Tsinghua China Law Review

清华中国法律评论

The *Tsinghua China Law Review* (TCLR), ISSN: 2151-8904 (cite as TSINGHUA CHINA L. REV.), is the first student-run organization that publishes a journal of legal scholarship on Chinese Law internationally. The organization is a collaborative effort by international and Chinese students at the School of Law, Tsinghua University. Student editors make all editorial and organizational decisions in addition to carrying out day-to-day operations. The *Tsinghua China Law Review* is formatted in accordance with *The Bluebook* system, the most widely-followed legal citation authority in the United States. It is printed by Joe Christensen, Inc. in Lincoln, Nebraska, U.S. and distributed across the globe biannually, publishing articles by professors, judges and practitioners on legal issues pertaining to China.

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Tsinghua China Law Review

would like to thank

The Tsinghua University Humanities and Social Sciences Development Initiative

for its generous financial support

[《清华中国法律评论》感谢清华大学文科建设“双高”计划资助]

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PREFACE

The study of international law in the West has experienced a "turn to history" at least since the late 1990s after the end of the Cold War,[1] both "as a way of understanding or critiquing the role of international law" in the turbulent unipolar world, and also "as a means of professionally engaging with the past,"[2] which brought about a great deal of scholarship.[3] At the same time, there is also an "international turn" or a "global turn" in the discipline of history, including the intellectual history,[4] which have also contributed a lot to the study of the history of international law. However, most of these burgeoning works are Western-centric focusing on Western figures,[5] Western countries,[6] and Western events.[7] The history of international law in the non-Western world, which China is one of, is understudied.[8]

As a matter of fact, China has a rich and complicated relationship with international law. The country encountered international law much earlier than commonly imagined. The Italian Jesuit Martino Martini (卫匡国) had begun to translate the *Tractatus de Legibus ac Deo Legislatore* (A Treatise on Laws and God as Legislator), composed by the Spanish theologist and jurist Francisco Suárez, with Cosme (Zongyuan) Zhu (朱宗元) in Hangzhou in

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[1] *See* Thomas Skouteris, *The Turn to History in International Law*, OXFORD BIBLIOGRAPHIES ONLINE,https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0154.xml (Feb. 17, 2021); Martti Koskenniemi, *Why History of International Law Today?*, 4 RECHTSGESCHICHTE 61, 61–63 (2004); ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 1 (2021).

[2] *See* ANNE ORFORD, *supra* note 1, at 3 (2021).

[3] *See* Thomas Skouteris, *supra* note 1. "Turn to history in international law" has even been regarded as a "cliché" by some scholars. *See* Ignacio de la Rasilla, *The History of International Law Matters: Looking Beyond the Tyranny of the Present in International Law*, VÖELKERRECHTSBLOG (Feb. 12, 2021), https://voelkerrechtsblog.org/the-history-of-international-law-matters/.

[4] *See e.g.*, DAVID ARMITAGE, FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT 17–32 (2013); Rosemarie Zagarri, *The Significance of the "Global Turn" for the Early American Republic: Globalization in the Age of Nation-Building*, 31 J. EARLY REPUBLIC 1 (2011); G. Balachandran, *History After the Global Turn: Perspectives from Rim and Region*, 14 HIST. AUSTL. 6 (2017); Samuel Moyn & Andrew Sartori, *Approaches to Global Intellectual History*, *in* GLOBAL INTELLECTUAL HISTORY 3 (2013).

[5] *See e.g.*, RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999).

[6] *See e.g.*, MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776–1939 (2010).

[7] *See e.g.*, MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001).

[8] There are indeed some works on Chinese international legal history, but it is far from enough. *See e.g.*, RUNE SVARVERUD, INTERNATIONAL LAW AS WORLD ORDER IN LATE IMPERIAL CHINA: TRANSLATION, RECEPTION AND DISCOURSE, 1847-1911 (2007); MARIA ADELE CARRAI, SOVEREIGNTY IN CHINA: A GENEALOGY OF A CONCEPT SINCE 1840 (2019); And *infra* literature cited.

