

BOOK REVIEWS

CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER EDITED BY MUTHUCUMARASWAMY SORNARAJAH AND JIANGYU WANG (CAMBRIDGE, UK: CAMBRIDGE UNIVERSITY PRESS, 2010) 660 PAGES. PRICE £75.00 (HARDCOVER) ISBN 9780521110570.

In *China, India and the International Economic Order*, Muthucumaraswamy Sornarajah and Jiangyu Wang from the National University of Singapore seek to explore the many dimensions of India and China's involvement in the contemporary international economic order. Their project is very ambitious and most welcome, as many recent events and phenomena have affected, and many experts have questioned, the position of these two states within the architecture of international law. In his historical analysis of the relations between economics, politics and society, Karl Polanyi drew attention to the gradual changes away from the traditional market, which had historically existed as a meeting place for producers and consumers and, consequently, as a place to trade goods.¹ The 19th century market evolved into an autonomous international system, independent from these social interactions, that began to challenge the role of the state. While it is true that states have since become economic territories, it is also true that globalisation has led to greater interdependence between states and between national economies. This interdependence is a major driver behind the re-emergence of India and China in the international economic order. These states' contribution is of particular interest as it differs from that of the declining Western powers, and is significant not only economically and demographically, but also culturally. China and India are now major actors in multilateral organisations, despite not having played a major role in their establishment, and they have substantial interests in the economic regulation of trade and investment, and therefore have great potential to influence international economic institutions through rule-making or participation in dispute settlement.

The book was published in August 2010 following an international symposium held in June 2006 at the National University of Singapore. Its aim was to study the resurgence of China and India as world powers from the perspective of international economic law and development.² The book is divided into three parts: 'China, India and the Global Trade System', 'China, India and Regional Economic Integration in Asia' and 'Law and Development in China and India: Domestic Issues'. The four years between the symposium and publication of the book may help to explain the disparity in the weighting of the chapters; with nine papers in the first part, but only four in the second and three in the third. It is also regrettable that only law professors participated in the collective project. Although all eminent scholars of high repute, one does wonder

¹ See generally Karl Polanyi, *The Great Transformation* (Beacon Press, 2nd ed, 2001).

² Muthucumaraswamy Sornarajah and Jiangyu Wang, 'Preface' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) xv.

if conferences that seek to address regulatory challenges of economic globalisation should not in principle also involve economists, international business researchers and political scientists. The book attempts to answer a number of questions, including whether the development of economic exchanges should be considered advantageous in itself, and what their real impact is on the wellbeing of the people in the world. More specifically, it seeks to answer whether economic exchanges merely serve the interests of economic players, or if they further the pursuit of a wider general interest often described as 'sustainable development'.

The first chapter, 'Introduction and Overview', is written by the two editors, and provides a brief synopsis of the issues explored in the book's later chapters. However, the subject matter, arguments and methodological approach of the book could have been more comprehensively explained. Furthermore, alternative approaches to exploring such a broad topic could have been examined, such as distinguishing between the reactive, coactive and proactive approaches taken by the countries in their international economic participation. Such a conception would assist in better understanding the two states' foreign policy evolution, their change in attitude within the global forum and their contributions to rule-making.

Part One, 'China, India and the Global Trade System', discusses several aspects of India and China's involvement in the World Trade Organization, and will be the focus of this review. International trade law, including the globalisation of labour markets across national borders, plays an important role in the international economic policies of the two countries. The *General Agreement on Tariffs and Trade*³ ('GATT') and the WTO have guided the growth of international trade law since World War II, widening and adapting international regulations. In particular, the *Marrakesh Agreement Establishing the World Trade Organization*⁴ represents an unprecedented increase in the scope of international trade rules and organisations. The most important of these has been the creation of the WTO Dispute Settlement Body ('DSB'), which requires member states to comply with the verdict of international judges. Part One challenges many assumptions, and tackles the key question of what the WTO and the 'emerging global regime for investment'⁵ can do to accommodate the development needs of developing countries such as China and India, making this book a valuable addition to the international economic debate. Surprisingly, only a single chapter is dedicated to the international law of foreign direct investment, one of the fastest-growing areas of international economic regulation. Although national laws and policies still constitute the most concrete and detailed component of the legal framework of foreign direct investment, the system is becoming increasingly dependent upon international treaties, and these innovations could have been addressed in additional chapters.

