

BILATERAL INVESTMENT TREATIES IN A HARMONIOUS WORLD:

CHINA'S PARADIGM

By Yonit Manor-Percival

Queen Mary, University of London

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Declaration

I declare that the work present in this thesis is my own. Any work from other author is duly referenced and acknowledged.

Yonit Manor-Percival

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ABSTRACT

China's ascent up the echelon of the contemporary interstate system is often debated by reference to its implications for the US designed neoliberal world order. A 'cauldron of anxiety' appears to be brewing around what is said to be a potentially contesting force that is at best shallowly integrated and at worse set on institutional reconstitution. US anxiety over the integrity of the order she landscaped and from which she benefits may be understood insofar as insufficient submission signifies the risk of a rising untamed competitor. Yet, against the background of China's participation in the international financial institutions, membership of the World Trade Organisation and the conclusion of a prolific bilateral investment treaties (BITs) program, in what way can she be said to have remained resistant and untamed? This work seeks to contribute to the debate by looking at it from the perspective of discourse. It examines two interrelated discursive structures - those of paradigm and law. In relation to the former it looks at the US engendered neoliberal worldview more specifically formulated as a Washington Consensus on the one hand and China's vision of a harmonious world of lasting peace and prosperity on the other. In relation to the latter, juridical institutions furnish legitimising mechanisms and the rules by which paradigms are to be practiced. Since treaties form part of the US designed world order, this work applies BITs as a prism through which the interiors of paradigms may be unpacked. BITs are creatures of the capitalist paradigm in its neoliberal configuration in that they articulate and provide rules for the material realisation of a homogenised world in which the spatial movement of capital is free of impediments and sovereign rights are subjugated to property rights. By contrast they are not creatures of the harmonious world paradigm with its resurrection of indigenous heritage. In the context of China they represent processes of importation and adaptation originally triggered by forcible rupture. Against this construct of two different paradigms that nevertheless share a juridical structure this work concludes that China does aspire to a reformed world order. However, only time will tell whether reformative ambitions can survive own integration and the expansive compulsions of neoliberalism.

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Dedication

To Daniel and Gil with all my love

CHAPTER 1: INTRODUCTION

Introduction

A Particularly US Order

There is recognition in academic circles that our global eco-political ecology represents a systemic configuration. In other words, our predicament – a dangerous world space that accommodates what Beck conceptualises as ‘large inequalities’ (as opposed to small inequalities that are located within the nation-state)¹ - is not a random phenomenon. There is an international order that is informed by American dominion and realised through the instrumentalities of institutions.² A statement to this effect by Richard S. Williamson, former Secretary of State for International Organisation Affairs at the US Department of State may not be as powerful as Gowan and Barnett and Duvall’s scholarly analysis, particularly when made in a private capacity. Nevertheless, it merits citing given that Williamson served in senior foreign policy positions under both President Reagan and President Bush and can be said to have enjoyed the authority that comes with being a government insider. Williamson summed up the post-World War II (WWII) order as ‘the treaties, multilateral institutions, and norms developed largely with United States leadership’.³ Acknowledgement of the existence of a world order is important since, were the predicament of large inequalities to be merely a spontaneous, inevitable consequence of forces beyond our control, this enquiry into paradigms, rules and the rationality that produces them might well prove an exercise in futility.

One institution, which forms part of this order, is that of international law (IL). The view of law as an institution is discussed further below in the context of the

¹ Ulrich Beck (trs), *Power in the Global Age* (Polity Press 2005) 25-26.

² See for example Peter Gowan, ‘US:UN’ (2003) 24 *New Left Review* 5; Michael Duvall and Raymond Duvall, ‘Power in International Politics’ (2005) 59 1 *International Organisation* 39.

³ Ambassador Richard S. Williamson, ‘China, America and a new World Order’ [2010] *The online Magazine of the Journal of the American Enterprise Institute*

www.american.com/archive/.../china-america-and-a-new-world-order accessed 9 Oct 2010.

research question and revisited in chapter 5. For now, let us say that there is much scholarly engagement with the concept of institutions and that which they produce, alternatively constrain.⁴ Diversity nevertheless shares a degree of common ground. It may be found in the understanding of institutions as made up of norms and rules, the exercise of power, and codes of behaviour that prescribe practice. When institutional actors have a material expression, in the forms of members, financial and spatial resources and a legal status, the institution may be said to have taken on an organisational form.⁵ In this sense, law is an institution with appended organisations e.g. courts and arbitral institutions.⁶ IL is the institution of law that prescribes rules and codes of behaviour for international practice.

International economic law (Economic IL) is a division within the institution of IL. It regulates cross-border economic practice - specifically for the purpose of this enquiry, cross-border investment. At its core lies an expansive network of bilateral investment treaties (BITs), which, following its inception in 1959, now includes almost every country around the globe.⁷ Its main protagonists are states and transnational corporations (TNCs), the latter being one of the actors in what may collectively be referred to as the institution of capital.⁸ BITs' organisational expression is to be found in the International Centre for the Settlement of Investment Disputes (ICSID), an arbitral institution established in 1966 under the auspices of the World Bank. Beck posits that it is an actor within the collective that forms institutional capital.⁹

⁴ See for example Beck, *ibid* (n 1) 2; Stephan W. Schill, *The Multilateralization of International Investment Law* (CUP 2009) 2; Michael Barnett and Raymond Duvall, 'Power in global governance' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge Studies in International Relations (CUP 2005) 18; Andrew Hurrell, 'Power, institutions, and the production of inequality' in *ibid* 33-58.

⁵ Beck, *ibid* (n 1) 2.

⁶ Schill, *ibid*.

⁷ *ibid* 8; the pace of BITs signing increased dramatically in the 1990s. See for example Andre T Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639, 652.

⁸ Beck, *ibid* (n 1) 15.

⁹ *ibid*; the inclusion of general consent to arbitration became the rule in the 1990s. Gas Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, OUP 2007) 26-27.

BITs are treaties entered into between two states whereby each undertakes to treat investors and their investments in accordance with prescribed standards. Substantively, they engage the neoliberal vision of a homogenised world in which the spatial movement of capital is freed of impediments, and sovereign rights are subjugated to property rights.¹⁰ With private foreign investment propagated as a developmental imperative, states take on the role of competitive entities in a race to attract investors.¹¹ Often it is a race to the bottom whereby capital is enticed by a promise of a market environment that is conducive to profit maximisation.¹² Economic IL is engaged through the externalisation of standards of treatment, choice of law and the forum for dispute resolution. As pointed out by Schill, the treaties provide the institutional framework necessary for the functioning of a market-based global economy.¹³

Viewed through the lens of hegemony, BITs can be said to have spread globally by means of a Gramscian dialectical interaction of coercion and consent, so as to maintain the flow of global tributaries from the peripheries of the interstate order to its core.¹⁴ As will be seen in the following chapter, from a historical perspective, they may be posited as representing the continuation of imperialist unequal treatification whereby IL is utilised to endow expansionist capital with juridical rights. In sum, BITs are creatures of capitalist progression to its contemporary neoliberal expression. They provide rules for the material realisation of 'a particularly American conception of investment rights'.¹⁵

¹⁰ For the relationship between neoliberalism and BITs, see for example M Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty' in Wenhua Shan Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty In International Economic Law* (studies In International Law Vol 7, Hart Publishing 2008) 199-224.

¹¹ See for example the preamble to the 'ICSID Convention Regulations and Rules' <<http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>> accessed 29 Jan 2010.

¹² For the growing inequality between countries see Janet Dine, *Companies International Trade and Human Rights* (Cambridge Studies in Corporate Law, CUP 2005) 8-9.

¹³ Schill, *ibid* (n 4) 8.

¹⁴ David Harvey, *The New Imperialism* (OUP 2003) 37-38; Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (Verso 2010) 29.

¹⁵ James Petras and Henry Veltmeyer, *Multinationals on Trial: Foreign investment Matters* (Ashgate Publishing Ltd 2007) 111.

The Newcomer

More recently, a newcomer has stepped into this world order and appears to be edging her way in the direction of its core. After almost two hundred years of life in the periphery, China is re-emerging as a major power forecasted by the CIA to surpass the size of the US economy by the middle of the twenty-first century.¹⁶ This dramatic rise in economic power, says Li Mingqi, 'is one of the most important developments at the current world-historical conjuncture'.¹⁷ It is a far cry from Henry Kissinger's assurance to Nixon following his meeting with Chairman Mao in 1972 that Chinese trade would never amount to much.¹⁸

It seems then that the opening up of China entailed unexpected consequences in the form of economic and political empowerment. The responses they provoked vary. Nevertheless, one may point to a broad shift in Western discourse from its traditional formulation – how can an integrated Chinese economy be best harnessed – to concerns about China's global impact and the imperative of its containment. Among the various statements expressing such concerns, perhaps the most famous is Robert Zoellick's, the then US Deputy Secretary of State, observation of 'a cauldron of anxiety about China'.¹⁹ Susan Shirk, a former deputy Assistant Secretary of State responsible for China and an academic, advises that to avoid a US-China confrontation, Americans need to understand the frailty of the CCP regime.²⁰ This statement may well be no more than an expression of US penchant for preoccupation with other countries' internal arrangements. Still, military muscles flexing in the form of a 'pacific pivot' is compounded by attempts at containment in the economic sphere. The Transatlantic Trade Partnership (TTP), currently being negotiated, excludes China. The US-EU Trade and Investment Partnership (TTIP) is said to prescribe

¹⁶ Susan L. Shirk, *China Fragile Superpower* (OUP 2007) 4,13-20.

¹⁷ Mingqi Li, *The Rise of China and the Demise of the Capitalist World Economy* (Pluto Press 2008) 1; see also Jonathan Fenby, *China Today, How It Got There and Where It is Heading: Tiger Head Snake Tails*, (Simon and Schuster 2012) 1-2.

¹⁸ Fenby, *ibid* 235.

¹⁹ Robert Zoellick, 'Whither China: From Membership to Responsibility?' [21 September 2005] <<http://www.asiaing.com/whither-china-from-membership-to-responsibility.html>> accessed 28 Dec 2010.

²⁰ Shirk, *ibid* (n 16) generally.

Western approach to China. Both agreements may be seen as defensive moves against her ascent.²¹

The reasons why unexpected consequences should be the cause of anxiety are not immediately apparent. China is incorporated into the post-WWII order of international financial institutions (IFIs) and the World Trade Organisation (WTO).²² Her integration into the investment protection legal regime is verging on the spectacular. Since the country's first BIT with Sweden in 1982 she signed some 139 BITs and is second only to Germany in the number of treaties concluded.²³ As shall be seen later, following on the trail of global trends, quantitative augmentation was supplemented by geographical expansion and normative evolution in the direction of greater foreign investors' protection.²⁴ Further, at least for the time being, Chinese corporations pose only a limited threat, if any, to Western corporate global domination. As Chen Jian, China's Vice Minister of Commerce pointed out in a press conference on 1 November 2010, by the end of 2009 the country's outbound investment accounted for only

²¹ On the US Asia 'pivot' see for example Bonnie G. Glaser, 'Prepare for Unintended Consequences' [2012] Global Forecast Center for Strategic and International Studies 22 <http://csis.org/files/publication/120413_gf_glaser.pdf> accessed 19 Feb 2013; on the TTIP see DB Research, 'An Early Good Luck to the US-EU Free Trade Agreement' Deutsche Bank <http://www.dbresearch.de/servlet/reweb2.ReWEB?addmenu=false&document=PROD0000000000301841&rdShowArchivedDocu=true&rwnode=DBR_INTERNET_DE->> accessed 26 Feb 2013.

²² China joined the IMF in 1945 as one of its 35 original members. The PRC assumed responsibility for relationship with the IMF in April 1980. China's voting power increased from 2.19 to 2.95% in February 2001. It increased again substantially as part of IMF reforms effective since 3 March 2011. International Monetary Fund, [31 March 2013] 'Factsheet IMF Quotas' <<http://www.imf.org/external/np/exr/facts/quotas.htm>> accessed 27 May 13; the IMF holds annual Article IV consultations with China on economic developments and policy issue. 'At a Glance' [2004] International Monetary Fund. 'Glance' <<http://www.imf.org/External/country/CHN/rr/glance.htm>> accessed 18 Dec 2010; an increase in China's voting share in the World Bank in April 2010 puts her behind the US and Japan but above Germany, Britain and France. 'China Gains Clout In World Bank Vote Shift' [25 Apr 2010] Reuters <<http://www.reuters.com/article/idUSTRE6301RQ20100425>> accessed 19 Dec 2010; China acceded to the WTO in 2001.

²³ Leon Trakman, 'Enter the Dragon IV: China's Proliferating Investment Treaty Program' <<http://www.clmr.unsw.edu.au/article/deterrence/public-v-private-enforcement/enter-dragon-iv-chinas-proliferating-investment-treaty-program>> accessed 27 May 2013.

²⁴ China's BITs network now covers most continents including 40 out of the forty-four Asian countries, 76% of European states, 31 out of fifty three African states, thirteen South American states and Pacific states including Australia and New Zealand. Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford International Arbitration Series OUP 2009) 2, 32.

1.3% of the world's total foreign investment, with Chinese companies lagging behind Western multinationals in terms of international and managerial experience, as well as the ability to compete in high-end industries. As of 2013 China's foreign assets are valued at US\$ 70 billion compared with the US\$ 3.36 trillion of UK foreign assets.²⁵ According to the Economist 2013 report, while the US economic position seems precarious, its global clout remains secure.²⁶

It may be that the search for a clue to the China 'threat' theory requires us to move away from facts and statistics and step into the discursive sphere.²⁷ At first blush, China's quest for modernity seems to conform to Harvey's two phases pattern of capitalist accumulation.²⁸ Yet, at the same time she appears to reject capitalist logic, insists on preserving her socialist credentials, and maintains that systemic equilibrium and a peaceful rise that turns away from expansionary and hegemonic ambitions are within collective grasp. Despite appearing at times to follow the Western path, China also asserts a new paradigm of a harmonious world (HWP) that is premised on the possibility of different outcomes from those produced by her predecessors.²⁹

At its core, the HWP is a statement about the political economy of globalisation – its potential to produce peace and common prosperity, its reality of unequal access to wealth and conflicts that are attendant on hegemonic ambitions, and the way the latter may be rectified through correct management. It is in the HWP's promotion of pluralistic multipolarity that it is arguably at its most systemically challenging. For multipolarity and diversity implicate a rejection of the 'one size fits all' US dominated neoliberal model in favour of a new design of diffused power, numerous centers of decision-making, and the preservation of

²⁵ 'Assets of China's Overseas Enterprises Exceed 1 Trillion USD' [1 Nov 2010] People's Daily Online <<http://english.people.com.cn/90001/90778/90861/7183957.html>> accessed 28 Dec 2010; Long Yongtu, talk to the China Association, London 28 June 2013.

²⁶ S.C and D.H., 'Chinese and US GDP Forecasts Catching the Eagle' [2 May 2014] The Economist

²⁷ Jenny Clegg, *China's Global Strategy: Towards a Multipolar World* (Pluto Press 2009) 4.

²⁸ Harvey, *ibid* (n 14) 34, 94-95, 125-27.

²⁹ See for example Yongnian Zheng and Sow Keat Tok, "'Harmonious Society' and 'Harmonious World': China's Policy Discourse Under Hu Jintao' (2007) Briefing Series – Issue 26 The University of Nottingham China Policy <[Institute http://nottingham.ac.uk/cpi/documents/briefings/briefing-26-harmonious-society-and-harmonious-world.pdf](http://nottingham.ac.uk/cpi/documents/briefings/briefing-26-harmonious-society-and-harmonious-world.pdf)> accessed 27 Oct 2012.

particularities. It is of little surprise then that in 2003, as the US was preparing to invade Iraq, and China, Russia and the European Union drew closer in their joint opposition to the proposed war, Condoleezza Rice hit back by describing multipolarity as 'a theory of rivalry'.³⁰ A visit to Beijing in May 2010 led Williamson to conclude that China would not embrace the US constituted world order. Appended to this conclusion was the spectre of US interests at peril.³¹

Yet, the type of reaction evinced in Rice and Williamson's statements does not make for a complete picture. In this respect, the Western conceptualisation of the HWP in Ramo's Beijing Consensus may be of particular interest. At the time of writing Ramo was advisor to Goldman Sachs and had his essay published by the Tony Blair founded UK Foreign Policy Centre.³² In other words, the Beijing Consensus came out of powerful neoliberal institutions and, indeed, is couched in neoliberal discourses.³³ Nevertheless, it conveys a sympathetic approach to the HWP. It may be, as argued by Dirlik, that the Beijing Consensus is primarily a 'sales gimmick' intended to promote China to the world and the concept of development to the Chinese leadership.³⁴ However, it did gain currency, including among developing countries.³⁵ It is thus sufficiently significant to merit examination, particularly as it may be said to be expressing conceptualisation of the HWP from a neoliberal perspective. The HWP, including its interface with the neoliberal paradigm, is the subject of chapter 5. The following is therefore by way of a brief discussion that focuses on the way the Beijing Consensus' representation of the HWP relates to China's own statements.

The Beijing Consensus' conceptualisation of Chinese power as being 'asymmetric' is absent from the HWP. Similarly absent is the notion of China as

³⁰ *ibid* (n 27) 3.

³¹ Williamson, *ibid* (n 3).

³² Joshua Cooper Ramo, *The Beijing Consensus* (The Foreign Policy Centre 2004).

³³ Arif Dirlik, 'Beijing Consensus: Beijing "Gongshi." Who Recognizes whom and to What End' *Globalization and Autonomy*

<http://globalautonomy.ca/global1/position.jsp?index=PP_Dirlik_BeijingConsensus.xml>

accessed 9 Nov 2012 2.

³⁴ *ibid*

³⁵ *ibid*

a superpower. Both appear to be more in the nature of neoliberal lexicon. Beyond this, the Beijing Consensus and the HWP nevertheless converge in Ramo's imaging of China as a rising power for whom peaceful multilateralism is to replace military control in the management of the global arena.³⁶ This is also confirmed for example, in a statement made by China's former Foreign Minister, Qian Qichen: 'even when China becomes a strong and developed country, it will continue to refrain from aggressions and expansion'.³⁷ China, wrote the think tank scholar, Wang Yizhou in 1999 '(...) will enter the twenty first century with the image of a responsible big power. With the passing of time, the so-called 'China Threat Theory' will be defeated automatically'.³⁸

The HWP and the Beijing Consensus also meet in their articulation of a shift from past solidarity-based collective resistance to emphasis on individual national empowerment. Such emphasis is also found, for example, in Deng Xiaoping's January 1980 address regarding the tasks of opposing hegemony and preserving world peace. 'Everything', he said, 'depends on our doing the work in our country well'.³⁹ Similarly, in Ramo's Consensus the national domain is where new ideas are to take root first.⁴⁰ The presumption is that success at the state level will then evolve so as to reconstitute the interstate space. However, the HWP supplements this chronological order with recognition of the need for global institutional reforms.⁴¹ It does not altogether foreclose the proposition that the predicaments to be addressed are structural rather than contingent, so that the particular and individual may not be able to blossom in the absence of a preceding collective action.

³⁶ Ramo, *ibid* (n 32) 37; Halper similarly considers that the Beijing Consensus does not purport to challenge the West militarily or economically but conceptually and politically. Stefan Halper, *The Beijing Consensus: How the Chinese Authoritarian Model will Dominate the 21st Century* (Basic Books 2010) generally.

³⁷ Shirk, *ibid* (n 16) 106.

³⁸ *ibid* 107.

³⁹ Deng Xiaoping (trs), 'The Present Situation and the Task Before Us' in *Selected Works of Deng Xiaoping* (1975-1982) (University Press of the Pacific 2001) 225.

⁴⁰ Ramo, *ibid* (n 32) 33.

⁴¹ Hu Jintao, 'Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society' [15 Oct 2007] Report to the 17th National Congress of the Communist Party of China 17.
<<http://www.china.org.cn/english/congress/229611.htm>> accessed 22 Aug 2012

Further by way of divergence, Ramo's use of the term consensus may be helpful for the purpose of positing China's paradigm as a counter discourse to the Washington Consensus. However, in itself the word may be read as hegemonic in that it encapsulates neoliberal delegitimisation of that which is conflictual and diverges from a purported universal rationality.⁴² By contrast, the HWP opposes hegemony and upholds diversity. Indeed, Dirlik is correct to point out that the concept of common recognition encapsulated in the Chinese equivalent word (*gongshi*) is slightly different from 'consensus'.⁴³

When Ramo distinguished between the Beijing and the Washington Consensus by reference to the citizen and the individual rather than corporate interests as the starting point for policies, he may have overlooked an important if discreet aspect of the HWP.⁴⁴ The concept of the citizen implicates a liberal individual subjectivity.⁴⁵ Such subjectivity is eligible for citizenship but only when socially prescribed criteria are met.⁴⁶ Its propensity is therefore towards exclusivity. In socialist ideology individual citizenship is replaced with the collective and inclusive subjectivity of the whole of the people in their social interactions.⁴⁷ The two therefore articulate different and potentially conflictual notions. Contrary to Ramo's proposition that China's paradigm begins with the individual,⁴⁸ the language mostly used by Hu Jintao in his address to the 17th Party Congress is that of people. In other words, as with the interstate order, the collective remains integral to the HWP. The possible implications of this choice of words will be returned to in chapter 5.

Finally, the Beijing Consensus has little to say about China's vision of an emerging multipolar world order, notwithstanding the centrality of this vision to the HWP. As seen above, it is here that the possibility of a contestation is at its most evident.

⁴² Dirlik, *ibid* (n 33) 2.

⁴³ *ibid*

⁴⁴ Ramo, *ibid* (n 32) 29-30, 60.

⁴⁵ Immanuel Wallerstein, *After Liberalism* (The New Press 1995) 78-79.

⁴⁶ *ibid*; Michael Hardt and Antonio Negri, *Empire* (Harvard University Press 2000) 50-51.

⁴⁷ Wallerstein, *ibid*, (n 45) 80-81.

⁴⁸ Ramo, *ibid* (n 32) 55.

In sum, the Beijing Consensus appears to fit within the camp of Shirk's type of responses to the rise of China, whereby the avoidance of confrontation is made contingent on China's otherness being made to fade away. It illustrates the way neoliberal discourse may select and adjust HWP statements so as to abate the paradigm's conflictual potential, and thus enable its incorporation into the neoliberal strategy. This interpretation is consistent with Foucault's idea that, a strategy can accommodate different discourses. They can 'circulate without changing their form to another, opposing strategy'.⁴⁹ Further, the HWP is vulnerable to such manipulation, given its combination of convergence and divergence, its attempt at being simultaneously in and out, and perhaps, more significantly, the inconsistency in its interior. It is this that preoccupies much of this work.

Research Question Statement

This work seeks to examine the logic of capital and the way it frames the development of Economic IL in a globalised world. In other words, it aims to delve below the surface of contingencies in order to probe the capitalist rationality, including its neoliberal progression, as it operates in the interiors of systemic structuring, and reveals itself institutionally and discursively. The examination is undertaken against the backdrop of the advent of a newcomer, one who appears to 'pick and choose', accept some aspects of this rationality and reject others, with resulting discursive and institutional inconsistency. The work therefore questions what it is that this newcomer finally proffers: a reproduction of a capitalist logic or an alternative model capable of displacing it. Put differently, this is an enquiry into whether a discourse that partially converges with and partially diverges from capitalist logic may nevertheless amount to a counter discourse. In the face of internal inconsistency, might it nevertheless produce an alternative whole, capable of interrupting the discourse that currently dominates our thinking?

⁴⁹ M Foucault, *The History of Sexuality: Introduction* (Pantheon Books 1990) 101-02.

Attempts at understanding the significance of China's interface with the world order are not new to the literature about the country. Opinions differ. Focusing on China's advocacy of a new multipolar order, Clegg, for example, sees her rise as heralding a new constellation of power and rationality.⁵⁰ Wang and Zheng assert that the country indeed calls for a new order, yet she remains an important connection in the chain of global capitalism.⁵¹ For Dirlik, the purported Chinese model represents a rescue plan rather than an alternative to a deleterious capitalist model.⁵² From a political economy perspective, some go as far as arguing that in reality China's ascent plays a significant role in maintaining systemic status quo. For Westra, for example, the country's incorporation into the global supply chains of low cost consumers' goods, bondage like labour practices and investment of surplus capital in US dollars facilitate the insidious ways by which Washington batters weaker economies into submission and link China inextricably to existing global trends.⁵³ Similarly, Li Mingqi postulates that, but for China's contribution, the neoliberal project would have been short-lived.⁵⁴ Coming from a world-system theoretical standpoint, the question he raises is whether the rise of China is merely another episode in the continuum of systemic cyclical renewals, or whether it signals something fundamentally different.⁵⁵

This is an important debate about what Wallerstein calls 'the strategy of transformation'.⁵⁶ As he points out, what we do in these times of transition will determine whether the world-system that will eventually emerge will be a better one.⁵⁷ My hope is to contribute to this debate by offering a new approach; one that searches for clues in the spheres of discourse and institutions. I seek to unpack paradigms by observing their rendering into juridical rules. In other

⁵⁰ Clegg, *ibid* (n 27) generally.

⁵¹ Wang Gungwu and Zheng Yongnian, 'Introduction' in Wang Gungwu and Zheng Yongnian (eds) *China and the New International Order* (Routledge 2008) 6,10.

⁵² Dirlik, *ibid* (n 33) 2.

⁵³ Richard Westra, *The Evil Axis of Finance: the US-Japan-China Stranglehold of the Global Future* (Clarity Press 2012) 19, 146-73.

⁵⁴ Mingqi Li, *ibid* (n 17) 60-72.

⁵⁵ *ibid* 1.

⁵⁶ Wallerstein, *ibid* (n 45) 4.

⁵⁷ *ibid* 68.

words, I look at paradigms through the lens of the law, specifically Economic IL, and within it, BITs.

Why is the law a suitable lens through which discursive surfaces may be examined? The answer is threefold. First, law expresses capitalist rationality with starkness rarely found elsewhere. In a way that leaves little room for subterfuge, legal rules unmask the realities of where power lies, whose benefit is being served and how this is achieved. By way of an example, in the context of BITs, Economic IL abandons principles such as 'separate legal personality' and 'limited liability' that lie at the heart of company law. These principles are nevertheless retained when it comes to harm caused by TNCs to populations and the environment. In all instances, the aim is to protect corporations being the leading actors within capital.⁵⁸

Second, law and the HWP relate to each other by virtue of both being Foucauldian discursive formations. That is to say, each represents a body of language, concepts and meanings.⁵⁹ Third, law is also an institution. Indeed IL is arguably 'the critical institution of an international society and the mark that relations among states embody shared rules and norms'.⁶⁰ As such it fulfils three main functions: it provides the rules that translate the discourse into practice, locks in norms so that they are not easily deviated from and, finally legitimises the power structures that formulated the discourse in the first place. It follows that paradigm and law should form a single and consistent governmental organism, a Foucauldian eco-political-juridical ensemble of mutual legitimisation.⁶¹ But is this so in the case of the HWP?

The HWP's high level of linguistic abstraction, its fusion of indigenous logic with imported ideas, and its temporal proximity combine to induce uncertainty. I

⁵⁸ On principles of company law see Dine, *ibid* (n 12) 1, 30-31.

⁵⁹ Michel Foucault (tr), *The Archeology of Knowledge* (Routledge 2002) generally; Sara Mills, *Discourse* (The New Critical Idioms series Routledge 1997) 15-16.

⁶⁰ Simon Bromley, 'Universalism and difference in international society' in William Brown, Simon Bromley and Suma Athreya (eds), *A World of whose Making? Ordering the International: History, Change and Transformation* (Pluto Press 2004) 77.

⁶¹ Michel Foucault (tr), *The Birth of Biopolitics: Lectures at the College De France 1978-1979* (Palgrave Macmillan 2008) 32-41.

conclude that, as yet, it may be too early, indeed unhelpful to draw conclusions. However, given the specificity of capitalist/neoliberal social relations, the compulsion for expansion and power accumulation that is attendant on its logic and the fault line that problematizes the HWP, at this juncture the possibility of an interruption seems unlikely. Furthermore, China's participation in the BITs network indicates an engagement with the existing order, a willingness to be institutionally locked in in a way that may ultimately override the country's commitment to divergence. As will be seen in chapter 4, in both China's BITs program and the HWP a pattern may be observed, one that combines a trajectory towards the absorption of Western practices with preservation of diversity. From this perspective, they appear to display unity. However, it is a unity that is founded on an internal contradiction. Thus, the HWP may prove a different discourse that nevertheless remains within the parameters of the same strategy.

Since I undertake this enquiry with one eye to the future, two points merit highlighting. First, I do not propose to engage in predictions. In this, I seek to avoid a Kahneman type illusion that knowledge of the past also makes the future knowable.⁶² Second, while conclusions are drawn, they do not purport to articulate any final word on the subject. Indeed, temporal proximity and the complexity of the processes at work mean that a claim to incontrovertibility would be misplaced.

Theoretical Framework and Methodology

The paradigms under examination are those of neoliberalism on the one hand and the HWP on the other. The juridical structure selected is that of BITs. As seen in the introductory section of this chapter, I argue that BITs are rooted in the long-term development of capitalism and its dynamic. They provide the rules for the practice of its neoliberal progression. By contrast, the HWP is the

⁶² Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Books 2012) 119-208.

product of rapturous historical processes. It articulates the indigenous heritage of Confucian philosophy and an ancient tributary system, one that has nevertheless become intermingled with internalised exogenous discourse. Low level of consistency with BITs should thus come as no surprise. We find it, for example, in HWP principles such as sovereignty, civilizational and developmental diversity, global co-operation, localism and common prosperity, all of which fits ill with BITs' impulses for sovereignty reduction, uniformity, globalised competition and developmental disparities. This fault line of incongruence in the interiors of the HWP may provide an indicator of the shape of things to come.

In what follows I elucidate the reasons for this selection. The argument for the choice of BITs was alluded to above, namely that being a juridical structure they are both a discourse and an institution. As a discourse they voice capitalist rationality in its neoliberal progression. As an institution they provide rules and codes of behaviour for its practice. What makes BITs of particular interest is the fact they operate at both the national and international levels. Similarly, they straddle both the public and private domains. They mesh the national with the international and the public with the private in a way that dispenses with hitherto established boundaries. Seen from this perspective, they represent a global institution that nevertheless operates in the national sphere.⁶³ Their expression of the neoliberal logic of enhanced private authority through statalisation of private capital and privatisation of the state is not only linguistic, but also structural.

There are three main reasons why China was selected. First, there is the fact of her empowerment. Her economic rise is hardly controversial and amply recorded. Her outward direct investment (ODI) – of particular interest for the purpose of this work – may be still relatively small. However, its trajectory is significant. Chinese ODI has grown fourteen folds between 2003 and 2009, with

⁶³ For a discussion of the implications for borders of global processes that take place within national territories see Saskia Sassen, 'When national territory is home to the global: Old border to novel bordering' in Anthony Payne (ed), *Key Debates in New Political Economy* (Routledge 2006) 106-127.

expansion continuing throughout 2009 despite overall decrease in total ODI of over 30% in that year.⁶⁴ With eight mergers and acquisitions (M&As) and nine greenfield-investments in the first quarter of 2013, Chinese ODI in the US is strengthening.⁶⁵ Economic empowerment was accompanied by a move up the hierarchical ladder of the interstate system and a greater proximity to its core. This move carries with it the possibility of new capacities and outcomes. Second, China straddles both the camp of the developed and the developing. From the perspective of purely economic measurements, she is still developing and may indeed be said to be a poor country.⁶⁶ However, if, as suggested by world-system analysts such as Wallerstein and Hardt and Negri, development is to be measured by a country's place within the capitalist world-system's hierarchy, she is fast joining the ranks of the developed.⁶⁷ In other words, she has a foot in each camp with access to different landscapes of interests and concerns. Third, China experienced being colonised. Her incorporation into modernity was violent. She thus brings to the table the perspective of a semi-colony's humiliation, a perspective that continues to play a role in shaping her responses, her discourse and her outwards projections.

This thematic triangulation is constructed using similarly triangular theoretical scaffoldings that comprise systems and their social structures, agency, and the power they mediate.

The Capitalist System

The word 'system' refers to a set of things working together as part of an

⁶⁴ China-Britain Business Council (CBBC) and China Council for the Promotion of International Trade (CCPIT), "'Going Global" Strategy Leads Chinese Entrepreneurs to Expand Overseas' in CBBC, China in Britain A special Publication on Chinese Investment in the UK (ISSN 2048-8061 Nov 2010).

⁶⁵ Chen Wenhua, 'Chinese Companies Increase Stake in the US' [2 May 2013] China Daily <http://www.chinadaily.com.cn/cndy/2013-05/02/content_16466596.htm> accessed 29 May 2013.

⁶⁶ Rafael Leal-Arcas, 'China's Attitude to Multilateralism in International Economic Law and Governance; Challenges for the World Trading System' (2010) 11 The Journal of World Investment and Trade 261.

⁶⁷ Michael Hardt and Antonio Negri, *Empire* (Harvard University Press 2000) 283; Immanuel Wallerstein, *World-systems Analysis: An Introduction* (Duke University Press 2004) 52-59.

interconnected network.⁶⁸ In other words, it is an integrated unitary whole that is made up of interconnected components, and is delineated by spatial and temporal boundaries. In the context of this work, the unitary whole is capitalism - a network of human relationships that takes the 'fantastic' form of relations between 'things'.⁶⁹ It has its own singular and specific logic. Such logic is expressed in hierarchical structures that are characterised by the dominance of the economic instance over the political and ideological one, the primacy of the market as a compulsion and a mediator of truths, and the imperatives of constitutive rules of competition and profit maximisation. The structures' basic objective is the endless accumulation of capital and its self-expansion.⁷⁰ This focus on the essence of capitalism does not exclude the plurality of forms and typologies found in the literature.⁷¹ It merely proposes the existence of an overarching logic and certain prerequisites for a system to qualify as capitalistic.

Capitalism's temporal and material beginnings, its substance and, indeed, the mere fact of its existence, are shrouded in controversy. Frank doubts whether there is such a thing as capitalism at all.⁷² In adopting the view of capitalism as canvassed here namely, a delineated system in possession of a distinct rationality, beginnings and therefore a possible end, I follow scholars such as Wood and Amin. For Amin, capitalism is exclusive to modernity and was absent from the earlier, tributary order. In issue is the specificity of appropriation by economic means. The difference associated with such specificity, he argues, is 'qualitative and decisive'.⁷³ This view departs from what Wood terms the 'commercialization model' according to which capitalist impulses were always there, deeply embedded in human essence - an eternal law of nature that stretches back to infinity and was merely prevented by political constraints

⁶⁸ Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/system>> accessed 1 July 2014.

⁶⁹ Joseph Choonara, *Unraveling Capitalism: A Guide to Marxist Political Economy* (Bookmarks Publications 2009) 15.

⁷⁰ Ellen Meiskins Wood, *The Origins of Capitalism: A Longer View* (Verso 2002) 2, 4; Foucault, *ibid* (n 61) 35; Samir Amin, *Global History: A View From the South* (Pambazuka Press 2011) 5.

⁷¹ For a discussion of models of capitalism see for example Colin Crouch, 'Models of Capitalism' in Payne, *ibid* (n 63) 11-31.

⁷² Andrew Gunder Frank, *ReOrient: Global Economy in the Asian Age* (University of California Press 1998) xix, 330-32.

⁷³ Amin, *ibid* (n 70) 161-62.

from revealing itself so as to allow the free movement of economic actors and the free expression of economic rationality.⁷⁴ The model assumes varied and refined theoretical forms, down to Polanyi. Polanyi was exceptional in that he did acknowledge the capitalist reversal of markets' role from secondary to primary, and took issue with the belief in 'spontaneous progress'.⁷⁵ Nevertheless, he too saw the development of a market society as both inevitable and natural.⁷⁶ Given the controversy over how capitalism came to be, it is hardly surprising that its temporal beginnings are similarly polemical. They vary from the early 16th to the 19th century.⁷⁷ Arrighi considers the city-state of Venice a prototype of a capitalist formation within a medieval system.⁷⁸ My focus is on the 18th and 19th centuries as a fitting temporal framework for the purpose of this discussion. For it was around this time that capitalism matured into its industrialised form.⁷⁹ It was also the moment when Polanyi's 'Great Transformation' collided with China's 'Great Divergence', and propelled the country via a 'century of humiliation' towards her own rupture:⁸⁰ from the centre to the periphery of the world-system, from a thriving and innovative civilization to the 'sick man of East Asia' and from a diffuser to a recipient of norms and systemic structures.⁸¹

Two points merit highlighting. First, in this work capitalism is understood as implicating a break with earlier systems of social relations, a qualitative rupture rather than merely a quantitative increment. Indeed, it is in the nature of a qualitative rupture that it interrupts quantitative processes. It operates so as to inject a new rationality into the motion of accumulative development and divert

⁷⁴ Wood, *ibid* (n 70) 4-5, 11-33; Choonara, *ibid* (n 69) 20.

⁷⁵ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1957) 37; for an account of varied theories of the 'commercialization model' see Wood, *ibid* (n 70) 17-21.

⁷⁶ *ibid*

⁷⁷ Amin, *ibid* (n 70) 12.

⁷⁸ Arrighi, *ibid* (n 14) 37-48.

⁷⁹ Wood, *ibid* (n 70) 3.

⁸⁰ Martin Jacques, *When China Rules the World: The Rise of the Middle Kingdom and the End of the Western World* (Allen Lane 2009) 72.

⁸¹ Li Xing, 'Introduction The Rise of China and the Capitalist World Order: The "Four-China" Nexus' in Li Xing (ed), *The Rise of China and the Capitalist World Order* (Ashgate 2010) 5; the term 'Great Divergence' was coined by Ken Pomeranz to denote the divergence in the political and economic fortunes of Europe and East Asia. Kenneth Pomeranz, *The Great Divergence: Europe, China and the Making of the Modern World Economy* (Princeton University Press 2000).

it in a new direction. As will be seen later, the capitalist rupture involved a transformation of structures, their agents and the power they mediate. Second, the break was neither unavoidable nor natural. Systemic similarities and the operation in China between the 16th and 19th centuries of what both Arrighi and Wong identify as Smithian processes did not produce the same developmental trajectory as that of Europe.⁸² Rather, the country was forcibly incorporated into the capitalist order. In contrast, in 16th century England, new property relations came into being through a co-constitutive dynamic that engaged the state, landlords and the exercise of economic powers.⁸³

The evolution of capitalism into an expansive capitalist world-system of accumulation is closely associated with the spatial reconstitution of the world, and its partitioning into nation-states.⁸⁴ Yet, the relationship between systemic agents – states on the one hand and actors of capital on the other - was to prove an uneasy one. The two grew together. Actors of capital did and continue to turn to the state for assistance in the management of the global space so as to reduce excessive competition and remove national impediments to their expansion. Yet, simultaneously they also resisted and continue to resist the extension of states' involvement.⁸⁵

BITs exemplify this combination of alliance and contradictions that inhabits the state-capital binary. They provide Economic IL's rules for the penetration of foreign investment into the national space. These rules buttress a vision of a global spatial totality, one that is governed by transnational norms, and in which capital can be mobile and unhindered by the permutations that reside within territorial boundaries. To this end, the state's assistance is enlisted, notwithstanding that at the same time the state is also required to accept a reduction in its sovereignty and regulatory space. Such reduction implicates a

⁸² R. Bin Wong, *China Transformed: Historical Change and the Limits of European Experience* (Cornell University Press 1997) 15,17-22; Giovanni Arrighi, *Adam Smith in Beijing: Lineages of The Twenty-First Century* (Verso 2007) 13-68.

⁸³ Wood, *ibid* (n 70) 94-105.

⁸⁴ Arrighi, *ibid* (n 14) 33; Immanuel Wallerstein, *The Modern World System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (Academic Press 1974) 348.

⁸⁵ Arrighi, *ibid* 33-36.

renouncement of difference, so as to enhance the normative uniformity necessary for capital's smooth cross-border expansion. Anghie's 'dynamic of difference' alludes to the aim of annihilating cultural divergence.⁸⁶ However, IL is included in his understanding of culture. Indeed, the dynamic of difference is examined through the lens of the evolution of IL in the wake of the colonial encounter. From this perspective, BITs and ICSID are but a chapter, the logical next step in a centuries-old process of reconstitution which, though evolutionary in terms of narrative and material realisation, is also marked by the constancy of its perspective and aim - that of 'normalising the aberrant society' by the universal institutionalisation of Westerncentric IL.⁸⁷

With endless capital accumulation as the primary and arguably the only objective of economic activity, the capitalist world-system 'can and must constantly expand in ways and degrees unlike any other social form'.⁸⁸ Its logic being different, the logic of its expansion is equally novel. In what Arrighi conceptualises as non-capitalist territorial logic, wealth is either the means for, or the by-product of expansion. By contrast, in the capitalist logic, territorial acquisitions are the means and by-product of the dictates of capital accumulation. In other words, the purpose is not size, but rather content, e.g. resources and markets.⁸⁹ It follows that the territory must also be prized open and transformed so as to ensure unfettered access.⁹⁰ Prizing open requires a design – one of Doyle's warning signs of imperial power.⁹¹ It also requires control that is ideally informal – e.g. through trade – so as to minimize the risk of disruptive resistance.⁹² To this IL adds a layer of legitimisation by transcribing incursions into the language of rules of universalised normativity. And so, as capitalism began its expansion into new territories, jurists

⁸⁶ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law, CUP 2004) 4.

⁸⁷ *ibid*

⁸⁸ Wood, *ibid* (n 70) 97; Immanuel Wallerstein, *Historical Capitalism* (Verso 1983) 14.

⁸⁹ Arrighi, *ibid* (n 14) 34-35.

⁹⁰ Harvey, *ibid* (n 14) 139-40.

⁹¹ Michael W. Doyle, *Empires* (Cornell Studies in Comparative History, Cornell University Press 1986) 22-30.

⁹² John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) Second Series VI 1 *The Economic History Review* <<http://www.mtholyoke.edu/acad/intrel/ipe/gallagher.htm>> accessed 25 Sep 2010.

correspondingly began to assert IL protection for the rights of travelling and trading aliens.⁹³ With the dissemination of European sovereignty to formerly colonised territories, BITs emerged as part of a corporations-driven tactical response to the threat, which former colonised countries' newly found sovereignty posed to their traditional arrangements with colonial governments.⁹⁴ Yet, both in terms of their lack of reciprocity and their treatment of consent as divorced from the circumstances in which it was given, BITs may be seen as a continuation of, rather than a break from colonial unequal treaties. Such continuation, however, is evolutionary. Statements about the civilizing mission were transformed into a discourse of development. For BITs signaled a conceptual shift from IL's traditional function of protecting aliens and their property to a notion of protection for the purpose of development.⁹⁵ In the sphere of political economy, BITs were instrumental in bringing about fragmentation of Third World postcolonial solidarity. They were a fitting tool for the implementation of this imperial design since, as previously noted, one of their effects is to turn states into competitive entities. Thereafter, they continued to spread as part of 'new imperialism's aim to bring the whole surface of the world within the realm of market-based economic imperatives.

Agency and Power

Let me start with a caveat. In law, agency refers to the acts of a person authorised by another, the principal, to act on her behalf. This definition has a role to play in the interplay between structures (principal) and the institutions/organisations (agents) that interpret structures to produce/reproduce social reality. However, what follows involves social science and philosophical theories that are highly complex, polemical and form part of a discipline that is outside my area of expertise. I hope I have done them justice.

⁹³ Andrew Newcombe and Louis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 4.

⁹⁴ Anghie, *ibid* (n 86) 226-43.

⁹⁵ Newcombe and Paradell, *ibid* (n 93) 21.

