deadline differently – also when the US took protectionist steps under the Trump administration from 2017 – China reacted within the system and filed further complaints.[2600] What is more, Chinese scholars interviewed for this study unequivocally stated that China should remain patient and stay the course even if these cases should be lost. Much of the status quo was to now be protected in line with Chinese interests, the AB defended against US attacks, and limited and gradual reforms to be pursued without excessive haste.[2601]

VI.2.2. Round Two – Investment Law

In a second step, the PRC and its companies started to engage in investment arbitration in the 2010s, whereas the number of relevant disputes only rose gradually.

This had been preceded by China agreeing to sign BITs since 1982 ('first generation' BITs), to include the option of arbitration at ICSID from 1990 ('second generation'), and to allow for investment arbitration for all investment disputes instead of just such about the amount of compensation for expropriation from 1998 ('third generation'). From 2008, PRC treaty practice changed further, with 'Americanization' in the sense of – inter alia – including much more detailed provisions or even separate sections on dispute settlement, and further addressing market access ('fourth generation').[2602]

2600 Para 15 (d) Accession Protocol; See Chapter IV.2.2.2.3.8.
2601 See also Chapters V.2.1.3.1.2 and V.2.1.3.2.2.
2602 See Chapter IV.2.1.2.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

China's very active conclusion of BITs contrasts strongly with its scarce and only recent engagement in investment arbitration. In the first years of this book's research period, China still refrained from actual engagement. This was in line with a Chinese scholarly discourse less unequivocally positive on judicial mechanisms in this field of law. Central recommendations, meanwhile, to focus on capacity building and gaining influence on legal development, were the same as and deemed just as important as in trade law. Despite an early consensus for liberal BITs, caution was urged on actual participation in arbitration, and attempts to convince foreign investors to refrain from that option.[2603]

From 2007 to 2018, Chinese investors initiated five arbitrations – the first Mainland investor in 2010 – and foreign investors filed three cases against China since 2011. Only five awards have been rendered, with the respective three 'firsts' in 2011, 2015 and 2017.[2604] The caseload has been growing very slowly, while Chinese international lawyers called upon Beijing to assiduously learn the lessons from every case and adapt the country's BITs to avoid supposed surprises and optimize outcomes. At the same time, although Beijing criticized the first awards, discourse turned strongly in favor of participation.[2605]

Over the research period, the PRC underwent a change in identity from 'host state' to 'home state' that was visible in scholarly discourse. Debates shifted from generalized notions of excessive investor rights and a supposed 'legitimacy crisis' in investment law to sober and concrete BIT reform proposals, mostly in line with an 'American' model deemed more amenable to balancing investor rights with space for public interest measures: 'textual precision,' more extensive and narrowed-down ISDS provisions, clearer transition, joint interpretation, and general exception clauses. Some authors even recommended lobbying developing nations to join the ICSID Convention, and mainly using BITs to secure better market access and protection for Chinese investors.[2606]

With the goal of gaining a stronger voice on 'balanced' legal development, Chinese scholars recommended 1) active participation in arbitration, 2) retracting China's Article 25 (4) ICSID Convention notification, as well as 3) making proactive use of high-profile bilateral negotiations (eg on the CAI with the EU) and multilateral processes (eg G20 working groups

2603 See Chapter V.2.2.3.1.
2604 See Chapter IV.2.1.3.
2605 See Chapter V.2.2.3.2.
2606 See Chapters V.2.2.2 and V.2.2.3.2.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

and 'Guiding Principles').[2607] Influence should be gained on the future of ISDS, but also substantive clauses, whereas Beijing is urged to go with, and influence from within, trends – inter alia – regarding labor and environmental provisions, the role of NGOs and amicus curiae briefs. Change is considered more likely, both because developed states adjusted positions after experiencing the respondent state role,[2608] and because developing states are more frequently in the capital-exporting role.[2609]

VI.2.3. Round Three – Law of the Sea and Territorial Disputes

The 2020s might very well see China submitting to international adjudication in more politically sensitive matters: law of the sea disputes, including on maritime delimitation, and maybe even territorial disputes. Scholarly discourse shows parallel patterns with such on trade and investment law, and crucial steps in *de facto* participation have been taken since 2008: advisory proceedings at the ICJ and ITLOS, as well as CLCS proceedings on continental shelf delimitation.