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1648,[9] a significant year in the European history of international law when the Peace of Westphalia was signed, purportedly laying down the fundamental principles of modern international relations and international law.[10] Unfortunately, there is no record whether they finished it or even published it. Forty years later, China concluded the Treaty of Nerchinsk (尼布楚条约) with Russia in 1689, under the assistance of another two Jesuits, Thomas Pereira (徐日升) and Jean-François Gerbillon (张诚).[11] This treaty is of particular significance in Chinese history. It is the first international treaty in modern sense in Chinese history, which even has an official Latin text beyond anyone's imagination.[12]

Nevertheless, China became a victim of Euro-centric international law after 1840. Since losing the First Opium War against the United Kingdom, China had paid a huge price as a result of international *Realpolitik* and insufficient knowledge of international law as well. Chinese people had not attained a systematic understanding of international law until the *Elements of International Law* (*i.e.*, Wanguo Gongfa, 万国公法), written by the American internationalist Henry Wheaton, was translated into Chinese by the Presbyterian missionary William A.P. Martin in 1863 and published in the country one year later under the sponsorship of Zongli Yamen (总理衙门).[13] Nevertheless, for quite a long time, China was categorized as a "barbarian" nation or even "savage" by international lawyers such as James Lorimer and Lassa F.L. Oppenheim from the perspective of the so-called "Civilization Theory."[14] At that time, international law was only used as an instrument of colonization by the Western Great Powers to subjugate and exploit China.

Indeed, there were practices of China making use of international law and disharmony among Western powers to preserve its legitimate rights in modern

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[9] *See* Zeng Tao (曾涛), *Jindai Zhongguo Yu Guojifa de Zaofeng* (近代中国与国际法的遭逢) [*Modern China's Encounter with International Law*], 5 ZHONGGUO ZHENGFA DAXUE XUEBAO (中国政法大学学报) [J. OF CHINA UNIV. OF POL. SCI. & L.] 103, 103–105 (2008).

[10] *See* Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20 (1948). This classic textbook narrative has been, however, challenged by many scholars as a "Westphalian myth." *See e.g.*, Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001); Pärtel Piirimäe, *The Westphalian Myth and the Idea of External Sovereignty*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 64 (Hent Kalmo & Quetin Skinner eds, 2010).

[11] *See* YUESEFU SAIBISI (约瑟夫·塞比斯), YESU HUISHI XU RISHENG GUANYU ZHONG'E NIBUCHU TIAOYUE TANPAN DE RIJI (耶稣会士徐日升关于中俄尼布楚谈判的日记) 103–21 (Wang Liren (王立人) trans., The Commercial Press (商务印书馆), 1973) [JOSEPH SEBES, S.J., THE JESUITS AND THE SINO-RUSSIAN TREATY OF NERCHINSK (1689): THE DIARY OF THOMAS PEREIIRA, S.J. (Institutum Hisroicum S. I. 1961)].

[12] *See* 1 TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES 3-13 (2nd ed., The Maritime Customs of China, 1917).

[13] *See* Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUIL DES COURS 195, 230–32 (1990).

[14] *See* Chen Tiqiang, *The People's Republic of China and Public International Law*, 8 DALHOUSIE L. J. 3, 4–6 (1984).

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Chinese history, though in a limited scope. For example, the Prussian minister to China seized three Danish merchant ships off the coast of Dagukou (大沽口) in 1864 after the Prusso-Danish War (*i.e.*, The Second Schleswig War) broke out. Based on Martin's translation manuscript of the *Elements of International Law*, the Qing government insisted that the venue of the capture is a part of China's "inner ocean" (内洋, territorial waters), not high sea; therefore, the Prussian minister had no right to capture vessels in this area. After multiple rounds of debating, the Qing government managed to have the Prussian minister release the seized ships and compensate 1500 dollars, and preserved China's sovereignty in maritime territory.[15] Another example is the issue of consular jurisdiction (领事裁判权). Starting from the United Kingdom in 1842,[16] more than twenty states had successively obtained consular jurisdiction in China.[17] Finally, after decades of struggle, China abolished these privileges step by step by taking the opportunities of two World Wars and using international legal arguments.

Furthermore, China has also contributed a lot to the development of international law. Here are a couple of illustrations. After World War II, China participated in the establishment of the United Nations as a founding member; And Peng Chun Chang (张彭春), the Vice-Chairman of the Commission on Human Rights, played an essential role in drafting the *Universal Declaration of Human Rights* and motivated to incorporate the Confucian idea of "ren" (仁, in the official text, "conscience") as well as the "social and economic rights" into the *Declaration*, which substantially improve the universality and diversity of *the Declaration*.[18] Moreover, the "Five Principles of Peaceful Coexistence" (和平共处五项原则) initiated by China has also set an example for new international relations,[19] and the term

[15] The successful resolution of this incident in turn facilitated the publication of the translated work. *See* IMMANUEL C.Y. HSÜ, CHINA'S ENTRANCE INTO THE FAMILY OF NATIONS: THE DIPLOMATIC PHASE 1858–1880, 132–34 (1960); Wang Weijian (王维俭), Pu Dan Dagukou Chuanbo Shijian he Xifang Guojifa Chuanru Zhongguo (普丹大沽口船舶事件和西方国际法传入中国) [The Dagukou Vessel Incident Between Prussia and Denmark and the Entrance of Western International Law into China], 5 XUESHU YANJIU (学术研究) [ACADEMIC RESEARCH] 84, 87–90 (1985).