In the first chapter, 'China, India and the Doha Development Round', Joel P Trachtman analyses, in particular, the constraints that the WTO may impose on the countries as they implement industrial policy aimed at development. The

³ Opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).

⁴ Opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

⁵ Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 *Harvard International Law Journal* 427.

issue is important, as India's development, for instance, has been successful on a number of fronts: the country has maintained electoral democracy, reduced absolute poverty by more than half, dramatically improved literacy and vastly improved health conditions. However, with these achievements have come new challenges. It is the extent to which India and China are able to foster their development policy within the WTO framework that Trachtman investigates. He analyses the three key issues of WTO law and policy related to developing countries: claiming special and differential treatment ('S&D'); domestic market liberalisation and institutional reform; and increasing market access for products and services from developing countries. Trachtman's contribution also identifies five types of measures that must be addressed in any development policy: balance of payment measures, sanitary and phytosanitary measures, intellectual property rights, import and export subsidies, and trade-related investment measures. Interestingly, he also suggests that the WTO establish a mechanism of development policy review, which could provide exceptions based on expert analysis of developmental policy, rather than political deliberation.⁶ Within such a multilateral mechanism, developing countries could deviate from normal WTO obligations in order to implement appropriate development-motivated policies. Chapter Two, 'China, India and Developing Countries in the WTO: Towards a Pro-active Strategy', by Jianfu Chen, presents a useful complement, arguing that S&D should be replaced with a shift of focus towards overall economic and trade capacity building, and that China and India should take the initiative to champion reform of the S&D system.⁷

Subsequently, in Chapter Three, 'China-India Cooperation, South-South Coalition and the New International Economic Order: Focus on the Doha Round', Chen An and Chen Huiping investigate the possibility and consequences of a China-India coalition. Despite both being signatory members of the *GATT*, China and India have had dissimilar experiences in the arenas of multilateral negotiations and trade. China lost its membership after the withdrawal of Taiwan from the *GATT* in 1950, but has steadily gained access to the global market since the late 1980s. India on the other hand, despite maintaining continuous membership of the *GATT*, did not focus on export promotion strategies prior to the late 1980s. However, both countries expect future export growth, with falling tariff and non-tariff barriers in member countries. The authors develop the interesting idea that a South-South coalition based on strong China-India cooperation could be the key to establishing a New International Economic Order within the international trade system.⁸ Before agreeing with such an assertion, it would be imperative to better understand how it would proceed. The negotiating agenda would require the inclusion of intellectual property rights,

⁶ Joel P Trachtman, 'The WTO and Development Policy in China and India' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 17, 48-9.

⁷ Jianfu Chen, 'China, India and Developing Countries in the WTO: Towards a Pro-Active Strategy' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 53, 83-4.

⁸ Chen An and Chen Huiping, 'China-India Cooperation, South-South Coalition and the New International Economic Order: Focus on the Doha Round' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 92, 94.

particularly of patents, as they can play an important role in development.⁹ In the case of patents, the concerns are on securing the interests of the consumers and the domestic industry. Although the *Doha Declaration on the TRIPS Agreement and Public Health*¹⁰ and the Cancun Ministerial Conference promised to allay these concerns, the two countries still need to overcome a variety of issues. Notably, there is a need to negotiate the purview of regulatory exception, compulsory licensing and parallel import rules from a developing country perspective.

Muthucumaraswamy Sornarajah grounds the reader's understanding of the domestic investment laws and policies in China and India, as well as an analysis of their foreign investment policies at the global and bilateral levels in Chapter Four, 'India, China and Foreign Investment'. The international investment framework is currently comprised of thousands of individual agreements that lack any formal coordination, and in the absence of global investment rules, states have no other choice but to continue concluding bilateral or regional agreements. However, all members of the international community have an interest in investment agreements, and predictability may be enhanced when domestic policies and regulations are enshrined or locked into regional and bilateral treaties and agreements.