The developments alluded to above may be theorised as taking place within a productive space that may be national or international and comprises a duality of social structures and agents. Structures are internal relationships that come into being by reference to structural positions.⁹⁶ Duality is double faceted. It alludes to the fact that space is divided between structures and agents, as well as to the dynamic by which the two, including their constitutive elements engage with each other. The agents internalise social structures, and then externalise them in the form of interpretive social actions. Conversely, the structures contain the agents and/or are the product of their past actions. In other words, agents are a medium through which structures pass, to become social actions that may in turn be incorporated back into structures. They are simultaneously the outcome of internalised structures and occupy a position within them.⁹⁷ Thus, the boundaries between the two are fluid, with agents and structures traveling back and forth in a co-constitutive, circular, evolutionary flow, the movement of which and its direction is not easily deciphered. Agents construct structures through their actions, but are also constructed by them. They are both autonomous and determined. In other words, 'structures cannot (re) produce themselves in abstraction from agency; nor is agency reducible to structural determination'.⁹⁸

The space is productive because the end result is an order that may be evolutionary, but in which structures and agents, including their foundational power allocation and interpretations are stable. Occasionally, the order experiences a rupture, such as the capitalist one and China's Great Transformation. The rupture engenders what Foucault refers to as 'displacements and transformations of concepts'.⁹⁹ In other words, it represents a change in structural positions, and a corresponding re-formulation

⁹⁶ Mark Rupert, 'Class powers and the politics of global governance' in Barnett and Duvall, *ibid* (n 4) 209; Barnett and Duvall, *ibid* (n 4) 19.

⁹⁷ Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) 17 and generally; Anthony Giddens, *Central Problem in Social Theory: Action, Structure and Contradiction in Social Analysis* (University of California Press 1979) 5; Rupert, *ibid* (n 96).

⁹⁸ Rupert, *ibid* (n 96).

⁹⁹ Foucault, *ibid* (n 59) 4-5.

of discourse. So, for example, the capitalist break implicated elevation in the structural position of markets from subordination to a site of command, resulting in their discursive re-conceptualisation. The order occasionally also falls into chaos, as in Arrighi's periods of systemic chaos.¹⁰⁰

At the international level it is embodied in a world-system, which Wallerstein conceptualises as a hierarchical interstate arrangement that comprises core, semi-peripheral and peripheral countries. Their relationship is one of power and takes place within the framework of structures of dominance and competitive actualisation. Core states safeguard their dominance. Semi-peripheral states aspire to the core and seek to ensure that, at the very least, they do not slip down the ladder. Broadly, peripheral states internalise structures and actions externalised by core states.¹⁰¹ In an imperial context such actions will form part of a design that in turn provokes resistance.¹⁰²

In this structures-agents duality, agents represent human action that takes place in a social, structural context.¹⁰³ They are composed of organisations and institutions that may be formal or informal, depending on their organisational level. Of these, states and transnational institutions/organisations, TNCs (being organisations within the institution of capital) and the law, including IL, form the main interest of this work. Other actors include think tanks, academia, transnational elites and people. There are different views as to the way the dynamic of agents' engagement with each other is mediated. They range from a methodology of consequences with its games theory and neo-classical economy, to Beck's 'logic of the rule change'¹⁰⁴ and to Krasner's logic of appropriateness, pursuant to which political actions are the product of power, identities and roles. These engender appropriate behaviour in given situations.¹⁰⁵

¹⁰⁰ Arrighi, *ibid* (n 14) generally.

¹⁰¹ Wallerstein, *ibid* (n 67) generally.

¹⁰² Doyle, *ibid* (91) 22-30.

¹⁰³ Barnett and Duvall, *ibid* (n 4) 13.

¹⁰⁴ Beck, *ibid* (n 1) 3

¹⁰⁵ Beck, *ibid* (n 1) 3; Stephen D Krasner, 'State Power and the Structure of International Trade' in Jeffrey A. Friedman and David A. Lake (eds), *International Political Economy: Perspectives on Global Power and Wealth* (Routledge 2000) 19-36.

Power is mediated in a multiplicity of forms, is spatially mobile and not easily contained.¹⁰⁶ Simply defined, it is the capacity for action that produces outcomes. Such capacity is socially structured, operates in the realm of socially structured relations and is exercised by their human participants.¹⁰⁷ This feature of ability to influence the behaviour of others meets the legal approach to power, namely the differential that exists in the parties' bargaining position, which shapes the outcome of their negotiations. Thus, BITs are said to be power instruments because the parties' capacities to dictate terms and enforce them are unequal. The treaties are thus formally symmetric and balanced but substantively imbalanced and asymmetric.¹⁰⁸

This is a thesis about law and so, its theoretical framework is informed by this basic approach to power. However, it also seeks to socially and politically contextualise law, which necessitates bringing in other perspectives. For power may not be limited to the ability to influence others. It may also refer to the actors' capacities to produce effects that determine their own circumstances and identity.¹⁰⁹ In both instances, power is mediated in and through social relations. Agents and structures convey to each other the boundaries of legitimacy and the hierarchical order, as well as the normative content of concepts, identities and strategies. Again, the dynamic is dual and generative. At the level of institutions, the main containers of power are transnational institutions, states and capital. In terms of their mutual engagement, as seen above, states and capital form a dialectical binary. Capital harnesses states' assistance, but at the same time develops strategies for the reduction of their ability to mediate power. In the context of the neoliberal regime, TNCs rely on core states to convey power so as to exert control over the world interstate system and launch it on a market-centered, pro-corporate program of privatization and commodification.¹¹⁰ However, at the same time, they also

¹⁰⁶ Mills, *ibid* (n 59) 34.

¹⁰⁷ Jeffrey Isaac, *Power and Marxist Theory: A Realist View* (Cornell University 1987) 7,9.

¹⁰⁸ M Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 77.

¹⁰⁹ Barnett and Duvall, *ibid* (n 4) 3.

¹¹⁰ On the transnational nature of the neoliberal state see David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 79-81.

seek to break out of the state 'institutional box' and thereby put its survival at risk.¹¹¹

Particularly helpful to the theorization of the different ways by which power is mediated is Barnett and Duvall's taxonomy of compulsory, institutional, structural and productive power.¹¹² Institutional power focuses on the way institutions, working through the rules by which they are defined, shape the actions/non-actions and conditions of existence of others.¹¹³ Its focus is on constraints - the determination of the social capacities and interests associated with a structural position. While structural power has a productive function, it is nevertheless different from productive power in an important respect: the first produces patterned structures of domination/subjugation; the other constructs subjectivities through broad and related systems of knowledge and discourse, the latter being a system of signification that produces social identities and capacities and give them meaning.¹¹⁴ In other words, in line with Foucault's critique of the 'repressive hypothesis', power is not thought about only in terms of restriction on freedom of action.¹¹⁵ The interaction between institutional and productive power is reminiscent of the question that preoccupies this work. That is to say, can the two operate in tandem, yet produce different outcomes? Put differently, where an agent is locked in by the exercise of institutional power, might productive power nevertheless engender a different identity? China is locked into the WTO and BITS. Yet, she sees herself as a leader of developing countries, and a country in the primary stage of socialism with a working class led and workers and peasant alliance-based democratic dictatorship.¹¹⁶

The various ways by which power is mediated tend to get conflated. While the first stage of neoliberal destruction may gravitate towards compulsory power, producing an enduring desired alternative to that which has been destroyed

¹¹¹ Beck, *ibid* (n 1) 3

¹¹² Barnett and Duvall, *ibid* (n 4) 13-22.

¹¹³ *ibid* 15.

¹¹⁴ *ibid* 18, 20-21.

¹¹⁵ Mills, *ibid* (n 59) 17.

¹¹⁶ 'Judicial Reform in China' [Oct 2012] Information Office of the State Council The People's Republic of China 1, 2.

may call for the introduction of the other three forms of power. Thus, the 'creative destruction' of Chile in 1973 and Iraq in 2003 implicated the use of compulsory power followed by institutional power, so as to reconfigure the state. China was besieged by a combination of guns and discourse in which capital's notion of 'progress' was used to depict her temporary weakness as an inherent condition; a permanent state of backwardness that was the antithesis of historically codified Western progress.¹¹⁷ The effect of this fusion of compulsory and productive power was to depattern China's identity and make her receptive to a new one, this time constructed for her by the West.¹¹⁸ By way of a footnote, this approach to identity as constructed and delineated by power differs in a fundamental way from the Chinese/Confucian understanding of the process by which identities are formed. This is discussed in chapter 5.

To observe the nature and formation of empires, I turn to Doyle's understanding of power whereby design and resistance are the two indicators for distinguishing a truly independent act from one that is only nominally independent.¹¹⁹ Such understanding focuses on differentials in actors' capacity to determine their own circumstances and destiny, and take social action. However, much like Barnett and Duvall, Doyle goes beyond overt power to take account of its covert and informal manifestations. Viewed from this perspective, BITs are instrumental in the implementation of a design of a contemporary 'empire of capital' that is marked by the informal and opaque power of economic dynamics.¹²⁰ The specificity of capitalist power is considered through concepts such as Arrighi's logic of capitalist, as opposed to territorial power; Ardent's observation of the fundamental difference between the localised, predictable power politics of national conquests and imperialism's limitless accumulation

¹¹⁷ Gregory Blue, 'China and Western Social Thought in the Modern Period' in Gregory Blue and Timothy Brook (eds), *China and Historical Capitalism: Genealogies of Sinological Knowledge* (Studies in Modern Capitalism Series, CUP 1999) 74, 77.

¹¹⁸ On 'depatterning' in shock therapy see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane 2007) 25-38.

¹¹⁹ Doyle, *ibid* (91) 45.

¹²⁰ Ellen Meiksins Wood, *The Empire of Capital* (Verso 2005) generally.

of power for accumulation sake; and to a lesser extent, Harvey's classification of collective as opposed to distributive power.¹²¹

Finally, law is an instrument of power.¹²² As an institution it mediates institutional power. That is to say, it locks other agents into prescribed rules and codes of behaviour. As a discourse, it mediates productive power. It conveys the difference between that which is lawful and that which is unlawful. As an institution it provides the rules for the practice of such difference. Agents, specifically states, internalise the difference and then externalise it in acts of governmentality and through their monopoly over legislation. Such monopoly, however, is not hermetic. For, the boundaries between institutions are porous. Cutler, for example, traces transnational merchant law to private origins.¹²³ Sornarajah posits the IL concept of state responsibility for injury to aliens as an instance of normative content that was shaped predominantly by private power.¹²⁴ One of the neoliberal order's features is capital's drive for a merger with both the state and the law. It is a strategy of legal legitimization through, for example, the establishment of an autonomous dispute resolution organisation such as ICSID.¹²⁵

Methodology

This being a largely legal thesis, it was deemed by the department's course instructors that it does not necessarily require a dedicated methodology section. However, considering that the thesis also engages other disciplines, it seems pertinent to say a few words on the subject.

¹²¹ Arrighi, *ibid* (14) 35-37; Hanna Ardent, *Imperialism: Part Two of the Origins of Totalitarianism* (A Harvest/HBJ Book) v, vi; Harvey, *ibid* (n 14) 139-40.

¹²² Colin Gordon, *Michel Foucault Power/Knowledge: Selected Interviews & Other Writing 1972-1977* (Vintage Book 1972) 140-41.

¹²³ A. Claire Cutler, *Private Power and Global Authority: Transnational Law in the Global Political Economy* (Cambridge University International Relations Series, CUP 2003) generally.

¹²⁴ Sornarajah, *ibid* (n 10) 37.

¹²⁵ Beck, *ibid* (n 1) 121, 126.

The methodological approach in this work has entailed a critical survey of a vast range of texts representing different genres, both Chinese and Western. They include primary sources in the form of statistical information, BITs, ICSID decisions, statements made by IFIs and think tanks such as the World Bank and the Mont Pelerin Society, legislation and governmental policy statements, as well secondary sources such as academic publications and media reports. The reasons why BITs and the HWP were selected as case studies were set out above.

In addition to the principal legal analysis, this thesis employs a discursive approach to the above texts. References were made earlier in this chapter to the meaning of discourse. As noted above, a discourse is a system of meaning that entails rules, practices and strategies, and which constructs as well as reflects the object it describes. In order to make sense of the hegemonic discourses associated with the neoliberal project and the potentially counter hegemonic discourse embodied in the HWP, this thesis employs a broadly deconstructive approach. In other words, it seeks to interrogate and disrupt dominant capitalist logic and its constitutive parts in the form of BITs. Influenced by Foucault, I too see an intimacy between truth and power, which regulates the way we speak about, for example, development and the law. Similarly, this analysis posits discourse as a time and space specific phenomenon. 'Each society has its regime of truth, its 'general politics' of truth: that is, the type of discourse which it accepts and makes function as true; the mechanism and instances which enable to distinguish true and false statements, the means by which each is sanctioned, the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true'.¹²⁶ In this sense, this thesis aims to understand the regime of truth produced by capitalism including its neoliberal progression. In applying deconstruction, the texts described above were chosen for their representative nature; I considered the status of the statement makers, the mechanism and strategies employed by agents to diffuse these statements, and the means by which they are internalised, adapted or rejected.

¹²⁶ Michel Foucault, *Power/Knowledge* (Pantheon Books 1980) 131-3.

Adopting a political economy approach to contextualisation, this thesis examines ‘ a specific set of social relations organized around power, or the ability to control other people, processes, and things, even in the face of resistance’.¹²⁷ This approach views economic, social and political system as temporally and spatially contingent. It therefore considers them both independent and dependent variables in need of explanation; in other words, capable of explaining but simultaneously in need of explanation.

Literature Review

As part of the PhD training I attended as part of the degree course, attention was drawn to a recent change in the approach to the way a thesis is to be structured. The point was made that it is no longer obligatory for it to include a dedicated literature review section since such review runs throughout the work in any event. Nevertheless, I hope the following will provide a brief guidance to the way this work engages with the literature including its novel contribution.

The research undertaken for the purpose of this work occurred primarily in the period of registration under supervision for the degree, namely between 2010 and 2014. It cuts across disciplinary boundaries in the hope that this will enable the analysis of texts liberated from, what Foucault observed, are the constraints of a narrow framework.¹²⁸ The literature I have chosen reflects this multi-disciplinary approach. It ranges from law to political economy, including international relations, philosophy and China studies.

The work similarly cuts across the geographical, historical and cultural (understood here in its broadest sense) boundaries that delineate China and the West. Thus, Chapters 2 and 3 focus on the Western perspective. Correspondingly, the research centers on Western literature. The gaze turns to

¹²⁷ Vincent Mosco, *The Political Economy of Communication* (Sage Publications 1996) 24.

¹²⁸ Andrew Cutrofello, *Discipline and Critiques: Kant, Poststructuralism and the Problem of Resistance* (State University of New York Press 1994) 132.

China in chapters 4 and 5. Here, the research combines Western with China's own literature. The only ICSID case to date involving a Chinese BIT is analysed at some length to demonstrate my critique of Snyder's version of global legal pluralism, specifically its failure to take account of the operation of power and related discourse in the dialogue between different sites of governance. The overall aim is to explore China as an agent that participates in the formation of the world order but nevertheless exercises a selection as to that which is to be internalised and that which is to be rejected. To this end, chapter 4 draws on both Western and Chinese legal and political economy literature so as to highlight the difference between the Chinese and Western perspectives of BITs, including the systemic implications of the country's participation in them. An emphasis on Chinese sources enables me to explore the way in which Potter's 'selective adaptation' animates China's interaction with imported Western concepts such as the 'rule of law', property rights and the use of external standards to appraise domestic institutions. Qin Yaqing's elucidation of the Confucian specificity that distinguishes Chinese approach to international relations guides me through an analysis of the HWP's philosophical framework and the way it is used to explain and legitimize contemporary positions.

Thematically, the literature may be divided into BITs, considered in the context of the development of capitalism including its neoliberal progression, and the Chinese trajectory.

In this work, BITs are posited within the developed/developing demarcation, thereby departing from Schill's view that the dichotomy is overstated. Such view, found also for example in the writings of Schwebel and Vandeveld, is associated with a perception of BITs as representing a global consensus and a coherent body of law. This surfaces in the context of the discussion of the New International Economic Order (NIEO) and its related General Assembly resolutions (Resolutions) in chapter 2. Scholarly debate focuses on the nature of the Resolutions' contribution to the normative content of Economic IL and whether they represent its rejection or a reformative attempt. This work engages with the Resolutions by raising two different points. First, I question

the validity of the proposition that Economic IL is a cohesive body of law representative of a discursive consensus. The second takes issue with the reference to 'general practice' often found in the literature. I contend that, in light of the Resolutions, this term exemplifies the way power shapes language rather than being a reflection of an objective reality (chapter 4). Here, I Join Sornarajah and Brownlie in asserting that the Resolutions remain a source of Economic IL, one that is superior to the decisions of private arbitrators.

In tracing the development of BITs in chapter 2, I am guided by the linkage that Anghie posits between the origins of Economic IL and the colonial encounter, and the 'dynamic of difference' that runs through its evolution. I broaden this contention by introducing a systemic contextualisation to explain Economic IL's enduring faithfulness to its origins. In other words, rather than a revolutionary occurrence, as suggested by Subedi and Montt, I view BITs as representing a systemic continuity, a discursive and institutional strategy precipitated by the dissemination of sovereignty to formerly colonised territories (chapters 2 and 3). Here I follow Wood and Amin and depart from Frank in positing capitalism as a system of social relations that has its distinct logic and historically specific origins (chapter 5). Foucault refers to such logic in terms of markets as the site of truth. Polanyi conceptualises the break from non-capitalist societies as a moment of 'great transformation', characterised by economic 'disembedding'—society's detachment from economic imperatives and its subordination to purportedly self-regulating markets (chapters 3 and 5). I view neoliberalism through the same lens, namely a systemic inflection, a drive for a return to form, rather than Postpone's revolutionary occurrence. Such drive is executed through the agency of institutional and discursive power of which BITs are one manifestation.

Polanyi characterizes capitalism's existential need for territorial expansion and power accumulation as analogue internal and externalized processes. I term these processes 'home' and 'abroad'. I apply them, in conjunction with the continuity/break dichotomy, to the analysis of China's encounter with the capitalist world order and her route to contemporary incorporation. I follow

Wang Hui in understanding such incorporation as linked to the specificity of modernity's preoccupation with the universalisation of economic relations, including the power employed to this end (chapter 5). At the point of encounter, power structures produced new discourses. Thus, Blue and Brook assign to the era of colonialism and imperialism the reversal in European consensus about China - from a model to be studied to an example of immanent backwardness. China internalised this discourse and responded by revisiting her past and reviewing her present (chapter 5). The work questions whether the country is already capitalist/in the course of a capitalist trajectory. It examines Chinese BITs in the context of these broader questions.

This work contributes to the existing literature briefly summarised above by bringing paradigms and law together. There are numerous writings on the discourse of law. However, there is little, if any, examination of BITs as forming part of a hegemonic discourse. Similarly, the HWP is discussed both in Chinese and Western literature, primarily from an international relations perspective. There is no attempt to decipher its abstract language by observing it through the lens of the law. This work aims to fill this lacuna by assessing the coherence of HWP in the context of participation in the neoliberal BITs regime.

Structure and Chapters Summary

The work is in two parts, each replicating structurally the other. The first comprises Chapter 1 and 2. Its focus is on BITs and the neoliberal paradigm respectively. The second contains chapters 4 and 5 and examines the Chinese BITs program and the HWP. At the forefront of contextualisation is the phenomenon of outward direct investment (ODI). ODI is not unavoidably corporatised. China invested in infrastructure projects in Africa also during her revolutionary era. However, these investments tended to be motivated by ideological driven solidarity in which profit maximisation played little part. The Tazara railway that began in 1965 was a 'friendship' project, in which resonated

Maoist repertoire of comradeship and shared commitment to true national independence.¹²⁹ The discourse of mutual benefit is now embedded in a shift towards that which makes profit.¹³⁰ Thus, for the purpose of this discussion, ODI refers to investment in its Western capitalist sense. It alludes to the flow of capital from a home to a host country, primarily via TNCs, who may represent either private or state capital, but in any event are guided by market and profit imperatives. In other words, the question with which I grapple is examined against a baseline of rapprochement in the practice of going global. In this context, liberalism, capitalism and its neoliberal progression are used interchangeably. The same applies to terms such as Third World, Global South/North, and developed/developing.

Chapter two charts the emergence of the BITs program as an instance of IL exceptionalism and capacious jurisprudence. It locates the treaties within a broader history of the colonialist encounter, the fracturing of Global South solidarity and the continuities of power-based imperialist design. Contestation by developing countries and the exercise of power to secure consent call into question the validity of claims to consensus, cohesion and universalism.

Chapter 3 takes the reader from the juridical landscape to its paradigmical ecology. It builds on the themes of continuities, power-based outcomes and imperial design explored in the previous chapter, but adds another – that of the analogue processes that self-replicate at home and abroad. As in the case of BITs, it posits the neoliberal paradigm as an instance of continuity rather than interruption. The chapter focuses on three main issues: the origins and durability of neoliberalism, the two stages of the Washington Consensus, and the way in which BITs are incorporated into both the theoretical and policy aspects of the neoliberal state-market interaction.

¹²⁹ Julia C. Strauss, 'The Past in the Present: Historical and Rhetorical Lineages in China's Relations with Africa' in Julia C. Strauss and Martha Saavedra, *China and Africa: Emerging Patterns in Globalization and Development* (The China Quarterly Special Issues New Series No 9 CUP 2009) 235-39.

¹³⁰ Julia C. Strauss and Martha Saavedra, 'Introduction: China, Africa and Internationalization' in Strauss and Saavedra, *ibid* (n 129) 6.

Following the review of BITs in a Westerncentric context in chapter 2, chapter 4 turns to BITs with Chinese characteristics. It examines the integration of BITs into Chinese political economy. The chapter analyses the different stages of China's adoption, re-contextualization, and strategic reorientation of her BITs program, identifying a trajectory towards Western practice that is combined with diversity. An analysis of the only Chinese BIT-based ICSID award to date, demonstrates how an ICSID tribunal employs functionalist interpretative methodology, one that is informed by the aim of imposing pro-private capital perspectives on the country's public policy.

Chapter 5 follows on with an analysis of the HWP as an expression of China's self-image of a rising power that is intent of peaceful cooperation rather than imperialist resort to coercion. The chapter examines the way the HWP applies Confucian philosophy to assert the possibility of harmonious interactions, and then contextualise it historically so as to highlight the two forces that animate the country's attempts at being simultaneously the same and different, incorporated and reformist – China's ancient identity and the process of her adaptation to Westernised modernity. The HWP is then posited against the practice of BITs to highlight inconsistencies between the two.

CHAPTER 2: THE LEGAL LANDSCAPE

Introduction

The treaty arbitration instituted by Société Générale de Surveillance (SGS) against Pakistan in 2001 took Makhdoom Ali Khan, the then Pakistan's Attorney General by surprise.¹ 'To be perfectly honest', he said in 2009 on the occasion of the world's first bilateral investment's 50th anniversary, 'I did not have a clue, so I had to look it up on Google'.²

The reason for this state of unawareness, explained Mr Khan, was the length of time that elapsed between treatification and its consequence.³ Indeed, it took time for bilateral investment treaties (BITs) to gain momentum and for their implications to unfold, so as to disabuse host states signatories of misapprehensions. Thus, the International Centre for the Settlement of investment Disputes (ICSID) Convention came into effect only some seven years after the first BIT had been concluded.⁴ The aim was to provide facilities for conciliation and arbitration of investor-state disputes under the auspices of the

¹ *SGS Societe Generale de Surveillance S.A. v Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction ICSID Case No. ARB/01/13 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622_En&caselId=C205 accessed 13 April 2013. The term 'treaty arbitration' is short for 'treaty investment protection arbitration'. The assumption is that protection leads to promotion; Kenneth J Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 4-5.

² Lauge Skovgaard Poulsen and Damon Vis-Dunbar, 'Reflections on Pakistan's Investment-Treaty Program After 50 Years: An Interview With the Former Attorney General of Pakistan, Makhdoom Ali Khan' [16 March 2009] Investment Treaty News <http://www.iiwh.org/itn/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan/> accessed 11 Feb 2011.

³ *ibid.*

⁴ The first bilateral investment treaty was concluded between West Germany and Pakistan in 1959.

World Bank.⁵ Inter alia, the facilities were to draw on BITs and on international law (IL) for the supranational source of adjudications.

For the following three decades treatification and its related arbitration mechanism remained relatively dormant.⁶ It was only on or about the mid-1990s that the shaping of the global investment protection landscape by means of international investment agreements (IIAs) fortified by ICSID provisions began in earnest. However, once in motion, the spread of IIAs proved rapid. A growth spurt brought the number of concluded BITs from 422 in 1990 to 1,149 in 1995 and 1,916 in 2,000.⁷ By the end of 2011 the number of BITs swelled to 2,833 and the number of other IIAs stood at 331⁸ with most countries being a party to at least one BIT.⁹ ICSID too assumed prominence as a forum for investor-state dispute settlement. By 2008, 317 known treaty claims were brought by investors against states.¹⁰ This compares with 166 cases in the years 1996 to 2005, and mere 35 in the previous 30 years.¹¹ In 2011 the number of investor-state cases increased by at least 46, the highest number of known treaty disputes ever filed in one year.¹² As of 31 December 2012, 419 cases were registered under the ICSID Convention and its Additional Facility.¹³ Investment protection has thus moved central stage in the furthering of a vision

⁵ Art 17 'Convention on the Settlement of Disputes between States and Nationals of Other States' <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 11 Feb 2012.

⁶ Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 1. Subedi dates the first investment arbitration brought under a BIT to 1987.

⁷ Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009) 84.

⁸ UNCTAD, 'World Investment Report 2012: Toward a New Generation of Investment Policies' <http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf> accessed 13 April 2013.

⁹ Amnon Lehavi and Amir N Licht, 'BITs and Pieces of Property' (2010) 36 *Yale Journal of International Law* 115 at 118 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554926> accessed 10 April 2011.

¹⁰ UNCTAD, 'IIA Monitor No 1 (2009): Latest Developments in Investors-State Dispute Settlement' <http://www.unctad.org/en/docs/webdiaeia20096_en.pdf> accessed 15 April 2010.

¹¹ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, OUP 2007) 4 footnote 11.

¹² UNCTAD, *ibid* (n 8) 86.

¹³ ICSID, 'The ICSID Caseload – Statistics (Issue 2013-1)' <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41>> accessed 13 April 2013. The ICSID Additional Facility Rules provides ICSID jurisdiction for arbitration and conciliation proceedings where either of parties to the dispute is not a party to the ICSID Convention. See ICSID Additional Facility Rules art 2(a).

of a global spatial totality in which private capital could be mobile, unhindered by territorial boundaries and supported by transnational normativity.

These cross-fertilising phenomena of treatification and supranational arbitration are often alluded to as revolutionary occurrences.¹⁴ Subedi, for example, refers to the establishment of ICSID as the 'silent revolution'.¹⁵ Montt talks about the 'BITs revolution'.¹⁶ That the significance of BITs and ICSID was and remains far-reaching and multi-faceted can hardly be denied. Yet can they be said to be revolutionary in any ontic or epistemic sense? Do they represent an instance of structural reconstitution?

Here I am assisted by Anghie's observation of a 'dynamic of difference' that, he argues, runs through the evolution of IL in the wake of the colonial encounter. It denotes 'the endless process of creating a gap between two cultures, demarcating one as 'universal' and 'civilized' and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society'.¹⁷ Seen through the lens of this dynamic, the BITs and ICSID generation is but a chapter, the logical next step in a centuries-old process of reconstitution which, though evolutionary in terms of narrative and material realisation, is also marked by the constancy of its perspective and aim; that of 'normalising the aberrant society' by the universal application of a Westerncentric IL that in turn institutionalises colonial and post-colonial structures.¹⁸ Deconstruction of contemporary discourse, such as 'economic development contracts'¹⁹ and 'general principles of law' unmasks its linkage to

¹⁴ In relation to cross fertilisation Montt argues that investment arbitration was made possible by the network of investment treaties. Montt, *ibid* (n 7) 82; by contrast, Subedi views ICSID as the catalyst for the proliferation of BITs. Subedi, *ibid* (n 6) 32.

¹⁵ Subedi, *ibid* 32-33.

¹⁶ Montt, *ibid* (n 7) 85.

¹⁷ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law, CUP 2004) 4.

¹⁸ See also M Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 51 arguing that the linkage between investment IL and development entrenches 'the division between developed and developing countries'.

¹⁹ Pierre-Marie Dupuy coined the term 'economic development contracts' in the *Texaco v Libya* arbitration to describe long-term agreements requiring considerable investment by the foreign party and forming part of the economic and social progress of the host country. *Texaco Overseas petroleum Co. and California Asiatic Oil Co. v. Libya* (1977) 53 I.L.R 389; (1978) 17 I.L.M 1. This differentiation enabled a reasoning that such a contract is subject to IL. See also, for example

Vitoria's civilized/backward binary. General principles of law, for example, are capable of dislodging contractually agreed municipal law by virtue of being acceptable to civilized nations.²⁰ If 'general principles of law' equate the law adopted by civilized nations, and if civilized nations equate the West, then we are substantially back to the colonial assertion that European investors are entitled to extraterritoriality because they carry with them the superior law of their nationality. The other facet of this 'dynamic of difference', I will suggest, is the 'dynamic of sameness' whereby the attainment of equality is intertwined with a race to sameness, a race in which the tortoise can never quite catch up with the hare, since it is the latter who defines and redefines the contest's parameters.

This chapter begins with an outline of the rise and consolidation of BITs and ICSID as isles of exceptionalism within the framework of IL, indeed by reference to most Western and Western-modelled systems of municipal law. It argues that these outcomes are not a natural and therefore unavoidable consequence of globalised commercial interactions. Rather, BITs and ICSID represent a discursive and institutional design of man-made origins. The chapter will then proceed to trace the genealogy of this design, and the role of power in bringing it about. Temporally, genealogy will begin with the colonialist encounter, when investment IL was forged by the tension between colonised and colonisers followed by developing and developed. For standards of protection can be traced back to as early as Medieval Ages.²¹ However, it was in the context of

Revere Copper and Brass Inc. v OPIC (1978) 17 ILM 1321 where the arbitrator held that because a foreign investor would not have invested in a developing country but for the guarantee of IL, the mere fact of such investment is sufficient to internationalise the contract.

²⁰ By Article 38.1 of the Statute of the ICJ 'the Court, whose function is to decide in accordance with IL such disputes as are submitted to it, shall apply: (...) c. the general principles of law recognized by civilized nations'. The Statute of the International Court of Justice (1945) <<http://www.icj-cij.org>>; in the *Texaco* arbitration Pierre-Marie Dupuy opined that 'the reference to the general principles of law [in its proper law] is always regarded to be a sufficient criterion for the internationalisation of a contract'. *Texaco v Libya*, *ibid* para 40.

²¹ Bjorklunk dates national treatment obligations back to the Hanseatic League treaties of the 12th and 13th centuries. Other protection standards such as MFN and minimum standard of treatment were accorded to foreign merchants during the middle ages. Andrea K Bjorklunk, 'National Treatment' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 30-31; the Roman Emperor promised the City of Mantova that it would always enjoy any privilege he granted to 'whatsoever other town'; Andreas R. Ziegler, 'Most Favoured Nations (MFN) Treatment' in Reinisch, *ibid* 61; Francioni refers to the development of special extraterritorial legal regimes for commercial establishments, trade centers and warehouses

emerging European statehood, overseas expansion, and the works of 17th and 18th century scholars such as Hugo Grotius and Francisco de Vitoria that jurists began to assert IL protection for the rights of travelling and trading aliens.²² This temporal link with emergent European sovereignty is telling since what followed was a propagated discord between such sovereignty, once disseminated to the rest of the world, and the dictates of investment protection. The public-private binary was thus turned into a site of struggle for domination over regulatory space and an ideological tug of war as to the route by which public interest is best served. Particularly with the rise of neoliberalism, a 'unique bargain' was struck 'in which developing countries traded part of their regulatory sovereignty for the promise of foreign investment'.²³ An analysis of the roots of this sovereignty/protection dichotomy is outside the scope of this enquiry except for the suggestion – discernible from the genealogical narrative – that it may be symptomatic of capitalism's compulsion for endless accumulation. Resources and markets are to be had with at least cost and disturbance and at maximum profit.

The Lay of the Land

Contested Rise

In liberal writings power and its inequalities often recede into the background.²⁴ Yet, power plays a pivotal role in the structuring of the global

maintained in Muslim lands by foreign merchants from the Italian maritime republics such as Venice and Genoa. The aim was to enable these Christian traders to benefit from legal guarantees of contractual and property rights in the face of prevailing Islamic law and religion. These extraterritorial legal regimes form a precedent for the modern 'free Zone'; Francesco Francioni, 'Access to Justice, Denial of Justice, and International Law' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in Investment IL and Arbitration* (International Economic Law Series, OUP, Oxford 2009) 63.

²² Andrew Newcombe and Louis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 4.

²³ Asha Kaushal, 'Revisiting History: How The Past Matters For The Present Backlash Against The Foreign Investment Regime' (2009) 50 2 *Harvard International Law Journal* 491 at 496.

²⁴ For an analysis of the neglect of power in liberal writing and the implications of such neglect see generally Andrew Hurrell, 'Power, institutions and the production of inequality' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge Studies in International Relations CUP 2005) 33-58.

space and the shaping of institutions.²⁵ Overlooking it thus produces a knowledge deficit, whereby the diffusion/imposition of dominant ideas and the means by which cooperation is secured are glossed over.²⁶ With regard to law, the technical and apolitical terms generally applied mask its constitutive role.²⁷ In particular, covert is the capacity of capital to mediate power, so as to generate norms and practices that legitimise market authority, inhibit states' regulatory functions, and privilege corporate interests.²⁸ Space constraints do not permit a full discussion that does justice to the multiple ways by which power is mediated.²⁹ I will therefore limit myself to the events with which the genesis of BITs is often associated.³⁰ That is, Third World solidarity that came on the heels of decolonisation, and played out internationally in the General Assembly (GA) resolutions of the 60s and 70s and domestically in a wave of nationalisations.³¹ As we shall see, such solidarity was to be fractured and replaced with interstate competitiveness. Internalisation of hegemonic discourse about matters such as a symbiotic relationship between development and foreign investment and the absence of alternatives followed suit.

Various factual accounts are proffered as to how BITs and Third World fragmentation came to converge. For Sornarajah it is reflective of pragmatism. Developing countries sought to combine their newly found sovereignty with the harnessing of transnational corporations (TNCs) to the task of national

²⁵ Michael Barnett and Raymond Duvall, 'Power in Global Governance' in Barnett and Duvall, *ibid* 3.

²⁶ Hurrell, *ibid* (n 24) 52.

²⁷ A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge Studies in International Relations CUP 2003) 4.

²⁸ *ibid* 4-6; for a definition of authority and a discussion of market authority in particular see Rodney Bruce Hall and Thomas J. Biersteker, 'The Emergence of Private Authority in the International System' in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge Studies in International Relations CUP 2002) 4-7.

²⁹ Barnett and Duvall, *ibid* (25) 2.

³⁰ See for example Lehari and Licht, *ibid* (n 9) 120-21.

³¹ Examples of nationalisations include Iran in 1951, Libya in 1955, the nationalisation of the Suez Canal by Egypt in 1956 and the nationalisation of an array of foreign held assets by Cuba in 1959. For the ideological link between the nationalisations movement and new states' doctrines see Lehari and Licht, *ibid* (n 9) 122; see also for example the Libyan Government's Memorandum of 26 July 1974 in which it relied on the doctrine of Permanent Sovereignty over Natural Resources (PSNR) to assert its right to nationalisation. Cited in R. Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes; Cases, Materials and Commentary* (Kluwer Law International 2005) 718.

development. Consequently, at the same time as being protective of sovereign control they were also inconsistently concluding investment treaties.³² Yet, Sornarajah accepts that the 'frantic treaty-making activity' was also attendant on developed countries' desire to circumvent the competing norms introduced by new states as part of a New International Economic Order (NIEO) vision. In a similar vein but with greater emphasis on an underlying power based design, Anghie points to the interaction between imperialism and Economic IL. For him, BITs emerged as part of a comprehensive and deliberate move by capital exporting countries to formulate new sources of IL through the instrumentality of commercial transnational law. It was a corporations-driven tactical response to the threat which former colonised countries' newly found sovereignty posed to their traditional arrangements with colonial governments.³³ From a political economy perspective, Arrighi formulates this threat as the reductive effect, which full sovereign rights were bound to have on flexibility in the use of Third World resources.³⁴ The risk was that true independence would lead to pressure on supplies, such that would in turn generate excessive competition within and among First World states.³⁵

The answer to the risk of 'excessive' competition in the Global North seems to have been found in the eventual dispensation of competition to the Global South. The opportunity presented itself in the 80's when, faced with a glut of global liquidity that threatened control over the world's purchasing power, the US abandoned traditional New Deal policies in favour of an alliance with private high finance. The aim was to restraint demand for Third World supplies through a combination of tight monetary policies, expansion of national indebtedness and deregulation.³⁶ The outcome was a de facto Third World

³² Sornarajah, *ibid* (n 18) 23; for a critique of the view that Least Developed Countries (LDCs) came to realize that they would be better off by entering into contractual arrangements with investors which Guzman terms the 'LDC enlightenment theory' see Andre T Guzman, 'Why LD Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law*) 639 at 667.

³³ Anghie, *ibid* (n 17) 226-43; Sornarajah, *ibid* 184-85.

³⁴ Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (New and Updated edn, Verso 2010) 332.

³⁵ *ibid*.

³⁶ *ibid* 326-28.

bankruptcy and an ensuing competition over mobile capital.³⁷ States were now expected to liberalise, open their markets, export, and pay back their debts.³⁸ The move in the direction of a sovereign debt crisis and corresponding drying up of lending was closely followed by the disintegration of socialist alternatives and the adoption of neoliberal orthodoxy by the international financial institutions (IFIs).³⁹ Such orthodoxy postulated - some may say falsely - that development necessitates foreign investment and that such foreign investment is best secured through treaties.⁴⁰

It is thus that the diffusion of statehood triggered a contest in which new states' attempt at innovations was met with multiple power responses that in turn engendered collaboration, discursive receptiveness, fragmentation and competitiveness.⁴¹ Arguably, it was precisely because BITs represented individual arrangements that they were fitting device for bypassing the United Nations (UN) and other multilateral forums where collective action made consent difficult to secure.⁴² Competition was thus enlisted in support of an

³⁷ *ibid* 334.

³⁸ Tomas Enrich Reifer, 'Beyond Divide and Rule? From the Washington to the Beijing Consensus' in Sungho Kang and Ramon Grosfoguel, 'Geopolitics and Trajectories of Development' (2010) Research Papers and Policy Studies 45, Institute of East Asian Studies University of California Berkley 21.

³⁹ The propagation of neoliberal doctrines among the IFIs is associated with conditionalities that required developing countries to implement market-oriented structural reforms and protect private property. Lehari and Licht, *ibid* (n 9) 124.

⁴⁰ Sornarajah, *ibid* (n 18) 185-86; in relation to the disintegration of socialist alternatives, often cited in the literature as a cause for the proliferation of BITs, Sornarajah makes the point that the Soviet Block's states' practice of concluding BITs began when communism was still in place. *ibid* 185; evidence that conclusion of BITs leads to an increase in investment is inconclusive. See Subedi, *ibid* (n 6) 86; M Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining sovereignty in International Economic Law* (Studies in International Trade Law, Hart Publishing 2008) 20; on whether BITs promote development see, for example, Jason W. Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) Research Papers Series Paper No. 1114 University Wisconsin Law School Legal Studies

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887> accessed 11 April 2011.

⁴¹ For a taxonomy of power in which compulsory power is one see generally Barnett and Duvall, *ibid* (n 25); on hegemonic production of collaboration see for example Hurrell, *ibid* (n 26) 51-52.

⁴² The elusiveness of multilateralism is generally attributed to an array of reasons, including the disagreements between developed and developing countries, the complexities involved and, as in the case of the Havana Charter 1948 and the Multilateral Agreement on Investment (MAI) unsuccessfully negotiated in the 1990s, substantive disagreements among capital exporting countries as well as opposition from non-government organisations (NGOs). An important concern particularly in the US camp centered on the risk of having to settle on the lowest

investors' friendly body of IL instruments.⁴³ Indeed, Dine attributes BITs' proliferation to the breakdown of the multilateral negotiations at Cancun. Powerful trading nations picked off the poorer countries one by one to pursue in BITs and FTAs those same contested matters that met with resistance at the multilateral forum.⁴⁴

The outcome was a regime that is probably more protective of investors than anything which could have been achieved otherwise. In the area of intellectual property rights for example protection provisions in BITs are more stringent than those required by TRIPS.⁴⁵ Similarly, the level of compensation for expropriation achieved through BITs can exceed that which is available through the application of the Hull formula.⁴⁶ The process is now coming full circle with the proposition that, disagreements over a multilateral agreement notwithstanding, the proliferation of BITs and their substantive similarities have combined to create a multilateral regime in any event.⁴⁷

A narration would be incomplete were it to focus solely on interstate contest to the exclusion of capital.⁴⁸ Private actors' role in the shaping of investment IL will be revisited later in this chapter. For now, let us say that the word

common denominator. On the reasons for the failure of attempts at a multilateral investment treaty, see for example Stephen W. Schill, *The Multilateralization of International Law* (Cambridge International Trade and Economic Law, CUP 2009) 33, 39, 54-58; Subedi, *ibid* (n 6) 41; Van Harten, *ibid* (n 11) 20, 22.

⁴³ For an argument that developing countries' defection from collaborative action in favour of competition created a 'prisoner's dilemma' with resulting loss of multilateral treaty benefits and increased sovereignty costs see Andre T Guzman, *ibid* (n 32) 669; Zachary Elkins, Andrew T Guzman and Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Treaties, 1960-2007' (2006) 60 *International Organization* 81; for a game model supporting this argument see Christoph Engel, 'Governments in Dilemma: A Game Theoretic Model for the Conclusion of Bilateral Investment Treaties' (2007) Working Paper No. 2007-22 University of St. Gallen Law & Economics <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001174> accessed 20 Feb 2011; For a critique of this theory arguing a theory of 'network effect' see Montt, *ibid* (n 7) 90-115.

⁴⁴ Janet Dine, 'Multinational Companies and the Allocation of Environmental Risk in International Investment Treaties' unpublished 2 citing from S. Anderman and R. Kariyawasam, 'Intellectual Property Rights and BITs' in J. Dine and A. Fagan (eds) *Human Rights and Capitalism* (Edward Elgar 2005).

⁴⁵ *ibid*.

⁴⁶ Guzman, *ibid* (n 32) 642.

⁴⁷ See for example Schill, *ibid* (n 42) generally.

⁴⁸ For an account of TNCs role in the MAI negotiations see for example Belén Balanyá and others, *Regional & Global Restructuring & the Rise of Corporate Power* (new edn Pluto Press 2003) 109-22.

‘investors,’ with its individualistic undertone, and the word ‘protection,’ with its suggestion of vulnerability mask a reality in which the protected entity is in all likelihood a commanding TNC with sufficient power to tip risk allocation in their favour. Taking the ICSID claims brought against Argentina as an example, the claimants were all TNCs such as Enron and Azurix of the US, Vivendi and Suez of France, Siemens of Germany, Gas Natural of Spain and National Grid of the UK.⁴⁹ Backed by financial resources that in some instances exceed those of states,⁵⁰ and utilising their power to mobilise the state’s legislative monopoly in their favour TNCs are able to shape the political and developmental path of countries, and formulate norms with claims to IL status.⁵¹

The growth of corporate private authority is recounted, inter alia, in Arrighi’s exposition on systemic cycles of accumulation (SCAs) whereby their rise fundamentally distinguishes the third (British) hegemonic cycle from that of the subsequent US cycle. Thus, British hegemony operated primarily through a system of small and medium-size enterprises. US hegemony, on the other hand, is characterised by large-scale, vertically integrated TNCs. Attendant on this change is a shift from trade towards direct investment at the centre of the global order.⁵² This transformation of the economic landscape was facilitated by the capitalist legal system.⁵³ Modern company law’s device of a ‘holding company’ enables mergers and acquisitions (M&As).⁵⁴ In turn, concepts such as ‘legal personality’ and ‘limited liability’ protect TNCs from the potentially adverse implications of such M&As.⁵⁵ In the context of investment, BITs are often corporations driven, serve their globalisation agenda and vest rights in them, while remaining silent on their responsibility and indeed their

⁴⁹ Van Harten, *ibid* (n 11) 2.