Through its ratification of UNCLOS, and despite its later Article 298 declaration, the PRC accepted a certain scope of compulsory dispute settlement for law of the sea matters in 1996. China also for the first time submitted comments in advisory proceedings starting in 2009, both at the ICJ (*Kosovo*, 2009; *Chagos*, 2018) and ITLOS (*Activities in the Area*, 2010; *Sub-Regional Fisheries Commission*, 2013). Moreover, it commented on submissions to the CLCS (Japan, 2008; Vietnam, 2009; Vietnam and Malaysia, 2009), and itself made a partial submission (2012).[2610] While China was not yet ready to participate in contentious proceedings initiated by the Philippines – ie the Annex VII UNCLOS *South China Sea Arbitration*, 2013–2016 – participation in the *Chagos* advisory proceedings demonstrated that the PRC intends to continue on its path of gradual engagement.[2611]

2607 Art 25 (4) ICSID Convention; OECD, 'G20 Guiding Principles' (n 2248).

2608 On changes to international investment treaty practices being likely as 'world economic power relationships' change, as well as 'Western capital exporters' perhaps becoming more defensive in interpretation methodology when faced with 'new economic powers,' see also Wälde, 'Interpreting Investment Treaties' (n 844) 780.

2609 See Chapter V.2.2.3.2.

2610 See Chapter IV.3.3.

2611 See Chapters IV.3.3. and IV.3.4.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

Chinese scholars have, within the research period of this study, lauded the ICJ for having changed for the better, and painted a largely positive picture of the work, decisions rendered, and principles developed both by the Court and ITLOS. Representation of developing states, and particularly China, through their citizens has been important.[2612] Harsh criticism of *Philippines v China* has generally been restricted to the tribunal in question.[2613]

Policy recommendations in many ways mirror patterns in trade and investment law in early phases of or before actual participation: increase law of the sea litigation capacity for potential future cases (and collect evidence), improve research, teaching and training, and build cooperation between academia and officials. Authors also adapted arguments after *Philippines v China* in recognition of what had failed to convince (ie de-emphasizing the 'nine-dash line' and historic rights). In a second key overlap, Chinese international lawyers counsel a perpetual reform push supported by efforts to increase China's 'discursive power.' This should entail influence and emphasis on certain state practice – particularly such contravening decisions in *Philippines v China* – and potentially also two-thirds majority UNGA resolutions on 'important questions'. New challenges should be underlined (eg through climate change), and UNCLOS review committees, further implementation, supplementary or regional agreements lobbied for (eg on the definition of 'islands' and 'archipelagos', historic rights, or military activities in the EEZ).[2614]

On actual participation in contentious proceedings caution mostly prevailed in Chinese academic debates, as was the case for a good while on investment law. Nonetheless, a very broad spectrum of opinions unfolded on law of the sea and even territorial issues. Some went as far as recommending immediate full engagement with ITLOS and ICJ. Several (mostly political) developments led to (self-)enforced homogeneous support for the government line of categorical rejection after 2013.[2615] However, it is unlikely that this would suddenly represent the cognitive beliefs of all Mainland Chinese international lawyers. During interviews conducted for this study, the clearly predominant position was that the PRC should be open to submitting law of the sea and territorial disputes to international adjudication at some point in the future. This was again linked both to levels of

2612 See Chapter V.3.1.
2613 See Chapter V.3.2.2.
2614 See Chapter V.3.3.1.
2615 See Chapter II.3.1.4.3.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

China's preparedness and of systemic influence and power. Several interviewed professors were willing to approximate a date, namely during the 2020s.[2616]

VI.3. Comparison and Outlook

VI.3.1. A Chinese Path – Not Your Ordinary BRIC

On its way towards becoming a 'leader country' in international law and great power overall, China will closely monitor – inter alia – other large powers' practice in international adjudication. However, importantly, BRICS partners and other large emerging economies are not necessarily indicative of the steps that the Chinese government will take.