This development has been reinforced by the bilateral investment treaties ('BITs') being concluded on a South-South level in recent years and by the increasing activity from transition countries. Patrick Juillard aptly summarised this trend by stating that in the evolution of the sources of law that govern foreign investments, there have been two '*victimes*' (losers): namely, internal law and customary international law, and two '*vainqueurs*' (winners): namely, BITs and general principles of international law.¹¹ Capital-exporting countries use these rules to seek investment opportunities abroad and to protect their investments in foreign jurisdictions. Capital-importing economies wish to promote inward investment by ensuring a stable business environment in line with high international standards for foreign investors.

Some developing countries, including India and China, stand on both sides of that road, making Sornarajah's paper extremely important in this book. It is correct to emphasise that investment liberalisation in India and China resulted from a unilateral process. By refusing to enter into multilateral negotiations on investment, India has been able to gradually facilitate foreign investment. Some of the most important decisions in recent years were to open up the petroleum refining sector and the sensitive area of titanium mining to higher levels of foreign direct investment. This approach to investment can be understood in the light of the Asian financial crisis. Moreover, it needs to be borne in mind that apart from the potential for a foreign exchange crisis, the adoption of capital account convertibility significantly affects fiscal policy, which is least effective

⁹ See, eg, Bryan Mercurio, 'Reconceptualising the Debate on Intellectual Property Rights and Economic Development' (2010) 3(1) *The Law and Development Review* 65.

¹⁰ WTO Doc WT/MIN(01)/DEC/W/2 (14 November 2001).

¹¹ Patrick Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 *Collected Courses of the Hague Academy of International Law* 9, 208–10.

under free mobility of capital.¹² India's current high inflation scenario needs to be reviewed in this context. Sornarajah's chapter concludes that the experience of China and India contradicts many neoliberal prescriptions for at least two major reasons: first, it is wrong to credit liberalisation for the economic growth of these two countries; and second, both countries have retained the power to control the flow of foreign investment.¹³

Chapters Five through Eight, 'China, India and WTO Law' by Julia Ya Qin; 'China, India and the WTO Dispute Settlement System: Towards an Interpretative Strategy' by B S Chimni; 'China, India and Dispute Settlement in the WTO and RTAs' by Locknie Hsu; and 'China, India and Global Outsourcing of Services under GATS' by Dora S Neo, address different aspects of China and India's participation in the global economic system, especially their participation in the multilateral trade system under the umbrella of the WTO. In particular, Hsu examines a core element of the trade order — the judicial function performed by the dispute settlement system. Because of the long stalemate in multilateral negotiations, until the breakthrough at the Doha Ministerial Conference in November 2001, the legislative function of the WTO was in low gear, and the real action was taken by the judicial arm. Since then, compliance with these judicial determinations has ensured that the DSB has saved the WTO from irrelevance and has maintained the WTO system at the centre of trade regulation, despite the proliferation of preferential trade pacts all over the world. Hsu compares the positions of China and India in dispute settlement and suggests that China may tend to employ strategies of 'dispute avoidance'.¹⁴ However, in recent years, China's possible emergence as a complainant is only too evident, as it falls among the nations most affected by contingency measures. Thus, disputes over textile and clothing products are likely to increase. On the other hand, the US is quite anxious about China's seriousness in reforming its domestic policies, and there is already an indication that it could turn out to be a major respondent before the DSB as well. A similar conclusion could be drawn for India, who might also be involved in disputes concerning anti-dumping, import measures or subsidies. Because of their involvement in WTO litigation, China and India believe that the DSB provides a major balancing tool in the multilateral trading system. However, they also believe that there is ample scope for improving the DSB to better help developing countries. As pointed out by Hsu,¹⁵ one can only predict that India and China will try to contribute to dispute settlement mechanism reform on the basis of the experience they have been developing in preferential trading area negotiations.

Part One ends with Chapter Nine, 'International Dispute Settlement: The Chinese Approach and Practice, and Their Implications' in which Kong Qingjiang traces the history of China's engagement with international dispute

¹² See generally Debashis Chakraborty and Arup Guha, 'Should India Opt for Full Capital Account Convertibility? Some Exploratory Results' (2007) 42(1) *Foreign Trade Review* 1.

¹³ Muthucumaraswamy Sornarajah, 'India, China and Foreign Investment' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 132, 162–4.

¹⁴ Locknie Hsu, 'China, India and Dispute Settlement in the WTO and RTAs' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 250, 255–9.