⁵⁰ Janet Dine, *Companies, International Trade and Human Rights* (Cambridge Studies in Corporate Law (CUP 2005) 47 making the point that TNCs account for fifty-one of the world’s largest economic entities. The rest are nation-states; for a graphical account of the most powerful TNCs see Transnational Institute, ‘State of Power (2013): A Corporate World’ <<http://www.tni.org/article/planet-earth-corporate-world>> accessed 16 April 2013.

⁵¹ Sornarajah, *ibid* (n 18) 61-62; business lobbies such as the International Chamber of Commerce (ICC) and the US Council of International Business for example worked alongside Western governments in promoting a multilateral investment protection treaty.

⁵² Arrighi, *ibid* (n 34) 73-74; for a historical account of the rise of TNCs see also Peter T. Mulchinski, *Multinational Enterprises & the Law* (2nd edn OUP 2007) 8-44.

⁵³ Mulchinski, *ibid* 33.

⁵⁴ *ibid* 35.

⁵⁵ Dine, *ibid* (n 44) 1, 30-31.

presence.⁵⁶ For formally BITs are entered into between states. In sum, a dualist dynamic is in operation whereby TNCs are both beneficiaries and producers of juridical structures.

Capacious jurisprudence

The transfer of investor-state disputes to the privately modelled forum of international arbitration was to prove conducive to the creation of a capacious jurisprudence. With no constitutive rules and with standards of treatment vaguely formulated, awards made by private arbitrators are relied upon as a source of expansive normative construction. Thus, first BITs stepped into the vacuum generated by the absence of a definition of investment in the ICSID Convention to create a broad and open-ended concept⁵⁷ that goes beyond the common understanding of the term to comprise non-tangible assets such as shares, contractual rights and intellectual property rights.⁵⁸ The definition was then further enlarged in ICSID practice to include loans guaranteed by the government and promissory notes.⁵⁹ In time, the requirement of a linkage between investment and development was weakened as in the cases of *Phoenix v Czech Republic* and *Saba Fakes v Turkey*, in which the tribunal diluted the test established in *Salini v Morocco* by excluding the requirement for a contribution to development.⁶⁰ This line of reasoning, which considers the *Salini* test a mere starting point, and eliminates its original requirement for contribution to development was also adopted in the recent case of *Deutsche Bank v Sri Lanka*.

⁵⁶ Sornarajah, *ibid* (n 18) 63.

⁵⁷ Vandevelde, *ibid* (n 1) 122; pre-1990s BITs provided a relatively restricted definition of investment. However, most recent treaties, including those based on the US and OECD models adopt a broad, descriptive approach of coverage such as 'every kind of asset' together with an illustrative list of categories. Noah Rubins, 'The Notion of 'Investment' in International Investment Arbitration' in Norbet Horn (ed), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Studies in Transnational Economic Law 19 Kluwer Law International 2004) 292-93.

⁵⁸ Sornarajah, *ibid* (n 18) 10-18.

⁵⁹ *Ceskoslovenska Obchodni Banka A.S v The Slovak Republic* (1999) ICSID Case No ARB/97/4; *Fedax NV v Venezuela* (1998) 37 ILM 1378.

⁶⁰ *Saba Fakes v The Republic of Turkey*, Award (2010) ICSID Case No ARB/07/20; *Phoenix V Czech Republic*, Award (2009) ICSID Case No ARB/06/5; *Salini Costruttori S.p.A v Kingdom of Morocco*, Award, ICSID Case No ARB/02/13; the objective requirements for an economic activity to constitute an 'investment' is stated in the *Salini* case to comprise duration, regularity of profit and return, assumption of risk, substantial commitments and significance contribution to the host state's development. On the implication of the *Phoenix* case see Dine, *ibid* (n 44) 5, 7.

Here, the majority found that an oil related hedging agreement was an asset, that claims to money need not be associated with a separate investment and that the *Salini* criteria ‘are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention.’⁶¹ The majority further elaborated that ‘the development of case law suggests only three criteria (...) namely contribution, risk and duration’ and found that these were satisfied by a hedging agreement of 12 months duration with preceding 2 years of negotiations.⁶² Further, the *Cemex* tribunal confirmed that rights derived from shares entitle an indirect shareholder to the protection of the Dutch/Venezuela BIT, thereby extending protection to the controversial indirect portfolio form of investment.⁶³

Other examples of expansive construction in favour of investors include the approval of corporate migration to another state to secure the protection of a BIT in *Aguas del Tunari v Bolivia*.⁶⁴ The fair and equitable standard of treatment (FET) - most often invoked by investors due to its vagueness and generality⁶⁵ - is being constantly expanded to incorporate new elements.⁶⁶ These include reasonableness, investor’s legitimate expectations, non-discrimination, transparency and due process.⁶⁷ In the *Deutsche Bank* case the tribunal followed the expansive line of reasoning in relation to the FET, finding it to be an autonomous standard as opposed to a restatement of the IMS.⁶⁸ Notably, the scope of treatment under the most favoured nation provision (MFN) was construed to extend at least the substantive benefits under one BITs to all other

⁶¹ *Deutsche Bank v Democratic Socialist Republic Sri Lanka*, ICSID Case No ARB/09/12 para 294.

⁶² *ibid* para 295.

⁶³ *Cemex Caracas BV and Cemex Caracas II Investments BV v Bolivarian Republic of Venezuela* (2010) ICSID Case No ARB/08/15; indirect investment is expressly provided for in some treaties as in the case of the investment chapter of the US-Singapore FTA. Rubins, *ibid* (n 57) 294; critics of the inclusion of portfolio investment in the definition of investment argue that such investment does not contribute to economic development, does not represent long term commitment, has the potential to trigger an economic crisis by sudden withdrawal and is generally volatile. Vandevelde, *ibid* (n 1) 123; Sornarajah questions the appropriateness of extending protection to portfolio investments on the ground that the shares referred to in the BITs’ definition of investment are only shares in the investing corporate vehicle. Sornarajah, *ibid* (n 18) 12; see also Mulchinski, *ibid* (n 52) 7-8.

⁶⁴ *Aguas del Tunari v Bolivia* (2005) ICSID Case No ARB/02/3 Award on Jurisdiction.

⁶⁵ Vandevelde, *ibid* (n 1) 203.

⁶⁶ Katia Yannaca-Small, ‘Fair and Equitable Treatment Standard: Recent Development’ in Reinisch, *ibid* (n 21) 111.

⁶⁷ Vandevelde, *ibid* (n 1) 202-03.

⁶⁸ *Deutsche Bank*, *ibid* (n 61) para 478.

BITs, to which the state is a party and which contain a MFN provision.⁶⁹ This 'multiplying effect' has the potential to fundamentally subvert the negotiated balance of the BIT in issue.⁷⁰

Exceptional jurisprudence

A number of facets conflate to render treaty arbitration an anomalous and exceptional institution within the framework of IL. First, it represents a departure from the assumption of reciprocity intrinsic to customary IL whereby states' juridical equality dictates that they alone can resolve among themselves disputes involving non-state actors.⁷¹ By contrast, in treaty arbitration, investors are accorded locus where locus was traditionally absent and are pitched directly against states.⁷² Not only does this attribution of standing distance IL from its positivist mooring, but it also legitimises the existence of what Cutler coins 'private international regimes' – the formal and informal institutions that operate as a source of governance in economic areas.⁷³ In other words, it recognises non-state centres of power.⁷⁴ Thus, foreign investors can avail themselves of awards for substantial damages that are then enforceable against states across the globe without any national or international vetting.⁷⁵ Given the possible chilling effect that such awards have on states' decision-

⁶⁹ Vandevelde, *ibid* (n 1) 359; for a baseline analysis of the operation of MFN clauses see Tony Cole & Madhu Agrawal, 'When is a Forum "More Favourable"? The Use of MFN Clauses to Found an Investment Tribunal's Jurisdiction', (2010) Legal Studies Research Paper No. 2010-19, University of Warwick School of Law

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674378 accessed on 20 April 2011.

⁷⁰ Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford International Arbitration Series OUP 2009) 142.

⁷¹ Van Harten, *ibid* (n 11).

⁷² Sornarajah, *ibid* (n 40) 210.

⁷³ A. Claire Cutler, 'Private International Regimes and Interfirm Cooperation' in Hall and Biersteker, *ibid* (n 28) 29.

⁷⁴ M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000) 6; Cutler, *ibid* 30.

⁷⁵ Unlike New York Convention awards, ICSID constitutes a self-contained arbitral body whereby awards may be appealed against in ICSID own annulment proceedings. Their enforcement bypasses national courts. Arts 52 and 54(1) of the ICSID Convention, *ibid* (n 2) 26-7; the award of US\$353 million made in the *CME Czech Republic BV v Czech Republic* on 13 Sept 2001 was roughly equal to the country's entire health-care budget. Von Harten, *ibid* (n 11) 7; following the Argentinian government's decision in 2002 to devalue the peso in response to the country's financial collapse, the over 30 claims that were pending against Argentina by 2006 totaled US\$17 billion, equivalent to almost entire national budget. *ibid* 2.

making, in all other areas, outside of Europe, claims by individuals against the state in IL are rare.⁷⁶

A second and related aspect of investment treaty exceptionalism arises out of its selectivity. That is to say, a designated group is singled out so as to enjoy privileges denied to others. Historically, claims arising out of state responsibility for injury to aliens were settled between states through the instrumentality of diplomatic protection and rarely by adjudication.⁷⁷ Thus, foreign investors were on a par with all other individuals in their dependency on their government for resolution of grievances. The exclusive availability to foreign investors of investor-state arbitration, argues Van Harten, constitutes a powerful system that protects one class of individuals by excluding them from state's authority.⁷⁸ Further, privileging investors has implications for the rest of the population. It potentially deprives them of regulations from which they would have otherwise benefited, or from public initiatives that are foreclosed by the threat of a treaty claim.⁷⁹ Given the essential principle of international society 'that a state is the legal representative of the population of its territory',⁸⁰ it is of little surprise that beyond the European Union, the extension of a similar privilege to other categories of complainants is resisted.⁸¹

Third is the blurring of the public-private binary.⁸² Within this binary, liberal discourse tends to associate the former with states' impositions, while equating

⁷⁶ Van Harten, *ibid* (n 11) 102-03 citing C Harlow, *State Liability: Tort Law and Beyond* (OUP 2004); despite the expansion of human rights protection since 1945, individual claims for damages are authorized only under the European and American conventions of Human Rights. In both the right to damages is far more limited than under investment treaties.

⁷⁷ By signing on to the ICSID Convention states give up their right to exercise diplomatic protection. Art 27 ICSID Convention *ibid* (n 2) 19; Van Harten, *ibid* (n 11) 9.

⁷⁸ Van Harten, *ibid* (n 11) 10.

⁷⁹ *ibid* 9; whether and the extent to which business regulation is foreclosed by investment treaties is the subject of debate. See for example Vandevelde's argument that most host states retain considerable discretion to regulate foreign investment' by narrowing the scope of a BIT, limiting the access provisions and adjusting standards of treatment. Further, he argues, once investment is admitted most host-state conduct is permitted provided it relates to legitimate regulatory objectives, is non-discriminatory and that is consistent with prior commitments to the investor. Vandevelde, *ibid* (n 1) 9-11; for an opposing argument see Dine, *ibid* (n 44) 9.

⁸⁰ Van Harten, *ibid* (n 11) 9.

⁸¹ *ibid*.

⁸² *ibid* 58-59.

the latter with individual market and contractual based freedom.⁸³ In reality, trends towards privatisation and states' engagement in commercial activities cast doubt over the coherence of this separation.⁸⁴ Yet, the binary is generally preserved in IL through, for example, the distinction in the context of sovereign immunity between sovereign acts (*jus imperil*) and states' commercial acts (*jus gestionis*). Thus, a state may be stripped of immunity, but only in circumstances where its act is deemed to have been a *jus gestionis*.

Treaty arbitration extends the obfuscation of the public-private binary to IL.⁸⁵ For now, a state may find itself embroiled in external proceedings, notwithstanding that the act that gave rise to such proceedings is *jus imperil*.⁸⁶ Further, adjudication of such disputes is assigned to an arbitral scheme that borrows from the private mechanism of international commercial arbitration. This distortion is particularly arresting when one considers the essential character of commercial arbitration - that of a confidential private alternative to national courts. In other words, commercial arbitration permits the parties to contract out of the public adjudicative sphere. Its discourse is animated by notions of complete liberation from court and municipal control in favour of an internationally floating *lex mercatoria*.⁸⁷ ICSID accomplishes these aspirations, notwithstanding that the substance of disputes before it concerns public regulatory matters. It thus offers a supranational jurisprudence, in which both the adjudicating process and the resulting awards are insulated from the national sphere. In contrast, IL conventional wisdom dictates that, subject to constraints such as the unavailability of local remedies, the first port of call for the resolution of regulatory disputes are domestic courts applying domestic law.⁸⁸ Thus, for example, in the *ELSI* case the United States questioned the

⁸³ Hall and Biersteker, *ibid* (n 28) 5.

⁸⁴ Cutler, *ibid* (n 27) 236-40.

⁸⁵ Van Harten, *ibid* (n 11) 58-59.

⁸⁶ It is argued that by consenting to arbitration the state voluntarily renounces its immunity. This seems a technical reasoning whereby the device of arbitration is adopted to enable a departure from IL.

⁸⁷ Sornarajah, *ibid* (n 74) 159-61.

⁸⁸ Van Harten coined the term 'regulatory disputes' to denote differences between states and private parties. Van Harten, *ibid* (n 11) 49-58; In *Helnan v Egypt* the ICSID the Ad Hoc Committee annulled the tribunal decision that a challenge by the investor in the Egyptian court was required in order to demonstrate the substantive validity of the claim. The Committee

application of the exhaustion of local remedies rule, given that its friendship, commerce and navigation (FCN) treaty with Italy was not qualified by this requirement. The International Court of Justice (ICJ) rejected this argument. It held that dispensation with this important principle of customary IL requires an express exclusion.⁸⁹

The application of a confidential privatised scheme to the resolution of public regulatory disputes has far-reaching implications.⁹⁰ The additional layer of protection offered to investors is hardly controversial. Yet, at the same time, competing principles attendant on democratic and governmental policy-making are weakened, so as to undermine the 'basic hallmarks of juridical accountability, openness and independence'.⁹¹ Thus, with practically no court supervision, free of constitutive rules and armed with wide discretion and broadly formulated standards of treatment, private arbitrators apply private law concepts and techniques to sit in judgment of sovereign acts. The awards meted out transfer substantial funds from the public to the private purse,⁹² and bite ever more deeply into states' regulatory space. They are animated by a propensity towards an absolutist approach to property rights and sanctity of contracts; such that exceeds modern trends in municipal law.⁹³

Exceptionalism is underscored by the fact that commercial arbitration is at odds with its treaty counterparty in a number of material respects.⁹⁴ First, in relation to the parties, in commercial arbitration jurisdiction stems from consent between private parties. By contrast, in treaty arbitration, one of the parties is a

noted that the consequences of the tribunal's approach 'could be serious and would 'inject an unacceptable level of uncertainty into the way in which an investor ought to proceed when faced with a decision on behalf of the Executive of the State, replacing the clear rule of the Convention which permits resort to arbitration'. *Helnan International Hotels A/S v Arab Republic of Egypt* (2010) Decision on Annulment ICSID Case No ARB/05/19 paras 52-53.

⁸⁹ *Case Concerning Elettronica Sicula S.p.A (ELSI) United States v Italy* (1989) ICJ Rep. 15 para 50 (1989) 28 I.L.M. 1109; The ICJ also found that Italy did not succeed in demonstrating that there was some local remedy which has not been exhausted so that its defence failed.

⁹⁰ Sornarajah, *ibid* (n 40) 202.

⁹¹ Van Harten, *ibid* (n 11) 5.

⁹² *ibid*; see also Sornarajah, (n 40) 200-11.

⁹³ Sornarajah, *ibid* (n 18) 212 linking absolutist trends in treaty arbitration to the internationalisation of investment contracts; Lehari and Licht, *ibid* (n 9) 116 arguing that the effect of BITs on securing cross-border property rights is unclear; see also Kaushal, *ibid* (n 23) 511-12.

⁹⁴ Van Harten, *ibid* (n 11) 46-47.

state acting in its public capacity. Whereas in commercial arbitration the parties are directly implicated in the making and performance of the contract, state's participation in treaty arbitration may flow from its prioritisation of public objectives rather than any contractual obligations. In other words, a third party is brought into a dispute in a manner that is generally excluded from commercial arbitration.⁹⁵ In commercial arbitration, either party may institute proceedings. In treaty arbitration, the right to bring proceedings lies exclusively with the investor. This lack of reciprocity is enhanced by the fact that substantive obligations are confined to states, whereas the investor is devoid of any.⁹⁶ Second, with regard to consent, in treaty arbitration, jurisdiction is founded not on a private agreement but on a sovereign act.⁹⁷ Further, consent is given not to the other party to the dispute, but to a group of potential claimants. Consensual adjudication thus becomes a governing arrangement in which agreement flows from an interstate bargain and consent represents a privilege rather than a reciprocal obligation.⁹⁸ It is not that state parties are excluded from participating in commercial arbitration. However, ordinarily, where a state engages in commercial arbitration, it does so pursuant to an agreement that was entered into specifically between itself and the contracting counterparty in an act of *jus gestionis*. The implications for policy making are thus much reduced.⁹⁹

Finally, claims for damages are traditionally a private law remedy. In the context of public law delinquency, it is applied mostly in adjudications between juridically equal states.¹⁰⁰

In sum, paradoxically, the process of privatisation that permeates investment protection law is triggered by a public act of treatification. Thereafter, state-investor contracts are treated as if they were entered into between private

⁹⁵ Sornarajah, *ibid* (n 74) 7; see also Van Harten, *ibid* (n 11).

⁹⁶ Kaushal, *ibid* (n 23) 491.

⁹⁷ Van Harten, *ibid* (n 11) 48.

⁹⁸ *ibid* 64, 70.

⁹⁹ *ibid* 62-63.

¹⁰⁰ *ibid* 105.

parties.¹⁰¹ In Guzman's view there is a good reason for this mechanism. In this way, he argues, BITs circumvent the problem known as 'dynamic inconsistency'.¹⁰² That is to say, contracts entered into by private parties enjoy the credibility associated with enforceability under domestic law. When contracting with a state, such credibility is rendered impossible by virtue of the state's monopoly over legislation, and the practical and conceptual difficulties with which enforcement under IL is fraught.¹⁰³ In the context of investment, the problem is particularly acute post-entry and in resources contracts. Once made, withdrawal of the investment becomes less of an option, with the result that the balance of power is tilted in favour of the state. Resources contracts are particularly vulnerable to this dynamic since they tend to be of long duration and may be subject to changing policies of successive governments. It is argued that stabilisation clauses insulate investors from such risks. However, theoretical difficulties, such as the question of whether a mere contractual provision can fetter a state's legislative sovereignty, stand in the way of a clear conclusion that the clause is binding on the state party.¹⁰⁴ The treatification of contractual obligations resolves the problem. Now the state and the investor face each other as if they were two private people entering into the transaction on equal footing. This is so, notwithstanding that the state is fundamentally different from the investor by virtue of being a public apparatus and a representative of a whole population. In achieving this outcome, the investor is assisted by the inclusion of contractual rights in the definition of investment. In consequence virtually any investor-state dispute arising out of a negotiated agreement becomes a matter of IL.¹⁰⁵

¹⁰¹ Guzman, *ibid* (n 32) 655.

¹⁰² *ibid* 658.

¹⁰³ There is no consensus that a state-private party contract in itself offers additional protection under IL. *ibid* 660; see also Lehavi and Licht, *ibid* (n 9) 128 for an argument that BITs function to enhance the credibility and certainty of states' commitment to the preservation of foreign investors' legal rights.

¹⁰⁴ Sornarajah, *ibid* (n 74); see also, for example, Sornarajah, *ibid* (n 18) 281-84; Thomas W. Waelde & George Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 *Texas International Law Journal* 215.

¹⁰⁵ Guzman, *ibid* (n 32) 656; for a critique of Guzman's view and arguing that states' promises to investors have long been held to be presumptively enforceable see Jason Webb Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties:

Foreign investors are further assisted by a retreat from the very same principles of legal separateness and shareholders limited liability by which municipal company law protects corporations from the implications of M&As. Thus, protection is afforded by adopting certain principles in the municipal sphere only to discard them at the international level. The mechanism by which this double act is performed comprises recognition, markedly absent from national company laws, of the parent company's control of and benefit from the activities of its locally incorporated subsidiary.¹⁰⁶ The purpose of such 'lifting of the corporate veil' in the sphere of investment protection is to facilitate its applicability to subsidiaries incorporated in the host states. It is thus justified by the need to bypass the requirement, often found in foreign investment national legislation, for entry to be made through a locally incorporated company.¹⁰⁷ Were the principle of corporate legal separateness to apply, such locally incorporated company would be a national of the host state, and therefore outside treaty protection. 'For this reason' so goes the argument, 'it has been necessary to devise a means of protection for the locally incorporated vehicle of the foreign investment'.¹⁰⁸ This may be so. However, it could be argued with similar conviction that such exceptionalism should also extend to claims for injuries sustained by populations and the environment in consequence of the activities of a foreign investor. Absent such extension, claims brought against the parent company tend to stumble against the combined barriers of legal separateness and the territoriality of state jurisdiction. Consequently, they may be limited to an action against the local subsidiary that, in turn, may be kept short of funds or may be made defunct altogether.¹⁰⁹ The prevailing resistance to such extension indicates an ideological and power underpinning that skews

Myth and Reality' [2008] Fordham International Law Journal <SSRN: <http://ssrn.com/abstract=1307132>> accessed 20 April 2011.

¹⁰⁶ Sornarajah, *ibid* (n 18) 201.

¹⁰⁷ *ibid* 324.

¹⁰⁸ *ibid*.

¹⁰⁹ For a discussion of this point and the foreign direct liability agenda see for example Philip I Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (1995) 24 *Hastings International and Competitive Law Review* 285; Halina Ward, 'Governing Multinationals: The Role of Foreign Direct Liability' (2001) The Royal Institute of International Affairs Briefing Paper New Series No.18; Peter Nygh, 'The Liability of Multi-national Corporations for the Torts of Their Subsidiaries' (2002) 3 *European Business Organization Law Review* 51; Sarah Joseph, *Corporation and Transnational Human Rights Litigation* (Hart Publishing 2004) 200.

the legal environment in favour of TNCs.¹¹⁰ Matters however do not rest here. For separateness appears to resurface in other instances so as to bypass the principle of '*res judicata*' and enable the institution of parallel claims by different entities within a group. Thus, the cosmetics billionaire, Ralph Lauder commenced arbitration against the Czech Republic under the Czech/United-States BIT for loss, allegedly suffered by reason of government advice that caused him to divest himself of a popular television station. The tribunal found no evidence of breach of FET and the claim was dismissed. CME Czech Republic, a Dutch company owned by Mr Lauder then brought the same complaint again, but under the Dutch-Czech Republic BIT. This time the award described the Czech government's conduct as amounting to interference, coercion and intentional undermining. Mr Lauder was able to collect through his Dutch holding company damages in the amount of US\$353 million.¹¹¹

Change and resistance

An account of the BITs program will be incomplete absent an observation of a possible emergent backlash. Bolivia was the first to denounce the ICSID Convention on 2 May 2007.¹¹² Reasons cited include references to ICSID as unjust, anti-democratic, expensive, unconstitutional and inherently biased. Such bias is associated with the World Bank's involvement in structural adjustment programs that favour investors, and its occasional role as an investor through its International Finance Corporation (IFC) arm.¹¹³ Ecuador exited ICSID in July 2009.¹¹⁴ It appears though that the effect of a denouncement pursuant to

¹¹⁰ For a discussion of the position in English company law see Dine, *ibid* (n 50) 53-65.

¹¹¹ *Lauder (Ronald) v Czech Republic* (2001) Final Award 4 World Trade and Arbitration Materials 35; *CME Czech Republic BV v Czech Republic* (2001), 14(3) World Trade and Arbitration Materials 109.

¹¹² 'Bolivia Submits a Notice Under Art 71 of the ICSID Convention' [16 May 2007] ICSID News Release

<<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>> accessed 7 March 2011.

¹¹³ *ibid*.

¹¹⁴ Fernando Cabrera Diaz, 'Ecuador prepares for Life After ICSID, While Debate Continues Over Effect of Its Exit from Centre' [2 Sep 2009] Investment Treaty News

<<http://www.iisd.org/itn/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre/>> accessed 7 March 2011.

Articles 71 and 72 of the ICSID Convention is yet to be finally determined.¹¹⁵ Shan points to the recent resurgence of the Calvo Doctrine.¹¹⁶ India has omitted key treaty protections such as the FET and the MFN standards from its Economic Cooperation Agreement with Singapore.¹¹⁷ Resistance at indigenous and societal level compounds awakenings at the state level. An example is the challenge mounted by the National Roundtable Against Metallic Mining, pursuant to which the El Salvadoran Supreme Court was asked to declare the US-Central America and Dominican Republic free trade agreement (CAFTA-DR) and the EU agreement to be declared unconstitutional.¹¹⁸

A trend in the direction of limiting expansive arbitral interpretations, delimiting sovereignty and revisiting the substantive content of BITs can also be discerned in the context of developed countries. It is often attributed to the changing patterns of global investment – increasingly, developing countries such as China and India are becoming capital exporters, with the potential to revisit the investment protection agenda on its originators.¹¹⁹ Thus, the US, Canada and Mexico issued a statement confirming that the FET in NAFTA was only reflective of customary IL. The US has revised its Model BIT to include non-economic objectives, such as health, safety, internationally recognized labour rights and the environment. Norway's new Model BIT refers to corporate social responsibility (CSR), the protection of health, safety, labour, the environment, democracy and human rights.¹²⁰ The EU is now proposing to follow in the footsteps of US and Canada by resolving to adapt their model BITs. Concerns extend to matters such as the need as to restrict interpretative discretion and

¹¹⁵ Ibid; for an analysis of the effect of an article 71 Notice see also Christian Tietje, Karsten Nowrot and Clemens Wackernagel, 'Once and Forever? The Legal Effect of a Denunciation of ICSID' (2009) 6 1 Transnational Dispute Management; see also their book of the same title (Institute of Economic Law 2008).

¹¹⁶ Wenhua Shan, 'Calvo Doctrine State Sovereignty and the Changing Landscape of International Investment Law' in Shan, Simons and Singh, *ibid* (n 40) 248; the doctrine's essential substantive assertion is that 'host states shall not grant foreigners any rights or benefits greater than those they accord to their own nationals'. *ibid* 251.

¹¹⁷ Kaushal, *ibid* (n 23) 493.

¹¹⁸ 'Free Trade Agreement with the European Union must be declared unconstitutional' [2013] <www.Stopesmining.org> accessed 19 July 2013; for an account of NGOs involvement in hindering the conclusion of the MAI see Balanya and others, *ibid* (48) 109-22

¹¹⁹ See for example Sornarajah, *ibid* (n 18) 4-5.

¹²⁰ Kaushal, *ibid* (n 23) 495.

ensure better protection for the public domain'.¹²¹ The report by the EU rapporteur calls for greater transparency in ICSID proceedings, opportunity for an appeal, an obligation to exhaust local remedies, amicus curiae briefs and the prevention of forum shopping. It expresses concern about the broad definition of a foreign investor and the vagueness of standards of protection.¹²²

There is also some evidence that the wave of BITs may be slowing.¹²³ Further, while the majority of BITs remain between developed and developing countries, a respectable percentage has now been concluded between developing parties. This may be an indicator of their rising economic power. However, it may also be construed as evidence of the success of the neoliberal impulse for uniformity, and of a further fracture within the developing camp. Notably, in its motion for a resolution on the future European international investment policy, the European Parliament (EP) stated that the Commission did not intend to have a standard model for all emergent capital exporting countries. It seems privileged partners will comprise countries such as China, India, Mercosur and Russia. There is no mention of poor, purely capital importing countries.¹²⁴ As Rajagopal points out, 'Vast differences in levels of economic and political power between Third World states have exacerbated collective action problems and created new coalitions.'¹²⁵ In other words, power variations now add another layer to the fragmentation of Third World solidarity. BITs fit into such variations. For, formal espousing of reciprocal

¹²¹ European Parliament, 'Report on European on the future of European International Investment policy' (22 March 2011)(2010/2203 (INI)) 2
<<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2011-0070&language=EN>> accessed 5 May 2011.

¹²² *ibid* 3-11.

¹²³ Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (Oct 2006) Series Working Paper No. LEO-027 Illinois Law and Economics Working Papers <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916351> accessed 15 Feb 2011.

¹²⁴ EP Committee, *ibid* (n 121) 1.

¹²⁵ Balakrishnan Rajagopal, 'Counter-hegemonic International Law: rethinking human rights and developments as a Third World Strategy' in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish 2008) 63.

rights notwithstanding, the flow of investment in a BIT usually remains one-sided, with little change to its power-based imbalance.¹²⁶

The Genealogical Framework

BITs of empire

Following on from Anghie's work, the view adopted here is that modern foreign investment protection law evolved in the context of the colonial encounter. Later, and following the dissemination of sovereignty to former colonised territories it sought to address the tension between the competing narratives of host - generally developing countries - and those of home - generally developed countries and their corporate emissaries.¹²⁷ Put simply, to a great extent, investment IL was shaped by the fact that the natural resources that are the lifeline of European industrialisation are mostly located in non-European territories.¹²⁸ Starting with the second half of the 19th century, this was supplemented by a growing need for new markets.¹²⁹ From a discursive perspective, establishing a Eurocentric normative universality through the instrumentality of IL, formed part of the historical project to ensure unfettered and secure access to such natural resources and markets. Universality was first

¹²⁶ Sornarajah, *ibid* (n 18) 177.

¹²⁷ For an in-depth examination of the historical relationship between IL and colonialism see generally Anghie, *ibid* (n 17); an analysis of investment IL which focuses on the conflicts between capital importing and capital exporting countries is also found for example in Van Harten, *ibid* (n 11) 12-18; Schill acknowledges the historical role of the developing/developed dichotomy in the construction of investment IL but points to a cutting point in 1998 in the context of the MAI. Schill, *ibid* (n 42) 57-58.

¹²⁸ For a discussion of the link between imperialist drives and 19th century Western demand for raw materials located in remote places see Eric Hobsbawm, *The Age of Empire 1875-1914* (Abacus 1994) 63.

¹²⁹ Rather than the quest for investment opportunities, Hobsbawm points to the search for markets as a generally more convincing motive for late 19th century imperialist expansion. In this, 'China was one which haunted the imagination of salesmen'. *ibid* 66-7; it is arguable that investment and the pursuit of market opportunities are complimentary. For example, much of the inward investment into China is motivated by the wish of corporations to secure an advantageous position for exploiting the Chinese market; Burbank and Cooper also point to the fact that, compared with earlier empires, the 19th century empire brought a greater section of the world under the power of a small number of states resulting in their enrichment compared with their colonies. Jane Burbank and Fredrick Cooper, *Empires in World History: Power and the Politics of difference* (Princeton University press 2010) 287; see also Anghie, *ibid* (n 17) 141-42 pointing to the perception that an intimate connection existed between the well-being of the European state's economy, its overseas possessions and its ability to protect and expand its overseas markets.

produced to explain and support the colonial encounter, and later, to counter the challenges posed by dispersed sovereignty.¹³⁰ Taken together, these two developments point towards a continuous overarching imperialist function.¹³¹

This last statement calls for a brief amplification. It will be necessarily brief and selective since the phenomenon of imperialism, and the forces by which it is driven are the subjects of polemic that is outside the scope of this work.¹³² A fitting starting point may be the distinction between colonialism and imperialism. The first alludes generally to the practice of physically settling territories.¹³³ The second, postulates Doyle, implicates processes and policies both formal and informal - e.g. the use of force, induced collaboration and dependency - the desired outcome of which is the establishment or maintenance of an empire. Their essential feature is control.¹³⁴ In other words, colonialism is but one of the many forms empires may assume.

As against this, Hardt and Negri may argue that a Doyle type narrative overlooks contemporary break with the past.¹³⁵ Such break, they would say, is manifest in the constitution of a new global empire, one that is devoid of territorial centres of power and control.¹³⁶ Globalisation thus produced a spatial totality, in which nation-states have been replaced with non-territorial imperial sovereignty, and where juridical definitions 'tend to project a single supranational figure of political power'.¹³⁷ Transcribed into the language of investment IL, these observations may be said to mirror the debate as to

¹³⁰ Anghie's central argument is that IL did not meet imperialism as a fully formed body of law. Rather, many of its basic doctrines, including that of sovereignty 'were forged out of an attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation'. *ibid* (n 17) 3 and generally.

¹³¹ Alluding to imperialism as a hegemonic concept Rajagopal refers to present-day IL as 'hegemonic' but argues that, combined with other factors, globalisation raises the specter of a return to an 'imperial' IL 'which legitimises the use of raw power by the USA'. Rajagopal, *ibid* (n 125) 64, 67.

¹³² Michael W. Doyle, *Empires* (Cornell Studies in Comparative History, Cornell University Press 1986) 22-30.

¹³³ Anghie, *ibid* (n 17) 11.

¹³⁴ Doyle, *ibid* (n 132) 45; Burbank and Cooper appear to bring Doyle and Anghie together by incorporating notions of both power politics and politics of difference into their understanding of empires. Burbank and Cooper, *ibid* (n 129) 11-12, 39.

¹³⁵ Michael Hardt and Antonio Negri, *Empire* (Harvard University Press 2000) 239.

¹³⁶ *ibid* preface xii.

¹³⁷ *ibid* 9.

whether, as argued here, the spread of BITs reflects the perpetuation of the historical binary of core/periphery societies, or whether it represents a multilateral arrangement which breaks with the past, via the formation of a new global order.¹³⁸

Consideration of this debate requires a brief examination of imperial compulsions. Doyle points to the warning signs of design and resistance. They should alert us to the possibility that collaboration may not be truly independent, but rather nominally independent and actually subordinate. That is to say, the imperial actor exercises control over the subordinate actor to achieve outcomes the latter may not desire.¹³⁹ Responses to resistance then vary according to the level of imperial formality. In formal empires resistance is met by police actions or the replacement of formerly collaborative elites. In informal ones the response tends to be by way of indirect constraints manifested, for example, by the imposition of embargoes.¹⁴⁰ One may recognize the warning sign of design in US policies, such as the sanctions imposed against Cuba and Iran, or the military interventions and regime changes in the Middle East and Central Asia. However, indicators of influence and power pose difficulties, since they tend to be covert and problematic to measure. They may therefore need to be thought of by reference to outcomes.¹⁴¹ Thus, WikiLeaks' revelations about US-India relationship exposed dynamics of control and influence over Indian political elites that produced 'an ignominious surrender of national sovereignty and dignity'.¹⁴² Rajagopal points to a security pretext for pushing a trade and investment protection design, as evidenced, *inter alia*, by an article written by Robert Zoellick shortly after 9/11. The former US Trade representative argued that the war on terror was in reality a war for free

¹³⁸ Schill, *ibid* (n 42) generally; for an opposing view as a matter of legal analysis see for example Sornarajah, *ibid* (n 18).

¹³⁹ Doyle, *ibid* (n 132) 34, 37.

¹⁴⁰ *ibid* 39.

¹⁴¹ Susan Strange, 'An International Political Economy Perspective' in John H Dunning (ed), *Government, Globalisation, and International Business* (OUP 1997) 136; Doyle, *ibid* (n 132) 34.

¹⁴² Pankaj Mishra, 'Behind the 'Rising India' Lies the Surrender of National Dignity' [5 April 2011] *The Guardian*.

trade.¹⁴³ For Zoellick, globalisation implicates a return to imperial IL, such that legitimises the use of raw power by the USA.¹⁴⁴

Turning to investment protection, even if Rajagopal's view on the renewed legitimisation of the use of force is to be rejected and, whether or not one adopts Montt's explanation of the 'network effect' in the spread of BITs,¹⁴⁵ the existence of design, is difficult to ignore. The neoliberal model articulates orthodoxies actively propagated by the US. They are implemented through the exercise of power and the drawing of a design.¹⁴⁶ Consequently, states' consent to act as competitive agents and to embrace BITs may not embody independently arrived at outcomes¹⁴⁷. Indeed, Sornarajah asserts that the power of TNCs to secure legislation that penalises errant states is amply evident.¹⁴⁸ Elkin, Guzman and Simmons' research reveals pressure on governments 'to adopt capital-friendly policies.'¹⁴⁹ Kaushal points to the complementary role of IFIs' conditionalities in imposing BITs on cash-strapped host states.¹⁵⁰ Inter alia, such policies may link the availability of insurance to the existence of BITs.¹⁵¹ In particular, in its project-based lending role, the World Bank avoids extending loans that may otherwise be available from private sources. This is so as to promote foreign private capital.¹⁵² Consequently, 'In the absence of foreign aid or other capital inflows, developing countries must create a favourable climate for foreign investment before their

¹⁴³ Rajagopal, *ibid* (n 125) 67.

¹⁴⁴ *ibid* 64.

¹⁴⁵ Montt, *ibid* (n 7) departing from Guzman's theory of 'prisoner's dilemma' whereby competitive forces drive developing states to adopt non-desirable solutions and explaining the spread of BITs as the product of a 'network effect' – 'an economic concept describing those markets in which the utility derived from the consumption of a good or service increases as more users consume the same good or service'. Thus, the more countries enter into a BIT the greater the utility. Hence, others are induced to do the same.

¹⁴⁶ See for example Sornarajah's discussion of the 'neo-liberal agenda'. Sornarajah, *ibid* (n 40) 206-07; Lehavi and Licht, *ibid* (n 9) 124.

¹⁴⁷ Vandeveld, *ibid* (n 1) 8.

¹⁴⁸ Sornarajah, *ibid* (n 18) 63.

¹⁴⁹ Elkins, Guzman and Simmons, *ibid* (n 43) 2.

¹⁵⁰ Kaushal, *ibid* (n 23) 505.

¹⁵¹ *ibid* 506.

¹⁵² *ibid* 507.

requests will be entertained by the Bretton Woods institutions'.¹⁵³ Or, in the words of Alvarez:

BIT partners turn to the US BIT with the equivalent of an IMF gun pointed at their heads; others may feel that, in the absence of a rival superpower, economic relations with the one that remains are inevitable. For many, a BIT relationship is hardly a voluntary, uncoerced transaction. They feel that they must enter into the arrangement, or that they would be foolish not to do so, since they have already made the internal adjustments required for BIT participation in order to comply with the demands made by, for example, the IMF.¹⁵⁴

Further, BITs entail 'sovereignty costs' - any regulatory change that affects foreign investors is potentially subject to review by an external tribunal.¹⁵⁵ Paradoxically, the fact of entering into a BIT engages a state's act, but its effect is to reduce the state's freedom to act.¹⁵⁶ Viewed from this perspective, BITs appear to implicate designed control exercised through the medium of reduced sovereign power.¹⁵⁷

To a great extent power-produced outcomes are assisted by informality so as to achieve greater legitimisation. Here we may want to review briefly Gallagher

¹⁵³ *ibid.*

¹⁵⁴ Jose E. Alvarez, 'The Development and Expansion of Bilateral Investment Treaties: Remarks' (1992) 86 *American Society of International Law* 532; But see Sornarajah, *ibid* (n 18) 23-24 attributing the spread of BITs to an initial evolvement of pragmatic attitudes among developing countries and subsequent willingness to compromise following on from the dismantling of socialist alternatives and changes in global investment patterns. Yet he too counts competition and the rise of neoliberalism among the reasons for the success of BITs.

¹⁵⁵ Elkin, Guzman and Simmons, *ibid* (n 43) 825.

¹⁵⁶ Kaushal, *ibid* (n 23) 511.

¹⁵⁷ For example, the requirement of free capital repatriation of funds is an important substantive right accorded to investors under BITs. Abba Kolo and Thomas Walde, 'Capital Transfer Restrictions under Modern Investment Treaties' in Reinisch, *ibid* (n 21) 213-15.

and Robinson's important polemic of British free trade imperialism for its striking applicability to present day eco-political realities.¹⁵⁸ According to Gallagher and Robinson, 19th century imperialism combined outflow of goods and capital with the willingness of states to directly intervene in support of their economic interests.¹⁵⁹ These fluctuations between outflow and intervention determined the degree to which imperialism was 'formal' or 'informal', not to be confused with a retreat in imperialist activity. Rather, when it was necessary for the formal political bond to be less pronounced, economic dependence stepped in, so as to keep the colonies bound to Britain, and enable their use as agents for further expansion.¹⁶⁰ Development efforts created the illusion of a period of withdrawal. Indeed, once entry has been forced, stable governments that did not require on-going coercion were deemed to lessen investment risks.¹⁶¹

In sum, it appears that investment protection juridical structures do not project a single supranational form of political authority, but rather the control and influence exercised by a centre or centres of power. From the outset, foreign investment thus resided in a fluid twilight zone of mutually reinforcing formal and informal power in which the latter, in the form of trade and investment, operated as a tool, used to rectify the adverse consequences of the former.¹⁶² Commercial penetration bred co-operation.¹⁶³ Conversely, political control that lacked commercial penetration was flawed.¹⁶⁴ Either way, ultimately, as Lord Clarendon pointed out in 1870 in the context of China, 'British interests (...) are strictly commercial, or at all events only so far political as they may be for the

¹⁵⁸ John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) Second Series VI 1 The Economic History Review

<<http://www.mtholyoke.edu/acad/intrel/ipe/gallagher.htm>> accessed 25 Sep 2010.

¹⁵⁹ Nicholas Frayn, 'Empires, Imperialism and Free Trade: Reinventing the Robinson and Gallagher controversy' [17 March 2004] paper presented at the annual meeting of the International Studies Association, Quebec, Canada

<http://www.allacademic.com/meta/p_mla_apa_research_citation/0/7/3/5/8/pages73583/p73583-15.php> accessed 25 Sep 2010.

¹⁶⁰ Gallagher and Robinson, *ibid* (n 158) 3.

¹⁶¹ *ibid* 6.

¹⁶² For examples of how this formula operated with various degrees of success in Latin America, China and the US see *ibid* 6-7.

¹⁶³ *ibid* 7; North America was an exception.

¹⁶⁴ In China British political supremacy failed to dislodge Chinese self-sufficiency resulting in social and political instability as demonstrated by the Taiping Rebellion. *ibid*.

protection of commerce'.¹⁶⁵ Applied to more recent times, this analysis sheds a different light on 20th century's modes of expansion and, in particular, the dissemination of sovereignty to non-European territories. Rather than an ontic break with the past, the grant of independence may be said to be a further step in the evolution of informal imperialism. From now on, with the exception of instances of a deemed need for intervention, formal independence would be founded on continuing informal subjugation, one that was constructed around discursive pillars, such as 'development',¹⁶⁶ and the necessity for structural and institutional integration.¹⁶⁷ Development, argues Rajagopal, provided the ideological foundation for the post-colonial state. It was invented in the post-WWII to spur a wave of IL innovations, including Economic IL.¹⁶⁸ Thus, the civilization/development discourse and colonial and imperial acts form an integrated continuum along which investment protection law evolved.¹⁶⁹

Fractured consensus

If the formation of foreign investment protection law took place in a historical context marked by initial domination and subsequent related disagreements, at what point, if at all, can it be said to have become truly consensual? After all, as will be seen below, treaties played no lesser role in the context of 19th century colonialism. The fact of their imposition was and, arguably remains severed from their legal validity.¹⁷⁰ Another way of formulating this question is to ask whether 20th and 21st centuries' consent to treaties is fundamentally different

¹⁶⁵ *ibid*, citing from N.A Pelcovits, *Old China Hands and the Foreign Office* (Octagon Books 1969) 85.

¹⁶⁶ Referring to Leroy-Baulieu's 1874 book Burbank and Cooper make the point that from the outset modern colonialism was predicated on a myth of mutually beneficial progress rather than conquest and extraction. Burbank and Cooper, *ibid* (n 129) 287.