Most similarities can be found in trade law, where China has learned and taken heart from Brazil and India's experience and successes. It has sought to emulate aspects of their previous strategies to improve litigation capacity and tactics, as well as joining them in core influence groups in WTO reform negotiations. Only the recently-acceded Russia and disengaged South Africa are less relevant. What sets the PRC most clearly apart – next to its forced focus on its Accession Protocol and lop-sided DSM statistics as a frequent respondent – is its enormous size as a trade power and grand overall ambitions. China has escalated DSM participation in a more linear way than others, filing complaints much more frequently in its most recent phase of engagement, and strategically refraining from filing complaints against anyone other than the US or EU.[2617]

In investment law, China has acted quite differently compared with the other BRICS. It developed the first and largest treaty network, and took the longest time to then actually participate in investment arbitration, demonstrating its dedication to caution and preparedness. Most importantly, China's ambition and convictions regarding the importance of international law engagement have not allow it to join the other BRICS states' restrictive turn over the last decade. This is despite what Chinese scholars and the government in Beijing perceived as several unfortunate case law developments (see eg the debates about *Tza Yap Shum* and *Ping An*). South Africa started to unilaterally terminate its BITs in 2012, India's new Model BIT 2015 severely restricts access to investment arbitration,

2616 See Chapter V.3.3.2.
2617 See Chapter IV.2.2.2.4.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

Russia's 2016 guidelines on investment treaties – inter alia – allow for state party consultations that can suspend an ongoing arbitration, and Brazil took investment arbitration out of its treaty drafts to get a first one ratified in 2017. Meanwhile, China has merely recalibrated to gradually shift its BIT practice from the European to the American model.[2618]

On law of the sea and territorial disputes, all BRICS states were reticent to engage, most chose to refuse any participation in at least one contentious case (India: *Pakistani Prisoners of War*; Brazil: *Certain Questions concerning Diplomatic Relations*; Russia: *Arctic Sunrise*), and some also issued diplomatic position papers while proceedings were ongoing in what could be considered indirect participation (India: *Right of Passage*; Russia: *Arctic Sunrise*). China was the last BRICS state to be confronted with contentious proceedings, whereas India and Russia eventually even launched cases themselves (*ICAO Council* and "*Volga*"). Moreover, India has become willing to even settle maritime boundary delimitation through international adjudication (*Bay of Bengal*). Discourse patterns among the *influential elite* of China's international law scholars indicate that the PRC is likely to gradually move from Brazil and South Africa (ie categorical rejection) to Russia (ie cautious and ambivalent testing of the waters) to India (ie more substantial engagement).[2619]

VI.3.2. The Way Forward – Engaging to Rise

This book submits that a common mindset and common concern underlie China's academic discourse and government approach to international adjudication. A 'skeptical pragmatism' with roots in late Imperial times springs from an *image* of international law dominated by two elements: 'something to be wary of' and 'something that needs to be studied and used in China's favor.' This was partly pushed aside in the Republican period in favor of fuller engagement, and in the PRC's first 30 years in favor of outright rejection. Thereafter, the country reverted to a deliberate, cautious engagement with different elements of the international legal system. Scholars recommend comprehensive preparation, pressing for reforms and building influence, and when the time is deemed right, the utilization of all legal tools at the country's disposal.