[16] *See* Guo Weidong (郭卫东), Jiangnan Shanhou Zhangcheng Ji Xiangguan Wenti (江南善后章程及相关问题) [The Jiangnan Supplementary Treaty and Its Related Questions], 1 LISHI YANJIU (历史研究) [HISTORICAL RESEARCH] 136 (1995).

[17] *See* Li Fang (李放), Shixi Jindai Qude Zai Hua Lingshi Caipanquan Guojia Shumu (试析近代取得在华领事裁判权国家数目) [A Brief Analysis on the Number of States Who Gained the Consular Jurisdiction from China], 5 LANZHOU XUEKAN (兰州学刊) [ACADEMIC JOURNAL OF LANZHOU] 164 (2008).

[18] *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, ch. 4 (2001); HANS INGVAR ROTH, P. C. CHANG AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, esp. ch. 8 (2018); PINGHUA SUN, HISTORIC ACHIEVEMENT OF A COMMON STANDARD: PENGCHUN CHANG AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2018).

[19] *See* Chen, *supra* note 14, at 23–27; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 123–26 (1963); Wang, *supra* note 13, at 263–78.

"Third World" canonized by Mao Zedong[20] has become a catch-phrase in international law and international studies.

Therefore, considering the deep connection between China and the history of international law, there is so much to be studied. Given the status quo of insufficient research and China's rising influence in the international society, *Tsinghua China Law Review* organizes a special issue on this topic. We hope to increase attention and research in this field both domestically and internationally through this issue. We reached out to many scholars and received quite a positive response. And we picked four thematic papers for this special issue (and another two for the next issue due to the time schedule). These papers investigate multiple facets of China's international legal history.

The first one comes from Professor Anthony Carty. In the article entitled *The Deformation of the Law of Territory Between 1880 and 1930—With Implications for Selected Present Day Controversies*, Professor Carty begins with China's territorial claim on Nansha Qundao (南沙群岛, *i.e.*, the Spratly Islands) based on historical rights and questions the existence of modern international law of territory which prerequires the effectively exclusive state control. He investigates the historical international legal doctrines on territory held by European international lawyers from the 1880s to 1930 and finds that there was no unanimous consensus on the law of territory among these lawyers before the *Island of Palmas Case*. The arbitrator in the case invented it. As a result of the fabricated law of territory—the territory not occupied by a recognized state is a *res nulius* and could be occupied by another state, there arise continuing problems in many cases such as Israel–Palestine Question, the boundary between Cameroon and Nigeria, as well as the South China Sea issue. Invoking Carl Schmitt and Max Scheler, Professor Carty proposes to reimagine concepts like people, nation, and state, and reconsider the possibility of all peoples recognizing one another and sharing a common destiny, which shall eliminate the aforementioned problems.

The second paper is from Professor Ryan Martínez Mitchell. In the article *Vast Imperium: The Origins of Modern Chinese Conceptions of Sovereignty and International Law in Guangxu Era Geopolitics*, he surveys the historical roots of the conceptions of sovereignty and international law in modern China. He goes through sources in six different languages and discovers that Qing officials in Guangxu era began to develop international legal concepts like "autonomy," "territory," and "sovereignty" during their geopolitical encounters with foreign empires, especially with Meiji Japan. For example,

[20] The term "Third World" was coined by the French demographer and historian Alfred Sauvy in 1952, but glorified by Mao Zedong. *See* Peter Worsley, *How Many Worlds?*, 1 THIRD WORLD Q. 100, 106–07 (1979); Leslie Wolf-Phillips, *Why 'Third World'?: Origin, Definition and Usage*, 9 THIRD WORLD Q. 1311, 1311–12 (1987); MAO ZEDONG ON DIPLOMACY 446 & 454 (1998); Editorial Board of Renmin Ribao (People's Daily), CHAIRMAN MAO'S THEORY OF THE DIFFERENTIATION OF THREE WORLDS IS A MAJOR CONTRIBUTION TO MARXISM-LENINISM (1977).

according to his viewpoint, the Japanese concept of *shuken* (主権, sovereignty), rather than the translation of the *Elements of International Law* by William A.P. Martin, drove the most to the adoption of the idea of sovereignty in China, which the Okubo Toshimichi (大久保利通) communiqué to Zongli Yamen (总理衙门) in 1874 was particularly influential. As Professor Mitchell points out, the diplomatic interactions in the Guangxu era are a "pivotal and paradigm-changing moment[]" in China's modern international legal history.