¹⁶⁷ Literature on investment IL generally accepts the proposition that it operates to reduce the sovereignty of host states. See for example Kaushal, *ibid* (n 23) 496; Anghie goes further to state that starting with the Mandate system 'non-European sovereignty was somehow destined to become distinctive and dependent and lacking in real economic power'. Anghie, *ibid* (n 17) 199.

¹⁶⁸ Rajagopal, *ibid* (n 125) 65; in the 50s, investment contracts were re-named 'economic development contracts' as part of the justification for their internationalisation. Sornarajah, *ibid* (n 74) 225.

¹⁶⁹ *ibid* 75, 76.

¹⁷⁰ Anghie, *ibid* (n 17) 85 disputing Alexandrowicz's account that pre- 19th century capitulation treaties were originally accepted voluntarily by Asian states seeking to promote trade and were entered into on equal terms in C H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press 1967) 9.

from its colonial antecedent; are BITs consensual or are they essentially the outcome of reconstituted, informal imperial structures?¹⁷¹

Lowenfeld's temporal taxonomy refers to a 'pre-1917 consensus' that signifies the accord, which existed during the times of European empires, but was confined to the core of industrialised nations.¹⁷² This was followed by the post-1917 era of its breakdown, when events such as the Mexican and Russian revolutions, new doctrines canvassed by newly independent countries, a wave of nationalisations and doubts among Western scholars¹⁷³ combined to raise questions about the existence and content of customary standards of investment IL.¹⁷⁴ Publicists such as Schill look to the proliferation and normative convergence of IIAs since the 1990s to assert a restored order and a rejuvenated multilateralism, albeit one that is not formally codified.¹⁷⁵ The view taken here is evident from the discussion above. Namely, that the multilateralisation discourse overlooks the means by which consent was extracted. Even if consensus can be said to exist, it does not epitomize the outcome of independent decision-making. Rather, it is founded on enduring power, mediated through global structures and the agency of states and capital. It aims to ensure that the 'Western model of law and behaviour would be seen as natural, inevitable and inescapable'.¹⁷⁶

The reconstitution of a contemporary consensus meant that earlier disagreements had to be, at best overcome, and at worst marginalised. The outcome is thus a victor's version of investment IL, one that, inter alia, overlooks GA resolutions as one of its possible sources.¹⁷⁷ Given that such

¹⁷¹ For a critique of the invocation of consent as justification for the global order see Thomas Pogge, 'The Role of International Law in Reproducing Massive Poverty' in Samantha Besson & John Tasioulas (ed), *The Philosophy of International Law* (OUP 2010) 425-26.

¹⁷² Andreas F. Lowenfeld, *International Economic Law* (OUP 2002) 391-92.

¹⁷³ In the 20s and 30s Western scholars such as Oppenheimer and Lauterpacht doubted the extent of host states' obligations to foreign investors. *ibid* 403-04.

¹⁷⁴ *ibid* 392-415.

¹⁷⁵ On the question of multilateralism see also, for example, Rafael Leal-Arcas 'Towards the Multilateralization of International Investment Law' (2009) 10 No 6 *Journal of International Investment and Trade* 865.

¹⁷⁶ Anghie, *ibid* (n 17) 146.

¹⁷⁷ Ian Brownlie, *Principles of Public International law* (7th edn, OUP 2008) 15; Sornarajah, *ibid* (n 18) 84.

marginalisation is contested, the debate that animated these resolutions deserves airing.

Schill argues an initial rejection of investment protection on the part of capital importing countries.¹⁷⁸ Such opposition, he says, finally changed in the post-1945 area, and then again in the 1990s with the decline of socialism.¹⁷⁹ As will be seen below, the proposition that the intention was to reject, or that the change in position was as fundamental as it is made out to be, appears overstated. Rather, the common reaction of newly independent, including socialist countries such as China, was to adopt Western discourse that replaced colonial civilized/uncivilized binary with the parlance of development. Internally, development was to be the universalising force that would bridge ethnic differences between disparate groups - now bundled together as nation-states - and facilitate nation building.¹⁸⁰ Thus, the experience of colonialism and a predatory West was translated into a commitment to modernity that was governed by Western notions of sovereignty, and the raising of living standards through industrialisation.¹⁸¹ This position is hardly surprising given that liberation movements were generally led by Westernised political and economic elites who sought to reproduce the Western path to national wealth and power.¹⁸² Indeed, one of the enduring effects of 19th century colonialism and the Mandate system of early 20th century can be said to be new states' internalisation of the aim of achieving European prescribed standards - the way in which the uncivilized would become civilized and the backward would progress.¹⁸³ Taking for example the principle of state responsibility for injury of

¹⁷⁸ Schill, *ibid* (n 42) 19.

¹⁷⁹ *ibid* 43-44, 60-64.

¹⁸⁰ Anghie, *ibid* (n 17) 204-07.

¹⁸¹ See Hardt and Negri, *ibid* (n 135) 247-48 for a discussion of the 'disciplinary project' - a post WWI mechanism originating from the dominant capitalist countries and representing a takeoff towards modernity in which disciplinary forms of industrialised production are posited as ineluctable from development.

¹⁸² Eric Hobsbawm, *The Age of Extremes: 1914-1991* (Abacus, London 1994) 200. Liberation movements also looked to the Bolshevik Revolution for guidance. However, the Revolution also emphasized the centrality of industrialisation to development and was by reference to Western discourse.

¹⁸³ On the various aspects of the transformation of the native and her society see for example Anghie, *ibid* (n 17) 127, 145-46 and generally.

aliens,¹⁸⁴ the colonialist encounter produced a reformist rather than a repudiatory approach.¹⁸⁵ Thus, argues Montt, contrary to the proposition proffered by a number of Western scholars, the late 19th century's Calvo Doctrine pursued neither the immunisation of states from liability to aliens, nor a prohibition of foreign investment.¹⁸⁶ Rather, its purpose was more limited. That is, to replace the forcible self-help excesses of 19th century diplomatic protection with state and nationals-aliens equality of treatment.¹⁸⁷ In other words, against the backdrop of bargaining inequality attendant on the threat of forcible response from militarily superior powers, the Calvo doctrine represented a more balanced and equal notion of foreign investment protection.¹⁸⁸ Beyond this, it remained committed to property rights and individual economic freedom. Further, the objective was to incentivise foreign investment by offering aliens full civil and legal equality, a progressive statement in those days.¹⁸⁹ Furthermore, the Calvo Doctrine did not object to diplomatic protection in principle. It simply limited its legitimacy to the event of denial of justice, a position not far removed from Western understanding.¹⁹⁰ As Walde observes 'the Calvo-doctrine, much opposed by Western governments with respect to developing countries, has in fact been – and still is – the dominant maxim of Western countries themselves'.¹⁹¹

Turning to the issue of compensation, Montt goes on to argue that, in contrast to the Calvo doctrine, during the 20th century, and particularly in the course of the Cold War, developing countries distanced themselves from a rule of law-based concept of state responsibility in favour of compensation as deemed

¹⁸⁴ Liability for injury provides standards of treatment of aliens and creates host state's liability for failure to adhere to them. Sornarajah, *ibid* (n 18) 120-21.

¹⁸⁵ Montt, *ibid* (n 7) 45.

¹⁸⁶ *ibid*.

¹⁸⁷ *ibid* 38-39, 48; on the Calvo Doctrine merely opposing 'super-national treatment' see also Shan, *ibid* (n 116) 248-49; the diplomatic protection doctrine refers to the principle that an alien carries with him the protection of his home state. Sornarajah, *ibid* (n 18) 121.

¹⁸⁸ Montt, *ibid* (n 7) 33-41.

¹⁸⁹ *ibid* 39.

¹⁹⁰ *ibid* 4-5; see also Francioni, *ibid* (n 21) 63-64.

¹⁹¹ Thomas W Walde, 'Investment arbitration under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation' (1998) 2 *Arbitration International* 429 at 426 cited in Montt, *ibid* (n 7) 45; but see Edwin Bochar, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 *American Society of International Law Proceedings* 51 arguing that national-aliens equal treatment is subject to a minimum standard of civilised norms of justice.

appropriate by the state.¹⁹² He then equates the principle of appropriate compensation with the idea of 'expropriation without compensation'.¹⁹³ The reason for such equation is not made clear. However, at first blush, it is problematised by the very example Montt gives. Namely, the exchanges between the Mexican and the US governments in the wake of the Mexican agrarian reforms in 1914, and subsequent nationalisation of foreign oil companies in 1938.¹⁹⁴ To expand, the emphasis that the 1917 Russian and Mexican revolutions placed on the social rather than private function of property, triggered a debate that went beyond property rights to encompass the content and operation of the IMS.¹⁹⁵ In its exchanges with the US Secretary of State, Cordell Hull, the Mexican government argued the subordination of private property rights to public welfare and, by implication, the primacy of societal rights where regulation, ownership, use and conservation of natural resources are concerned.¹⁹⁶ The corollary was a rule that, though compensation may be in principle due, questions such as whether they were in fact payable and if so, whether payment was to be prompt and for full value, were contingent on the nature and circumstances of the taking. In this regard, Mexico distinguished between expropriations that follow on from juridical reorganisation and affect equally the population as a whole on the one hand, and takings that are exercised by decree and impact on specific individual interests on the other.¹⁹⁷ In relation to the first, Mexico asserted the absence of a universally accepted doctrine of IL 'that would render obligatory the giving of adequate compensation'.¹⁹⁸

The Mexican government further invoked the principle that municipal laws governed the time and manner of compensation.¹⁹⁹ In line with the Calvo doctrine, it argued that IL did not confer on aliens rights that are greater than

¹⁹² Montt, *ibid* (n 7) 55-56.

¹⁹³ *ibid* 55-57.

¹⁹⁴ *ibid* 55-56.

¹⁹⁵ Lowenfeld views these developments as marking the end of what he terms 'the long century of consensus'. Lowenfeld, *ibid* (n 172) 392.

¹⁹⁶ *ibid* 394-95.

¹⁹⁷ Mexican Minister of Foreign Affairs to US Ambassador, 1 Sep 1938, cited in *ibid* 401.

¹⁹⁸ Mexican Minister of Foreign Affairs to US Ambassador, 3 Aug 1938, cited in *ibid* 399, 400.

¹⁹⁹ *ibid* 399.

those afforded to nationals of the host state.²⁰⁰ Hull accepted the legality of expropriation undertaken in the public interest.²⁰¹ However, he argued, such legality was subject to the international rule of 'adequate, effective, and prompt' compensation.²⁰² This 'ancient principle' he asserted was integral to a universally recognized law of nations, to which, when applied to aliens, municipal laws were subordinate.²⁰³ It did not follow from this that foreign nationals were entitled to special privileges, as suggested by the Mexican government's 'wholly inapplicable doctrine of equality'.²⁰⁴ Rather, it was a matter of maintaining an international order that was consistent with the preservation of 'reason, equity and justice'.²⁰⁵

A degree of semantic similarities in the invocation of notions of equity and justice notwithstanding, the writings reveal different perspectives – collective v individualist - and contrasting interests. For Mexico, social justice appears to be associated with the collective needs of an impoverished nation, whose future should not 'be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end'.²⁰⁶ Equity requires that payments would not be made to foreign nationals in circumstances when her own nationals could not be similarly compensated. Hull, by contrast, invokes IL in defence of individualised 'human and property' rights, the deprivation of which cannot be legitimised by the fact that others are equally deprived. Justice requires that such individual rights be protected regardless of collective circumstances. Thus, according to Hull, IL operates to afford protection and justice by ensuring that, the wellbeing of own nationals

²⁰⁰ *ibid* 395.

²⁰¹ US Secretary of State to Mexican Ambassador to the US, 21 July 1938, cited in *ibid* 398.

²⁰² US Secretary of State to Mexican Ambassador to the US, 22 Aug 1938, cited in *ibid* 400. This formula stipulates a standard of compensation whereby, at the very least, such compensation must reflect the full value of the property taken. Sornarajah, *ibid* (n 18) 209.

²⁰³ Lowenfeld, *ibid* (n 172) 400.

²⁰⁴ *ibid*.

²⁰⁵ US Secretary of State to Mexican Ambassador to the US, 21 July 1938, cited in *ibid* 398.

²⁰⁶ Mexican Minister of Foreign Affairs to US Ambassador, 3 Aug 1938, cited in *ibid* 399.

notwithstanding, governments may not be free to take property beyond their ability or willingness to pay.²⁰⁷

Both the existence of an obligation to pay 'prompt, adequate and effective' compensation and its status as a principle of customary IL remain the subject of intense debate. In *Sabbatino*, the US Supreme Court declined to review expropriation by Cuba, commenting that there were 'a few if any issues in international law today on which opinion was so divided as the limitations on a state's power to expropriate the property of aliens'.²⁰⁸ The OECD considers that positive attitudes towards foreign investment and the proliferation of BITs containing the Hull formula deprive the debate of practical significance.²⁰⁹ Sornarajah, on the other hand, opines that the issue remains both controversial and of practical significance given that the effect of BITs is limited to law making as between the parties. Further, BITs are not uniform in this respect. Their effect becomes even more questionable when variables such as differences in bargaining power are factored in.²¹⁰ According to Reinisch, 20th century nationalisations and developing countries' doctrines operated to dislodge the Hull formula from its former status of a widely accepted expression of customary IL, leaving a much reduced principle that at least some compensation must be paid for expropriation.²¹¹ Mendelson refers to the ongoing raging controversy as to whether the Hull formula represents, or indeed has ever represented, a standard of customary IL.²¹² Be it as it may, Montt's characterisation of developing countries' position as 'opportunistic' departure

²⁰⁷ US Secretary of State to Mexican Ambassador to the United States, 21 July 1938, cited in *ibid* 398.

²⁰⁸ *Banco Nacional de Cuba v Sabbatino* [1964] 376 US 398, 428.

²⁰⁹ OECD Directorate for Financial and Enterprise Affairs, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) 2004/4 Working papers on international investment 2 <www.oecd.org/data/oecd/22/54> accessed 14 Aug 2010; but see Sornarajah's distinction between developing countries' subscription to 'appropriate compensation' at the international level and their pragmatism driven practice of signing BITs containing the Hull Formula on a case by case basis. Sornarajah, *ibid* (18) 211.

²¹⁰ Sornarajah, *ibid* (n 18) 208-11.

²¹¹ August Reinisch, 'Legality of Expropriation' in Reinisch, *ibid* (n 21) 194-195; see also for example D J Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell 2004) 596-601.

²¹² M. H Mendelson, 'Agora What Price Expropriation? Compensation For Expropriation: The Case Law' (1985) 79 *American Journal of International Law* 395.

from the rule of law appears questionable.²¹³ Mexico did not seek to dispute the principle of compensation. Rather, she questioned the existence of a customary IL in the specific circumstances of a nationwide systemic reform. In this, she was not alone. The 1937 edition of Lauterpacht similarly qualified a state's obligation to respect the property of aliens by reference to 'fundamental changes in the political system and economic structure of the state':²¹⁴

In such cases neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offers a satisfactory solution to the difficulty. It is probably that, consistently with legal principle, such solution must be sought in the granting of partial compensation.²¹⁵

The OECD similarly distinguishes between expropriation - generally applied to individual measures taken for a public purpose - and nationalisation, which involves large-scale takings on the basis of an executive or legislative act.²¹⁶

Turning to the newly independent states' attempts at bringing about a NIEO, were such attempts rejectionist or reformist and adaptive? In itself, the word 'international' in the NIEO points to a participatory approach, rather than to an intent at withdrawal. Indeed, for Anghie, the aim was to reform, not to dispense with IL.

Reform meant that the discipline had to be stripped of its colonial past.²¹⁷ It is here that the new states' response to the grant of sovereignty proved fractious. For them, the fact of their sovereignty, the hard won prize of their struggle, was

²¹³ Montt, *ibid* (n 7) 55-57.

²¹⁴ L. Oppenheim, *International Law* (9th edn, Jennings and Watt 1992) 407.

²¹⁵ *ibid*.

²¹⁶ OECD, *ibid* (n 209) 3.

²¹⁷ Anghie, *ibid* (n 7) 202.

understood to have made them ‘masters in their own house’ and to have conferred on them real power and equality, both political and economic.²¹⁸ The desirability of development as a universalising and progressive force was accepted.²¹⁹ However, the path to such development required that the relationship between former colonised and former colonisers be transformed.²²⁰ The creation of IL which would cater also for their interests, and in which their power to shape their national future would not be a mere formality was to be part of such transformation.²²¹ By contrast, for the West, the diffusion of sovereignty represented the culmination of a shift from exclusion to inclusion, via a prescribed, European-modelled uniform process of self-reform.²²² Further, new states’ participation was to support the universality of IL’s classical origins.²²³ Thus, the emphasis was on the strengthening and continuation of an institution that had been shaped by the powerful colonial powers and has served their interests.²²⁴ With this level of misapprehension, and given the enormity of what was at stake, the eruption of a contest seemed inevitable.

In issue was the question of whether, by reason of new states’ non-participation in the construction of IL their creation occasioned a demarcation line between past and future, and a point at which reform could take place. For the West, the

²¹⁸ *ibid* 196 citing from R P Anand, ‘Role of the “New” Asian-African Countries in The Present International Legal Order’ (1962) 56 *American Law of International Journal* 383 at 390.

²¹⁹ *ibid* 207.

²²⁰ *ibid*, 208 citing from R P Anand, ‘Attitude of the Asian-African States Toward Certain Problems of International Law’ in F. Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law: An Introduction* (Martinus Nijhoff, 1987).

²²¹ *ibid* 198.

²²² Anghie points to the mandate system as charged with the task of grooming non-European territories for the impending de-colonialisation so as to ensure their future participation in the existing international institution. This was important for the purpose of promoting universality. It was to be achieved under the supervision of an international institution with a shift in IL narrative from exclusion to inclusion. Thus, under the mandate system development, persuasion, ethical administration, common goals and shared interests replaced the language of exploitation, coercion and exclusion. The aim was to create self-governing societies by restructuring their interior in a process of self-reform. It was in the context of the Mandate system that the role of ‘standards’ (rather than rigid legal rules) in maintaining flexibility was first recognized. For a full discussion of the mandate system see Anghie, *ibid* 115-95 and Anthony Anghie, ‘*The Evolution of International Law: Colonial and Postcolonial Realities*’ in Falk, Rajagopal & Stevens, *ibid* (n 125) 42-44.

²²³ Anghie, *ibid* (n 17) 197.

²²⁴ *ibid* 198.

dissemination of sovereignty from Europe to elsewhere supported the claim that IL as a truly universal discipline had finally come of age.²²⁵ The argument as found for example in the writing of Karol Gess can be summarised as follows: prior to and while being colonised new states had no existence cognizable by IL. It follows that they entered the international area through conquest and colonisation. The statehood then gifted to them was thus of European origins and bound with existing IL.²²⁶ Doctrines such as state succession and acquired rights supported this proposition that, having assumed a Eurocentric statehood, new states were deemed to have accepted the IL that went with it.²²⁷

In contrast, the new states questioned the applicability 'stock lock and barrel' of a discipline in the formation of which they did not participate, which they believed to have been structured with the furthering of Western interests in mind, and which imposed on them onerous and inequitable concessions.²²⁸ Once again, disputes over the doctrine of state responsibility for injury to aliens moved centre stage. Following on arguments advanced earlier in Latin America, the new states disputed Eurocentric understanding of state responsibility. In particular they resisted the imposition of an external standard through the medium of an IMS and the associated exclusion of aliens from the application of municipal laws. From this flowed an assertion of equality in the treatment of foreign investors and nationals, one that was to be based on domestic laws and jurisdiction.²²⁹

By the 60s and 70s, the newly independent states embarked on realizing their aspirations to bind together political and economic sovereign equality. They did so by formulating within the GA a comprehensive set of IL doctrines.²³⁰ These

²²⁵ *ibid* 197-98,

²²⁶ Anghie, *ibid* (n 17) 219.

²²⁷ Broadly, these doctrines refer to the principle of the continuity of obligations whereby a government is bound by rights granted to private parties by its predecessors; it encompass the principle of *Pacta Sunt Servanda*.

²²⁸ Anghie, *ibid* (n 17) 198, 209-10.

²²⁹ *ibid* 209.

²³⁰ For an account of the UN debate regarding the legal effect of the PSNR and whether it created a new legal basis as argued by Syria for example see Karol N Gess, 'Permanent Sovereignty Over Natural Resources: An Analytical Review of the United Nation Declaration and Its Genesis' (1964) *International & Comparative Law Quarterly* 13 398, 408-11.

came to be known as the NIEO. In the main the NIEO comprised the Permanent Sovereignty Over Natural Resources (PSNR) resolution of 1962 and the Charter of Economic Rights and Duties among States (CERDS) resolution of 1974. Together they challenged the mandate era's narrative of externally led progress.²³¹ The PSNR was also a response to the industrialised countries' move to address their dependency on overseas raw materials and the vulnerability of their supply lines by concluding the Atlantic Charter of 1941.²³² This Charter sought to characterize natural resources as 'the raw materials of the world'.²³³

The NIEO tackled IL on a number of issues including nationalisation, expropriation, standards of compensation, exhaustion of domestic jurisdiction, and principles of *Pacta Sunt Servanda* and acquired rights.²³⁴ Opinions as to its implications for investment IL vary. Gess concludes that the PSNR positively affirms four of IL's basic principles. Namely, that (i) lawful expropriation attracts compensation; (ii) the measure of compensation is subject to international standards; (iii) states are bound by their promises to investors; (iv) arbitration agreements are binding.²³⁵ Yackee is assisted by this conclusion to critique the 'myth' that 'BITs are necessary to establish an international legal principle of *Pacta Sunt Servanda* in state-investor relationship.²³⁶ He attributes such myth to the influence of Guzman's contention that, in the wake of the destructive effect, which the PSNR, and even more so, the CERDS had on the Hull formula, BITs provide a route by which the credibility of states' promises can be restored.²³⁷ In fact, argues Yackee, by its articles 3 and 4, the PSNR

²³¹ Anghie, *ibid* (n 17) 212.

²³² Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1998) 37; see also Anghie, *ibid*.

²³³ Schrijver, *ibid*; The US-UK joint declaration known as the Atlantic Charter provided the blueprint for many of today's agreements including the Agreement on Tariffs and Trade (GATT); see also Anghie, *ibid* 212; if the division of wealth between developing and developed countries can be characterised as the natural resources of the first and the technological advances of the latter, it is interesting to note the difference between the principle of humanity's free access to natural resources and IL principles relating to intellectual property rights as expressed, for example, in the TRIP agreement. The characterisation of resources as belonging to humanity as a whole can be found also in the narrative of the mandate era. Anghie, *ibid* (n 17) 212.

²³⁴ For the various understandings of permanent sovereignty see Schrijver, *ibid* (n 232) 22-23; for an account of the debates in the UN about these issues see Gess, *ibid* (n 230) 420-48.

²³⁵ Gess, *ibid* 448.

²³⁶ Yackee, *ibid* (n 105) 10, 21.

²³⁷ Guzman, *ibid* (n 32) 648-51.

affirms the binding nature of host states' promises to investors and their right to agree international adjudication.²³⁸ Outside of the PSNR, in international jurisprudence predating BITs, tribunals consistently presumed that states' promises were enforceable, so that investors were entitled to compensation in the event of a breach.²³⁹

In the same vein, Sornarajah points to the fact that states' control over all economic activities within its boundaries is a self-evident principle of state sovereignty.²⁴⁰ Thus, he argues, the PSNR encapsulated an inoffensive principle. The sole reason it required re-articulation was developed countries' quest for on-going post-colonial domination.²⁴¹ Yet, Sornarajah may be overlooking the full legal implications of the GA resolutions, such that may explain why they produced the contest they did. For implied in them was a preceding native sovereignty, one that 'survived the colonialist encounter'.²⁴² It followed that the new states had the right to review concessions granted by colonial powers to trading companies including, *inter alia*, the assessment of any compensation payable.²⁴³

Schrijver contends that the PSNR eventually matured into a comprehensive principle of treaty law and state practice.²⁴⁴ In the process it produced a myriad of states' rights and duties, including the right to regulate foreign investment, a duty to co-operate in international development, respect for IL, fair treatment of foreign investors and obligations pertaining to the taking of foreign

²³⁸ Yackee, *ibid* (n 105) 14-15; the reference to IL was however removed from the CERDS; see also Sornarajah who distinguishes between the Hull Formula and 'appropriate' compensation as in the PSNR. Sornarajah, *ibid* (n 18) 208-11; for a critique of Guzman's analysis of the CERDS as essentially placing the investor at the mercy of that government see Yackee, *ibid* (n 105) 16-18
²³⁹ *ibid*, abstract 1.

²⁴⁰ Sornarajah, *ibid* (n 18) 83.

²⁴¹ *ibid*.

²⁴² Anghie, *ibid* (n 17) 212.

²⁴³ *ibid* 212-13.

²⁴⁴ Schrijver, *ibid* (232) 34.

property.²⁴⁵ Chowdhury considers that at best the PSNR established a norm of 'equitable principles' in determining compensation.²⁴⁶

Notwithstanding the divergence of views summarised above, and attempts at marginalising the GA resolutions as soft law or as *lex ferenda*, they continue to constitute a source of principles of investment IL.²⁴⁷ As Sornarajah points out, In comparison with GA Resolutions, law that is stated to have emanated from such low-order sources as publicists' writings and private arbitrators' decisions carries little weight. At the very least, he argues, states' opinions 'must have the effect of neutralising the views stated by mere individuals (...)'.²⁴⁸ In this Sornarajah is supported by Brownlie who includes the PSNR in his list of GA resolutions that 'provide a basis for the progressive development of the law and the speedy consolidation of customary rules'.²⁴⁹

In sum, the narrative that evolved around attempts at reforms raises a number of issues. The first pertains to the proposition that the doctrines proffered by the new states shattered a pre-existing consensus. Echoing Schill's assertion of a process of multilateralisation, Schwebel considers that such consensus was reconstituted when a cascade of parallel BITs cut through the developed/development divide to create an essentially unified investment IL.²⁵⁰ In reality, as evidenced, inter alia, by codification difficulties, all along variances ran and continue to run through the discipline.²⁵¹ Further, given the vagueness

²⁴⁵ For a full discussion of these rights and obligations see *ibid* 258-364.

²⁴⁶ Kamal Hossain and Subrata Roy Chowdhury (eds), *Permanent Sovereignty over Natural Resources in International Law: Principles and Practice* (Frances Pinter 1984) 1,6,15.

²⁴⁷ Sornarajah, *ibid* (n 18) 83.

²⁴⁸ *ibid* 84.

²⁴⁹ Brownlie, *ibid* (n 177) 15; see also *Texaco v. Libya*, *ibid* (n 19) where the arbitrator accepted that the PSNR expresses real general will.

²⁵⁰ Stephen M. Schwebel, 'Investor-state Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 *American Society of International Law Proceedings* 27; for an opposing view see for example Sornarajah argument that BITs contain widely disparate principles and standards. Sornarajah, *ibid* (n 18) 85.

²⁵¹ When finally welcomed by the GA following forty five years of attempts at codification, the Draft Articles on State Responsibility for Internationally Wrongful Acts comprised only residual rules and did not attempt to define the content of international obligations the breach of which gives rise to responsibility. [2001] 'General Commentary (1) Draft Articles on State Responsibility for Internationally Wrongful Acts, with Commentary' <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 23 Sep 2010; for a summary of the efforts to codify state responsibility see, for example, Montt,

of BITs' provisions, the lack of uniformity in their interpretation²⁵² and the sporadic inconsistency of arbitral awards,²⁵³ it is questionable whether the mere fact of abundant treatification is sufficient to support an argument of disciplinary unity. Indeed, the inventory of the disagreements surrounding the normative content and sources of investment IL may suggest otherwise. The proposition that it is a cohesive body of law founded on a meeting of minds is thus vulnerable to questioning.

The second and related issue touches on the notion of a linear progression of universal dimensions.²⁵⁴ Referred to by Yackee as a 'make-believe universalism',²⁵⁵ such notion is at pains to erase the diversities of interests, power and perspectives which criss-cross political economy. Arguably, its success is limited, given that the question of why host countries should want to participate in a program that entails sovereignty and potential monetary costs continues to engage much scholarly attention. It is said that BITs minimise the credibility deficit inherent in states' contractual promises.²⁵⁶ In this way, it is argued, BITs encourage foreign investment and thus contribute to economic development. Yet, Yackee's critique of the 'myth' of pursuit of certainty serves to undermine this contention. Further, empirical evidence indicates that BITs may not necessarily produce an increase in the flow of foreign investment.²⁵⁷ In this respect, one is struck by the fact that no BIT has, so far, been concluded between developed countries, notwithstanding that it is there that the greatest

ibid (n 7) 59-60; see also Schill on the point that the failure of the MAI was due to disagreements among developed countries and opposition from NGOs. Schill, ibid (n 42) 54-58.

²⁵² Sornarajah, ibid (n 18) 85.

²⁵³ Yackee, ibid (n 105) 7.

²⁵⁴ ibid 71.

²⁵⁵ ibid.

²⁵⁶ See for example Guzman' theory discussed in the text to n 101-05; see also Jeswald W. Salacuse, 'The Treatification of International Investment Law' (2007) 13 *Law & Business Review America* 155 arguing that other factors, such as relation- building and economic liberalisation are also at play.

²⁵⁷ Yackee, ibid (n 40); see also for example Salacuse, ibid 161-62; Sornarajah, ibid (n 40) 201; Ginsburg, ibid (n 123) 16, 18-19 pointing that 'the best available evidence suggests that BITs have either no effect or a minimal positive effect on investment flow; Brazil is often cited as an example of a country which attracts substantial foreign investment notwithstanding that it neither signed the ICSID Convention nor concluded many BITs. Similarly, Bolivia continued to attract foreign investment despite tightening its foreign investment regime. Subedi, ibid (n 6) 86; but see Vandevelde, ibid (n 1) 117 referring to studies which establish BITs' positive effect on the flow of investment. The quality of such investment is less researched.

concentration of foreign investment flow is to be found.²⁵⁸ If we are to accept that matters such as credibility deficit and flow of investment are not in reality the main drivers behind ‘make belief universalism’, what then might be its true purpose? A clue may be found in Arrighi’s definition of hegemonism and, in particular, his reference to ‘(...) the additional power that accrues to a dominant group by virtue of its capacity to place all the issues around which conflict rages on a “universal” plane’.²⁵⁹ Seen from this perspective, universalism thus appears to be a tool in the kit of hegemonism, a discourse in which BITs serve the purpose of spreading prescriptive liberalisation throughout developing economies.²⁶⁰ Yet, the emergent backlash, alluded to earlier in this chapter, indicates that, whether constructed on a foundation of ‘consent’ or ‘coercion’, hegemonic structures remain vulnerable to changing circumstances, and the revival of suppressed disagreements. Or as Yackee puts it, this system of ‘grandiose ambitions’ ignores at its peril ‘the basic truth that foreign investment is ‘at least as some level, inherently controversial’.²⁶¹

The third issue concerns IL’s role in supporting imperial control. Can capital exporting countries’ uncompromising response to attempts at reform be said to reflect a strategy – a design aimed at curbing potential erosion of their domination? According to Montt, the Calvo doctrine was the subject of ‘historical and conceptual misunderstanding’.²⁶² Was this a random misunderstanding, or was it the by-product of an anxiety about change in the balance of power? Indeed, looking at investment law through the prism of its genealogy, it may be said that the developed/developing discourse resides in the interior of the discipline. Its normative content was constructed with a specific section of the global community in mind; claims to universalism formed part of a strategy. This proposition is in line with Anghie’s view of BITs as a tactical response to post-colonial states’ resistance, one that is located in a

²⁵⁸ Ginsburg, *ibid* (n 123) 3-4.

²⁵⁹ Arrighi, *ibid* (n 34) 29.

²⁶⁰ Salacuse, *ibid* (n 256) 160; see also for example Vandeveld, *ibid* (n 1) 3 arguing that promoting a liberal investment regime may be regarded ‘as a second major function of BITS’.

²⁶¹ Yackee, *ibid* (n 105) 73-74.

²⁶² Montt, *ibid* (n 7) 47.

historical continuum of imperialist design.²⁶³ It is also supported by the gap between discourse and its institutional materialisation. The PSNR expressly links a state's exercise of permanent sovereignty with a requirement to promote people's wellbeing.²⁶⁴ As we saw, the language of wellbeing is a shared one, and one that can be traced back to the Western narrative of the mandate system. Yet, then as now, for the West, it is welfare that should be properly shaped by its own interests and under its control. Indeed, one of the least controversial outcomes of BITs is the reduction in host states' sovereign space for independent policy.²⁶⁵ Thus, as pointed by Sornarajah, in the BITs and ICSID generation the sanctity of investment contract is often protected to the exclusion of other considerations, such as public interest, bargaining capacity deficit and the environment. This is notwithstanding that municipal contract laws have shifted towards greater emphasis on such surrounding circumstances to better facilitate just outcomes.²⁶⁶ A reductive trend has emerged more recently in the face of changing foreign investment patterns. However, rather than being value-driven, such trend responds to a threat of adjustments. This raises the possibility that promised changes may not represent a true re-assessment of the role Economic IL plays in the constitution of the world order. More likely, they will continue to be driven by the pursuit of hegemonic interests.

²⁶³ Anghie, *ibid* (n 17) 236.

²⁶⁴ GA Resolution, 'Permanent Sovereignty Over Natural Resources' (1803) XVII of 14 December 1962, guideline 1 <<http://www2.ohchr.org/english/law/resources.htm>> accessed 16 April 2011.

²⁶⁵ For example, the prohibition on performance requirements in some BITs prevents host states from engaging in a desired industrial policy. Similarly, the provision for free transfer of profits may make it impossible for the host state to prevent the flight of 'hot money' as happened during the Asian financial crisis of 1997-98. Ginsburg, *ibid* (n 123) 10.

²⁶⁶ Sornarajah, *ibid* (n 40) 212.

CHAPTER 3: THE PARADIGM – DIVINE MARKETS

Introduction

At the time of writing, markets have assumed mythological proportions. Like the deities of ancient days, their displeasure looms over popular discontent. In places such as Greece and Italy governments live or die by their ability to nurse divine predicaments. Human sacrifice is the order of the day. Translated into modern discourse, what is being witnessed is the practice of neoliberalism.

In the liberal art of government, says Foucault, markets inhabit the site of truth. Conceptualised as spontaneous and natural, they constitute a benchmark, by which correct administration is distinguished from an erroneous one.¹ Market-based veracity is then complemented by legal doctrine.² There is an intertwined narrative, in which the history of truth 'is coupled, from the start, with a history of law'.³ Or as Hayek, a founding father of the neoliberal movement succinctly put it: 'Liberalism is a doctrine about what the law ought to be'.⁴ In other words, the normative content of juridical principles is embedded in the paradigmatic logic of the prevailing art of government. The two evolve in tandem so as to shape the trajectory of institutional configuration. The outcome is an interdependent eco-political-juridical ensemble. Within it, the function of distinguishing truth from falsehood has been allocated to markets. Law then provides the rules by which differentiation is practiced.⁵ Thus, it validates sovereign self-limitation, segregates public intervention from individual independence, and enables contract-based social relationships.⁶ It articulates the rationality of what Wood terms the 'Empire of Capital'⁷ or what

¹ Michel Foucault (tr), *The Birth of Biopolitics: Lectures at the College De France 1978-1979* (Palgrave Macmillan 2008) 32.

² *ibid.*

³ *ibid* 35.

⁴ F.A. Hayek, *The Constitution of Liberty* (Routledge Classics 2006) 90.

⁵ Foucault, *ibid* (n 1) 35.

⁶ *ibid* 37-38, 41.

⁷ Ellen Meiskins Wood, *The Empire of Capital* (Verso 2005).

Gill names 'the 'empire of civil society', being one in which private property and mobile capital take precedence over political jurisdiction.⁸

Seen through the lens of Marxist determinism, such ensemble cannot but follow capitalism's crisis-prone and ultimately fatal logic of endless accumulation. By contrast, for liberal thinkers capitalism is no more than an economic theory. In other words, it is not embedded in structures, and so, when at risk, is capable of self-rescue through institutional innovations.⁹ The evocative rhetoric of freedom and civilizational peril, adopted by the 1947 founding statement of the neoliberal Mont Pelerin Society (MPS) to describe such risk, captures the essence of the neoliberal message, and the way it plays on internalised discourse, one that treads a path between collective civilizational imaging and related individual fears and aspirations.¹⁰ The message states:

The central values of civilization are in danger. Over large stretches of the earth's surface the essential conditions of human dignity and freedom have already disappeared. (...). The position of the individual and the voluntary group are progressively undermined by extensions of arbitrary power.¹¹

In the previous chapter I looked at the juridical constituent of the eco-political-juridical ensemble. In this chapter I turn my attention to its paradigmatic imperatives. Given that both paradigm and law are mechanisms for the expression of discursive truths, such division may appear at first blush

⁸ Stephen Gill, 'The Contradictions of US Supremacy' in Leo Panitch and Colin Leys (eds), *The Socialist Register 2005: The Empire Reloaded* (Merlin Press 2004) 24.

⁹ For a discussion of the ordoliberal conceptualisation of capitalism as an economic theory that is capable of survival through institutional corrections and innovations see Foucault, *ibid* (n 1) 164-67.

¹⁰ The MPS is a think tank founded by Freidrich Hayek.

¹¹ The Mont Pelerin Society, (April 8, 1947)

<<https://www.montpelerin.org/montpelerin/mpsGoals.html>> accessed 18 July 2010.

artificial.¹² However, it reflects the proposition that within the same discourse, the two fulfil different functions. Borrowing Foucault's traffic metaphor, the paradigm determines the type of transport used. The law then functions as a 'highway code' that manages its circulation.¹³

This chapter explores the worldview that broadly animates the governmental discourse of neoliberalism. The allusion to 'governmental' denotes the fact that, having gone through a prolonged period (1920-1960) of theoretical digestion, neoliberalism now informs acts of states across the globe, and inspires the institutions they landscape nationally and globally.¹⁴ Specifically, neoliberal orthodoxy allocates to states the function of custodians of free, spontaneous markets, a function they fulfil through the instrumentality of the rule of law.¹⁵ It may be appropriate at this juncture to say a few words about what such rule entails in its neoliberal mutation. The preservation of markets' purported freedom and spontaneity requires that the rule of law be abstract, impersonal and detached from its outcomes¹⁶. It thus has little natural affinity with the attainment of societal collective aims such as justice and welfare. Rather, its natural habitat is that of individualised processes. In its advanced form, argues Hayek, the rule of law encapsulates Hume's 'three fundamental laws of nature': stability of possession, transference by consent and the performance of promises.¹⁷ In other words, it is through a blueprint of property ownership and contractual exchange that law and liberty converge, and law - a human creation that is underpinned by the natural law of the market - is transformed from a constraining institution to a custodian of freedom.

¹² For Johnstone the discourse of law fulfills three functions: it shapes interactions, indirectly determines their direction and affects the position of states; Ian Johnstone, 'The Power of Interpretive Communities' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge Studies in International Relations: 98 CUP 2008) 185.

¹³ Foucault, *ibid* (n 1) 162.

¹⁴ Jamie Peck, *The Constructions of Neoliberal Reason* (OUP 2010) 20.

¹⁵ Kean Birch and Vlad Mykhnenko, 'Introduction - A World Turned Right Way Up' in Kean Birch & Vlad Mykhnenko (eds) *The Rise and Fall of Neo-liberalism: The Collapse of an Economic Order?* (Zed Books 2010) 3.

¹⁶ Hayek, *ibid* (n 4) 135-38.

¹⁷ *ibid* 138.

The word 'broadly' alludes to the possibility that, with its varying claims to theoretical purity, contradictory processes, variegated forms of implementation and propensity to invisibility, the neoliberal phenomenon eludes concise definition.¹⁸ The answers to what is meant by neoliberalism, argues Clarke, are both divergent and overlapping.¹⁹ He identifies two broad categories: a Foucaultian analysis that focuses on governmentality on the one hand, and a political economy approach on the other.²⁰ In this latter category diverse understandings may be found. For example, there is neoliberalism as open-ended processes of 'statecraft' and global restructuring aimed at formulating a pro-corporate market order;²¹ neoliberalism as a set of variegated transformative policies that range from 'shock therapy'²² and 'creative destruction',²³ to internal regime shifts and externally imposed economic restructuring;²⁴ neoliberalism as a political project of transnational economic elites' power restoration;²⁵ neoliberalism as a Western led neo-imperialist strategy of free trade and investment aimed at locking in Western competitive advantages.²⁶ Yet, within such diversity a degree of consensus may be teased

¹⁸ Peck, *ibid* (n 14) 8-20.

¹⁹ John Clarke, 'Living With/In and Without Neo-liberalism' [2008] *Focaal*, 51 135 <http://oro.open.ac.uk/18127/1/10_Clarke.pdf> accessed 28 Oct 2011.

²⁰ *ibid* 136.

²¹ Peck, *ibid* (n 14) 8-10.

²² The term 'economic shock treatment' was coined by Milton Friedman, the Chicago University professor and guru of neoliberal globalisation who, together with other 'Chicago boys' economists was summoned to help with the reconstruction of the Chilean economy following the Pinochet coup in 1973. The theory that the shock of speedy and intense reforms will produce adjustment was based on the 'psychic driving' treatment developed by the psychiatrist, Ewen Cameron. Broadly, the idea was to break up pathology by using electric shocks so as to turn the patient's mind into a blank slate upon which new patterns can be etched. Researchers at the CIA became interested in Cameron's work in the 50s and funded his work until 1961. Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane 2007) 7, 25-38.

²³ Originally derived from Marxist economic theory to denote the associated processes of accumulation and annihilation of wealth, the term was adopted and given a different meaning in the 50s by the economist Joseph Schumpeter as part of his theory of innovation and progress. It now forms part of neoliberal economics to describe the process of replacing old with new.

²⁴ Bob Jessop, 'What follows Neo-liberalism? The Deepening Contradictions of US domination and the Struggle for a New Global Order' in Robert Albritton, Bob Jessop and Richard Westra (eds), *Political Economy and Global Capitalism: The 21st Century, Present and Future* (Anthem Press 2010) 70-71; for a discussion of the road from capital/labour compromise to US 'supercapitalism' see Robert Reich, *'Supercapitalism: The Battle for Democracy' in an Age of Big Business* (Icon Books 2007).

²⁵ David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 19.

²⁶ Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2002). See also Adam Swain, Vlad Mykhnenko and Shaun French, 'The Corruption Industry and Transition: Neoliberalizing Post-Soviet Space?' in Birch & Mykhnenko, *ibid* (n 15) 114 arguing the existence of three main understandings of neoliberalism: a class

out. It is to be found in the notion of a project that comprises national and transnational interactions. At the global level, neoliberalism is reliant on the power of core states to exert control over the interstate system so as to launch its constituents on a state-led, market-centred, pro-corporate program of privatization and commodification.²⁷ As we saw in the previous chapter, control may employ diverse strategies. For it does not necessarily implicate formal coercion. Instead it may set in motion a process of internalisation that in turn produces the appearance of consensual participation. The result is a dialectical dynamic of what may be depicted as imposed voluntariness. Such imposed voluntariness is aided by interstate competition over a place in the hierarchical world-system. Particularly vulnerable to such pressure, for example, is Wallerstein's semi-peripheral state that strives for a place at the core, but is forever at risk of slipping down to the periphery.²⁸ Imposition may not be perfect and may end up producing variegated local regime formations. However, the aim is one of uniform implementation.

With this in mind, this chapter will now proceed to outline the unfolding of the neoliberal paradigm. A section will be dedicated to its Washington Consensus incarnation. It encapsulates the capitalism/neoliberal impulse for expansion, one that is not only territorial, but seeks also to penetrate all manners of spaces - political, cultural, social and economic.²⁹ As with BITs, I will argue that, rather than a rupture, the neoliberal movement represents an evolutionary stage in a continuum of historical capitalism. The chapter will also examine the paradigm's remarkable capacity for endurance through the prism of its essential tenets. Finally, it will consider the way its rationality is reflected in the BITs regulatory architecture. Here, the word 'regulatory' alludes to the fact that

project, a neo-imperial project and an ideology which informs state policies and generate neoliberal processes.