2618 See Chapter IV.2.1.2.6.
2619 See Chapter IV.3.5.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

The dominant concern is to act in line with the 'national interest,' whereas several (often explicit) axioms underlying Chinese authors' work need to be noted. First, Chinese state behavior (and that of other states) in matters of international law should be in line with and is indeed guided by national interests. Second, China's overarching national interest is increasing its relative power within the international system, ie regaining the status of a world power. Third, both economic growth and the 'soft power' that comes from being perceived as 'responsible' contribute to greater relative power. Fourth, maximum flexibility regarding available tools positions a state to best protect its national interests. Fifth, only after preparing oneself, and to a degree the respective tools, can they be sensibly used. Sixth, when the state changes (and its position in the international system does), the tools it should use also change. Accordingly, the prism through which Chinese international lawyers view the subject of this book is how their country should engage with international adjudication to best increase its relative power.

Several strong indications point to the arc on participation bending further towards a fuller usage of international adjudication 'tools.' China is likely to undergo a further economic and technological rise, and concomitant identity shifts as an actor in international relations and international law. Participation in international adjudication is viewed as a key element in becoming an 'international law power,' which in turn is considered central to 'soft power' increases without which the PRC will not be able to attain (much less consolidate) great power status.

Chinese scholars are largely optimistic on the PRC's efforts regarding preparedness and institutional influence; they remain so even after continuing NME treatment in trade law post-2016, and the *South China Sea Arbitration*. Many have maintained that China, also concretely, has more to gain from participation in international adjudication, including protecting newly-ballooning outward investment flows and Chinese IP interests, as well as territorial and maritime border interests vis-à-vis India and Japan.[2620] Authors decidedly do not approach law of the sea and territorial disputes with a fundamentally different mindset – some likely temporary (self-)censorship post-2013 notwithstanding – and discursive patterns are instead in many ways similar to such on trade and investment law.

Some scholars have cautioned against 'worshipping sovereignty' and argued that China has profited more from globalization than anyone

2620 See eg Zhipeng He, 'Open Development and International Law' (n 2586) 16, 28.

https://www.nomos-shop.de/isbn/978-3-8487-7108-0

else,[2621] while noting that a stable international economic law system had also long been a critical interest of the US.[2622] More 'effective participation' also beyond economic matters is called for, as a sine qua non for gaining influence on normative developments – this includes being less constricted at the ICJ (eg submitting more extensive and less theoretical written comments in advisory proceedings as well as comments on other states' statements).[2623] Next to a proliferation of cases in trade and investment law, a broader spectrum of engagement is to be expected.

In terms of what European and like-minded governments could and should do in response to the described phenomena, the first answer is probably: wait. They should be patient and trust that engagement will improve wherever the stakes in the system rise. Second, they should be open to and even enable a stronger Chinese physical representation at judicial mechanisms, as well as to certain concrete compromises with China in norm interpretation and future legal development, in order to increase trust and a feeling of 'ownership.' Finally, they should refrain from undermining the international legal order themselves, and strengthen coalition building and cohesion around positions they want to defend or newly pursue. Changes driven by the PRC should then remain incremental and such driven by the West should remain possible. If such seemingly simple advice is heeded, the PRC should continue to follow its long-standing self-defined national interest and approach to optimally pursue it, by gradually broadening engagement with international adjudication. This would mean further integration with an international legal order that Beijing would find it increasingly difficult to describe as anything other than China's as well.

2621 Rudan 儒丹 Chen 陈, '解开"囚徒困境"的国际经济法律制度——博弈论方法和中国问题视角' (Resolving "Prisoner's Dilemma" in International Economic Legal System: A Game Theory Analysis from China's Perspective) (2014) 34 (1) *Faxue Yanjiu* 120, 125.

2622 Zhiyun 志云 Liu 刘, '国家利益的层次分析与国家在 国际法上的行动选择' (Analytic Hierarchy of National Interest and Nation's Action Selection on International Law) (2015) 37 (1) *Xiandai Faxue* 139, 143.

2623 Jie Song, 'Evaluating the Effectiveness of China's Participation in International Legal Matters: Lessons from China's Practice in the International Law Commission and the International Court of Justice' (2017) 15 (2) *China: An International Journal* 144, 161, 163.