Professor Chao Wang writes the third paper. In his article *International Law and the Evolution of the Chinese Constitution: From Peaceful Co-existence to Humanity's Interdependence*, he examines the contextualization of international law in China's constitution from 1949 onwards, especially the economic aspect. He reviews the "Five Principles of Peaceful Co-existence" and the development of the economic policy in the Chinese constitution, and is of the opinion that the idea of the "community with a shared future for mankind" (CSFM) incorporated in the 2018 Amendment is a new phase of "exporting virtues," which marks a shift from the passive acceptance of international law at the local level to a more active engagement in the development of the international legal framework. Professor Wang argues that the CSFM reflects the notion of humanity's interdependence and co-existence and thereby there is a possibility for the West and China to reach a normative consensus to address current challenges faced by the whole of humanity. It seems to be more urgent considering the trend of isolationism in these recent years and the current global pandemic.

The fourth thematic paper is a review written by Professor Zhiguang Yin, inspired by Professor Zhang Yongle's new book in Chinese—*Shifting Boundaries, A Global History of the Monroe Doctrine* (此疆尔界: "门罗主义"与近代空间政治), whose English translation will be published by Brill. In the article entitled *Is China Just another Japan in the World?: Towards a Non-hegemonic Understanding of Global Order*, Professor Yin acclaims Professor Zhang's book as an unconventional study of the historic diffusion of the Monroe Doctrine. In his view, remarkably, Zhang's thorough research on the discourse of the Monroe Doctrine in China prompts an interesting and significant question: Is China just another Japan, *i.e.*, will China become a new global hegemon like Japan? This question has been contested for years by many scholars, politicians, and commentators. As Professor Yin sees it, the way of posing the question presupposes a theory of hegemonic stability: the rejection of one hegemon will lead to another one. However, this kind of presumption *per se* is a narrative of hegemony. To address the question straightforwardly, Professor Yin goes back to the historic evidence. He reviews the Japanese origin of Pan-Asianism and clarifies how Chinese intellectuals were initially attracted by and finally rejected it. These intellectuals were more inclined to reckon Asia as a union against imperialism. In particular, to counter Japanese Asianism, Li Dazhao (李大钊), one of the

founders of the Communist Party of China (CPC), came up with a New Asianism, which is a prototype of CPC's internationalism and whose future is the union of the world. In this version of Asianism, there is no hegemonic domination. This view develops into the discourse of "solidarity and cooperation among Asia, Africa, and Latin America." Hence, according to Professor Yin, the history of China's foreign policy has indicated that China is not another Japan.

Another two articles in this issue do not focus directly on the theme of China and the history of international law (because of not history enough), but they are also highly relevant to the current status of the relationship between China and international law. In the article *Enforcing Global Health Law in Domestic Legal Systems: A Case Study of the Hong Kong Special Administrative Region*, Professor Eric C. Ip scrutinizes how the global health law is enforced in the Hong Kong Special Administration Region. He uncovers that the enforcement of global health law in Hong Kong is uneven, some in the form of hard law, some in soft law. Specifically, Professor Ip has identified four categories of enforcement methods: explicit hard enforcement, implicit hard enforcement, soft enforcement, and mixed enforcement. The International Health Regulations (2005) is an example of explicit hard enforcement, while the Framework Convention on Tobacco Control is a typical case of implicit hard enforcement. Meanwhile, there are numerous soft laws that are used to incorporate international specifications into domestic law. To advance the international right to health, these methods can also be used in combination. At the end of the article, taking Hong Kong as an example, Professor Ip proposes to develop a new field called "comparative global health law."