²⁷ On the transnational nature of the neoliberal state see Harvey, *ibid* (n 25) 79-81.

²⁸ Immanuel Wallerstein, *World-systems Analysis: An Introduction* (Duke University Press 2004) 55-57.

²⁹ Gill, *ibid* (n 8) 23; Robert O'Brien & Marc Williams, *Global Political Economy* (3rd edition, Palgrave Macmillan 2010) 11; Moishe Postone, 'Theorizing the Contemporary World: Robert Brenner, Giovanni Arrighi, David Harvey' in Albritton, Jessop and Westra, *ibid* (n 24) 19 referring to David Harvey, *The Conditions of Postmodernity: An Enquiry into the Origins of Cultural Change* (Basil Blackwell 1989) vii.

BITs replicate the neoliberal paradox of regulated deregulation. This will be discussed further in the chapter.

Positioned as it is ahead of the China related part of this enquiry, this chapter will focus on those constituents of the neoliberal dogma for which the Harmonious World Paradigm (HWP) is posited as an alternative. That is, an alternative to neoliberalism as a promissory note of markets-based economic growth that is animated by hegemonic, prescriptive, sovereignty-reducing impulses. It follows that for the rest of this chapter my perspective will generally be the one identified by Clarke as that of political economy, with an emphasis on neoliberalism's transnational rather than national facets.

Neoliberalism in Historical Context

The genesis of civilization

In the previous chapter I called into question the proposition that the emergence of BITs represents a revolutionary occurrence.³⁰ In a similar vein, I also argue that, in important respects, the rise of neoliberal regimes marks a discontinuity rather than a break in capitalist development.³¹ Postone, for example, considers that the trajectory of weakening economic sovereignty, and corresponding consolidation of neoliberal globalisation in the past three decades, denotes a significant break with the post- WWII order.³² As will be seen below, the view canvassed here is that, rather than any ontic or epistemic rupture, neoliberal discourse and institutions represent an evolutionary development in a historically innovative continuum of reconstitution and inflections. At its base, such continuum has enduring and non-contingent structural configurations. Thus, the introduction of the gold standard (1870-1914) was shored up by a vision of an integrated global marketplace that would

³⁰ Chapter 2 text to n 14-20 pp 45-46.

³¹ See for example Jessop, *ibid* (n 24) 68; Peck, *ibid* (n 14) 18 referring to Gamble's description of the neoliberal project in the 70s as 'a great convulsion'; Andrew Gamble, 'Two Faces of Neoliberalism' in R. Robison (ed), *The Neo-Liberal Revolution: Forging the Market State* (International Political Economy Series, Palgrave Macmillan 2006) 21.

³² Postone, *ibid* (n 29) 7.

guarantee world peace.³³ A similar vision of world peace reverberates in contemporary Fukuyama's 'end of history' treatise.³⁴ The post- WWII Bretton Wood institutional innovation was not, as argued by some, an era of capital repression to be followed by an era of its liberation in the 70s and 80s.³⁵ Rather, the Bretton Wood design planted the seeds that were to blossom into present day global regime of neoliberal trade and international investment under US hegemony. In other words, the two phases flowed into each other.³⁶ Indeed, for Petras and Veltmeyer, the neoliberal model is no more than a variant of liberalism, rather than any new construction.³⁷ That is to say, it represents resurrection of liberalism in its pre-1930s configuration.³⁸ Implied in this proposition is the possibility that the post-WWII 'golden period of capitalism', with its accommodation of trade unions, state intervention, progressive taxation and other efforts at income distribution, represented a deviation from capitalist logic.³⁹ Or put differently, the hostility of the present 'golden period of profitability' to all the above represents a return to form.⁴⁰

Moreover, as illustrated by Hayek's harking back to the thoughts of 18th century Hume, continuities and recurrences go back to even earlier times. Thus, the discursive propagation of a political 'culture of danger' to justify the bailing out of banks was in operation as early as the 19th century.⁴¹ Indeed, the trail of

³³ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1957) xxxi; for a brief summary of the liberal belief in the connection between economic nationalism and conflict on the one hand and capitalism and peace and happiness on the other see O'Brien & Williams, *ibid* (n 29) 22-23; for a discussion of the theoretical and historical roots of 'perpetual peace' see Foucault, *ibid* (n 1) 56-59.

³⁴ Francis Fukuyama, *The End of History and The Last Man* (Penguin Books 1992).

³⁵ Eric Helleiner, *States and the Reemergence of International Finance* (Cornell University Press 1994) 3.

³⁶ Leo Panitch and Sam Gindin, 'Finance and American Empire' in Panitch and Leys, *ibid* (n 8) 48-54.

³⁷ James Petras and Henry Veltmeyer, *Multinationals on Trial: Foreign investment Matters* (Ashgate Publishing Ltd 2007) 22.

³⁸ *ibid* 83; but see Noam Chomsky, *Profit Over People: Neoliberalism and Global Order* (Turnaround Publisher Services Ltd 1999) 19 arguing that neoliberalism is based on classical liberal ideas but is also new.

³⁹ Dieter Plehwe, Bernhard Walpen and Gisela Neunhoffer, 'Introduction: Reconsidering Neoliberal Hegemony' in Dieter Plehwe, Bernhard Walpen and Gisela Neunhoffer (eds) *Neoliberal Hegemony: A Global Critique* (RIPE Series in Global Political Economy Routledge 2006) 8-9.

⁴⁰ Robert Albritton, Bob Jessop and Richard Westra, 'Introduction: Political Economy and Global Capitalism' in Albritton, Jessop and Westra *ibid* (n 24) xiv.

⁴¹ Foucault, *ibid* (n 1) 66-67.

power diffusion by means of private property ownership may take us all the way back to the Roman Empire.⁴² Wood points to the Roman strategy of purposely developing Romanised local propertied elites in the peripheries. Then as now, the gain was mutual enrichment. The Roman Empire, she argues, represents 'the criterion, (...) of European imperialism. In a sense, it was the first colonial 'empire', as we have come to understand the word'.⁴³

Historical beginnings are notoriously difficult to capture. It is therefore unsurprising that the temporal dawn of the capitalist continuum is shrouded in controversy.⁴⁴ For present purposes I adopt the 18th century as the point in time at which it was constituted as a specific, distinct and historically unique form of social relations.⁴⁵ For many of the essential elements of neoliberalism can be found in the treatises on that century's political economy. Thus, it is to that period that Foucault traces the inauguration of the liberal art of 'frugal', 'least possible government',⁴⁶ and the emergence of the market as the site of natural, price-forming mechanisms - a regime of truth that was to become the standard for good practice.⁴⁷ It was this purported state/market dichotomy that neoliberalism fine-tuned by elevating market spontaneity to such commanding heights that almost any proposed intervention could be warned off as impairing and distortive.⁴⁸ The outcome is 'a state under the supervision of the market rather than a market supervised by the state'.⁴⁹

It was also in the 18th century that capitalism matured into its industrialised form.⁵⁰ For Polanyi, it was the disruptions engendered by industrialisation that

⁴² Wood, *ibid* (n 7) 32-37.

⁴³ *ibid* 27.

⁴⁴ Samir Amin, *Global History: A View From the South* (Pambazuka Press 2011) 12; Amin attributes the start of capitalism to early 16th century. Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins Of Our Times* (new edn Verso 2010) 37-48; Arrighi posits the city-state of Venice as a prototype of a capitalist formation within a medieval system.

⁴⁵ See for example Ellen Meiksins Wood, *The Origins of Capitalism: A Longer View* (Verso 2002) 2-3, 6-7, 75-80, 189, 194-95.

⁴⁶ Foucault, *ibid* (n 1) 28-29.

⁴⁷ *ibid* 32, 37.

⁴⁸ *ibid* 31.

⁴⁹ *ibid* 146.

⁵⁰ Wood, *ibid* (n 45) 3.

gave rise to the specificity of the capitalist civilization.⁵¹ The transformative force unleashed was that of market liberalism with its core belief in what Polanyi conceptualised as economic ‘disembedding’ – society’s detachment from economic imperatives and its subordination to self-regulating markets. Thus, disembedding represented a radical break from past social relations. It articulated a new singular logic that substantively divided English classical economists from previous thinkers.⁵² By 1820 it evolved from ‘a spasmodic tendency’ to a full fledged dogma, one that, inter alia, called for free flow of foreign trade.⁵³ I single out this particular tenet of 19th century liberal thinking, since it highlights the expansionary impulse that characterised the capitalist project from the outset. As seen in the previous chapter, expansive compulsions harnessed both ‘formal’ and ‘informal’ free trade and investment dynamics of empire building.⁵⁴ Yet, they were not confined to the practice of an outward reach. For the imperialist economic, political and juridical ensemble was replicated at home. Thus, European industrialisation and colonisation constituted analogue processes. In line with a Ricardian construct of the labour market, they sought to dismantle social structures both at home and abroad as part of a unitary aim to extract a supply of commodified labour.⁵⁵ Consequently, during the early years of the 19th century the condition of some African tribes resembled that of the English labouring classes.⁵⁶ This theme of ‘home’ and ‘abroad’ is similarly found at the other end of the social hierarchy. Western and non-Western local elites converged to form collaborative transnational networks. Such networks continue to present times, except that their early colonial beginnings are now further enhanced by neoliberal globalisation. For Harvey, they are the driver behind the neoliberal project of class power restoration.⁵⁷

⁵¹ Polanyi, *ibid* (n 33) xxii, 3, 90-107.

⁵² *ibid* xxiii-xxiv.

⁵³ *ibid* 141.

⁵⁴ John Gallagher and Ronald Robinson, ‘The Imperialism of Free Trade’ (1953) Second series VI no 1 *The Economic History Review*

<<http://www.mtholyoke.edu/acad/intrel/ipe/gallagher.htm>> accessed 21 Oct 2011; see also Wood, *ibid* (n 7) x referring to the American empire’s reliance on economic hegemony.

⁵⁵ Polanyi, *ibid* (n 33) 172.

⁵⁶ *ibid* 165.

⁵⁷ Harvey, *ibid*, (n 25) 35.

At the same time, juridical principles were constructed so as to explain and legitimise commodification and expropriation. Thus, the principle of freedom of contract enabled the commodification of labour, and its subjugation to the laws of the market.⁵⁸ It further legitimised the liquidation of non-contractual relationship, such as kingship, as well as non-European collective traditions.⁵⁹ In relation to expropriation, theories were developed to distance land ownership from its occupancy, and to attach it instead to market value. Grotius postulated a nexus between ownership rights and the transformation or consumption of property. Related to this nexus was the entitlement to punish with minimal moral constraints those who infringed such rights.⁶⁰ Grotius - widely regarded as the forefather of IL - was, we may recall, counsel to the Dutch East India Company and. Locks' theory of property ownership - the proposition that private rights over common property derived not from occupancy but from the augmentation in its exchange value⁶¹ - justified both enclosures at home and colonial expropriations.⁶² This association of private rights with exchange value can in turn be seen as a progression from Vattel's notion of the rightful expropriation of uncultivated land. Vitoria's conceptualisation of ownership rights as secular rather than divine was essentially concerned with explaining the relationship between the Spaniards and the Indians in the context of their colonial encounter.⁶³ However, its significance went further than that. For, of the feudalist triangulation of divine, natural and human law, it was only the first that was dispensed with.⁶⁴ Thus, for Vitoria, human laws derived their universality from the fact that they articulated laws of nature.⁶⁵ This coalescence of the natural, the human and the universal is similarly found in the neoliberal discourse, whereby sovereign legislation reflects, or ought to reflect, natural and universal laws of markets.

⁵⁸ Polanyi, *ibid* (n 33) 171.

⁵⁹ *ibid*.

⁶⁰ Wood, *ibid* (n 7) 70, 95, 97.

⁶¹ John Lock, 'Of Property' in Matthew Clayton and Andrew Williams (eds), *Social Justice* (Blackwell Readings in Philosophy, Blackwell Publishing 2004) 30.

⁶² Wood, *ibid* (n 7) 96.

⁶³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 13-17. Vitoria's two famous lectures were entitled in translation 'On the Indians Lately Discovered' and 'On the Law of War Made by the Spaniards on the Barbarians'.

⁶⁴ *ibid* 17.

⁶⁵ *ibid* 17-18.

The conflation of innovative juridical structures and imperialist ambitions encapsulates the historically intimate relationship between home and abroad. Anghie posits this intimacy as a two-ways normative traffic that is borne out of the core/peripheries encounter. In other words, the 'colonizer constructs himself as he constructs the colony'.⁶⁶ The spatial fluidity of these processes, and their propensity for a boomerang style homecoming, is exemplified in the concept of sovereignty. The sovereignty that was to be disseminated to non-European peoples as part of de-colonialisation was an essentially Eurocentric juridical construct. However, the sovereignty actually granted was a reduced variation. In particular, political sovereignty was detached from economic autonomy.⁶⁷ This carving out of developing countries' economic self-determination as somehow different and liable to a more invasive treatment was then institutionalised in neoliberal IFIs, and juridically, for example, in the practice of BITs. More recently, however, such reductive practices spread beyond their non-Western origins to penetrate the European core/periphery interaction as exemplified by the response to the Greek, Italian and Spanish crisis. Thus, policies of bail out and economic restructuring, observed by Dine in relation to developing countries, is now being replicated in the treatment meted out to the countries of Southern Europe by the continent's Northern core. At the same time the transatlantic public interstate/ private corporate space is the subject of proposed remodelling through a Transatlantic Trade and Investment Partnership (TTIP).⁶⁸

The genesis of hegemonic discourse

Turning to neoliberalism's more recent beginnings, the term originates from a 1938 Paris meeting organized by the philosopher Luis Rougier. It alludes to a 'new' liberalism, one that is capable of responding to capitalism at risk. At the time of inauguration, the perceived risk took the form of German National

⁶⁶ *ibid* 1.

⁶⁷ *ibid* 196-204.

⁶⁸ Janet Dine, *Companies, International Trade and Human Rights* (Cambridge Studies in Corporate Law, CUP 2005) 100-05; 'Investor-state dispute resolution: Will the EU-US deal encourage attacks on the public interest?' [June 2013] Transnational Institute <<http://www.tni.org/events/investor-state-dispute-resolution>> accessed 11 July 2013.

Socialism, the British Keynesian state and the US New Deal.⁶⁹ In a similar vein, for Friedman, the need for a new liberal configuration was born out of 20th century corruption.⁷⁰

Neoliberalism's foundational tenets derive from doctrines hypothesized by economists and philosophers such as Ludwig Von Mises and Friedrich Von Hayek.⁷¹ For instance, Von Mises's axiom that 'egoism is the basic law of society'⁷² led him to conclude that unrestricted laissez-faire, free markets and the confinement of governmental acts to the defence of private property rights comprised the only viable policy.⁷³ For Hayek, spontaneous order of free markets offered a solution to the problems of economic computation.⁷⁴ Such principles then propped up a host of political and ideological claims.⁷⁵ The establishment of the MPS after the WWII launched neoliberalism's expansion into the intellectual establishment, bringing together several diverse strands of thoughts, including Austrian émigrés, British academics from the London School of Economics (LSE) and University of Manchester, Chicago School Americans and Germans from the Freiburg School.⁷⁶ This nestling in intellectual circles proved significant. For think tanks, corporations and academia played and, indeed, continue to play a pivotal role in the diffusion of neoliberal ideology, and in justifying corporate and governmental intimacy. It was Hayek who identified the need for an initial process of creating a neoliberal persona by shaping commonly held political and social beliefs through top to bottom dissemination of ideas.⁷⁷ And so it was that 'ideas centres' or 'centres of persuasion'⁷⁸ served as a launching pad for neoliberalism's journey from a theoretical construct, to a hegemonic discourse, to a state/elites/global finance

⁶⁹ Birch & Mykhnenko, *ibid* (n 15) 3.

⁷⁰ Milton Friedman, *Capitalism and Freedom* (40th anniversary edn, University of Chicago Press 2002) 4-6.

⁷¹ Birch & Mykhnenko *ibid* (n 15) 3.

⁷² *ibid*.

⁷³ Murray N. Rothbard, 'Biography of Ludwig Von Mises (1881-1973)' Ludwig Von Mises Institute <<http://mises.org/about/3248>> accessed 29 Oct 2011.

⁷⁴ Birch & Mykhnenko, *ibid* (n 15) 3.

⁷⁵ *ibid*.

⁷⁶ *ibid*.

⁷⁷ Hayek, *ibid* (n 4) 97-99.

⁷⁸ Birch & Mykhnenko, *ibid* (15) 49.

led political project.⁷⁹ Nurtured by corporate financiers and lobbying groups, its discourse made its way to governments via global networks of thinkers that were positioned in specific sites across the globe e.g. Washington and London.⁸⁰

Given the Westphalian state's monopoly over legislation and violence, it is hardly surprising that it quickly became the neoliberal movement's battlefield of choice. The formation and reproduction of historical capitalism as a world order, argues Braudel, is related to processes of state formation on the one hand and market formation on the other.⁸¹ Or as Wood puts it, the world was carved into small states that were then to be drawn into the orbit of world capitalism.⁸² The IFIs may be the 'de facto world government' of a 'new imperial age'.⁸³ However, it is through nation-states that they function. Similarly, TNCs rely on the state to prize open markets and to minimise operational risk.⁸⁴ Thus, state reconfiguration was essential, one would say, the starting point, to the expansion of the neoliberal project. It was in that arena that it mutated from an ideological to a political project of state formation and institutional reconstitution.

What was reconstitution to entail? In theory, the neoliberal state sheds off economic intervention. Instead, it uses its monopolistic powers to protect national and global institutional arrangements of individual freedoms: private property rights, the rule of law and free markets. Specifically in relation to the rule of law, freedom is posited as the unconstrained ability of juridical and natural persons to negotiate contractual relationships in the marketplace.⁸⁵ This in turn is translated into a number of core policy prescriptions which cut across neoliberalism's various national guises: privatisation of state assets, liberalisation of trade and capital investment, monetarist focus on inflation control and supply-side economics, deregulation of labour and marketisation of

⁷⁹ Peck, *ibid* (n 14) 16.

⁸⁰ Birch & Mykhnenko *ibid* (n 15) 6.

⁸¹ Giovanni Arrighi, (n 44) 10.

⁸² Wood, *ibid* (n 7) 129.

⁸³ Chomsky, *ibid* (n 38) 20.

⁸⁴ Petras and Veltmeyer, *ibid* (n 37) 31.

⁸⁵ Harvey, *ibid* (n 25) 64.

society.⁸⁶ In practice, such policies engender a state that is anything but innocuous. Rather, it becomes fused with capital to form an alliance that is historically unique to the West.⁸⁷ Not only does the state construct so-called free markets and free trade institutions that benefit corporations, but it also then propagate them to its population as a fundamental good'.⁸⁸ It is here that neoliberalism's core contradictions is located: the notion of a state that is economically less sovereign, and which is side-lined by the primacy of market compulsions; yet, it remains vital for the purpose of safeguarding those same economic imperatives by which it was marginalised in the first place.⁸⁹ It deregulates so as to free its TNCs from the impediments of public supervision. Yet, it does so by using its monopoly over legislation and treatification. These implicate new 'legalities' aimed at protecting the rights of global capital of which the neoliberal state is the ultimate guarantor.⁹⁰

In sum, neoliberalism represents an institutional and paradigmatic progression of capitalist civilization, one that is linked to the rise of world money and global finance.⁹¹ More recently, in its quest for a uniform world order, it manufactured what came to be known as the Washington Consensus, to be diffused as a prescriptive remedy for the Global South.⁹²

The Demise of a Promise

The Washington consensus – first generation

In a paper, written for a 1989 conference convened by the Institute of International Economics, the economist, John Williamson identified ten policy

⁸⁶ Plehwe, Walpen and Neunhoffer, *ibid* (n 39) 5.

⁸⁷ Postone, *ibid* (n 29) 15.

⁸⁸ Harvey, *ibid* (n 25) 64.

⁸⁹ For a fuller discussion see *ibid* 70-81; Wood (n 7) 10-14.

⁹⁰ Saskia Sassen, 'The State and Globalisation' in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Public Governance* (Cambridge Studies in International Relations CUP 2002) 94.

⁹¹ For the role of international haute finance in the political landscape of 1815-1914 see for example Polanyi, *ibid* (n 33) 10-20.

⁹² Birch & Mykhnenko, *ibid* (n 15) 7; John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990) 8.

tenets with regard to which a reasonable degree of consensus could be found in Washington, and the adoption of which would enable lagging economies to catch up with the developed world.⁹³ Such policies comprised fiscal discipline, removal of subsidies, tax reforms, the freeing of interest and exchange rates by subjecting them to market forces, trade and foreign direct investment liberalisation, privatisation of state industries, deregulation and secure property rights.⁹⁴ Together, they were to form the Washington Consensus - a design of purportedly prudent macroeconomics policies, outward orientation instead of economic nationalism and free-market capitalism.⁹⁵ The bush fire-like spread of the Washington Consensus during the 1980s and 90s transformed the global developmental landscape, resulting in 'more privatization, deregulation and trade liberalization in Latin America and Eastern Europe than probably anywhere else at any point in economic history'.⁹⁶ In Bolivia, even rainwater was privatised.⁹⁷ Increasingly, developing countries abandoned import substitution-based industrialisation, as well as economic interventionism and protectionism, in favour of a deepening global integration. In consequence, in a matter of three decades, the Washington Consensus brand went global, variously reaching every corner of the world.⁹⁸ In the process it was also amplified, and Williamson's protestations notwithstanding, became equated with a neoliberal agenda of market fundamentalism, IMF driven capital account liberalisation and small governments. By contrast, public sector institutions were propagated as 'the black hole of economic reforms'.⁹⁹ Such was the breadth of enthusiastic

⁹³ John Williamson, 'A Short History of the Washington Consensus' in Narcis Serra and Joseph E. Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (The Institute for Policy Dialogue Series, OUP 2008) 15, 19.

⁹⁴ *ibid* 16-17; see also Williamson, *ibid* (n 92) 8-17.

⁹⁵ Williamson, *ibid* (n 92) 18.

⁹⁶ Dani Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform' (2006) XLIV *Journal of Economic Literature* 974.

⁹⁷ 'Cochabamba Water Revolt' Timeline

<<http://www.pbs.org/frontlineworld/stories/bolivia/timeline.html>> accessed 5 Nov 2011; for the application of the 'shock doctrine' in Bolivia see Klein, *ibid* (n 22) 142-54.

⁹⁸ Birch & Mykhnenko, *ibid* (n 15) 8.

⁹⁹ Moises Naim, 'Fad and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?' [Oct 1999] *Foreign Policy Magazine Working Draft of a Paper Prepared for the IMF Conference on Second Generation Reforms*, Washington D.C.

implementation that 'Williamson's original list of do's and don'ts came to look remarkably tame and innocuous (...).'

¹⁰⁰

The Washington Consensus, argued Williamson, reflected a program of 'universal convergence', one that sprouted out of the US government and its IFIs' conventional wisdom.¹⁰¹ Whether or not such consensus ever existed in reality is at best questionable. According to Naim, the impression of universal accord masked persistent disagreements even among pro-markets Washington ideologues. A measure of coercion was implicated in that dissent came under attack as anti-markets and anti-American.¹⁰² At the interstate level, implementation was assisted by coercive strategies, such as the making of debt-forgiveness and IFIs' lending to developing countries - already convulsed by the Volcker Shock -¹⁰³ conditional on the implementation of Consensus-inspired policy reforms.¹⁰⁴ The IMF and the World Bank thus became 20th century's missionaries entrusted with the spread of an economic prescription that was the same for each and every country, and which invariably reflected free market orthodoxies.¹⁰⁵

No less powerful was the allure of a promise of a historically unique prosperity.¹⁰⁶ This pledge was poignantly articulated by Renato Ruggiero, the first director-general of the WTO, when he declared the transition to neoliberal globalisation as having 'the potential for eradicating global poverty in the early part of the next [21st] century - a Utopian notion even a few decades ago, but a real possibility today'.¹⁰⁷ A disciplinary discourse of 'no alternative'

<<http://www.imf.org/external/pubs/ft/seminar/1999/reforms/Naim.HTM>> accessed 19 June 2011; Rodrik, *ibid* (n 96) 974; see also Williamson, *ibid* (n 93) 16, 21-22.

¹⁰⁰ Rodrik, *ibid* 974.

¹⁰¹ John Williamson, 'Democracy and the "Washington Consensus' (1993) 21 *World Development* 1329-36, 1329.

¹⁰² Naim, *ibid* (n 99).

¹⁰³ The Volcker Shock refers to the hike in interest rates instituted by Paul Volcker, chairman of the Federal Reserve during the Carter and Regan administrations. Rates went up to as much as 21%. Klein, *ibid* (n 22) 159; the first casualty was the Mexico default in 1982-4. Harvey, *ibid* (n 25) 29.

¹⁰⁴ Naim, *ibid* (n 99).

¹⁰⁵ Joseph Stiglitz, *Globalization and its Discontents* (Penguin Books 2002) 13-14.

¹⁰⁶ O'Brien and Williams, *ibid* (n 29) 384.

¹⁰⁷ Ha-Joon Chang, *Bad Samaritans: The Guilty Secrets of Rich Nations & The Threat to Global Prosperity* (Random House Business Books 2007) 23 citing from R. Ruggiero 'Whither the Trade

supplemented the promise.¹⁰⁸ This 'carrot and stick' rhetoric was articulated in the 1996 World Bank Development Report directed specifically at transition economies that displayed an enduring attachment to central planning.¹⁰⁹ It merits citation for the way it invokes a sense of isolation. In other words, central planning is not only bad, but is also counter-historic. To this, a layer of seduction is added, whereby prosperity would materialise if only impediments were to be removed. Thus, the Bank declared:

This transition, which affects about one-third of the world's population, has been unavoidable. The world is changing rapidly; massive increases in global trade and private investment in recent years have created enormous potential for growth in jobs, incomes, and living standards through free markets. Yet, the state-dominated economic systems of these countries, weighed down by bureaucratic control and inefficiency, largely prevented markets from functioning and were therefore incapable of sustaining improvements in human welfare.¹¹⁰

The Washington consensus – second generation

Naim's working paper to the IMF offered a critique, whereby Washington Consensus ideas were 'necessary but not sufficient'. What was required was 'stronger, more effective institutions'. That the paper was delivered in 1999 was no coincidence.¹¹¹ By then it became apparent that, even excluding the full-blown financial crises across South America, East Asia, Russia and Turkey, outcomes, predicted to follow on the footsteps of the application of neoliberal

System Next?' in J. Bhagwati & M. Hirsch (eds) *The Uruguay Round and Beyond – Essays in Honour of Arthur Dunkel* (The University of Michigan Press 1998) 130.

¹⁰⁸ *ibid* 40.

¹⁰⁹ World Bank, *From Plan to Market, World Development Report 1996* (OUP 1996) iii.

¹¹⁰ *ibid*.

¹¹¹ Naim, *ibid* (99).

reforms, were not about to materialise.¹¹² Rather than unprecedented affluence, in most countries neoliberal globalisation became associated with unprecedented poverty.¹¹³ The 90s and 2,000s turned out to be 'lost decades for most developing and transition economies',¹¹⁴ with financial crises becoming both endemic and contagious.¹¹⁵ By 2010 world poverty accounted 'for a third of all human deaths and the majority of human deprivation, morbidity and suffering worldwide.'¹¹⁶ Any windfall, such as the one generated by a property boom was limited to the Global North and in any event was relatively short lived.¹¹⁷ Even there, excluding government guarantees of Euro 6 trillion, the monetary value of proceeds from three decades of privatisation, marketisation and liberalisation is only twice the amount spent by US and European governments on bailing out their failing banks.¹¹⁸

The answer was to be more neoliberalism. In its 1996 policy manifesto the World Bank continued to espouse policies of stabilisation, liberalisation and privatisation. It insisted that the unleashing of markets remained the basis reform from which all benefits would flow, and the only mechanism capable of renewing growth and spreading prosperity.¹¹⁹ The conclusion reached by the IMF was that the problem was one of implementation. It did not go deep and far enough.¹²⁰ In particular, it was argued, reforms stopped short of the full-blown restructuring necessary for well-functioning market economies. This further

¹¹² Rodrik, *ibid* (n 96) 974.

¹¹³ At a time when annual total world income increased by 2.5% the number of people living in poverty has gone up by 100 million. For most people in East and Central Europe the market economy proved worse than predicted by their communist leaders. Stiglitz, *ibid* (n 105) 5-6; World per capita income grew at 2% during the neoliberal period of 1980-2000 compared with 3.1% in 1960-80. Growth of per capita income in developing countries declined from 3% to 1.5% and would be even less once China with its non-neoliberal policies is taken out of the equation. Ha-Joon Chang, *Globalisation, Economic Development and the Role of the State* (Zen Books Ltd 2004) 2; on the Consensus' failure to deliver growth see also Petras and Veltmeyer, *ibid* (n 37) 56-57.

¹¹⁴ In the post Soviet Union world The 'transformational depression lasted for six years on average, unemployment ranged between 20-40% and broader indicators such as life expectancy, infant mortality and poverty suggest heavy cost associated with transition. Birch & Mykhnenko, *ibid* (n 15) 10-11.

¹¹⁵ Harvey, *ibid* (n 25) 94-98.

¹¹⁶ Thomas Pogge, *Politics As Usual: What lies Behind the Pro-Poor Rhetoric* (Polity Press 2010) 107.

¹¹⁷ Birch & Mykhnenko, *ibid* (n 15) 1-2.

¹¹⁸ *ibid*.

¹¹⁹ World Bank, *ibid* (n 109) 7.

¹²⁰ Rodrik, *ibid* (96) 977-79; O'Brien & Williams, *ibid* (n 29) 386.

augmentation of market fundamentalism with a second-generation Consensus of institutional fundamentalism drew from works, such as those published by D H Soto and Acemoglu and Johnson and Robinson, who by 2001 pointed to secure property rights as the single most important determinant of successful development.¹²¹ Thus, property rights which came last and ‘almost as an afterthought’¹²² in Williamson’s list of policy tenets now reclaimed their place as a paradigmatic centrepiece of strong legal institutions of contract and property.¹²³ The focus on institutionalised rule of law was then coupled with notions of market-based democracies and freedom. The world order so conceptualised went beyond pure economics to encompass a vision of a Kantian perpetual peace, towards which humanity is to be guided by a single hegemonic state.¹²⁴ History as an evolutionary process, wrote Fukuyama, a former deputy director of the US State Department’s Policy Planning Staff and a member of the US neoconservative movement, has reached its end point with the triumph of Western economic and political liberalism.¹²⁵ With liberal democracies now embedded in human consciousness, he argued, they represent a globally shared coherent political aspiration. Nation-states are bound together by global markets, the universal diffusion of consumer culture and capitalist scientific logic.¹²⁶ In the context of the IFIs, incursion into institutional reforms meant that IMF conditionalities now extended beyond economics to encompass political demands.¹²⁷ Thus, financial assistance became contingent on the transformation of the interior of the recipient state by posing ever-greater sovereignty encroaching demands for political, legal and social reforms.¹²⁸ Yet, as pointed by Rodrik, there is no evidence of a causal link between institutional

¹²¹ Rodrik, *ibid* (n 96) 978-79; see also M Sornarajah, ‘The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty’ in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economy* (Studies in International Trade Law, Hart Publishing 2008) 206.

¹²² Rodrik, *ibid* (n 96) 973.

¹²³ Sornarajah, *ibid* (n 121) 206.

¹²⁴ *ibid* 206-07.

¹²⁵ Fukuyama resigned from the neoconservative movement in 2006 over the Iraq war.

¹²⁶ Francis Fukuyama, ‘The end of History?’ [Summer 1989] *The National Interest* <<http://courses.essex.ac.uk/GV/GV905/IR%20Media%202010-11/W4%20Readings/Fukuyama%20End%20of%20History.pdf>> accessed 3 July 2011;

Fukuyama, *ibid* (n 33) xii, xv.

¹²⁷ Joseph Stiglitz, *ibid* (n 105) 44-45 giving as an example the case of Korea, where IMF lending was conditional on a change in the charter of the country’s Central Bank.

¹²⁸ Ha-Joon Chang, *ibid* (n 113) 1-2.

design and growth, so that the focus on the latter is 'largely a dead-end upon closer look':¹²⁹

And so, neoliberalism appears to repeatedly 'fail forward'.¹³⁰ Neither the unravelling of its utopian vision of a non-cyclical 'new economy' as a reality of deepening poverty, nor even the severe and on-going financial crisis which began in the West in 2008 appear able to dislodge this paradigm from its hegemonic perch.¹³¹ Thus, in his speech of 19 May 2011 President Obama called on post-uprising Tunisia and Egypt to implement liberalising reforms, and adhere to integration promoting agreements.¹³² In a further demonstration of what Dine terms 'risk free banking',¹³³ in the UK, Greece and elsewhere, banks appear immune to the consequences of their bad decisions, while people are forced by their governments, the EU and the IMF to bear the cost of indebtedness, regardless of the consequences to their livelihood and wellbeing.¹³⁴

Probing the moral implications of this world design, Pogge points out that at a time of unprecedented global wealth, such that is sufficient to eradicate all life-threatening poverty, global inequalities are on the rise and 'the global economic regime that our countries designed and impose kills more efficiently than the Nazi extermination camps; the daily suffering from poverty and disease greatly exceeds that caused by World War II in its darkest days'.¹³⁵

¹²⁹ Rodrik, *ibid* (n 96) 979.

¹³⁰ Peck, *ibid* (n 14) 6-7.

¹³¹ Plehwe, Walpen and Neunhoffer, *ibid* (n 39) 1.

¹³² Barack Obama speech to the English parliament on 19 May 2011.

¹³³ Janet Dine, *ibid* (n 68) 100-105.

¹³⁴ Harvey, *ibid* (n 25) 29.

¹³⁵ Pogge, *ibid* (n 116) 2, 12-13 pointing out that in 2000 the bottom half of the world's adults together owned 1.1% of global wealth with the bottom 10% possessing only 0.03%; by contrast, the top 10% owned 85.1% and the top 1% possessed 39.9% of global wealth.

On Power, Hegemony and Empire

The puzzle of endurance

So here we have it: a paradigm, its features ruffled by popular resistance, but the compulsive dissemination of which persists essentially unmodified and impervious to the growing chasm between discourse and real outcomes.¹³⁶ The neoliberal claim to a basis in scientific logic renders such dogmatic endurance all the more puzzling.¹³⁷ For the capitalist claim to scientific approach would ordinarily include a final stage of testing models against empirical observations. Yet, there is little historical evidence that markets produce growth or that such growth translates into benefit for the poor.¹³⁸ This in turn lends support to Polanyi's view that the notion of functioning free markets is a myth constructed as part of a utopian vision.¹³⁹ The answer may lie in the 'no alternative' discourse. However, yet again, in reality and as pointed out by Pogge, rather than an inevitable consequence, the massive deprivation consequential upon the present world design is not only foreseeable, but is also avoidable at a miniscule cost to the affluent.¹⁴⁰

In seeking to explain this phenomenon of outcomes-defying endurance three possible conjectures come to mind: First, neoliberalism as a theoretical model is not concerned with consequences. Support for this supposition may be found, for example, in Hayek's conceptualisation of liberty and law. Freedom is postulated as a stand-alone moral value that is detached from its aftermath. One

¹³⁶ But see O'Brien & Williams, *ibid* (n 29) 385-86 arguing that initial disagreements, variegated implementation and popular resistance had the effect of stalling the spread of the Washington Consensus; see also Dieter Plehwe and Bernhard Walpen, 'Between Network and Complex Organization: the Making of Neoliberal Knowledge and Hegemony' in Plehwe, Walpen and Neunhoffer, *ibid* (n 39) 28; referring to the fact that the electoral success of new social democratic parties in Italy and France and the Noble Prizes awarded to development economist Amartya Sen and World Bank insider turned critique, Joseph Stiglitz, were seized upon as pointing to the emergence of a more ethical 'post-Washington Consensus'; see also Peck, *ibid* (n 14) 9 arguing that declarations of the death of neoliberalism are premature.

¹³⁷ O'Brien & Williams, *ibid* (n 29) 10-11.

¹³⁸ Polanyi, *ibid* (n 33) vii.

¹³⁹ *ibid* xxix, 116-35, 148; see also Robert B. Reich, *The Work of Nations* (1st edn Vintage Book Edition) 186 stating that the free market idea is a construct produced by laws and political decisions and is pure fantasy outside this context.

¹⁴⁰ Pogge, *ibid* (n 116) 12, 21-24, 107.

may be free to starve for example.¹⁴¹ Similarly, in truly free societies, law too is detached from its real outcomes.¹⁴² The focus is thus on processes rather than on end-results. For Nozick justice is embedded in the processes that lead to proprietary entitlement, rather than in the management of their outcomes.¹⁴³ Further, in the context of the Washington Consensus, the proposition that equity may be pertinent to development ‘often received short shrift’.¹⁴⁴ Yet, development that is measured by GDP performance is very much integral to the Consensus rhetoric.¹⁴⁵ Further, neoliberalism may be described as a utilitarian discipline in that the sufferings encountered on the way are justified by the outcome of overall benefit. Chicago school orthodoxy may be averse to distribution. Nonetheless, it is concerned with the welfare of consumers. Such welfare is maximised when the general level of wealth is raised.¹⁴⁶ This is then distributed through a spontaneous process of ‘trickling down’.¹⁴⁷ To say that neoliberalism is indifferent to consequences is therefore to ignore one of its fundamental constituents.

The second supposition is that neoliberalism may represent an instance of irrationality, whereby paradigmatic pronouncements are incongruous with their implementation. The proposition is not as far-fetched as it may first appear. For, at least on some views, irrationality is integral to empire building.¹⁴⁸ The rejection of the Keynesian model is a case in point. Neoliberalism is the product of at least three decades of capitalist evolution. At one stage, spurred on by workers’ resistance, its liberal progenitor mutated into the growth producing, state-led Keynesian model of post-WWII ‘golden age of capitalism’. Yet, this model was vilified and replaced with a return to pre-1930 ideas, notwithstanding the severe financial crisis they had produced by 1929. Thus, by the time neoliberalism came on line, the experience of market failure

¹⁴¹ Hayek, *ibid*, (n 4) 17.

¹⁴² *ibid* 135-38.

¹⁴³ Robert Nozick, ‘An Entitlement Theory’ in Clayton and Williams, *ibid* (n 61) 94.

¹⁴⁴ Joseph E Stiglitz, ‘Is There a Post –Washington Consensus?’ in Serra and Stiglitz *ibid* (n 93) 47.

¹⁴⁵ *ibid*.

¹⁴⁶ Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press 2011) 61.

¹⁴⁷ Foucault, *ibid* (n 1) 16; Polanyi, *ibid* (n 33) 35; Harvey, *ibid* (n 25) 64; Petras and Veltmeyer, *ibid* (n 37) 60.

¹⁴⁸ Petras and Veltmeyer, *ibid* (n 37) 12-13.

under conditions of unrestrained freedom had already been etched into collective consciousness. Nevertheless, as between two models in difficulties, it was the one with proven track record of growth that was rejected. Further, in the liberal/neoliberal construction, markets are not subject to a test of legitimacy by reference to some other overriding values. Rather, they are evaluated in terms of their success or failure to achieve projected outcomes.¹⁴⁹ Yet, as we saw, failure is consistently excused away as the product of interference and faulty implementation.

One may conclude that what is being witnessed is an empire in the grip of a permanent state of irrationality. Alternatively, one may deduce - and here we come to the third conjecture - that there is something else, a subterfuge, whereby paradigm is incongruous not with its implementation, but with its true intent. In other words, objective truth is masked by discourse. Rather than the manifestation of a dynamic of irrationality, the rhetoric of growth is adopted to facilitate the realisation of another, more covert rationale. Polanyi succinctly articulated this rationale when he said: 'Laissez faire was not a method to achieve a thing it was the thing to be achieved'.¹⁵⁰ In line with the capitalist compulsion for accumulation that has no purpose other than its own endlessness, the neoliberal paradigm's real intended outcome is its own perpetuation. Seen from this perspective, perhaps the next question to pose is the one which for Susan Strange is central to any realist approach; that is, who actually benefits from this self-perpetuation.¹⁵¹ This question leads us to consider the phenomenon and rationale of the 'new imperialism.'¹⁵²

¹⁴⁹ Foucault, *ibid* (n 1) 16.

¹⁵⁰ Polanyi, *ibid* (n 33) 145.

¹⁵¹ O'Brien & Williams, *ibid* (n 29) 38.

¹⁵² Petras and Veltmeyer, *ibid* (n 37) 30; see also Foucault, *ibid* (n 1) 56.

New imperialism

Discourse and governance

‘New imperialism’ denotes ‘a new global calculation’ in Western governmental practice.¹⁵³ Its aim is for the whole surface of the earth to be brought within the realm of market-based economic imperatives.¹⁵⁴ It is designed to bring about the integration of disparate nation-states into a unified global order that is forged by the US, and which serves to enrich it and its corporate elite.¹⁵⁵ As well as capital and debt bondage, the dynamics of ‘new imperialism’ also include what Harvey terms ‘accumulation by dispossession’ – the continuity within neoliberal capitalism of Marxist primitive accumulation through for example, land grabbing and privatisation.¹⁵⁶

The polemic surrounding the traits of post-WWII US Empire is vast. A comprehensive discussion is outside the scope of this work.¹⁵⁷ I therefore focus on one essential feature most pertinent to this enquiry. That is, new imperialism’s preference for informal strategies. That is to say, it shies away from direct colonial rule in favour of a dynamic of imposed voluntariness. The order into which incorporation is required comprises first, multiple states and second, an ecology of accumulation regimes. In this ecology no country is permitted to be itself.¹⁵⁸ Rather, each is called upon to put its law and violence monopolies at the service of empire. Development is made subject to the free operation of capital ‘whose property rights are militarily and constitutionally guaranteed and upheld’.¹⁵⁹ ‘On the whole’ says Wood, the practice of the US has

¹⁵³ Foucault, *ibid* 56.

¹⁵⁴ *ibid* 57.

¹⁵⁵ Wood, *ibid* (n 7) 130- 42.

¹⁵⁶ David Harvey, *The New Imperialism* (OUP 2003) 87-169; see also Harvey, *ibid* (n 25) 154, 178-79.

¹⁵⁷ For a brief summary of various views from a Marxist perspective see Alex Callinicos, *Imperialism and Global Political Economy* (Polity Press 2009) 14-21.

¹⁵⁸ Petras and Veltmeyer, *ibid* (n 37) 30; Wood, *ibid* (n 7) xi.

¹⁵⁹ Gill, *ibid* (n 8) 24.

been to avoid direct colonial rule wherever possible and to rely on economic hegemony, which is less costly, less risky and more profitable'.¹⁶⁰

From a paradigmatic perspective, imposed voluntariness is diffused from 'persuasion centres' by means of a discourse that goes beyond universalism to claim 'natural' or 'moral' attributes and assert inevitability.¹⁶¹ In turn, inevitability that is founded on natural and moral attributes serves to gloss over the conflictual dimensions of the 'political'.¹⁶² In the process, capitalist imperatives and TNCs' interests are presented as aligned with those of developing countries to suggest a 'win-win' formula.¹⁶³ From an implementation perspective, structural adjustments are applied under the supervision of Washington and the IFIs so as to ensure that the ensuing order is irreversible.¹⁶⁴ Crises are at times orchestrated, and invariably managed and packaged to rationalise the system and discipline the peripheries.¹⁶⁵ Economic mechanisms are supplemented by military power, or the threat of its use; 'a war without end' posited as a foundational layer of persuasion and a warning to foes and allies alike.¹⁶⁶

Discourse and governance thus replicate each other. Both are grounded in an order that is steered by economic imperatives. The starting point is one of juridically equal free and autonomous institutions, be it states, people or corporations. Such institutions are treated as 'individuals' engaged in a competitive interaction through voluntary exchanges in the marketplace. Yet, this starting point is flawed since the purported freedom, voluntariness and equality are illusory. In reality, the structural positions of 'natural' and 'legal' persons are asymmetric. The result is a two-tier system, whereby people's ability to make free choices is rendered almost meaningless when pitched

¹⁶⁰ Wood, *ibid* (n 7) x.