¹⁵ *Ibid* 274.

settlement.¹⁶ Although China may have been originally opposed to international dispute settlement, it has recently developed a new approach that coincides with its WTO accession. Kong discusses how China undertook obligations to protect foreign investments beyond the WTO commitments in a large number of BITs and free trade agreements, such as the *Treaty of Amity and Cooperation in Southeast Asia*,¹⁷ and the agreement on dispute settlement mechanisms made with the Association of Southeast Asian Nations ('ASEAN').¹⁸ Following the reforms and open policy from 1978, and beginning with the first Chinese BIT between China and Sweden in 1982,¹⁹ China has now signed more than 120 BITs.²⁰ In accordance with the progressive integration of China's economy into that of the world, Chinese BITs have reflected the gradual acceptance of high-level investment protection in China, especially with respect to the national treatment standard and the investor-state arbitration mechanism. With regard to the investor-state arbitration provisions, the access of foreign investors to international arbitration was restricted by the old Chinese BITs to disputes concerning an amount of compensation. The China–Barbados BIT from 1998 is the first Chinese BIT in which the contracting parties have granted far-reaching consent to international arbitration for 'any dispute concerning an investment'.²¹

Since then, similar investor-state arbitration consent has been given in most of the Chinese BITs conducted in the 21st century.²² There are many reasons for this development. The first two are directly derived from the WTO experience — being the understood and accepted practices of national treatment and international litigation.²³ The third reason, which could have been discussed further, is a consequence of the globalised world into which China is fully integrated, and how it now needs to protect its (growing) investment abroad. China's accession to the WTO has generally contributed to its willingness to grant national treatment to foreigners. China's WTO accession and the WTO 'culture' have also contributed to a better understanding of international litigation. China has changed its perception of the role of the international judge and come to accept international investment arbitration, which has witnessed an exponential surge of investment disputes between foreign investors and host

¹⁶ Kong Qingjiang, 'International Dispute Settlement: The Chinese Approach and Practice, and Their Implications' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 314, 314–25.

¹⁷ Opened for signature 24 February 1976, 1025 UNTS 316 (entered into force 15 July 1976).

¹⁸ *Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China*, signed 29 November 2004 (entered into force 1 January 2005) <<http://www.aseansec.org/16635.htm>>.

¹⁹ *Agreement on the Mutual Protection of Investments*, China–Sweden, 1350 UNTS 255 (signed and entered into force 29 March 1982).

²⁰ Cai Congyan, 'China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications' (2009) 12 *Journal of International Economic Law* 457, 460.

²¹ *Agreement between the Government of Barbados and the Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investments*, signed 20 July 1998 (entered into force 1 October 1999) <<http://www.investbarbados.org/docs/BIT%20-%20Republic%20of%20China.pdf>>.

²² Cai, above n 20, 461–2.

²³ Kong, above n 16, 324–5.

country governments, to which China, as a recipient country or investor, might soon contribute.

China, India and the International Economic Order would have benefited from a concluding chapter mapping the way ahead, and offering a research agenda for a growing community of international scholars eager to better understand the trajectories and ambitions of China and India in their region and in the world. A few lines are devoted to the way ahead in the initial chapter,²⁴ but do not address many interesting issues for India, China and the international economic order, such as the quest for natural resources, which will be crucial for their development but may endanger many other Asian countries; the role of public entities in investing abroad;²⁵ and the capacity to better their future regional trade and investment policies, which may be boosted as Chinese and Indian investors emerge as significant players in foreign markets, looking for protection that can only be granted by investment treaties. This book begins an ambitious study of what the contribution of China and India to a new international economic order could be. It does not offer an exhaustive view and definite answer, but it is meritorious in being one of the first books to bring together scholars and experts from a great variety of fields, in order to approach the challenges that China, India and the international economic order are currently facing. The analysis provided offers a rich canvas, making this book a very useful addition to the literature on international economic law. I am sure it will be of great help to students, researchers and policy makers and it will certainly generate many more studies.

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²⁴ Muthucumaraswamy Sornarajah and Jiangyu Wang, 'Introduction and Overview' in Muthucumaraswamy Sornarajah and Jiangyu Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 1, 12–13.

²⁵ Julien Chaisse et al, 'Sovereign Wealth Funds in the Making — Assessing the Economic Feasibility and Regulatory Strategies' (2011) 45(4) *Journal of World Trade* (forthcoming).

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