In the other article entitled *The EU-China Comprehensive Agreement on Investment — Blunder or Win?*, Professor Daniel Zigo probes into the EU-China Comprehensive Agreement on Investment (CAI) reached in December 2020, and aims to answer whether it will deepen the bilateral relationship or not. He analyzes the foreign direct investment barriers between the EU and China and observes that each party has its own concerns. The EU is concerned with its investors' access to licenses, China's complicated administrative procedures, intellectual property rights protection, market access, etc. And China's main concern is likewise its investors' market access, particularly the high-tech sectors. Then Professor Zigo screened both the solutions CAI provided to resolve many of these barriers and their deficiencies compared with the China-US Phase One Agreement in addition to the EU-Vietnam Trade Agreement and the Investment Protection Agreement. In Zigo's view, both the EU and China made concessions in CAI and gained benefits. Certainly, this agreement left out many other issues which need further negotiation. Even so, it can be seen as initial progress.

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Besides the articles aforementioned, in the China Law Update column, we also publish two notes concentrating on the latest developments in Chinese law. This first one explores the Anti-Foreign Sanctions Law (AFSL) which is enacted as a countermeasure by the Standing Committee of the National People's Congress in June 2021 and receives a lot of attention considering the intense atmosphere in international society these years. In the paper *The Anti-Foreign Sanctions Law: Content, Features, and Legitimacy under International Law*, Mr. Liu Mingxin focuses on the entity list designated by AFSL after a concise yet insightful introduction to AFSL's application scope and enforcement. Then he compares the entity list regime established by AFSL with the one in the Provisions on the Unreliable Entity List[21] adopted by the Ministry of Commerce of China in September 2020 and the control list in the Export Control Law. At the same time, he briefly compares the entity list in AFSL with those in the US and the EU. Furthermore, Liu discusses AFSL's legitimacy under general international law and WTO law. In his opinion, the anti-sanction measures in AFSL are a retorsion that does not violate general international law and specifically the WTO rules as well after a thorough inspection. Building on this, he considers the fundamental reason for China to adopt AFSL: There are few effective dispute settlement mechanisms in international law and the existing WTO dispute settlement mechanism is too lengthy and has been paralyzed by the US. Thereby, China's enactment of AFSL is a reflection of the global rise of recourse to states' self-help.

The second note inquiries the amendment draft to the Arbitration Law proposed by the Ministry of Justice in 2021. In the paper entitled *China's Draft Amended Arbitration Law: Does It Go Far Enough?*, Mr. Fredrik Opsjøn Lindmark believes that although China's Arbitration Law has little substantive revision in the letter since its inception in 1994, it has undergone gradual transformations through judicial interpretations and court judgments. Therefore, it is time to revise the Arbitration Law, to reflect China's significant socioeconomic changes over the past thirty years and establish a more effective system that meets the evolving needs of society. With this in mind, how are the proposed amendments shaping up? Lindmark offers a detailed analysis of the draft proposal, comparing it to the current Arbitration Law in terms of subject matter, judicial review, foreign arbitral institutions, foreign-related ad hoc arbitration, and other aspects. He finds that the proposed amendments are more modern in their approach. In particular, the recognition of the principle of Competence-Competence is a major step forward. However, as Lindmark sees it, there are also many shortcomings compared with international standards. The most essential one is the

[21] *See* Bu Kekao Shiti Qingdan Guiding (不可靠实体清单规定) [Provisions on the Unreliable Entity List] (promulgated by the St. Council, Sep. 19, 2020, effective Sep. 19, 2020), art. 2, CLI.4.346165 (Chinalawinfo).

continuous distinction between domestic and foreign-related arbitration, even without a criterion to determine how to delineate between them. To sum up, Lindmark sees the proposal draft as a significant step forward but believes that it falls short in some areas.

This special issue has not been an easy undertaking. It is TCLR's second special issue on a thematic topic, the first being Volume 11, Issue 1 in 2018, which commemorated our journal's 10th anniversary.[22] Producing such a special issue has required additional efforts compared to a regular issue. We would like to express our gratitude to all our fellow editors for their hard work, especially the members of our Business Development Team who contacted numerous potential authors for this special issue. We would also like to thank Professor Gao Simin of Tsinghua University School of Law for her kind mentorship, and Professor Shen Weixing, the dean of Tsinghua University School of Law, for his continuous support. Special thanks go to the Tsinghua University Humanities and Social Sciences Development Initiative for their generous financial support for this issue. Finally, we extend our highest gratitude to all the contributors and readers for their constant support of our journal.

CAO Wenjiao & WU Peiyao
Co-Editors-in-Chief

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[22] Apart from these two special issues, there is another special issue in memoriam to the late Professor Betty May Foo Ho in Volume 3, Issue 1 in 2010.