¹⁶¹ Birch & Mykhnenko, *ibid* (n 15) 49.

¹⁶² Chantal Mouffe, *On the Political* (Routledge 2005) 8-13, 72-76.

¹⁶³ Wood, *ibid* (n 7) 118; Petras and Veltmeyer, *ibid* (n 37) 129-30.

¹⁶⁴ *ibid* 108.

¹⁶⁵ Harvey, *ibid* (n 156) 150; for the role of crises in producing profitable investment opportunities through the fall in the value of assets see also Harvey, *ibid* (n 25) 162-63.

¹⁶⁶ Wood, *ibid* (n 7) 143-59.

against the systemic power of and protection afforded to corporations.¹⁶⁷ Such illusion is mirrored in the asymmetry of core/periphery interstate relations.¹⁶⁸ States are not equal, and are rendered even less so when the sovereignty cost of their incorporation into the imperial order is brought into the equation. As seen above, the expansion of the Consensus into institutional fundamentalism meant that such cost now touches not only on economic, but also on political sovereignty. The flip side is that inequalities in core/periphery relations also aggravate national differences and provoke instincts for self-preservation in the face of predatory globalisation.¹⁶⁹ In consequence, coercive power is often called upon at both the national and international levels to secure order, to annex and to discipline. Paradoxically, especially since the fall of the Soviet alternative, argues Gill, the neoliberal project has become increasingly 'disciplinary' and 'punitive'.¹⁷⁰

Power

Foucault distinguishes liberal power from that of feudalism by its inventiveness and capacity to expand through successive transformations.¹⁷¹ Thus, capitalism endures by means of power that is light on its feet. However, lightness of form is supplemented by a mode of operation that is invariably 'heavy, ponderous, meticulous and constant'.¹⁷² In other words, change and constancy are intertwined and interdependent. Change facilitates durability. Both are contingent on persistence and planning. This interplay between change, permanence, and perseverance was observed earlier in the chapter. It also seems to run through Arrighi's theory of capitalist Systemic Cycles of Accumulation (SCAs). According to Arrighi, the phenomenon of world hegemony is maintained through successive cycles of empire. All cycles share

¹⁶⁷ Harvey, *ibid* (n 25) 79.

¹⁶⁸ Petras and Veltmeyer, *ibid* (37) 20-22.

¹⁶⁹ Harvey, *ibid* (n 156) 188.

¹⁷⁰ Gill, *ibid* (n 8) 24.

¹⁷¹ Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1927-1977* (Vintage Books 1977) 160.

¹⁷² *ibid* 58.

the same evolutionary stages. Yet, each draws on the causative roots of its predecessor's downfall to acquire new qualities.¹⁷³

Versatility means that power may take on a variety of guises. Yet such guises are also homogenous in that they share a single purpose, that of designing a desired outcome, and then maximising compliance and minimising resistance.¹⁷⁴ Barnett and Duvall's taxonomy of power distinguishes between four categories of guises: compulsory, institutional, structural and productive. Each operates differently, but all function so as to shape the capacity of actors to determine their fate in the context of their social interactions.¹⁷⁵ It stands to reason that in the context of neoliberal creative destruction, they also tend to be conflated. The first stage of destruction may gravitate towards compulsory power. However, the production of an enduring alternative to that which has been destroyed may call on a variety of power forms. Thus, the creative destruction of Chile in 1973 and Iraq in 2003 implicated the use of compulsory power, followed by institutional power, so as to reconfigure the state. For Harvey, the fact that these two instances of state restructuring occurred in different times, and in two quite different parts of the world, suggests that 'the grim reach of imperial power might lie behind the rapid proliferation of neoliberal state forms throughout the world from the mid-1970 onwards'.¹⁷⁶ Naim similarly discerns the operation of power from the fact that the Consensus originated in Washington, the seat of 'the victorious empire'.¹⁷⁷ Notably, the overthrow of the democratically elected Allende government in Chile on 11 September 1973, and its replacement with the Pinochet brutal regime -

¹⁷³ Arrighi, *ibid* (n 44) 6, 9-10, 89.

¹⁷⁴ David Miller, 'How Neoliberalism Got Where It is: Elite Planning, Corporate Lobbying and the Release of the Free Market' in Birch & Mykhnenko, *ibid* (n 15) 39.

¹⁷⁵ Michael Barnett and Raymond Duvall, 'Power in Global Governance' in Barnett and Duvall, *ibid* (n 12) 3.

¹⁷⁶ Harvey, *ibid* (n 25) 6-9; the four orders promulgated on 19 September 2003 by Paul Bremer, head of the Coalition Provisional Authority in Iraq included the full privatisation of public enterprises, full ownership rights by foreign firms of Iraqi businesses, full repatriation of foreign profits, the opening of Iraqi banks to foreign control, national treatment and the elimination of nearly all trade barriers; for the MENA/OECD investment program for Iraq see MENA/OECD Investment Program, 'Iraq – International Investment Program' [2004] <<http://www.oecd.org/dataoecd/2/5/41052987.pdf>> accessed 15 July 2011; Gill, *ibid* (n 8) 39 discussing the privatisation of the Iraqi economy by the US in the wake of its invasion.

¹⁷⁷ Naim, *ibid* (n 99).

sometimes referred to as ‘the first 9/11’¹⁷⁸ - was the first, but not the only US and corporations-led experiment in neoliberal state restructuring.¹⁷⁹ In fact, between the 60s and the Soviet collapse in 1990, ‘the number of political prisoners, torture victims, and executions of non-violent political dissenters in Latin America vastly exceeded those in the Soviet Union and its East European satellites’.¹⁸⁰ Other views on the role of power in guaranteeing implementation include Crouch’s explanation of the ‘strange non-death of neoliberalism’ as attendant on industrial workers historical loss of power.¹⁸¹ Sornarajah points to the role of institutional power in determining the normative content of the rule of law.¹⁸² Similarly, Stiglitz talks about the inability of poor countries to influence IFIs’ rules. Consequently, their governments are forced to ignore popular protestations and trade sovereignty for cash.¹⁸³

Last but not least in Barnett and Duvall’s taxonomy is productive power, with its moulding of subjectivities through the social diffusion of meanings, and the legitimisation/delegitimisation of knowledge and its sources. The successful dissemination of discourse fulfils a particularly important function in the securing of imposed voluntariness. In the neoliberal context, concepts such as individual freedom, human dignity and human rights are powerful and compelling precepts to pitch against the spectre of state intervention, and to act as a subterfuge for political realities.¹⁸⁴ Such is the impact of the word freedom on Western popular understandings that it becomes ‘a button that elites can press to open the door to the masses to justify almost anything’.¹⁸⁵

¹⁷⁸ Noam Chomsky, ‘9/11 and the Imperial Mentality: Looking Back on 9/11 a Decade Later’ [6 Sep 2011] Common Dreams <<http://readersupportednews.org/off-site-opinion-section/423-national-security/7326-911-and-the-imperial-mentality>> accessed 6 Nov 2011.

¹⁷⁹ Harvey, *ibid* (n 25) 7-8; Gill, *ibid* (n 8) 39.

¹⁸⁰ Chomsky, *ibid* (n 178); referring to John Coatsworth, 3 *The Cambridge History of the Cold War Series* (CUP 2010).

¹⁸¹ Crouch, *ibid* (n 146) title, 1.

¹⁸² Sornarajah, *ibid* (n 121) 206.

¹⁸³ Stiglitz, *ibid* (n 105) 9.

¹⁸⁴ Harvey, *ibid* (n 25) 5.

¹⁸⁵ *ibid* 39; citing from J. Rapley, *Globalization and Inequality: Neoliberalism’s Downward Spiral* (Boulder, Col: Lynne Reiner 2004) 55.

Design

Power is exercised for a purpose. Within the neoliberal framework, it shores up a desired design. In the words of Polanyi: 'Laissez faire was planned'.¹⁸⁶ In a historical process of 'double movement' – that of economic 'disembedding' and its opposition– argues Polanyi, it is only the latter that is unpremeditated. In other words, in reality, 'disembedding' is preconceived, notwithstanding its claim to spontaneity.¹⁸⁷ Support for the proposition that the neoliberal order is in fact the product of a conscious and calculated policy blueprint is found in the operation of elite policy planning organisations, think tanks and corporate lobby groups.¹⁸⁸ In the case of the MPS for example, as recalled by Ralph (Lord) Harris, 'the 'war aim' was to establish a class-wide propaganda organisation to reverse the tide of collectivism sweeping from the Soviet Union westward across Europe'.¹⁸⁹ It took a generation for the MPS to be adopted by right wing political parties and a further 10-15 years for residual parties that sought to represent popular interests to be neutralised.¹⁹⁰ This deliberate capturing of the state through a combination of ideas and power politics belies the propagated myth that the rise of neoliberalism was a spontaneous response to the failure of alternatives. Home and abroad processes replicated each other as elites' planning went global through the power and influence of transnational business lobbies and policy planning groups such as the International Chamber of Commerce (ICC), an early campaigner for the global harmonisation of business rules, the secretive Bilderberg Group,¹⁹¹ the World Economic Forum and the enigmatic Trilateral Commission, a self-appointed crusader for the dismantling of the welfare state.¹⁹² All four are run by and for the biggest TNCs, are often directed by their CEOs, and represent policy planning, networking and

¹⁸⁶ Polanyi, *ibid* (n 33) xxvii.

¹⁸⁷ *ibid* 138-39; 151-57.

¹⁸⁸ Miller, *ibid* (n 174) 24-25.

¹⁸⁹ *ibid* 26; citing from R Harris, 'The Plan to End Planning – The Founding of the Mont Pelerin Society' [1997] *National Review*.

¹⁹⁰ *ibid* 27-33 discussing the rise of Thatcherism and the involvement of US linked organisations often connected with the CIA in the neutralization of the Labour party in the UK between 1979 and 1997.

¹⁹¹ *ibid* 34; TNCs involved in the Bilderberg Group include British American Tobacco, BP, Shell, Exxon, IBM, Rio Tinto, General Motors and others.

¹⁹² *ibid* 37.

co-ordination groups that pursue a transnational free market agenda.¹⁹³ Thus, Miller points to a subterranean layer in Arrighi's concept of hegemonic leadership: the role of elites in supplying the normative content to be dispersed. Such content is borne out of national and transnational class unity of shared ideas and interests.¹⁹⁴

A second and complementary mechanism that is constitutive of design is foreign direct investment (FDI).¹⁹⁵ TNCs are its 'basic operating units'.¹⁹⁶ Thus, by and large, imperial planning and implementation appear to implicate the same people namely, corporate transnational elites. Together, they form the 'shock troops'¹⁹⁷ of neoliberal paradigmatic diffusion, and are 'key agents of US imperialism'.¹⁹⁸ They are the bearers of the gift of economic liberalism and its rules of governance from the imperial core to its peripheries. In return, TNCs bring back tributes in the form of 'surplus transfer'.¹⁹⁹ In the 1990s returns on the operations of US capital in Latin America averaged \$60 billion a year. Over the decade \$585 billion in interest and profit were remitted to the imperial core, primarily to US corporations' home quarters.²⁰⁰ This excludes the significant revenues drawn from royalty payments, shipping, insurance and fees for other services.²⁰¹ Nor does it include the billions of dollars illegally transferred by elites to overseas accounts in US and European banks.²⁰² Once a country's capital market has been prized open, FDI can easily be made liquid and then repatriated.²⁰³ It also facilitates 'transfer pricing', the practice whereby TNCs charge and undercharge their subsidiaries in a manner, which ensures that the highest profits are registered in the country with the lowest corporate tax rate, preferably one of the ever proliferating tax havens.²⁰⁴ All the while, the host state is burdened with foreign capital expenditure, inter alia, in

¹⁹³ *ibid* 33.

¹⁹⁴ *ibid* 24.

¹⁹⁵ Petras and Veltmeyer, *ibid* (n 37) 1.

¹⁹⁶ *ibid* 33.

¹⁹⁷ *ibid* 6.

¹⁹⁸ *ibid* 30.

¹⁹⁹ *Ibid* 46.

²⁰⁰ *ibid* 43.

²⁰¹ *ibid*.

²⁰² *ibid*.

²⁰³ Ha-Joon Chang, *ibid* (n 107) 88-9.

²⁰⁴ *ibid* 89.

the form of input importation and foreign loans. Rather than a carrier of much needed capital, FDI may thus prove a source of foreign capital drain. This is in circumstances where much of foreign investment is 'brownfield': mergers and acquisitions, often of privatised local industries, sold at a depressed price courtesy of collaborative local elites.²⁰⁵ The process is circular: FDI creates capital shortage. This sustains the myth that peripheral economies are underdeveloped which in turn justifies their need for further FDI.²⁰⁶ It is little wonder that in the neoliberal construction of the global order FDI was celebrated, albeit ironically, 'as if it was Mother Teresa of foreign capital'.²⁰⁷ It is equally unsurprising that home countries are happy to pave the way for their TNCs abroad or that, for that matter, the US designs its national interests in line with those of its TNCs.²⁰⁸

BITs – The Juridical Imaging

And so, we are back to the beginning. That is, Foucault's proposition that political economy and the law develop in tandem, are mutually replicating and that, within this ensemble, the role of the law is to provide rules and codes of practice. Here, the focus of attention is the BITs program, and the way it acts as a 'highway code' for the implementation of the neoliberal consensus. I argue that BITs do so in two fundamental ways. First, they translate neoliberal law-state-market interaction into juridical rules. Second, they provide an institutional framework for the neoliberal world order. In performing these functions BITs cut through the two levels of neoliberal orthodoxy articulated by Jessop: its ideological surface and its interior realities.²⁰⁹

²⁰⁵ *ibid* 80-90; Petras and Veltmeyer, *ibid* (n 37) 34.

²⁰⁶ Petras and Veltmeyer, *ibid* 79; but see for example Stephan W. Schill, *The Multilateralization of International Investment Law* (CUP 2009) 3-5 arguing that foreign investment is widely viewed as positive for host countries.

²⁰⁷ Ha-Joon Chang, *ibid* (n 107) 88 citing a remark made by the Chilean economist, Gabriel Palma.

²⁰⁸ Petras and Veltmeyer, *ibid* (n 37) 31.

²⁰⁹ Jessop, *ibid* (n 24) 83.

Law-state-market interaction

According to Foucault, in neoliberal dogma, the function of the law is to structure the way by which state power is exercised. The law imposes and formulates sovereign powers limitations.²¹⁰ This proposition, however, is predicated on a paradox: it is the state that has monopoly over legislation. In other words, it is the government and it alone that possesses the power to limit its own power. The neoliberal state thus becomes the author of its own misfortune. It means that the path to the various forms of less government must in the first instance pass through more government. BITs encapsulate this phenomenon of self-imposed reduction, this alternation between power and powerlessness, initiative and passivity. The act of entering into a BIT is a positive sovereign act. Yet, its purpose is to curb sovereignty. The state party to a BIT acts to conclude it, and then retreats, to return only in the event of a dispute. The standards of treatment contained in the treaty limit its regulatory space.²¹¹ International arbitration and IL mean that even when the state does venture into policymaking, the consequences that follow may prove to be out of its control.

What legitimises the neoliberal state's juridical self-limitation? For Foucault, it is the economy that validates state actions and creates public law.²¹² The market is the site of truth. Importantly, however, it is not the site of justice.²¹³ Thus, the state's divestiture of its sovereign powers is endorsed or criticised by reference to a just price. Yet, such just price has little to do with justice in the sense of equity. It is just in the sense that it represents the economic rationale of a fair outlay. In the case of BITs, such outlay is the cost of sovereignty as against the benefit of foreign investment. In this way BITs embody a straightforward economic bargain, whereby a promise of future investment is secured for a

²¹⁰ Foucault, *ibid* (n 1) 15, 37-8.

²¹¹ But see Kenneth J Vandewelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 9-11 arguing that the state party to a BIT retains regulatory discretion.

²¹² Foucault, *ibid* (n 1) 84.

²¹³ *ibid* 30-1.

levy.²¹⁴ It is indeed on these terms that they are discussed in much of the literature.²¹⁵

Turning to fairness, for Franck fairness in IL is judged, *inter alia*, by reference to justifiable distribution of costs and benefits²¹⁶. Thus, he applies a principle of 'distributive justice'²¹⁷ in the sense of a fair system for the allocation of rights and obligations and for the equalisation of outcomes.²¹⁸ In the context of BITs, he argues, fairness is revealed, for example, in the preamble's reference to 'mutual benefit' and to IL.²¹⁹ More generally, the BITs program is essentially fair because it transforms a relationship of disequilibrium (private investor-sovereign) to one of equilibrium (sovereign-sovereign).²²⁰ The application of 'distributive justice' appears at first blush appropriate since the language is one of economic activity. However, it is difficult to see how the principle itself relates to BITs. First, the treaties are silent on the outcomes of investors' economic activity, such as the impact on the environment or the actual maximisation of human wellbeing. In this way, they are more in the nature of Nozick's theory of 'entitlement', whereby justice and fairness reside in rules of distribution rather than in their outcomes.²²¹ Second, rather than a fair distribution of rights and obligations, in the case of BITs, one of the parties, the host state, has all the obligations and none of the rights. In this respect, the treaties' hallmark is disequilibrium as opposed to equilibrium.

²¹⁴ See for example Asha Kaushal, 'Revisiting History: How The Past Matters For The Present Backlash Against The Foreign Investment Regime' (2009) 50 2 Harvard International Law Journal 496.

²¹⁵ See for example, Jason W. Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) Research Papers Series Paper No. 1114 University Wisconsin Law School Legal Studies

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887> accessed 11 April 2011; Christoph Engel, 'Governments in Dilemma: A Game Theoretic Model for the Conclusion of Bilateral Investment Treaties'

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001174> accessed 20 Feb 2011.

²¹⁶ Tomas M. Franck, *Fairness in International Law and Institutions* (OUP 1995) 7.

²¹⁷ *ibid* 8-9.

²¹⁸ *ibid* 11.

²¹⁹ *ibid* 446.

²²⁰ *ibid* 447.

²²¹ *ibid* 20.

Reductive sovereignty is but one of the ways in which BITs replicate neoliberalism's dialectic relationship with the state.²²² Looking for example at deregulation, BITs can be said to be regulatory instruments and a form of state intervention in the operation of free markets. Indeed, it is arguable that, in itself, deregulation does not entail a move away from state intervention, but merely a shift in the nature of such intervention. Rather than introduce regulations, the state is now tasked with managing their absence.²²³ It is a dialectical process of 'regulation-in-denial'.²²⁴

This brings us to another aspect of BITs' neoliberal underpinning: that is, that the state/market binary is in reality a triangular relationship involving a third party - the corporate elites, which inhabit the TNCs, and to whose freedom of operation the treaty bargain is tailored. The proposition is that the investor is not an active participant, but a passive recipient. Its entitlement for the benefit of the bargain struck by the government is derived from the neoliberal proposition that corporate freedom to maximise profits serves the wellbeing of all.²²⁵ This subterfuge of TNCs' power mirrors the disparity between discourse and objective truth. In neoliberal orthodoxy, TNCs' power is subject to market mediation. In neoliberal reality, TNCs can dominate markets and indeed do so. Through fuzzy relationships with governments they formulate policies, shape institutions and pitch states against each other in competition for propagated benefits.²²⁶

²²² Peck, *ibid* (n 14) 65.

²²³ *ibid* 187.

²²⁴ *ibid*, xiii.

²²⁵ This supposition is habitually found in the preamble. Taking the US/Argentina BIT as an example the treaty states: 'Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the parties'. 'Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment'

<http://www.unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf> accessed 3 Sept 2011.

²²⁶ Crouch, *ibid* (n 146) 50.

The World order

Extrapolating the main constituents of US led new imperialism's logic, they include: (i) economic incorporation under US hegemony (ii) optimal universalisation of economic imperatives²²⁷ (iii) uniformity (iv) design that benefits the imperial core and its elites (iv) mobilisation of nation-states' sovereign powers.

BITs are a device for the geographical incorporation of states into the imperial order in a way that is less visible and less costly than naked force.²²⁸ Through their global diffusion, they promote the universalisation of Westerncentric liberal notions of property rights, deregulation and the rule of law.²²⁹ More generally, they foster a world order that is underpinned by markets and the 'logic of competitiveness'.²³⁰ In particular, they facilitate the global spread of FDI. They are instrumental in turning it into what the IMF termed the 'backbone' of development finance.²³¹ BITs achieve this status by providing a layer of investors' protection, so as to supplement institutional reforms imposed by IFIs. In this way, BITs complement the IFIs' task of locking in reforms and render them difficult to reverse.²³² The operation of protection in times of financial crises provides a pertinent example of the gulf between neoliberalism's acute sensitivity to the plight of corporate investors, and its disregard to its true victims – the rest of humanity. On 4th July 2011 UNCTAD pointed out that, as in the previous case of Argentina, investment treaties' broad assets-based definition of investment and treatment standards, such as expropriation, FET and umbrella clauses, provide potential jurisdiction for bondholders. They can sue states for their debt restructuring policies.²³³ In *Abaclat*, the tribunal found by a majority that it had jurisdiction to hear

²²⁷ Wood, *ibid* (n 7) 22.

²²⁸ Petras and Veltmeyer, *ibid* (n 37) 15 discussing the problems associated with incorporation.

²²⁹ Vandeveld, *ibid* (n 211) 108-14.

²³⁰ Birch & Mykhnenko, *ibid* (n 15) 7.

²³¹ Petras and Veltmeyer, *ibid* (n 37) 38.

²³² Chomsky, *ibid* (n 38) 123.

²³³ UNCTAD, 'Sovereign Debt Restructuring and International Investment Agreement' [4 July 2011] IIA Issues Notes

<<http://www.unctad.org/Templates/Page.asp?intItemID=6004&lang=1>> accessed 15 July 2011.

proceedings advanced by around 60,000 holders of bonds issued by the Argentine government. The claims arose out of Argentina's default on its sovereign debt obligations and subsequent debt restructuring. In January 2005 the government launched an offer pursuant to which existing bonds would be exchanged for new bonds on revised terms. The Claimants refused to participate in the offer and commenced ICSID arbitration. The tribunal determined, *inter alia*, that the facts relied on by the claimants were capable of establishing a breach of the Argentina-Italy BIT's provisions relating to FET, discrimination and, possibly, expropriation. Notably, it concluded that the claims did not arise merely from the failure to perform payment obligations under the bonds, but rather from Argentina's intervention and exercise of its sovereign power to restructure its sovereign debt.²³⁴

In sum, BITs core stated aim is to ensure additional and higher standards of legal protection than those offered under national laws.²³⁵ However, in reality, their function goes beyond this. For the treaties signal the country's willingness to get incorporated and accept 'a particularly American conception of investment rights'.²³⁶ They are power-based creatures of empire. Power thus permeates both the process by which they are created, and the way by which substantive obligations are allocated. In this way, they mirror structural positions within the global order.²³⁷ They are similarly reflective of the way in which capital mediates power. We saw the operation of corporate elites in the conversion of the neoliberal paradigm from mere ideas into a political, policy-producing project. Such project included the shaping of BITs. Consequently, the treaties are designed to be a legal instrument that ensures open borders for the free movement of capital and guards the primacy of private property rights, including their entitlement to protection.

²³⁴ *Abaclat and others v Argentine Republic* [2012] ICSID Case No ARB/07/5.

²³⁵ Petras and Veltmeyer, *ibid* (n 37) 111 citing from UNCTAD, 'World Investment Report 2000: Cross-Border Mergers and Acquisitions and Development' (United Nations 2000).

²³⁶ *ibid* 111.

²³⁷ *ibid*.

CHAPTER 4: China's Bilateral Investment Treaties: Incorporation with 'Chinese Characteristics'

Introduction

The year 2011 signalled a number of 'firsts' in the chronicles of China's BITs program. On 24 May a Malaysian construction company made history by bringing the first ever CSID claim against her.¹ The same year saw an ICSID tribunal awarding damages against Peru in the first ICSID proceedings brought under a Chinese BIT.² Also in 2011 professor An Chen became the first Chinese to be appointed to an ICSID tribunal.³ In July, the Implementing Opinion concerning Encouraging and Guiding Private Enterprises to Actively Carry Out Investment Overseas declared state's support for ODI by private capital. Such support was to include the signing of BITs with more countries so as 'to create a stable and transparent external environment (...)'.⁴ Some two months later China's biggest financial services company, Ping An Insurance became the first mainland company to have filed ICSID arbitration proceedings.⁵ It seems all aspects of China's integration into the global BITs network of private capital protection have finally come of age both discursively and materially.

Chapter 2 examined the drive towards uniformity from a juridical perspective.⁶ In the previous chapter this theme was looked at through the lens of the neoliberal paradigm. Home and abroad were posited as analogue processes that shaped the historical continuum of capitalist development.⁷ The complexities of China's quest for reform and integration lend force to this need for a reasoning

¹ *Ekran Berhad v The People's Republic of China*, ICSID Case No. ARB/11/150. The proceedings were suspended two months later pursuant to the parties' agreement.

² *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6.

³ An Chen was appointed arbitrator in two ICSID claims against Zimbabwe. ARB/10/25).

⁴ '13 Authorities Issue Measures to Encourage and Guide Private Enterprises to Invest Overseas', [13 July 2012] the Xinhua Agency; see also 'China to Shore Up Private Capital Overseas Investment' [4 July 2012] Morning Whistle.com
<http://www.morningwhistle.com/html/2012/Macro_0704/212863.html> accessed 21 July 2012.

⁵ *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium* ICSID Case No ARB/12/29.

⁶ Chapter 2 generally.

⁷ Chapter 3 text to n 55-66 p 95.

that is not confined to the study of individual facets, but looks at systemic connections. In this respect, China's BITs program offers an insight into the way the dual process of treatification and internalisation coalesce to transform not only the country's exterior, but also her interior. Study of the 'interior' is outside the scope of this enquiry. However, in view of its importance to understanding the exterior, this chapter will reflect on aspects of the country's domestic legal transformation most closely linked to the operation of BITs. It will highlight areas of alignment with, as well as residual resistance to imported concepts and rules making. In particular, the 'rule of law' is pertinent to the internalisation of external norms. Since the concept of expropriation resides in both the domestic and international arenas,⁸ consideration of China's 'rule of law' will be supplemented by an attempt to decipher her property ownership configuration.

The intricacies of China's progress towards modernity, and the violent rapture that accompanied the juxtaposition of Westernized self-imaging on her historical topography, give rise to a wide spectrum of diverse opinions. They complement, but also dissent from official discourse. It is said that discursive multiplicity nevertheless remains confined to a shared preoccupation with the country's own developmental path, to the exclusion of the world beyond her borders. Wang Chaohua, for example, comments on his inability to commission a chapter on the country's relations with the outside. For all the differences among the contributors to his book, he says, they all displayed lack of 'any sympathetic understanding of other smaller countries especially those of the Third World, or any critical standpoint on global politics'.⁹ The extent to which Wang's experience encapsulates a general phenomenon is questionable. The HWP ventures into the realm of the country international positioning. Dong Chen and An Chen observe that the proposed inevitability of her becoming a compliant actor in a US dominated interstate system remains the subject of

⁸ Ye Ji, 'Voluntary "Westernization" of the Expropriation Rules in Chinese BITs and Its Implication: An Empirical Study' (2011) 12 1 *Journal of World Investment and Trade* 86.

⁹ Chaohua Wang, 'Introduction; Minds of the Nineties' in Chaohua Wang (ed), *One China, Many Paths* (Verso 2005) 44-45.

disagreements.¹⁰ This chapter aims to tease out this debate by reference to the interaction between the Chinese treatification program and Western practice.

More generally, BITs straddle both the local and the international. Their implications flow in both directions. Such two-way flow is often oblique and may take place simultaneously, so that separation between cause and effect is not self-evident. Indeed, the polemic surrounding the interaction between national and transnational rules making appears to display this dilemma. Bourdieu, for example, observes the internationalisation of national legal norms.¹¹ For Merry, on the other hand, abstractions of international origins assume variegated forms when translated into local linguistic, legal and social cultures.¹² In the same vein of reasoning, Potter conceptualises the interplay between the adoption of external legal norms and their interpretation at the national level as a process of 'selective adaptation' that comprises dynamics of perception, complementarity and legitimacy.¹³ Global legal pluralism, first pioneered by Eugen Ehrlich, abandons altogether the national/international dichotomy in order to look at how globalisation is governed. Here, the premise is that the global arena is animated by a multiplicity of legal orders that cut across juridical territoriality.¹⁴ Snyder builds on this premise by looking at the global realm as comprising distinct sites of governance that nevertheless produce global pluralism through episodic dialogues. Thus, globalism is governed by means of multiplicity of sites of governance that are activated and

¹⁰ An Chen and Dong Chen, 'What Should Be China's Strategic Position in the Establishment of New International Economic Order? With Comments on Neo-Liberalistic Economic Order, Constitutional Order of the WTO and Economic Nationalism's Disturbance of Globalization' (2009) 10 3 *The Journal of World Investment and Trade* 361.

¹¹ P Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal* 814.

¹² See generally Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law Into Local Justice* (Chicago Series in Law and Society, University of Chicago Press 2006).

¹³ Pittman B. Potter, 'Public Regulation of Private Relations: Changing Conditions of Property Regulation in China' in Guanghua Yu (ed) *The Development of the Chinese Legal System: Change and Challenges* (Routledge 2011) 51-68; Pittman B. Potter, 'China and the International Legal System: Challenges of Participation' in Donald C. Clarke, *China's Legal System: New Developments, New Challenges* (The China Quarterly Special Issues New Series, No. 8, CUP 2008) 145-61.

¹⁴ Francis Snyder, *The EU, The WTO and China: Legal Pluralism and international Trade Regulation* (China and International Economic Law Series, Hart Publishing 2010) 29.

brought into relation with each other by strategic actors.¹⁵ Their interactions comprise a two-way dynamic. That is to say, they create ‘international normative repertoire’ which then returns to, and is absorbed by the sites, so as to shape their interior.¹⁶ This analysis appears aligned with Hardt and Negri’s conceptualisation of the global order as devoid of territorial centres of power and control. Instead, the process of globalisation is mediated by multitude of states and non-states actors, to create a territorially detached supranational totality.¹⁷ In relation to BITs, one would presumably look to Schill for a contextualisation that is informed by a Snyder type perception of an unregulated global market place in which actors from different sites of governance freely negotiate treaties.¹⁸ Out of these disparate negotiations arises a state of multilateralism, or what Shapiro alludes to as ‘a single set of rules’ that characterizes the ‘globalization of law’.¹⁹ In other words, outcomes may be uniform rather than pluralistic. Nevertheless, such uniformity is voluntary and consensual.

Notable in this line of analysis is the absence of Doyle’s identification of dynamics of design and resistance and his distinction between independent cooperation and one that is nominally independent but actually subordinate.²⁰ Similarly absent is Barnett and Duvall’s attention to the operation of power in the determination of capacities and outcomes. The hierarchical nature of global structures, whereby some sites are more strategic than others does not appear to have been factored in. Further, in reality, within this hierarchy each site of governance is not for itself. Rather than a two-way flow, overall interaction

¹⁵ *ibid* 382; a site of governance is a locus of decision-making with the authority to settle disputes. *ibid* 49; strategic actors may be organizational – states, firms, regional and international organizations – or structures of governance. *ibid* 42.

¹⁶ *ibid* 265.

¹⁷ Michael Hardt and Antonio Negri, *Empire* (Harvard University Press 2000) generally; see specifically xii, 239.

¹⁸ Stephan W. Schill, *The Multilateralization of International Investment Law* (International Trade and Economic Law, CUP 2009) generally; in relation to China see Stephan Schill, ‘Tearing Down the Great Wall: The New Generation Investment Treaties of the People’s Republic of China’ (2007) 15 *Cardozo Journal of International and Comparative Law* 73 <<http://www.transnational-dispute-management.com/article.asp?key=1418>> accessed 21 June 2012.

¹⁹ Martin Shapiro, ‘The Globalization of Law’ (1993) 37 *Indiana journal of Global Legal Studies* 37.

²⁰ Michael W. Doyle, *Empires* (Cornell Studies in Comparative History, Cornell University Press 1986) generally; see specifically 39, 45.

tends to be characterized by a process of drawing the other into the orbit of a normative and institutional centre in a continuous civilizing drive for global uniformity. The result is 'a certain overlap between globalization and Americanization'.²¹ In other words, a discourse of consent that is posited as spontaneous and invisibly formed masks the centrality of power and agency in the imposition of voluntariness.²² Snyder concedes that at least where foreign direct investment (FDI) is concerned, the relations between the United States and the European Union remain the centre of gravity.²³ Or, as observed by Shapiro: 'much of the time, the globe will turn out to be the US and Western Europe with shadowy addenda'.²⁴ Such dynamics of territoriality and power are theorised in Wallerstein's world-systems analysis and supplemented with an additional component, that of competition. For Wallerstein, the global interstate system is a trilateral arrangement comprising core 'strong' states, semi-peripheral and peripheral, weak states; or in legal pluralism discourse – core, semi-peripheral and peripheral sites of governance. Core states/sites engage in a contradictory rivalry. For, the competition between them is tempered by a common interest in holding together the interstate system from which they benefit.²⁵ Semi-peripheral states/sites on the other hand 'spend their energy running very fast in order at the very least to stay in their intermediate place, but hoping as well that they may rise on the ladder.'²⁶ Theirs is a relationship of unmitigated competition for a place sufficiently high on the hierarchical ladder to liberate them from the flow of economic, political and juridical dictates transmitted from strong to weak states/sites through treaties and international organisations.²⁷

In the context of the Chinese BITs discourse, preoccupation with the external is found in allusions to international practice that is then posited against the

²¹ Shapiro, *ibid* (n 19) 61.

²² Richards Westra, *The Evil Axis of Finance: The US-Japan-China Stranglehold on the Global Future* (Clarity Press, Inc. 2012) 17.

²³ Snyder, *ibid* (n 14) 15.

²⁴ Shapiro, *ibid* (n 19) at 38 cited in Snyder, *ibid*.

²⁵ Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Duke University Press 2004) 56.

²⁶ *ibid*.

²⁷ *ibid* 55, 57.

backdrop of a developed/developing binary and hegemonic power concentration.²⁸ This chapter echoes this multiplicity. In narrating the penetration of investment treaties' international normative repertoire into the Chinese juridical landscape, it is assisted by Snyder's conceptualisation of the formation of a global juridical arena. In seeking to unravel the way by which imported norms and rules making are absorbed, it turns to Potter's selective adaptation. These are then supplemented by a Wallerstein's world-system analysis perspective to take account of issues of power and agency. Yet, it is an investigation that confesses its own limitations. The evolving nature of China's BITs program, the paucity to date of ICSID cases involving this country, and the novelty of her progression up the global hierarchical ladder impose constraints on the analysis of her investment related interaction with other sites of governance. *Tza Yap Shum*, the only award to date to arise out of a Chinese BIT will therefore be looked at in some detail.

The chapter is structured in two main sections. The first observes the interface between the concomitant processes that operate in the interior and the exterior of the Chinese eco-political-juridical ensemble and inform its evolution. The section then goes on to focus on the differences between indigenous and exogenous perspectives of the country's unfolding investment treaties program. Its second part outlines the historical progression and features of this program. It does so by reference to corresponding transformations in the country's interior on the one hand, and to interaction with the ICSID dispute resolution arm of the World Bank site of governance on the other. The hope is that by the end an overall view of China's BITs network and its place in the global arena will emerge.

²⁸ But see the title to Ye Ji, *ibid* (n 8) which refers to the process of Westernisation as 'voluntary'.

China's Eco-Political-Juridical Ensemble

Home and abroad

Elucidations of China's progression towards her BITs related coming of age cover the gamut of both inward and outward transmutations. On the domestic front, explanations include the passage to a market economy, including the creeping privatisation of SOEs and their restructuring as modern corporations;²⁹ the adoption of a development model that is based on the absorption of foreign capital, with a resulting need to structure a stable and competitive investment environment; financial solvency and a surge in FDI.³⁰ On the international front, allusion is made to a quest for integration into the global economy,³¹ a surge in national confidence³² and the implementation of China's going abroad policy (*zou chuqu*), first declared in the 2001 Outline of the Tenth-Five Year Plan for the National Economy and Social Development.³³ This policy – spearheaded by the now corporatised SOEs rather than the ideologically motivated state projects of earlier times – saw China transforming from a capital importing to the largest capital exporting developing country. By 2011 she overtook Japan and the UK to become the fifth biggest global investor.³⁴ With new opportunities presented by the current economic crisis,

²⁹ See for example Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford International Arbitration Series (OUP 2009) 7-8; Jian Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective' (2000) 10 *Touro International Review* 39 at 116-17; on the need to enhance SOEs' global competitiveness see generally Liu Wenbing, *zhongyang qiye guoji jingzhengli yanjiu: binggou chongzu de shijiao* (*Study of Central Enterprises' International Competitiveness: a Mergers and Acquisitions Restructuring Perspective*) (China Economic Publishing House 2010).

³⁰ Ye Ji, *ibid* (n 8) 87,94-95; Gallagher and Shan *ibid* 1-2; Schill, *Tearing Down* *ibid* (n 18) 78-79; Jian Zhou, *ibid* generally.

³¹ Schill, *Tearing Down* *ibid* (n 18) at 82.

³² Ye Ji, *ibid* (n 8) 99.

³³ Cai Congyan, 'Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BITs Practice' (2006) 7 *Journal of World Investment and Trade* 621 at 626-27.

³⁴ Cecily Liu, Zhang Haizhou and Ding Qinfen, 'Firms to Unite in Europe' [28 June 2012] *China Daily* <http://usa.chinadaily.com.cn/business/2012-06/28/content_15529107.htm> accessed 20 July 2012; Gallagher and Shan, *ibid* (n 29) 2; Cai Congyan 'China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications' (2009) 12 (2) *Journal of International Economic Law* 457 at 458; according to the 2010 Statistical Bulletin of China Outward Direct Investment China's net ODI flow was US\$68.8 billion, an increase of 21.7% from the previous year with 16,000 overseas enterprises in 178 countries. <<http://hzs.mofcom.gov.cn/accessory/201109/1316069658609.pdf>> accessed 23 June 2012.

Chinese ODI is predicted to register an annual growth of 17% in the period 2011-2015.³⁵

As observed in earlier chapters, these multiple transformations are not fenced off from each other. Rather, they coalesce in a dual and mutually reinforcing interaction of internalisation and externalisation whereby external norms and rules are absorbed internally. Thereafter, cloaked in voluntariness and localisation, they resurface in the relations with the world beyond one's borders from whence they came in the first place. Li Mingqi, for example, points to the need to break the power of the Chinese working class in order to maintain China's global competitiveness.³⁶ For Li Hui, the sense of urgency displayed by Premier Zhu Rongji and his entourage of economists in the context of China's entry into the World Trade Organisation (WTO) - and presumably also the conclusion of BITs - reflected a loss of confidence in the government's capacity to modernise its SOEs. It was hoped that competition from foreign capital would steer the economy in the direction of reforms.³⁷ An expansive and transformative dynamic that crossed from the external to the internal arena and vice versa may be distilled from the enlisting of private capital to the task of national development. Thus, the private sector was first pronounced a useful supplement to the public sector following the Thirteenth Party Congress in October 1987. At that point, it was to be encouraged, but was to exist alongside other forms of co-operative ownership.³⁸ In the countryside, the People's Communes as the basic administrative unit were dismantled in favour of, in practice, private ownership.³⁹ Nevertheless, overall, the indigenous private sector was kept small with public ownership continuing to form 'the basis of the socialist economic system'. SOEs remained the main source of national industrial output.⁴⁰ Thus, at least in the first instance, solutions to socialist

³⁵ Ding Qingfen, 'More Chinese Firms Opt for M&As' [10 July 2012] ChinaDaily.com.cn <http://www.chinadaily.com.cn/bizchina/2012-07/10/content_15564004.htm> accessed 25 July 2012.

³⁶ Mingqi Li, *The Rise of China and the Demise of the Capitalist World Order* (Pluto Press 2008) 62.

³⁷ Wang Hui, 'The New Criticism' in Chaohua Wang, *ibid* (n 9) 79.

³⁸ John Gittings, *The Changing Face of China: From Mao to Market* (OUP 2006) 116-17.

³⁹ *ibid* 128.

⁴⁰ Jian Zhou, *ibid* (n 29) 115.

quandaries were to be found in the exterior. The door of the national economy was prized open for foreign private capital to provide resources, now propagated as both necessary and lacking - money, technology, management skills and business know how. Aided by purposefully designed legal vehicles, such as joint ventures and wholly owned foreign enterprises, these imported resources were to transform China's economic topography and propel it towards the ultimate goal of catching up with the West.⁴¹ It was only at a second stage, and against the backdrop of a falling growth rate, that domestic private capital was invited to join FDI in infiltrating sectors traditionally reserved for SOEs.⁴² In July 2011 a Chinese private company was the first to be licensed to construct a cross-border natural gas pipeline between Kazakhstan and Xinjiang.⁴³ A survey of private companies with annual revenues of over RMB300 million conducted by the All-China Federation of Industry reported 50.9% and 79.5% year-on-year increase in assets and profit respectively.⁴⁴ A year later, Yunnan provincial government announced it was looking for private capital to exploit the area's rich reserves of mineral and energy resources.⁴⁵ Detailed policies were to be unveiled to allow private capital in telecommunications, until now a strategic industry with restricted entry for non-state investment.⁴⁶ By March 2013, in a bid to break state monopoly, Wang Fang, deputy head of the China's State Commission Office for Public Sector

⁴¹ *ibid* 43-45.

⁴² See, for example 'New lure for private investment in SOEs' [25 Dec 2012] Xinhua News Agency <http://news.xinhuanet.com/english/business/2012-05/25/c_131611324.htm> accessed 16 July 2012; according to Li Pumin, spokesman for the National Development and Reform Commission (NDRC), China's top planning body, the focus of the rules on private investment in state sectors published is 'to widen market access to stimulate the vitality of private capital' in accordance with the pledge made by premier Wen Jiabao in March 2012. 'Private investment Details Released' [6 June 2012] China Daily <http://www.china.org.cn/business/2012-06/06/content_25579566.htm> accessed 22 June 2012.

⁴³ 'Private firms eager to tap more sectors' [17 July 2012] China Daily <http://www.china.org.cn/business/2012-07/17/content_25929223.htm> accessed 16 Aug 2012.

⁴⁴ Xinhua News Agency 'IT giant Huawei leads top 500 Chinese private firms 2010: survey' [25 Aug 2011] China. Org.cn <http://china.org.cn/business/2011-08/25/content_23284194.htm> accessed 29 July 2012.

⁴⁵ Wang Qian, 'Chinese Mining Seeks Investors' [18 July 2012] China Daily <http://www.chinadaily.com.cn/china/2012-07/18/content_15592901.htm> accessed 15 Aug 2012.

⁴⁶ Rich Zhu, 'Private Capital Likely For Telecom Sector' [26 July 2012] Shanghai Daily <<http://www.shanghaidaily.com/nsp/Business/2012/07/26/Private%2Bcapital%2Blikely%2Bfor%2Btelecom%2Bsector/>> accessed 16 Aug 2012.

Reform announced the introduction of private capital into railways construction and operation.⁴⁷ These developments were homogenised into a coherent policy when, in its 2013 session, the NPC proclaimed that controls over market access for the non-public sector is to be relaxed as governmental investment decreases.⁴⁸ In addition, private capital is encouraged to participate in the country's ODI drive, with more BITs promised to facilitate its border crossing. Further, now legitimized and expanding, private capital has found its voice. Thus, in a July 2012 critique of the measures aimed at encouraging ODI by private enterprises, the All China Private Enterprises Federation (ACPEF) called for SOEs monopolies to be dismantled and for the private sector to be consolidated.⁴⁹ In other words, in the encounter between domestic and foreign capital the external integrated into the interior, and the interior is now making its way into the external. Simultaneously, Chinese private capital is also questioning the terms of its incorporation into both arenas, so as to challenge the very structural and ideological foundations of China's eco-political model.

A preoccupation with this interconnectedness between the international and the domestic can also be discerned at the leadership level. The slogan 'Domestic, external, two big situations' (*guonei, guowai, liangge daju*) was a major theme of a Central Work Conference on Foreign Affairs convened by the Chinese Communist Party (CCP) as early as August 2006.⁵⁰ The Conference's top priority was to ensure that China's international activities support her domestic objectives.⁵¹ Excluding for present purposes the emergence of dissenting voices⁵² and workers' resistance,⁵³ implied in this discourse is an

⁴⁷ 'Private Capital Introduction to Break Railway Monopoly: Official' [11 March 2013] Xinhua News Agency <http://news.xinhuanet.com/english/china/2013-03/11/c_132224670.htm> accessed 29 April 2013.

⁴⁸ 'China to Further "Stimulate" Private Investment: Report' [5 March 2013] Xinhua News Agency <http://news.xinhuanet.com/english/china/2013-03/05/c_132208412.htm> accessed 29 April 2013.

⁴⁹ Song Shengxia, 'Guidelines Not Enough' [10 July 2012] People's Daily <<http://english.people.com.cn/90778/7869918.html>> accessed 25 July 2012.

⁵⁰ Bonnie S. Glaser, 'Ensuring the "Go Abroad" Policy Serves China's Domestic Priorities' (2007) 7 issue 5 China Brief 2-3 <http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=4038> accessed 12 July 2012.

⁵¹ *ibid* 2.

⁵² See generally for example An Chen and Dong Chen, *ibid* (n 10).

acceptance of the current world order, and an understanding of national development in terms of a need to absorb external standards and structures so as to secure a self-serving integration. At the same time, this discursive criterion of own benefit may also point to a utilitarian approach rather than normative sanctioning, whereby the pursuit of empowerment remains the overriding object of the act of incorporation.⁵⁴ 'Self-serving' thus denotes the possibility that the process of assimilation may leave space for variations. As suggested by Clegg, it may be finely tuned, so as to subtly influence the world order from within, rather than pursue one-way adaptation.⁵⁵ It may also intimate a potential for withdrawal should circumstances so dictate.⁵⁶ The complexities of China's quest for modernity, her long and divergent history, her multi-faceted uniqueness and the route by which she was propelled towards integration, render this possibility particularly intriguing. On further analysis, parallels with the Western experience may well be revealed as potentially superficial. It is possible Polanyi's self-replicating 'home' and 'abroad' analogue processes of violent industrialisation and colonialisation cannot be properly equated with China's contemporary global search for commercial partnerships and win-win economic diplomacy.⁵⁷ Whether or not she represents another instance of national succumbing to an expansive neoliberal hegemony is polemical.⁵⁸ But even if one is to accept that she is, unlike in the West, such succumbing did not come about as an evolutionary development in a continuum of non-contingent structures. If European industrialization represents an 'intervening' rather than an 'independent' event, and an integral part of two or three centuries of interaction between finance, capitalism, militarism and imperialism,⁵⁹ until the

⁵³ 'Will Chinese Workers Challenge Global Capitalism?' interview with Li Mingqi, The Real News <http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=5502> accessed 29 July 2012.

⁵⁴ Kong Qingjiang, 'Bilateral Investment Treaties: The Chinese Approach and Practice' in B. S. Chimni, S. Ko Swan and others (eds) *Asian Book of International Law 1998-1999* (Volume 8 Martinus Nijhoff Publishers, 2003) 110.

⁵⁵ Jenny Clegg, *China's Global Strategy: Toward a Multipolar World* (Pluto Press 2009) 6-7.

⁵⁶ But see Westra, *ibid* (n 22) 146-75 for an argument that China is chained to the US designed order.

⁵⁷ *ibid* 4.

⁵⁸ For a view of China as an instance of 'neoliberalism with Chinese Characteristics' see David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 120-51; for a dissenting view see Giovanni Arrighi, *Adam Smith in Beijing: Lineages of the Twenty-First Century* (Verso 2007) 357-58; see also Samir Amin, 'China, Market Socialism, and US Hegemony' (2005) 28 3 Review 274-5.

⁵⁹ Arrighi, *ibid* 272.

19th century China was neither industrialised in the Westerncentric sense, nor a participant in the capitalist world-economy. Her incorporation, when it finally came, was achieved via compulsion and trauma. Implicated in this traumatic rupture were major transformations of both her internal structures and external projections.⁶⁰ Markets are not new to China – traditional Chinese society had vast regional and inter-regional markets.⁶¹ However, her 19th century violent encounter with Europe meant that, for the first time, the process of markets formation became entangled with the colonial pressures of world capitalism.⁶² In this entanglement, the dynamics of the Chinese tributary system were propelled into an encounter with Western dialectics of militarily competing and expansionist nation-states on the one hand, and a pull towards a prescriptively uniform interstate system on the other.⁶³ It was a novel landscape in which China had to navigate her way from the periphery to the core. Internal truths were pitched against external realities in a process of national re-invention, one that was founded on a different historical path, and thus impregnated with multiple potential outcomes. Whether one views her as a ‘civilization state’ or a ‘nation-state’⁶⁴, unlike many other non-European states, her sense of sovereign integrity is not the outcome of Western imperialist manipulations. Rather, it existed before the Great Wall was finally breached, and may well continue to guide the country’s quest for her own identity, notwithstanding the interstate system’s impulse for uniformity.

The above is by way of intimation of some of the issues that inhabit the complexity of the Chinese phenomenon. They will come to the forefront later in the work when I look at the country’s paradigm. But this is not to say that they are absent from the subject of this chapter. For, in what appears to be another manifestation of Foucault’s eco-political-juridical ensemble, Chinese transformative discourse incorporates juridical innovations. On the domestic front, Wang Yi adopts Henry Maine’s conceptualization of human development

⁶⁰ Mingqi Li, *ibid* (n 36) 5.

⁶¹ Wang Hui, *ibid* (n 37) 64; Arrighi, *ibid* (n 59) 321-26.

⁶² Wang Hui, *ibid* 64.

⁶³ Arrighi, *ibid* (n 59) 314-20.

⁶⁴ For a view of China as a civilization see Martin Jacques, *When China Rules the World: The Rise of the Middle Kingdom and the End of the Western World* (Allen Lane 2009) 194-232.

as a progress from 'status to contract'. He observes the way in which the Chinese government utilises the modern legal paradigm of contractual relationships 'to shrug off political debts and moral obligations bequeathed by the previous ideological regime. In consequence a whole generation is being unjustly discarded and sacrificed'.⁶⁵ A private property framework was created, first in order to serve foreign investors, and then to accommodate China's own emergent capital owning class. The same applies to sectors such as stock exchanges, insurance and financial services.⁶⁶ Municipal law designed to regulate, encourage and protect foreign investment was developed, with calls for its coherence to be improved through the adoption of a unified Foreign Direct Investment Code.⁶⁷ On the international front, China appears to have progressively shed off past mistrust of IL as a tool of hegemony and imperialist ambitions. She participates and contributes to its development,⁶⁸ has become an actor in the global BITs program, and seems to have come close to accepting customary IL.⁶⁹ As we saw in earlier chapters, Economic IL serves to uphold the existing world order and balance of power through binding and enforceable rules.⁷⁰ China's evolving BITs program can thus be viewed as signalling her changing attitude toward the system it underpins, a change that is complemented internally by the domestic application of market doctrines and neoclassical economics.⁷¹

⁶⁵ Wang Yi, 'From Status to Contract' in Chaohua Wang, *ibid* (n 9) 190.

⁶⁶ Odd Arne Westad, 'China's International Future' [2012] China Geoeconomic Strategy 6 <<http://www2.lse.ac.uk/IDEAS/publications/reports/pdf/SR012/westad.pdf>> accessed 13 July 2012.

⁶⁷ Wenhua Shan, *The Legal Framework of EU-China Investment Relations: A Critical Appraisal* (Hart Publishing 2005).

⁶⁸ For a discussion of China's contribution to IL see Wang Zonglai and Hu Bin, 'China's Reform and Opening-up and International Law' (2010) 9 Chinese Journal of International Law 193.

⁶⁹ 'Agreement on the encouragement and Reciprocal Protection of Investment between the Government of The Republic of Korea and the Government of the People's Republic of China' (2007) art. 4(1) <http://unctad.org/sections/dite/jia/docs/bits/korea_china.pdf> accessed 14 June 2012; 'Agreement Among the Government of Japan and the Government of The republic of Korea and The Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment' (May 2012) art 1(c) <http://www.mofa.go.jp/announce/announce/2012/5/pdfs/0513_01_01.pdf> accessed 14 July 2012; Ye Ji, *ibid* (n 8) 96-97; see also Schill, *Tearing Down* *ibid* (n 18) 79.

⁷⁰ See also An Chen and Dong Chen, *ibid* (n 10) 399.

⁷¹ Ye Ji, *ibid* (n 8) 99.

Different sites different perspectives

The Western site

BITs, we recall, were born out of the extension of self-determination to formerly colonised territories.⁷² It was a juridical innovation aimed at preserving imperialist dynamics and power structures within an expanded interstate system, a response to the need to protect Western capital from the vagaries of a new and resistant non-European sovereignty.⁷³ Such protection was premised on the absence of reciprocity – obligations-free investments on the one hand, and obligations-laden protections on the other, would flow in opposite directions across the capital exporting/capital importing, North/South divide. One should thus not be surprised to find within Western literature on Chinese BITs a pre-occupation with their significance to her functioning as a host country, and the extent to which the protection she purports to offer to foreign investors is trustworthy.⁷⁴ By contrast, there appears to be little interest in the treaties' impact on her internal wellbeing. In addition, there are also attempts at assessing the systemic implications of China's passage through the global BITs network, including the effect of her crossing the global North/South divide to become a home country of certain import. Views diverge. For Schill, such passage serves to affirm the value of investment IL to developing countries. This, he argues, vindicates his assertion that the developed/developing dichotomy is overstated.⁷⁵ It is also said to lend support to his hypothesis that the BITs network is in reality a non-hegemonic multilateral arrangement, the absence of a multilateral treaty notwithstanding. China, he argues, is a case in point by virtue of her negotiating power, such that enables her to decline

⁷² Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law, CUP 2004) 209, 223-24.

⁷³ *ibid*; Karl P. Sauvant and Jose' E Alvarez, 'Introduction: International investment Law in Transition' in Jose' E Alvarez and Karl P. Sauvant with Kamil Gerrard Ahmed and Gabriela P. Vizcaino (eds) *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP 2011) xxxi.

⁷⁴ See for example Michael J. Moser, 'Do China's BITs Have Teeth?' in Michael J. Moser (ed), *Business disputes' in China* (2nd edn, JurisNet LLC 2009) 245-48; for a view that China's new generation BITs transform them into effective and powerful tools of investment protection see Schill, *Tearing Down* *ibid* (n 18) 77.

⁷⁵ Schill, *Tearing Down* *ibid* (n 18) 73; Schill, *The Multilateralization*, *ibid* (n 18) 57.

certain standards desired by capital exporting countries.⁷⁶ Sauvants and Alvarez, on the other hand, point to a systemic readjustment in the direction of more limited protection and greater space for government action. This, they say, was occasioned by, inter alia, the rise of investors headquartered in emerging markets, including China.⁷⁷ Sachs predicts a change in the world order, and questions the ability of Western law to maintain its dominance over the international investment regime.⁷⁸ Seen through the lens of legal pluralism, the expectation is that China will become a dominant site of governance. In world-system analysis terms, she will make her way to the top echelon of the interstate hierarchical ladder.

These extrapolations from China's arrival on the BITs scene are vulnerable to questioning. Given the primacy of the US site of governance, US BITs practice provides a suitable example. Following in the footsteps of its 2004 predecessor, the new US Model BIT 2012 indeed limits FET and full protection and security standards of treatment to the international minimum standard (IMS).⁷⁹ However, the IMS remains defined by reference to an external baseline of customary IL, rather than developing countries' preferred FET in accordance with the host country's actual prevailing circumstances.⁸⁰ Further, the recommendation that the scope of the IMS for the purpose of the FET should be limited to the one articulated in the *Glamis Gold*⁸¹ was not adopted.⁸² Other

⁷⁶ *ibid* 114.

⁷⁷ Sauvants and Alvarez, *ibid* (n 73) xxxiv, xli.

⁷⁸ Jeffrey D. Sachs, 'The Context: Foreign Investment and the Changing Global Economic Reality' in Sauvants and Alvarez, *ibid* (n 73) I-ii.

⁷⁹ '2012 U.S Model Bilateral Investment Treaty: Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment' art 5 (2)

<http://www.state.gov/documents/organization/188371.pdf> accessed 17 July 2012.

⁸⁰ *ibid*; Xiuli Han, 'The Application of the Principles of Proportionality in *Tecmed v Mexico*' (2007) 63 Chinese Journal of International Law 635 at 637.

⁸¹ In *Glamis Gold*, an ICSID case brought under NAFTA, the tribunal held that the FET has not evolved under customary international law since it was first articulated in the *Neer* case: violation 'requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of process, evident discrimination, or a manifest lack of reasons'. *Glamis Gold Ltd V United States of America* [8 June 2009] ICSID Tribunal, Not Indicated para 627 http://italaw.com/documents/Glamis_Award.pdf accessed 9 Aug 2012.

⁸² Paolo Di Rosa, 'The New 2012 U.S Model BIT: Staying the Course' [1 June 2012] Kluwer Arbitration Blog

recommendations for restrictions on protection, e.g. limiting the scope of expropriation to direct taking, prohibiting the multiplying effect of the most favoured nation (MFN) clause, limiting national treatment (NT) to measures with discriminatory intent, and curbing the range of claims for violation of the IMS were all similarly overlooked.⁸³ In other words, changes in the patterns of investment flow did produce calls for lesser protection. However, at least as far as US practice is concerned, such calls remain for most part unheeded, leaving all substantive protection provisions unaltered.⁸⁴ Presumably, this reflects an enduring emphasis by the US government and its TNCs on the protection of their capital exporting interests. Such presumption is lent support by the key changes introduced to tackle investments in countries with state-led economies. The US 2012 Model BIT endeavours to address perceived concerns about investment by SOEs. It does so by means of a broader prohibition on performance requirements, whereby the state is barred from requiring the use of domestic technology.⁸⁵ A new provision imposes on the state an obligation to allow foreign investors to participate in technical and similar standards setting.⁸⁶ This stipulation forms part of general new transparency requirements for advance publication and consultation of proposed laws and regulations pertaining to matters covered by the treaty.⁸⁷ A footnote on delegated government authority was added to ensure that SOEs are covered by the BITs obligations.⁸⁸ In other words, under the catchword of transparency, sovereign regulatory space is prized open to private interests, so as to enable TNCs' participation in domestic legislative processes. Thus, at least in the dominant US site of governance, any relatively novel trend in the direction of diminution in

<http://kluwerarbitrationblog.com/blog/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/> accessed 7 Aug 2012; in the case of *Railroad Development Corporation v the Republic of Guatemala* (Award 29 June 2012) ICSID Case No. ARB/07/23 the tribunal adopted the reasoning in *ADF Group Inc. v USA* (NAFTA) (Award, 9 January 2003) and *Waste Management v Mexico* (NAFTA) (Final Award, 30 April 2004) to hold that the minimum standard of treatment is constantly in a process of development. The tribunal opined that the requirement to provide FET as part of the minimum standard of treatment would be infringed by conduct that is 'arbitrary, grossly unfair, unjust or idiosyncratic'.

⁸³ Di Rosa, *ibid.*

⁸⁴ *ibid.*

⁸⁵ US Model Law 2012 *ibid* (77) art 8.

⁸⁶ *ibid* art 11(8).

⁸⁷ *ibid* art 11 (1)- (5).

⁸⁸ *ibid* n 8 to art 2 (2).

protection remains within the confines of the fundamental aim of peddling a free-market prescription under the umbrella of existing IL.⁸⁹ The response to geopolitical shifts appears then to be tactical in nature.

As will be seen later, Chinese BITs do maintain divergent features that belie the assertion of implied multilateralism. Further, from the waning of China's past resistance to Western practice, Schill extrapolates a rebuttal of the allegation of hegemonic pressures at play, and an indication that BITs' FDI/sovereign regulatory trade-off is beneficial. These conclusions are supported by an assertion of an equality of bargaining power.⁹⁰ In other words, China's change of attitude represents a free choice and one that is 'deliberate'.⁹¹ The difficulty is that, in itself and absent an empirical study, a shift from resistance to compliance is insufficient to support sweeping conclusions regarding benefits and voluntariness. Particularly in relation to the latter, as we saw, voluntariness may be imposed through informal and covert dynamics. Indeed, integration produces its own internal and external constraints on true independence of action. Here, we may observe again the fusion of national economic elites into transnational elites, so as to form collaborative and mutually dependent centres of discourse and policymaking. There is also the increased control by, and reliance on, foreign investment by TNCs.⁹² Hung Ho-Fung, for example, points to China's growing inability to renounce the consumers markets of the global North as the source of her growth, and the US financial vehicles as the store of value for her savings.⁹³ Similarly, Westra predicts that, were the country to give up her US dollars holdings, her current economic structure would

⁸⁹ 'Bilateral Investment Treaties and Related Agreement', US Department of State Diplomacy in Action <<http://www.state.gov/e/eb/afd/bit/index.htm>> accessed 17 July 2012.

⁹⁰ Schill, Tearing Down *ibid* (n 18) 37-38.

⁹¹ *ibid*.

⁹² 21 out of 28 industries opened by the Chinese government to foreign investment are controlled by foreign TNCs. Altogether foreign TNCs control a third of the entire market. 'China already has too much foreign investment, threatening its economic safety?' [31 Dec 2012] Global Times <<http://www.globaltimes.cn/NEWS/tabid/99/ID/607831/Backgroundre-China-already-has-too-much-foreign-investment-threatening-its>> accessed 18 May 2012; for a discussion of China's new elites see He Qinglian, 'A Listing Social Structure' in Chaohua Wang, *ibid* (n 9).

⁹³ Hung Ho-Fung, 'America's Head Servant? The PRC's Dilemma in the Global Crisis' (2009) 60 *New Left Review* <<http://newleftreview.org/II/60/ho-fung-hung-america-s-head-servant>> accessed 31 July 2012.

'unceremoniously unravel'.⁹⁴ These factors may well operate to reduce bargaining capacity. Further, even if China enjoys an enhanced bargaining power, the fact that one developing country appears to be doing better than others do not necessarily entail a retreat from a systemic developed/developing dichotomy. On the contrary, for Westra China's dollars facilitate Washington Consensus bludgeoning of weaker economies.⁹⁵ Seen through the lens of world-systems analysis, enhancement in China's negotiating power, if any, thus remains specific to her own passage in the interstate order. A fourth and related point is that hegemony as understood here is about the power to persuade others that they should follow the same path and that such path is universal and in their interests. From the perspective of world-systems analysis, it represents the ability to formulate rules and cultural discourse.⁹⁶ From this perspective, China's absorption into the BITs architecture may well be understood, at least in part, as the product of subordination to a hegemonic logic and an indication of diminution in bargaining power.

The Chinese site

Chinese writings point towards a site of governance with a different perspective. In line with Wang Chaohua's observation, they tend to focus on the domestic backdrop to China's BITs program, its significance to her national development and the quality of the protection the country's treaties extend to her ODI.⁹⁷ One may detect in these writings the anxieties of an enterprising Wallersteinian semi-peripheral state with an eye to her position in the existing hierarchy. Such anxieties veer on the side of engagement rather than schism or withdrawal.⁹⁸ However, Chinese publicists are not altogether oblivious to BITs' systemic context. Thus, some also reflect on the need to refashion the global network of investment treaties, and on China's capacity to become a site of

⁹⁴ Westra, *ibid* (n 22) 20.

⁹⁵ *ibid* 19.

⁹⁶ Hung Ho-Feng *ibid* (n 93) 58.

⁹⁷ See for example An Chen, 'Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily dismantled? Comments on Provisions concerning Dispute Settlement in Model US and Canadian BITS' (2006) 7 No 6 *Journal of World Investment & Trade* 899; Cai Congyan, *ibid* (n 33) 621; Ye Ji, *ibid* (n 8); Jian Zhou, *ibid* (n 29) 39.

⁹⁸ But see An Chen and Dong Chen, *ibid* (n 10) generally.

governance capable of generating a reformative trend. In other words, an instinct for self-serving integration coalesces with an awakening sense of empowerment and the possibility of change, albeit one that remains within existing parameters.

Significantly, the reformative trend appears linked to a conceptualisation of China as a leader of a developing camp where South-South rhetoric is increasingly underpinned by trade and investment co-operation.⁹⁹ Cai Congyan, for example, argues the need for the BITs practice to pursue a development orientated 'third way', so as to take account of the transformation of some developing countries into capital exporting nations. The risk of South-South BITs merely replicating the North-South ones, he argues, is to be avoided.¹⁰⁰ For him, the rapprochement in the BITs arena between China, leader of the developing and the US, leader of the developed, presents an opportunity for the two to engage in an equal dialogue. Its aim would be to refashion the current treaty regime into one that is 'more balanced, more responsive and more accountable'.¹⁰¹ Such refashioning would take into account the level of economic development, regulate the conduct of investors and incorporate the concept of sustainable development.¹⁰²

Four presumptions may be extrapolated from this proposition: first, the US is posited as a leader of only a section rather than the whole of the interstate system. Second, the developed/developing dichotomy persists as a feature of this system. Third, wealth accumulation is not contingent on a whole sway of the world population being suspended in an interminable state of underdevelopment. Fourth, equal bargaining between China and the US is possible, and the differences between the two are reconcilable. In other words, the world order and its dichotomy are neither inevitable nor incapable of

⁹⁹ See for example Chen Huiping, 'The Investor-State Dispute Settlement Mechanism: Where to Go in the 21st Century?' (2008) 9 6 *The Journal of World Investment & Trade* 467; Cai Congyan, 'Change of the Structure of International Investment and the Development of Developing countries' BIT Practice – Toward a Third Way of BIT Practice' (2007) 8 6 *The Journal of World Investment & Trade* 830.

¹⁰⁰ Cai Congyan, *ibid* generally.

¹⁰¹ Cai Congyan, *ibid* (n 34) 458; to date, China has not signed a BIT with the US.

¹⁰² *ibid* 474-77.

reform. Investment treaties have the potential to be a mechanism for equitable and even development. The issue is merely one of negotiated management. In this potential for transformation, China has a leadership role to play. Her capacity to lead in the direction of a global non-zero game is embedded in the convergence her own national interest in investment protection with political weight that cuts across both developed and developing camps. As a result she is both willing and capable of bargaining with the US.¹⁰³ Cai's allusion to China as a 'leader state' thus implicates Arrighi's combination of dominance and moral leadership that is exercised in the interest of all but does not hold out itself as a model to be compulsively mimicked.¹⁰⁴ At first blush, this leadership remains within the parameters of the developmentalist discourse, first introduced in 1945, as a way of defining the 'other'.¹⁰⁵ However, here again, one needs to take account of the possibility that in its Chinese context, development imports a specific normative content. For Kong Qingjiang, for example, concluding BITs with developing countries was politically significant because it accentuated 'China's commitment to South-South co-operation'.¹⁰⁶ The suggestion is that investment treaties are, or at least can be, vehicles for mutually beneficial parallel development rather than power-based device for capital accumulation.¹⁰⁷ Yet, the 2012 US Model BIT and the Trans-Pacific Economic Partnership (TPP), rumoured to contain higher than ever TNCs' dictated levels of protection, do not point in this direction. In particular the TPP is open for more countries to join overtime. It is thus positioned to become incrementally a multilateral agreement that was conceived and executed under the unilateral leadership of the US and her TNCs.¹⁰⁸ As observed earlier in this work, such leadership strives towards the conversion of the interstate order into a uniform world empire with little tolerance for competitive national variances.

¹⁰³ *ibid* 474.

¹⁰⁴ G. Arrighi and B Silver, *Chaos and Governance in the Modern World System* (University of Minnesota Press 1999) 26-28; David Harvey, *The New Imperialism* (OUP 2003) 36-37.

¹⁰⁵ Wallerstein, *ibid* (n 25) 10.

¹⁰⁶ Kong Qingjiang *ibid* (n 54) 113.

¹⁰⁷ Ho-fung Hung (ed), *China and the Transformation of Global Capitalism* (The John Hopkins University Press 2009) 24-26.

¹⁰⁸ 'The Trans-Pacific Partnership Free Trade Agreement: NAFTA of the Pacific Rim' <<http://www.citizenstrade.org/ctc/trade-policies/tpp-potential-trade-policy-problems/>> accessed 21 July 2012.

In contrast to Cai, An Chen's is a more cautious perspective, one that calls for prudence in the pursuance of internationalised jurisdiction.¹⁰⁹ The two share a premise that BITs are effective in regulating transnational investment relationship.¹¹⁰ However, rather than envisioning a future convergence, An Chen goes on to probe the fault lines within such effectiveness and their implications for a developing country such as China. His focus is on the negative dynamic of home/host distribution of obligations, whereby the higher the protection afforded to the former, the heavier the duties imposed on the latter.¹¹¹ Invoking China's 'bitter historical lessons over 100 years',¹¹² Argentina's move to limit her involvement with international tribunals in the wake of the claims triggered by measures taken at a time of economic distress,¹¹³ and the US and Canada's recent recoil from extensive openness,¹¹⁴ he warns against hasty liberalisation. Prudence, says An Chen, dictates the preservation of what he identifies as the 'Four Great Safeguards' provided in the ICSID Convention and the Vienna Convention on the Laws of Treaties 1969 (Vienna Convention), but dismantled in the US and Canada Model BITs. Such safeguards comprise four rights. That is, (i) exhaustion of local remedies in ICSID Article 26 (ii) consent on a case by case basis in ICSID Article 25(1) (iii) the right to apply the host country's laws in ICSID article 42(1) and (iv) the right to invoke national security exceptions in the Vienna Convention Article 62(1).¹¹⁵ Accepting the paradigm of the powerful, he concludes, does not suit China's current circumstances as a major recipient of FDI. In support of this conclusion, he points to the disconnect between FDI flow and BITs, as evidenced by the fact that China does not have a treaty with the US, yet the US often tops the list of her foreign investors.¹¹⁶ This cautionary note proved somewhat prophetic. For two years later Chen Huiping was able to point to a revival of the Four Great Safeguards or what he terms the 'four safety valves'.¹¹⁷

¹⁰⁹ An Chen, *ibid* (n 97) 901.

¹¹⁰ *ibid* 899.

¹¹¹ *ibid* 913.

¹¹² *ibid* 901.

¹¹³ *ibid* 921-26.

¹¹⁴ *ibid* 927-29.

¹¹⁵ *ibid* 908-13.

¹¹⁶ *ibid* 913-20.

¹¹⁷ Chen Huiping, *ibid* (n 99) 467.

For a while, points Chen, developing countries, China included, abandoned these safety valves to follow the NAFTA type highly protective investment-state dispute resolution mechanism.¹¹⁸ However, the resulting flood of ICSID cases and the level of compensation awarded triggered a withdrawal from excessive protection and a return to safety. Thus, Guatemala for example notified ICSID in 2003 that her consent would be subject to exhaustion of local remedies; Ecuador excluded certain types of disputes from the scope of her consent, and Bolivia withdrew her consent altogether in 2007.¹¹⁹ China, Chen recommends, should follow suit.¹²⁰ Interestingly, the Ministry of Justice sponsored his research.¹²¹

Three points merit highlighting. First, An Chen does not attribute to China the power on which Cai seems to rely. Writing against the background of the conclusion of the China-Germany BITs 2003 with its unreserved acceptance of ICSID arbitration, An's main preoccupation is with the risk associated with yielding to external pressures. Indeed, contrary to Schill's notion of equal bargaining power, he observes that 'when China now negotiates with some foreign countries to conclude new BITs or to revise existing ones, such countries provide the US Model BIT or its variations as the negotiation model and require to negotiate with China on this basis'.¹²² Similarly, Chen Huiping links the renouncement of the Four Safety Valves to US dominance and developing countries' lack of choice.¹²³ Second, reformative analysis tends to be undertaken with one eye to the developed countries' BITs practice. The aim is to reach a consensus rather than engage in conflict. Absent is a Sachs' type sense of newly accumulated power. Thus, Cai's postulation of possible reforms is premised on the shrinking differences between China and the US. Chen similarly deduces a potential for an emerging consensus in the direction of greater sovereignty, and the conversion of state-investor into state-state

¹¹⁸ *ibid* 467, 472-76.

¹¹⁹ *ibid* 476-78.

¹²⁰ *ibid* 478.

¹²¹ *ibid* 467.

¹²² An Chen, *ibid* (n 97) 904.

¹²³ Chen Huiping, *ibid* (n 99) 472.

arbitration.¹²⁴ Third, An Chen's note of caution against excess liberalisation is founded on an empirical, statistics-based assertion that China remains a predominantly capital importing, developing country. But what if the statistics were to change? What if China is to go up the ladder to become a predominantly capital exporting strong country? An Chen's answer to this question is to be found in his article written three years later in which he joins Dong Chen in conceptualizing the country as a leader state and, putting consensus aside, boldly reminds her of past association with the NIEO:

As the largest developing country peacefully rising in the world, China should play important role in the historical course of establishing the NIEO. Under such background, strategically positioning China's role in participating international economic activities and establishing the NIEO will not only be expected by the international community but also needed by China herself who is to realize her strategic perspective of Peaceful Rising.¹²⁵

Such NIEO will be 'just, fair and reasonable', one in the creation of which the coalition of the weak will participate, and into which China will bring not only her modernity, but also her historical heritage.¹²⁶ The year is 2009 and China is already well into her ODI ambition. Yet, An Chen and Dong Chen remain stubbornly anchored in the developed/developing dichotomy and in a search for a new order capable of addressing global inequities.

The impact of these critical voices on China's BITs practice remains to be seen. For the multiplicity of class and foreign capital interests that inhabit the country since the introduction of her open door policies, raises the possibility of

¹²⁴ *ibid* 467-78; 479-96.

¹²⁵ An Chen and Dong Chen, *ibid* (n 10) 360.

¹²⁶ *ibid* generally.

outcomes being shaped by power. Fewsmith attributes such power to public intellectuals of the Chinese so-called 'New Left' when, somewhat mistrustfully, he points to the Hu Jintao's leadership's active backing for their critique of neoliberal globalisation.¹²⁷ By contrast, however, and reminiscent of policy formation processes in neoliberal regimes generally, He Qinglian observes the crystallization of new elites that strive to acquire a commanding position within China's political, economic and cultural life.¹²⁸ Consequently, 'more and more economic policies are based not on considerations of any overall national interest, but on a nexus of benefits to a specific social group'.¹²⁹ Similarly, Hung refers to coastal export sectors' vested interests in perpetuating the current growth model.¹³⁰ Thus, in appending their reformative hopes to an emergent new global consensus, Cai and Chen may have overlooked elites' counter pursuit of constancy and expansion of the current order. Cai nevertheless asserts that a 'balanced paradigm' is on its way.¹³¹ An example, he argues, is Article 154 of the China-New Zealand FTA, which provides for some preliminary procedures aimed at preventing abuse of procedural rights.¹³² An emergent new balance may also be found in the 'fork in the road' provision in Article 15 (5) of the Japan, China, and Korea trilateral investment treaty 2012.¹³³ In addition, there is a three year time limit for the institution of arbitration proceedings,¹³⁴ intellectual property rights and prudent measures relating to financial services are excluded from the scope of consent to investor-state arbitration,¹³⁵ the state party may require the investor to submit first to a domestic administrative review¹³⁶ and the introduction or maintenance of

¹²⁷ Joseph Fewsmith, 'China under Hu Jintao' 14 China Leadership Monitor <http://media.hoover.org/sites/default/files/documents/clm14_jf.pdf> accessed 25 June 2012.

¹²⁸ He Qinglian, *ibid* (n 92) 163.

¹²⁹ *ibid* 185.

¹³⁰ Hung Ho-Feng, *ibid* (n 93).

¹³¹ Cai Congyan, *ibid* (n 33) 459.

¹³² 'China New Zealand Free Trade Agreement 2008' <<http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php>> accessed 9 Aug 2012.

¹³³ 'Agreement Among The Government of Japan, the Government of the People Republic of Korean and the Government of the People's Republic of China For The Promotion, Facilitation and Protection of Investments' 13 May 2012 <http://www.mofa.go.jp/announce/announce/2012/5/pdfs/0513_01_01.pdf> accessed 20 July 2012.

¹³⁴ *ibid* art 15 (11).

¹³⁵ *ibid* art 15 (12).

¹³⁶ *ibid* art 15 (7).

special formalities in connection with investment activities are permitted.¹³⁷ Yet, the Four Great Safeguards cannot be said to have been fully re-instated: the consent is not on a 'case by case' basis and the right to require the application of domestic law is not exercised.¹³⁸ Overall, the trend towards balance appears to be more in the nature of a cautionary compromise rather than a push for a substantive NIEO style divergence. Perhaps even more significant is China's recent enlisting of private capital to the task of reinventing the country as a global player.¹³⁹ For, as we saw in previous chapters, if the experience of the West is anything to go by, capital is amenable to forming a parallel power base, one that lobbies for the rolling back of the state's regulatory space. The aim is to secure spatial freedom and internationalised protection for investments. These combined elements of freedom and internationalisation form part of what Sornarajah classifies as TNCs and home states' 'free market paradigm'.¹⁴⁰ Indeed, the preamble to the ICSID Convention emphasises the role of private investment in international cooperation for economic development.¹⁴¹ From this perspective, China's conscription of private ODI may prove her most momentous turn in the direction of the neoliberal paradigm.

BITs – A Pathway to Integration

Historical background

The watershed

By the late 20th century, China appeared ready to actively participate in global capital accumulation.¹⁴² Yet, not so long ago, she was an active promoter of the

¹³⁷ *ibid* art 16 (1).

¹³⁸ *ibid* art 15 (4).

¹³⁹ *ibid* (n 4).

¹⁴⁰ M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000) 79.

¹⁴¹ 'ICSID Convention, Regulations and Rules as amended and in effect from 10 April 2012'

<<http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>> accessed 10 Aug 2012.

¹⁴² Mingqi Li, *ibid* (n 36) 5.

NIEO movement.¹⁴³ It was only with Chairman Mao's death and the subsequent launching of open door policies in the late 70s, that her anti-systemic, revolutionary period is said to have come to an end. In parallel, her interaction with foreign investment underwent a metamorphosis.

Thus, in what is broadly alluded to as the pre-1979 period,¹⁴⁴ China endorsed Egypt's right to nationalise the Suez Canal, describing such right as both legal and moral.¹⁴⁵ As late as April 1974, at the Special Session of the UN Assembly, Deng Xiaoping declared China's support for developing countries' permanent sovereignty over their natural resources and their right to control and regulate all foreign investment, including the unconditional right to nationalise it.¹⁴⁶ Chinese scholars endorsed the exclusion of IL from the CERDS.¹⁴⁷ Both the inviolability of private property and the principle of state responsibility for injury to aliens were publicly renounced. Indeed, as part of China's socialist transformation, non-public ownership of the means of production was not recognized constitutionally. The state's right to nationalise foreign property was declared an inherent attribute of sovereignty.¹⁴⁸ Between 1949 and 1957, foreign investments were nationalised or expropriated with either no compensation,¹⁴⁹ or with compensation that was limited to a fixed rate of interest.¹⁵⁰ State contracts or concessions were to be preserved, except where they were judged to be the outcome of plunder under unequal treaties. Surviving contracts were made subject to a sovereign right to re-negotiate, or unilaterally revise in response to a change in circumstances.¹⁵¹ Such stance made China integral to and, according to Kong Qingjiang, a leader of and a spokesman for the concerted move by the new countries to bring about a NIEO.¹⁵² A novel IL was to replace traditional principles and rules which, in the

¹⁴³ For a discussion of the NIEO movement see Chapter 2 text to n 217-53 pp 78-84.

¹⁴⁴ Kong Qingjiang, *ibid* (n 54) 107.

¹⁴⁵ Ye Ji, *ibid* (n 8) 87.

¹⁴⁶ *ibid*.

¹⁴⁷ *ibid* 96.

¹⁴⁸ Kong Qingjiang, *ibid* (n 54) 107-10.

¹⁴⁹ Wenhua Shan, *ibid* (n 67) 7-9; in 1979 partial compensation were paid for American assets (1979) 18 *International Law Materials* 551.

¹⁵⁰ Kong Qingjiang, *ibid* (n 54) 108.

¹⁵¹ *ibid* 108-09.

¹⁵² *ibid* 108-09.

words of the late Huan Xiang, senior diplomat and chairman of the Chinese Society of International Law ‘ (...) reflected the interest and demands of the bourgeoisie, the colonialists and in particular the imperialists’ and was used by them ‘as a means to carry out aggression, oppression and exploitation (...)’.¹⁵³

The post-1979 period saw China’s path to modernity turn towards foreign investment, as part of her newly adopted model for the acquisition of national wealth and power. Her first treaty was with Sweden in 1982.¹⁵⁴ By the end of July 2008, BITs were concluded with 126 countries, including 76 per cent of European states, over half of African countries and Pacific states, such as Australia and New Zealand.¹⁵⁵ In addition China signed the ICSID and MIGA treaties and participated in the negotiations for a multilateral investment agreement.¹⁵⁶

The evolution of China’s BITs program

China’s recent move towards harnessing private capital for the purpose of ODI implementation testifies to an evolution that was not merely quantitative. Indeed, the three decades since the inception of China’s BITs program saw it shifting from a so-called ‘conservative’ to a ‘liberal’ paradigm,¹⁵⁷ to a quest for a balance between the two.¹⁵⁸ Broadly, the post 1979 period may be sub-divided into three stages – China’s three BITs generations with a fourth, potentially on the way.¹⁵⁹ Throughout, the evolution of her investment treaties was inextricable from the country’s own institutional transformation.

Thus, in line with China’s then primary aim of becoming a FDI destination, the first generation (1982-1989) focused on treaties with capital exporting countries. By 1985, however, Chinese BITs became more diversified and,

¹⁵³ *ibid* 108.

¹⁵⁴ Schill, *Tearing Down* *ibid* (n 18) 81.

¹⁵⁵ Gallagher and Shan, *ibid* (n 29) 32-33.

¹⁵⁶ *ibid* 2.

¹⁵⁷ Gallagher and Shan, *ibid* (n 29) 37.

¹⁵⁸ Cai Congyan, *ibid* (n 34) 459.

¹⁵⁹ Gallagher and Shan, *ibid* (n 29) 35; but see Ye Ji, *ibid* (n 8) 83-85 referring to two generations of Chinese BITs.

starting with Thailand, targeted also developing countries. According to Kong, this reflected China's intention for her 'open door' policy to be 'all directional'.¹⁶⁰ A first Model BIT was introduced in 1984. It was followed in quick succession by a second Model BIT that was marked by free market paradigm's features such as NT (albeit one that was subject to local laws), market value as a measure of compensation for expropriation and an umbrella clause. Yet, disputes remained subject to local jurisdiction, except for the amount of compensation, which, at the request of either party (i.e. on a case by case basis) could be submitted to ad hoc arbitration.¹⁶¹ These innovations notwithstanding, BITs with developing countries retained special features. The preamble, the definition of investment and the consultation process displayed a general tone of comradely encouragement. Sovereignty and national jurisdiction were emphasized. The legality of expropriation was made subject to local jurisdiction, and flexibility was introduced to take account of national needs.¹⁶² For investments to enjoy protection under the China-Sri Lanka BIT, they need to be approved in writing and be undertaken upon such conditions as each party shall deem fit.¹⁶³ The obligation to encourage and promote is limited to investments that correspond to general economic policy.¹⁶⁴ Expropriation is conditional on being authorised and in accordance with municipal law.¹⁶⁵ The amount of compensation for expropriation is to be determined by the local court and in accordance with local law, though a dispute may be referred to ad hoc arbitration on request.¹⁶⁶ There is no indirect expropriation, no NT and the right of each party to apply prohibitions or restrictions for the protection of the national interest is unlimited.¹⁶⁷

¹⁶⁰ Kong Qingjiang, *ibid* (n 54) 113.

¹⁶¹ 'Chinese Model Version I' art 9; 'Chinese Model Version II' art 9, Gallagher and Shan, *ibid* (n 29) 421-31.

¹⁶² Li Shishi, 'Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China' in Paul de Waart, Paul Peters and Erik Deniers (eds), *International Law and Development* (Martinus Nijhoff Publishers 1988) 177-80.

¹⁶³ 'Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the People's Republic of China 1986' art 2 (1) (a) http://unctad.org/sections/dite/ia/docs/bits/china_srilanka.pdf accessed 22 July 2012.

¹⁶⁴ *ibid* art 3(1).

¹⁶⁵ *ibid* art 6 (1).

¹⁶⁶ *ibid* art 6 (2).

¹⁶⁷ *ibid* art 11.

In line with the global explosion in the number of BITs concluded during the 90s, the advancement of China's market economy and the country's entry into the WTO, the second generation (1990-1997)¹⁶⁸ saw the number of Chinese BITs double from 24 to 68.¹⁶⁹ Beyond quantitative expansion, the other main feature of this period is China's accession to ICSID in February 1993. Ratification was made subject to a reservation that limited ICSID jurisdiction to the determination of the amount of compensation for expropriation - a possible explanation for the paucity to date of claims involving China.¹⁷⁰ Nevertheless, it meant that from now on, her BITs practice could include an unconditional reference to ICSID. This evolution notwithstanding, many BITs of this period continued to follow the first generation template by omitting any reference to the Centre's jurisdiction.¹⁷¹ Probably the first BIT to include an unrestricted reference to ICSID was with Lithuania.¹⁷² This may reflect the diversity in treaties concluded with developing and transition countries, so as to take account of the divergence in their developmental concerns.¹⁷³ Some replicated China's BITs with developed countries modelled on European practice. Others, however, followed the Asian-African Legal Consultative Committee (AALCC) proposed Model BIT. It allowed for greater host state's control, along the lines envisioned by the UN Code of Conduct for Transnational Corporations.¹⁷⁴

The third generation of Chinese BITs (1998 onwards) saw a big leap in the direction of Western practice. Here, the word 'Western' is used (rather than the term 'international' or 'general' often found in the literature) to allude to the pluralism of economic IL. As seen in Chapter 2, economic IL is a variegated product of interaction between multiple sites of governance. The non-Western,

¹⁶⁸ Gallagher and Shan, *ibid* (n 29) 35; but see Cai Congyan, *ibid* (n 34) 459 which places the second generation of Chinese BITs in the years 1998-2005.

¹⁶⁹ Gallagher and Shan, *ibid* (n 29) 31-32.

¹⁷⁰ Guang Hong, 'Scope of Arbitration in Chinese BITs: Policies & Implications' (2009)(unpublished) 6 <http://works.bepress.com/guang_hong/1/> accessed 12 Aug 2012.

¹⁷¹ *ibid* 39.

¹⁷² 'Agreement Between the Government of the Republic of Lithuania and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment 1993' art 8 (2) b)

<http://unctad.org/sections/dite/ia/docs/bits/china_lithuania.pdf> accessed 22 July 2012.

¹⁷³ Kong Qingjiang, *ibid* (n 54) 113.

¹⁷⁴ Daniel Aguirre, *The Human Right to Development in a Globalized World* (Ashgate Publishing 1988) 161; *ibid*.

developing block of sites has in the meantime disintegrated to become, at least for now, somewhat mute. Nevertheless, much as the operation of power in the world-system may have muffled the voice of less strategic actors, their contribution to the formation of global legal pluralism should not be discounted altogether. The PSNR and the CERDS resolutions continue to constitute a source of principles of investment IL¹⁷⁵ and the Calvo doctrine is experiencing a revival.¹⁷⁶ In relation to China, the eleven BITs she renegotiated in the 2,000s remain confined to European countries.¹⁷⁷ Thus, putting aside for now the multiplying effect of the MFN standard of treatment conjured up by Western BITs practice, the special features of some of her BITs with developing countries remain standing.

Observed from this perspective of a contest between divergent sites, China's recent departure from past practices indicates a trajectory in the direction of that section of the global community that produced the currently dominant BITs practice, and in the interests of which this practice operates. The proposition that such shift may be normative rather than purely pragmatic is underscored by the fact that, by the time China's Model BIT was revised for the third time and substantially liberalised, the country was enjoying unprecedented levels of FDI.¹⁷⁸ If BITs are indeed no more than a practical device for attracting FDI, she had no need to liberalise. It is possible other factors were at work - the surge in China's own ODI, the consolidation of her market economy, the collapse of the Soviet Union and the increase in interstate competition for FDI.¹⁷⁹ Be it as it may, by the time of her third generation BITs China appeared ready, at least *prima facie*, to signal her willingness to be

¹⁷⁵ See for example M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 84; Iain Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 15.

¹⁷⁶ Wenhua Shan, 'Calvo Doctrine, State Sovereignty and the Changing Landscape of International Investment Law' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Studies in International Trade Law, Hart Publishing 2008) 248.

¹⁷⁷ Gallagher and Shan, *ibid* (n 29) 32.

¹⁷⁸ *ibid* 40.

¹⁷⁹ *ibid* 41.

incorporated into the prevailing order and accept 'a particularly American conception of investment rights'.¹⁸⁰

Notable in this signal is the wider access granted to international, including ICSID arbitration, for all investor-state disputes. The Third Model BIT does, however, retain some specific Chinese characteristics. To be covered investment has to be legally and regulatory compliant, the standards of national and non-discriminatory treatments and monetary transfers are similarly subject to lawfulness, the measure of compensation for expropriation makes no direct reference to the 'Hull formula' of 'adequate, prompt, and effective' recompense, and the dispute resolution clause contains a 'fork in the road' provision.¹⁸¹ Taken together, the repeated allusions to domestic law indicate an enduring attachment to sovereignty, albeit one that is now curtailed. According to Gallagher and Shan, the fact that the first treaty to be based on the third Model BIT prototype was with Barbados - a developing country - may have been 'pure coincidence'.¹⁸² Forty-four new and re-negotiated treaties followed. Most, but not all allow for ICSID jurisdiction.¹⁸³ In particular, the revised treaties with the Netherlands and Germany shed off some the Model BIT's Chinese characteristics. It is of little surprise that they were heralded as a 'breakthrough' in China's BITs practice¹⁸⁴ and 'a fundamental change in the country's foreign economic policy'.¹⁸⁵ For the practitioner Aaron Chandler, innovations such as a NT that is not qualified by a requirement to adhere to local laws and regulations, and an ICSID arbitration provision that is stripped of its 'fork in the road' constituent evidence 'a huge step in the direction of the economic system at the heart of international investment law: capitalism (...)'.¹⁸⁵

¹⁸⁰ James Petras and Henry Veltmeyer, *Multinationals on Trial: Foreign Investment Matters* (Ashgate Publishing Ltd 2007) 111.

¹⁸¹ Gallagher and Shan, *ibid* (n 29) 43-46, 439-51; a fork in the road provision operates to preclude an investor who has elected one of the prescribed dispute resolution options from exercising the other option.

¹⁸² *ibid* 40.

¹⁸³ *ibid* 41; one exception is the Qatar BIT that contains a first generation type dispute resolution provision and makes no reference to ICSID. 'Agreement between the Government of the People's Republic of China and the Government of the State of Qatar Concerning the Encouragement and Protection of Investments' (04/99) art 9

http://unctad.org/sections/dite/ia/docs/bits/china_qatar.pdf accessed 22 July 2012.

¹⁸⁴ Wenhua Shan, *ibid* (n 67) 217.

¹⁸⁵ Schill, *Tearing Down* *ibid* (n 18) 76.

China, he elaborates, 'knows the MFN clauses function like a "one-way ratchet" (...)'.¹⁸⁶ Once one treaty has been liberalised all other follow suit at least substantively.

'In between' BITs – an overview

The measured pace of China's internal and external transmutations meant that the progression of her BITs program was equally gradual. Consequently, her network of investment treaties may be said to reflect a shifting spectrum of policy and practice. The possibility that policy guides implementation is underscored by fact that at, least to date, revisions focus on BITs with capital exporting countries, whereas many of the country's South-South BITs remain 'conservatively' fashioned. This is notwithstanding the greater bargaining power attributed to the country. In other words, China's BITs program casts doubt over Schill's proposition that with strength came compliance, and that such compliance vindicates his assertion of BITs' non-hegemonic multilateralism. In reality, China did not use her position at the forefront of developmentalism to extract greater concessions. Indeed, writing in 1998, Kong Qingjiang points to guiding principles in the management of the country's economic co-operation. These in essence replicate the 'Five Principles of Peaceful Co-existence', first formulated in the 50s: sovereignty, equality and mutual benefit.¹⁸⁷ Since then, a general trajectory towards greater liberalisation along Western lines may be observed. However, a more careful analysis reveals a residue of specific features. Adopting Sornarajah's classification of two conflicting paradigms, she seems to be walking a winding path that brings together elements of both. In some treaties she adopts constituents of the 'free market paradigm' with its contractual sanctity, compensation for the taking of foreign property and international arbitration. In others, she espouses the opposing developing countries paradigm, e.g. localisation of foreign investment contract. In all of her treaties she restricts the entry of foreign investment, thereby rejecting the principle of capital movement that is entirely liberated. In

¹⁸⁶ Aaron M. Chandler, 'BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Practice' (2009) 43 no 3 *The International Lawyer* 1301.

¹⁸⁷ Kong Qingjiang, *ibid* (n 54) 110.

most, she shies away from the IMS, also a constituent of the free market prototype.¹⁸⁸

Still, the pluralism identified in China's BITs program may be overridden by the operation of the MFN clause, as well as arbitral practice.¹⁸⁹ In relation to the latter, the expansive interpretation applied by the *Tza Yap Shum* tribunal to the scope of consent and to the concept of 'indirect investment', the arbitrators' repeated emphasis on the overriding purpose of the BIT to promote investment¹⁹⁰ and their refusal to draw inferences from provisions in other treaties,¹⁹¹ all point to the possibility that interactions with a transnational site of governance might cloak her BITs with a veil of uniformity.¹⁹² This point will be returned to later. For now, let us say that in light of imposed uniformity, Cai may be unduly concerned about ineffective protection for China's ODI by reason of a mismatch between her treaties and the patterns of her overseas investment.¹⁹³

With this in mind, this section will now proceed to summarise some of the main BITs provisions as they appear in Chinese treaties. The subject is wide, making a comprehensive review impossible. The focus is therefore on those provisions that most illustrate the plurality of China's BITs policy and practice, and the interplay between her interior and the exterior.

Preamble

Chinese preambles generally follow a pattern comprising three main principles: (i) facilitation and attraction of investment; (ii) contribution to the prosperity of

¹⁸⁸ For a discussion of the two paradigms see Sornarajah, *ibid* (n 140) 77-83.

¹⁸⁹ For an argument that the MFN should be extended also to procedural rights in Chinese BITs see, for example, Chandler, *ibid* (n 186) 1304-09.

¹⁹⁰ *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6 (19 June 2009) Decision on Jurisdiction and Competence paras 103, 108.

¹⁹¹ *ibid* paras 109-1110.

¹⁹² There is no principle of precedents, but several tribunals have acknowledged relying on earlier awards.

¹⁹³ Cai Congyan, *ibid* (n 33) generally.

both contracting parties; and (iii) equality and mutual benefit.¹⁹⁴ The last two reflect the three policy principles identified by Kong. Their effect is to curtail pro-investment interpretive presumptions. Some preambles veer on the side of the host state by expressly recognizing that investments should be made in accordance with domestic laws and regulations. The preamble in the Trinidad and Tobago and Guyana BITs (2002 and 2003 respectively) contain ‘exception clause’ relating to health, safety and environmental measures.¹⁹⁵ Another China specific feature is that, to date, the preamble avoids any reference to private investment. This reflects the dominance of public ownership in her domestic arena.¹⁹⁶ It would be interesting to observe the effect of the country’s recent policy of encouragement of private capital ODI on this feature. Notably, the trilateral investment treaty with Japan and Korea 2012 already refers to liberalisation of investment as conducive to ‘stimulating business initiative of the investors and increase prosperity (...)’.¹⁹⁷

Investment

Most Chinese BITs adopt a broad assets-based definition of ‘investment’ that is followed by an illustrative list of such assets. The definition is qualified only by a requirement for the investment to be lawful and regulatory compliant. This qualification was removed, however, from some recent BITs, notably the 2003 Germany and 2004 Uganda BITs. Another innovation, first introduced in the Gabon BIT 1997, concerns the introduction of ‘indirect investment’. The 2003 Germany BIT goes on to explain ‘invested indirectly’ as investment made by an investor in the home country, but operated via a subsidiary in the host state.¹⁹⁸ In *Tza Yap Shun* the Tribunal considered whether the Peru BIT that does not

¹⁹⁴ But the third principle has been omitted, for example, from the preamble to the 2003 Germany BIT and the 2012 trilateral investment treaty with Japan and Korea. ‘Agreement between the People’s republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investment 2003’

<http://unctad.org/sections/dite/ia/docs/bits/china_germany.pdf> accessed 2 Aug 2012; treaty with Japan and Korea, *ibid* (n 133).

¹⁹⁵ Gallagher and Shan, *ibid* (n 29) 49-51.

¹⁹⁶ Kong Qingjiang, *ibid* (n 54) 116.

¹⁹⁷ Treaty with Japan and Korea, *ibid* (n 133).

¹⁹⁸ *ibid* 54-69; see also Wei Shen, ‘The Good, The Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in *Tza Yap Shun v The Republic of Peru*’ (2011) 10 1 Chinese Journal of International Law 55 at 70-71.

expressly protect indirect investments covered Mr Tza's indirect ownership of the Peruvian company through an offshore, non-Chinese entity. The arbitrators exercised the wide discretion available to them by virtue of the absence of definition of investment in Article 25(1) of the ICSID Convention to rule that it did.¹⁹⁹ It refused to draw a contrary inference from the explicit protection of indirect investments in other treaties.²⁰⁰

Fair and equitable treatment

In line with general practice, FET forms part of the substantive provisions in most Chinese treaties.²⁰¹ Yet, given FET's potential intrusion into domestic rules making and proceedings, it remains controversial among Chinese commentators.²⁰² Yu Jingsong and Liang Danni, for example, call for the exclusion of FET-based claims.²⁰³ Chen Huiping and Huang Yumei want the standard removed altogether from new BITs.²⁰⁴ Han Xiuli alerts Chinese scholars and authorities to the inclusion in FET of an expansive principle of proportionality the impact of which, he argues, is to afford excessive protection to private property and infringe the state's regulatory discretion.²⁰⁵

This sense of wariness towards FET permeates China's BITs program. Whether or not the treatment extends to the stage of admission is not made clear in her third Model BIT.²⁰⁶ Further, most Chinese FET clauses do not contain an express interpretive criterion. Where they do, criteria are diverse. Some allude to domestic law, others refer to the treaty or treaties concluded by the parties, generally recognised principles of IL accepted by both parties and, more recently, universally/commonly recognised principles of IL.²⁰⁷ Up to now, the

¹⁹⁹ *Tza Yap Shum*, *ibid* (n 190) para 107; for a detailed discussion see Wei Shen, *ibid* 63-71.

²⁰⁰ *Tza Yap Shum*, *ibid* paras 109-1110.

²⁰¹ Gallagher and Shan, *ibid* (n 29) 126.

²⁰² Schill, *Tearing Down* *ibid* (n 18) 105-06.

²⁰³ Yu Jingsong and Liang Danni, 'Latest Trends of F&E Treatment and Countermeasures of Chinese Government' (2007) 6 *Jurists Review* 151.

²⁰⁴ Chen Huiping and Huang Yumei, 'New Developments of Fair and Equitable Treatment Standard in international Investment Treaties' (2006) 13 3 *Chinese Journal of International Economic Law* 1.

²⁰⁵ Xiuli Han, *ibid* (n 80) 635.

²⁰⁶ Gallagher and Shan, *ibid* (n 29) 126.

²⁰⁷ Gallagher and Shan, *ibid* (n 29) 127, 128.

application of the IL criterion to FET was exceptional. In those treaties where this test was adopted, it was qualified by a requirement that its principles had to be accepted by both parties. In particular, the IMS was a source of concern in the BITs negotiations with the US.²⁰⁸ It is altogether absent from China's Third Generation treaties, including the Germany BIT 2003.²⁰⁹ This testifies to an enduring wariness of customary IL in the formation of which China did not participate.²¹⁰ However, even here, reforms produced diversity. Most novel until recently was the Mexico BIT 2008 in which, for the first time, China accepted the IMS: clause 5 of this treaty appears to follow the FET clause in the US Model BIT. Nevertheless, it avoids using the term 'customary IL'.²¹¹ The Canada BIT overtook such novelty in September 2012. By its Article 4 it establishes IL as the criterion for determining FET and, in addition, specifies that a breach does not require treatment beyond the IMS. The IMS is then defined as 'state practice accepted as law'.²¹² Similarly, the requirement of 'acceptance' has been removed from some recent treaties, such as the Seychelles BIT 2007. At least for now, the question of whether the BITs network itself amounts to customary IL remains debatable.²¹³ Most Chinese commentators reject this proposition alluding, *inter alia*, to the operation of power and compulsion in the conclusion of many treaties.²¹⁴

²⁰⁸ Cai Congyan, 'International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules' (2008) 7 no 3 Chinese Journal of International Law 659 at 660.

²⁰⁹ R. H. Kreindler, 'Investment Treaties and the Evolution in Their Negotiations and Application: The New Germany-China "BIT" and its relevance to International Financial Law Trends' (2009) 1 Transnational Dispute Management <www.transnational-dispute-management.com/article.asp?key=1417> accessed 2 Aug 2012.

²¹⁰ *ibid* 128.

²¹¹ 'Agreement Between the Government of the United Mexican States and the People's Republic of China for the Promotion and Reciprocal Protection of Investment 2008' <http://unctad.org/sections/dite/ia/docs/bits/mexico_china.pdf> accessed 2 Aug 2012.

²¹² 'Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (2012)' art 4 1. 2 <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx>> accessed 19 May 2013.

²¹³ See for example Patrick Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law?' (2010) 28 4 Penn State International Law Review 675.

²¹⁴ See for example Cai Congyan, 'International Investment Treaties and the Formation, Application and Transformation of Customary International Law' (2008) 7 3 Chinese Journal of International Law 659.

FET is an absolute standard of treatment. That is to say, it is not contingent on the treatment granted to other investors. Its normative content is vague and its parameters fluid, with different interpretive approaches running through BITs practice. The standard is often linked to notions of rule of law, legality, due process, denial of justice and, at the level of IL, to the IMS.²¹⁵ The effect of coupling a FET clause with IL is to subject national legal institutions to examination by reference to external rules. In other words, the normative and procedural content of legislation in national sites of governance are appraised by reference to their compliance with a notion of justice that is said to reside in the global arena.

The notion that sites of governance are accountable to an international repertoire can also be found in the Global Judicial Integrity Principles (JIP). The JIP was compiled from a research of an array of national 'best practices'.²¹⁶ It reflects a counter pluralistic approach that assumes a global consensus about what amounts to best practice.²¹⁷ In Henderson's view, countries should 'embrace, adapt, prioritize, and implement' such consensus 'in a holistic manner (...)'.²¹⁸ In what appears to be another demonstration of China's willingness to participate in the global juridical discourse, she took part in the JIP research.²¹⁹ This involvement points to the inculcation of the rule of law abstraction into her internal discourse. Given the relevance of such inculcation to the application of the FET standard, this statement merits expansion.

It is said that China's internalisation of the rule of law came about in response to the violent upheaval of the Cultural Revolution. Routinely enforced lawfulness

²¹⁵ See for example, Stephan W Schill, 'Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law' (2006) Institute for International Law and Justice Working Paper 2006/6 (Global Administrative Law Series) <http://www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf> accessed 4 Aug 2012.

²¹⁶ For a critique of the 'Best practices' methodology that does not take account of local cultural and political context see Antoine Garapon, 'A New Approach for Promoting Judicial Independence' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUB 2010) 37-51.

²¹⁷ Keith E. Henderson, 'Halfway Home and a Long Way to go: China's Rule of Law and the Global Road to Judicial Independence, Judicial Impartiality, and Judicial Integrity' in *ibid* 24-28.

²¹⁸ *ibid* 25, 28-36.

²¹⁹ *ibid* 25.

was to replace political campaigns as agent of societal progress.²²⁰ This not uncommon narrative appears to posit the transition to a rule of law as a product of popular demand for the stability that comes with rules making. It also seems to infer that China's previous, anti-systemic stage was either devoid of juridical structures or that such structures - being brokers of that which is predictable and stable - were incompatible with policies that sought to raise political consciousness through mass participation.²²¹ A full analysis of this discourse is beyond the scope of this work. Two points, however, may be observed: first, it is anchored in the liberal paradigm, whereby law is accorded centrality of universal dimensions. Implied in it is the proposition that the sole commendable form of societal organisation is juridical. Second, the discourse skims over the complexities of the encounter between Chinese traditional concepts of societal interactions and Romano-Germanic conventions. Central to the former was harmony that was founded on communality and reconciliation. Law occupied only a residual, last resort space.²²² In the latter, by contrast, private relationships are primarily regulated by juridical rules.²²³ The iconoclasm that emerged out of the experience of semi-colonisation and China's concomitant courting of modernity, saw the country turn to the Romano-Germanic juridical family as early as the 1911 nationalist revolution.²²⁴ The Civil Code 1929-1931, the Code of Civil Procedure 1932 and the Land Code 1930 all testified to, at least, surface Europeanisation of Chinese relationship with law.²²⁵ Contrary to the discourse referred to above, this juridical importation persisted in the post-1949 revolutionary period. Thus, 'Socialist legality' found expression in a constitution and an institutional structure.²²⁶ It was only when, independently of the Soviet Model, China embarked on a search for her own socialist path, that one discerns a return to ancient norms. Rather

²²⁰ Peter Moody, *Conservative Thought in Contemporary China* (Lexington Books 2007) 24.

²²¹ Shapiro for example asserts that 'the enormous population of China has moved from a regime of Imperial however thin and corrupted, to a Leninist regime of non-law. Shapiro, *ibid* (n 19) 37.

²²² Rene David and John E.C. Brierley, *Major Legal Systems in the World Today* (3rd edn, Stevens & Sons 1985) 518-21.

²²³ *ibid* 22.

²²⁴ On China's iconoclasm see Maurice Meisner, *Mao, China and After: A History of the People's Republic of China* (3rd ed, Free Press 1999) 3-4, 12-16, 295, 525; David and Brierley, *ibid* (222) 23, 523-24.

²²⁵ David and Brierley, *ibid* 523.

²²⁶ *Ibid* 525-26.

than law, education and persuasion (including through mass movements) became the primary framework for resolving societal contradictions. Law, declared Mao in 1957, amounted to dictatorship formerly thought suitable for barbarians only.²²⁷ Thus, paradoxically, it was at the height of China's revolutionary period that past traditions made their way back into the country's version of Westernised modernity.

Yet, once China embarked on a development model that had foreign capital at its core, for it to work, she was compelled to implement that which foreign capital requires – strong state institutions capable of enforcing property rights.²²⁸ Ironically, much like the proposition that BITs bring foreign capital and through it development, empirical and analytical study indicate that the propagated linkage between economic growth and the rule of law is more dogma than fact.²²⁹ From this perspective, as in the case of BITs, China's adoption of the rule of law may have less to do with progress, and more with a perceived need to signal incorporation and secure acceptance.

Implicit in the proposition that the rule of law operates essentially as an imported signalling mechanism is the potential for variegated implementation. For absent a true process of identification, the likelihood is that cultural beliefs will persist in seeping through. The Chinese construct may well prove to be a Janus like twin-faced creation, with one face looking to the internal and the other observing the external. For the country's internal conceptualisation of the rule of law remains disparate. One may point, for example, to a distinction between this concept and that of legality.²³⁰ The two are identical when transcribed into pinyin (*fa zhi*), but the characters for *zhi* are different. Legality operated throughout revolutionary times. It denotes law that is an instrument in the hands of the sovereign. By contrast, under the rule of law, the law itself is

²²⁷ *ibid* 528-29.

²²⁸ Shapiro, *ibid* (n 19) 37.

²²⁹ Randall Peerenboom, 'Introduction' in Peerenboom, *ibid* (n 216) 16.

²³⁰ The distinction is also expressed as 'rule of law' and 'rule by law'. Suisheng Zhao, 'The China Model: Can It Replace the Western Model' (2010) 19 65 *Asian Pacific Business Journal* 419; see also Jacques, *ibid* (n 64) 221 who defines 'rule by law' as a process of determining issues in accordance with a legal code while 'rule of law' applies irrespective of the view of the government and is to be found only in 10-20% of cases.

the sovereign.²³¹ In China, rule of law as a concept first emerged formally in the 90s. Yet, even then, the phrase coined – state by means of law (*yi fa zhi guo*) points to a strong element of legality. Unlike in the liberal paradigm where juridical structures are constructed with the aim of limiting governmentality, in China they are the means by which state power is exercised.²³² Thus, at least for now, in contrast to the models of Western liberalism where norms of individual liberty and economic efficiency impose limits on the state, the Chinese state remains central to the mediation of private relationships.²³³ Zhu Xiuli, at the time of writing dean of the Peking University School of Law, acknowledges the far-reaching influence – albeit one that is more complex and limited than generally perceived – exercised by the CCP on the country's juridical institutions. Such control, he argues is essentially positive and necessary.²³⁴ Peerenboom concurs. For him, the success of Chinese reforms owes much to the selective adoption and adaptation of 'the ideologically driven prescriptions offered by Western states and international donor agencies'.²³⁵ It may be said that such variegated implementation encapsulates the essence of true universalism as understood by Kleinfeld and Nicolaidis. That is, a dynamic that is predicated on reciprocal influences.²³⁶ Further, and paradoxically, the introduction of a juridical structure aimed specifically at foreign investors may act as a buffer zone that separates and to an extent shields local norms from the effects of integration.

National treatment

NT is a relative, anti-discriminatory standard of treatment that is contingent on the treatment granted to domestic investors. It is aimed at securing a 'level

²³¹ Moody, *ibid* (220) 2.

²³² Pittman B. Potter, *ibid* (n 13) 63; on the role of law in liberal governability see also Michel Senellart, Francois Ewald Michael & Alessandro Fontana (eds) (tr), *Michel Foucault, The Birth of Biopolitics: Lectures at the College De France 1978-1979* (Palgrave Macmillan 2008) 1-26.

²³³ Potter, *ibid* 67.

²³⁴ Zhu Xiuli, 'The Party and the Courts' in Peerenboom, *ibid* (n 216) 52-68; see also Benjamin L. Liebman, *China's Courts: Restrictive Reform* and Shen Kui, 'Commentary on "China Court's: Restrictive Reforms"' in Clarke, *ibid* (n 13) 66-89.

²³⁵ Randall Peerenboom, 'Judicial Independence in China' in Peerenboom, *ibid* 91.

²³⁶ Rachel Kleinfeld and Kalypso Nicolaidis, 'Can a Post-Colonial Power Export the Rule of Law? Elements of a General Framework' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 144-145.

playing field' between local foreign and investors, posited as a prerequisite for equal competition'.²³⁷ However, its focus is the protection of foreign investors. In this it differs from the Calvo Doctrine and the NIEO. These are concerned with equality of treatment for domestic investors, one that does not fall short of that accorded to foreign capital.²³⁸ For about ten years China resisted demands for the introduction of NT into her BITs. Consequently, only less than half of them contain this standard.²³⁹ Reluctance was partially anchored in a typical developing country's concern about the ability of its national industries to compete with powerful foreign corporations.²⁴⁰ Partially, it was linked to the specific characteristics of a centrally planned economy with public ownership at its core. At the time China entered the BITs arena, state and collective ownership were treated differently, with the small, private sector dealt with differently again. Thus, SOEs were charged with implementing state economic plans. Special privileges were made available to them in return for meeting workers' welfare requirements. Such function could not be expected of foreign investors. Private domestic investors were excluded from many sectors of the economy. It meant that the comparator of 'like investor' required for the purpose of establishing NT was impossible to identify.²⁴¹ Thus, the introduction of NT into Chinese BITs is inextricable from processes of privatisation and marketisation, and the corresponding construction of Western style legal structures. The Company Law of the PRC 1993 and the Foreign Trade Law of the PRC 2004 expressly adopted NT. Indeed, starting in 1993 the Chinese government repeatedly proclaimed – both internally and externally – its commitment to the creation of NT friendly conditions.²⁴²

Broadly, China's NT provisions follow European treaties in excluding investments at their pre-admission stage, and North American treaties in including a 'in like situation/circumstance' qualification.²⁴³ Gallagher and Shan observe six different approaches. They illustrate the plurality engendered by

²³⁷ Schill, *Tearing Down* *ibid* (n 18) 94.

²³⁸ Gallagher and Shan, *ibid* (n 29) 157; Sornarajah, *ibid* (140) 82.

²³⁹ Gallagher and Shan *ibid* 165, 166.

²⁴⁰ *ibid* 165.

²⁴¹ *ibid* 166; Jian Zhou, *ibid* (n 29) 47-48, 85, 115-16.

²⁴² Jian Zhou, *ibid* 116, 145-48.

²⁴³ Gallagher and Shan, *ibid* (n 29) 158.

negotiations, and the innovative formulations created in the course of incremental quest for a path within the world order. They include (i) 'best efforts NT' (UK BIT 1986); (ii) 'substantially qualified NT' (compliance with laws and regulations is moved to the preamble and is complemented with a stipulation that NT is subject to the host country's economic policy - Japan BIT 1988, Czechoslovakia BIT 1991 and the Korea BIT 1993); (iii) NT that is subject to local law (Spain BIT 1992 and now a standard formulation); (iv) 'subject to grandfather clause NT', typically supplemented by a 'best effort' commitment to progressively remove non-conforming measures (Cyprus BIT 2001, Germany BIT 2003); (iv) Least popular 'full post-admission NT'; (v) 'non -reciprocal NT', which grants NT to Chinese investors only (Peru 1994, South Africa and Syria 1996). The exclusion of the black empowerment scheme from the NT obligation in the South Africa BIT is of particular interest against the backdrop of the ICSID claim, brought by European investors in November 2006, on the ground that the scheme amounted to expropriation and breach of the FET and NT standards of treatment.²⁴⁴ The Syria BIT compensates for the non-reciprocal NT with a non-reciprocal MFN clause, whereby this treatment is granted to Syrian investors only.²⁴⁵

NT proved the most contentious issue throughout the China-US BIT negotiations.²⁴⁶ The latter insisted on the inclusion of a pre-admission NT in accordance with her Model BIT.²⁴⁷ China resisted. A pre-admission NT would have required an overhaul of her investment regime, whereby investments are filtered through a process of a case-by-case approval. She would have had to further decentralize such approval, over time increase the threshold for central government review, and open up to US investors sectors currently dominated by or reserved for SOEs.²⁴⁸

²⁴⁴ The claim was dismissed by consent.

²⁴⁵ Gallagher and Shan, *ibid* (n 29) 167-71.

²⁴⁶ Kong Qingjiang, 'US-China Bilateral Investment Treaty Negotiations' (2012) 7 *1 Asian Journal of WTO & International Health Law and Policy* 181.

²⁴⁷ *ibid* 181.

²⁴⁸ *ibid* 184, 191.

Expropriation

In the exchanges between the Mexican and US governments following Mexico's agrarian reform in 1914 and the nationalization of her oil industry in 1938, the Mexican government distinguished between general and impersonal expropriation and the individual taking of property. In relation to the first, she argued, there was no universally accepted obligation to compensate. Since the issue remains undecided,²⁴⁹ one may question Gallagher and Shan's sweeping statement that the obligation to compensate is well recognized in IL.²⁵⁰ Be it as it may, this principle is uniformly accepted in BITs practice and, having loosened her association with the NIEO, China is no exception. Her treaties provide for expropriation that is wide in scope, and goes as far as including contractual rights.²⁵¹ Indirect expropriation is absent from her Model BITs. However, it takes on various formulations in actual treaties, including an express provision in the German BIT 2003.²⁵² The four substantive restrictions that determine the legality of expropriation – it has to be undertaken in the public interest, in accordance with due process of law, carried out in a non-discriminatory manner and against compensation – appear in China's Model BITs and in nearly all her treaties.²⁵³ By way of a footnote, as seen above, historically, at least within the developing camp including China, the right to expropriate was understood as intrinsic to sovereignty.²⁵⁴ Thus, China's acceptance of a distinction between lawful and unlawful expropriation implicates acquiescence to reduced sovereignty.

Such acquiescence may however not as yet be complete. In relation to the criterion for due process, all three Model BITs require that expropriation comply with domestic law. An exception is the Korea BIT 2007, which expressly refers to IL standards, and a few treaties, which are silent on the applicable law.

²⁴⁹ See Chapter 2 text to n 194-207 pp 75-77; Sornarajah places the right to compensation in the free market paradigm only. Sornarajah, *ibid* (n 140) 80-81.

²⁵⁰ Gallagher and Shan, *ibid* (n 29) 256.

²⁵¹ *ibid* 268; In *Vivendi v the Argentinean Republic* Case no. ARB/97/3 the Tribunal held that contract rights were capable of being expropriated.

²⁵² Gallagher and Shan, *ibid* 260-63.

²⁵³ *ibid* 271.

²⁵⁴ Schill, *Tearing Down* *ibid* (n 18) 78; Ye Ji, *ibid* (n 8) 295.

Silence, however, opens the door for investors to argue the application of IL.²⁵⁵ Further, the combination of domestic law and international standards of due process, previously unique to the Korea BIT, has now been repeated in the China, Japan Korea trilateral investment treaty 2012.²⁵⁶ Still, the German BIT omits altogether the due process and non-discriminatory requirements. It gives the investor the option of submitting both the lawfulness of expropriation and the amount of compensation to review by national courts.²⁵⁷

In relation to the measure of compensation for expropriation, China does not expressly adopt the widely used Hull formula of adequate, prompt and effective compensation.²⁵⁸ Her refusal to follow this prescription was indeed one of the reasons for the failure of her treaty negotiations with the US in the 80s.²⁵⁹ However, since then a variety of measures were adopted, including appropriate or reasonable compensation (UK BIT and others), actual, real, genuine value, market value, fair market value immediately before expropriation (Netherlands BIT) and 'for the purpose of placing the investor in the same financial position as that in which it would have been prior to the expropriation' (Sweden BIT).²⁶⁰ Their adoption points to a convergence with Western practice. In this practice, endorsed by the World Bank, the market value measure is most commonly used.²⁶¹ Of the ten older Chinese BITs, reference to market value is found only in the 1992 Korea. However, since 2006, over 50% of Chinese BITs introduced a fair market value requirement that is habitually combined with an obligation to pay without delay. The World Bank Guidelines on the Treatment of Foreign Direct Investment equate this term with adequate payment.²⁶² 'Prompt' is to be

²⁵⁵ Gallagher and Shan, *ibid* (n 29) 280-83.

²⁵⁶ Treaty with Japan and Korea, *ibid* (n 133) art 11 (1).

²⁵⁷ China-Germany BIT 2003, *ibid* (n 194) art 4 (2).

²⁵⁸ Gallagher and Shan, *ibid* (n 29) 280.

²⁵⁹ Ye Ji, *ibid* (n 8) 84.

²⁶⁰ *ibid*; Gallagher and Shan, *ibid* (n 29) 280-83.

²⁶¹ Gallagher and Shan, *ibid* 281.

²⁶² 'Adequate' means that payment is to be made in convertible currency. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 92. Both the US Model BIT 2004 and 2012 define the 'adequate' constituent of the Hull formula as the fair market value of the investment immediately before it was expropriated.

understood as ‘without undue delay’.²⁶³ Thus, at least at the textual level, Hull’s three stipulations appear to have now been incorporated into China’s third Model BIT and into much of her more recent BITs practice. This led some Chinese commentators to opine that, in fact, the Hull formula has been accepted.²⁶⁴ Even where, as in the case of Mauritius, the BIT provides for ‘just’ compensation explained as ‘genuine value’, the tribunal in the *CME* case equated such measure with fair market value.²⁶⁵

It is thus possible to point to a trajectory away from developing countries’ traditional standard of appropriate compensation - a flexible measure, pursuant to which assessment takes into account a number of factors. These include profits made by the investor up to expropriation and the duration of the investment. The extent of such progression is brought into relief when one considers that, as recently as 1984, Yuan Zhenmin, then director of the Law and Treaty Department at the PRC Ministry of Commerce, explained China’s refusal to adopt developed countries’ Hull formula by reason of it being unreasonable. Expropriation and nationalisation, he explained, are sovereign behaviour. Further, China was a signatory to the CERDS and could not violate its stipulations.²⁶⁶

From this trajectory Ye Ji extrapolates a prediction of permanence.²⁶⁷ She correlates this prediction to an observed unison between treaty practice and domestic reforms. Westernised rules of compensatory expropriation have now been internalised to form a new official understanding of property-sovereignty relationship, whereby private property protection is equated with enhanced human rights and correspondingly limited governmental power.²⁶⁸

²⁶³ ‘World Bank Guidelines on the Treatment of Foreign Direct Investment’ IV (3) 31 international Legal Materials 1379, 1382 <<http://italaw.com/documents/WorldBank.pdf>> accessed 11 Aug 2012.

²⁶⁴ Ye Ji, *ibid* (n 8) 85.

²⁶⁵ *CME Czech Republic v Czech Republic* (2003) UNCITRAL Final Award Para 493. I Brownlie dissented.

²⁶⁶ Ye Ji, *ibid* (n 8) 84 citing Yuan Zhenmin in (1984) 11 China Market (*Zhongguo shichang*).

²⁶⁷ Ye Ji, *ibid* (n 8) 83.

²⁶⁸ *ibid* 95.

In sum, the evolution of China's BITs practice implicates the internalisation of a discourse that (i) is external; (ii) originates from the Western site of governance; (iii) is informed by coalescing principles of markets, sovereignty and human and property rights (iv) is legitimised by top to bottom gradual transformations of the eco-political-juridical ensemble in the domestic sphere. The process was gradual. Thus, restricted expropriation and the entitlement to compensation were first exclusive to FDI.²⁶⁹ It was only after the Central Committee of the CCP had proclaimed in 1992 the establishment of a socialist market economy, that these principles were incorporated into the internal landscape through legislative and constitutional changes.²⁷⁰ Private ownership was expanded so as to attract a right to protection, and to make the lawfulness of expropriation contingent on public interest, due process and compensation. These principles were first affirmed in China's 2004 constitution²⁷¹ and re-affirmed in the Property Rights Law 2007 (2007 Law).²⁷² Academic discourse followed suit, *inter alia* elevating restricted expropriation to the status of customary IL.²⁷³

Yet, Ye's allusion to Westernisation as a coherent phenomenon may be too broad brushed, overlooking the potential differences between imported convergence and an organic continuum. If Western property rights hark back to Roman law and the Roman Empire, whereby power and wealth were represented by ownership, in the Chinese empire power and wealth resided in high position within the bureaucratic structures of the state.²⁷⁴ True riches derived from office. Further, the imperial state had an interest in obstructing the growth of the landed aristocracy, while preserving peasant possession of

²⁶⁹ 'Law of the People's Republic of China, on 'Foreign Capital Enterprise'' (1986) art 5 <<http://www.china.org.cn/english/features/investment/36754.htm>> accessed 10 Aug 2012.

²⁷⁰ Ye Ji, *ibid* (n 8) 88-89.

²⁷¹ Constitution of the People's Republic of China (2004) art 13 <http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm> accessed 10 Aug 2012.

²⁷² Property Rights Law of the People's Republic of China (2007) art 42 and 44 (unofficial translation) <http://www.lehmanlaw.com/fileadmin/lehmanlaw.com/laws_regulations/Property_Rights_Law_of_the_PRC_LLX_03162007.pdf> accessed 10 Aug 2012.

²⁷³ Ye Ji, *ibid* (n 8) 90-91; but see Gong Xiantian, 'A Property Law (Draft) That Violates the Constitution and Basic Principles of Socialism' [2005] *Links International Journal of Socialist Renewal* <<http://links.org.au/node/221>> accessed 17 Aug 2012 arguing that the Property Law of the PRC is unconstitutional in that it violates socialist principles.

²⁷⁴ Potter, *ibid* (13) 60.

land as a source of taxation.²⁷⁵ From the outset, therefore, the incorporation of principles of property rights implicated a process of borrowing, first from the former USSR, and then from Europe and the German legal tradition in particular. Both influences are represented in the 2007 Law but with a layer of innovations that cater for indigenous circumstances.²⁷⁶ The outcome is an on-going dynamic involving normative tension between globalised liberal ideology and local legal and political culture.²⁷⁷ Potter conceptualises this dynamic as 'selective adaptation' to describe the interplay between acceptance of external regimes and their interpretation by local communities.²⁷⁸ Challenging the propensity to view global convergence as uniform, his analysis looks to the dynamics of perception, complementarity and legitimacy, to explain the way international rules are mediated by local norms. In contrast to liberal principles, whereby the realm of private property is conceptualised as independent of the state, Chinese commentary emphasizes the priority of state's policies and its role in the mediation of private property relations. In other words, private property rights may be expanding. Yet, they remain anchored in the public arena, and are constraint by the requirements of socialist development.²⁷⁹ In consequence, national perception of liberal discourses is somewhat selective. Its draws upon notions of economic utility, but simultaneously avoids unqualified embrace of political implications.²⁸⁰ Complementary is similarly limited. Legitimacy too is undermined by the tension between individual property rights and collective rights to development. Thus, the 1991 White Paper on Human Rights posits the right to subsistence rather than ownership as the primary right from which all others derive.²⁸¹ The 2004 amendments to the constitution and the 2007 Law reveal that norms protective of social interests remain strong, notwithstanding the shift among legal and policy elites towards

²⁷⁵ Ellen Meiskins Wood, *Empire of Capital* (Verso 2005) 31.

²⁷⁶ Albert H. Y. Chen, 'The Law of Property and the Evolving System of Property Rights in the Development of the Chinese Legal System' in Guanghua Yu *ibid* (n 13) 91.

²⁷⁷ Potter, *ibid* (n 13) 51.

²⁷⁸ *ibid* 59; Potter, in Clarke, *ibid* (n 13) 147-49.

²⁷⁹ For a rule of law conceptualized in official discourse as a feature of socialist development see White Paper, 'The Socialist System of Laws With Chinese Characteristics' [Oct 2011], Information Office of the State Council People's Republic of China <http://english.gov.cn/official/2005-08/17/content_24165.htm> accessed 21 Aug 2012.

²⁸⁰ Potter, *ibid* (n 13) 60; see for example Gong Xiantian, *ibid* (n 273) generally.

²⁸¹ Potter, *ibid* 61-62.

liberal notions of property rights.²⁸² Ye Ji is correct to observe that the 2007 Law provides for equality of treatment between China's three types of ownership – state, collective and private. Yet, she overlooks the fact that it nonetheless keeps all three within an overall framework of the need to uphold and regulate a socialist economic system.²⁸³ Further, the exercise of property rights is made subject to social morality, public interest and the legitimate rights and interests of others.²⁸⁴ This provision may appear somewhat vague. Nevertheless, it is incongruent with the absolutist approach found in BITs practice.²⁸⁵ Furthermore, even this partial assimilation triggers critique and resistance. Thus, writes Gong:

To the labouring masses and all Chinese Citizens, the public ownership system and state property provide the most important and fundamental protection and are also the material expression of the property right of each of them. In the absence of the property right of the state and the collective, the property right of individual citizens has not chance of being realized. However, in our country, there are people who, on the one hand, have been scheming ceaselessly to remove the principle of the sanctity of public property under socialism from our constitution and, on the other hand, have been seeking to replace it with the spirit and principle of the sanctity of private property.²⁸⁶

How does this partiality in absorption work in practice? The interaction among China's three forms of ownership is formulated through the concept of *yongyi*

²⁸² *ibid* 68.

²⁸³ Property Rights Law, *ibid* (n 273) arts 1, 3,4.

²⁸⁴ *ibid* art 7.

²⁸⁵ M Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty' in Shan, Simons and Singh, *ibid* (n 176) 202.

²⁸⁶ Gong Xiantian, *ibid* (n 273).

wu quan commonly referred to as ‘user rights’ - the right to possess, use and derive benefit from property owned by another. In other words, ownership in land cannot be privately held, but enters the market through user-rights. Chen considers this the most original feature of the 2007 Law, one that distinguishes the socialist market economy from other jurisdictions, and which ‘was grafted onto the socialist ownership to create a synthesis of socialist and private property’.²⁸⁷ China’s experimentation with the possibility of a balance between private and collective property, suggests Alison Clarke, may provide important lessons for other countries, particularly for Sub-Saharan communities who wish to avoid the wholesale privatisation of their traditional culture of communal property.²⁸⁸

Investor-State dispute resolution

Referred to as the ‘ultimate’ protection’, investor-state dispute resolution is perceived as the most important of all other substantive protections proffered by BITs.²⁸⁹ As seen above, China’s policy towards investor-state arbitration was initially restrictive, then liberalised over time. Here again, liberalisation is aligned with the changes to the internal economic landscape.²⁹⁰

Ad hoc arbitration under UNCITRAL rules remains the most prevalent dispute resolution mechanism in Chinese BITs practice.²⁹¹ Yet, many of her treaties also contain ‘case by case’ consent to ICSID arbitration for quantum disputes.²⁹² In some, such consent is combined with an option to refer non-quantum disputes to arbitration.²⁹³ About thirty ‘third generation’ BITs provide for ICSID arbitration for all disputes. Notably, the current Model BIT adopts the pro-

²⁸⁷ Chen, *ibid* (n 276) 103.

²⁸⁸ Alison Clarke, ‘Integrating Private and Collective and Rights: Can China Achieve the Impossible?’ talk at the Law, Governance and Development: The Transformation of Property Rights in Land and Property Law in China workshop held by the Centre of East Asian Law & Centre of Chinese Studies 11-12 May 2012.

²⁸⁹ Rudolf Dolzer and Magrete Stevens: *Bilateral Investment Treaties* (The International Centre for Settlement of Investment Disputes Kluwer Law International 1995) generally; An Chen, *An Chen’s Series of International Economic Law* (Fudan Press University 2008) Vol 1 459.

²⁹⁰ Guang Hong, *ibid* (n 170) 2, 17-25.

²⁹¹ Gallagher and Shan, *ibid* (n 29) 302.

²⁹² *ibid* 304-06, 313.

²⁹³ *ibid* 318-19.

investors approach, whereby only they have the option to commence arbitration. However, mostly such option may be exercised only after investors have first availed themselves of the domestic administrative review procedure.²⁹⁴

The dispute resolution provision in the Peru BIT was considered in the *Tza Yap Shum* case. This treaty adopts a restrictive arbitration clause pursuant to which ICSID jurisdiction is limited to disputes involving the amount of compensation for expropriation. Jurisdictional extension is possible, but made contingent on consent and the absence of prior adjudication by the host country's courts.²⁹⁵ Mr Tza commenced ICSID proceedings claiming that the Peruvian tax authorities breached investment protection standards. Peru challenged jurisdiction on a number of grounds, including the limited consent to ICSID arbitration. The tribunal considered whether the prescribed consent precluded jurisdiction to determine whether an expropriation had occurred in the first place. In considering this question it adopted a 'textual or pro-arbitration interpretative methodology'.²⁹⁶ Thus, it applied the 'good faith, 'ordinary meaning' and a treaty's 'object and purpose' guidance contained in the Vienna Convention to conclude that the parties' consent to arbitration should be given the broadest interpretation.²⁹⁷ Such interpretation, it reasoned, was most likely to give effect to the treaty's preamble. That is to say, attract investors and confer on them envisioned benefits.²⁹⁸ Accordingly, the tribunal held, the dispute resolution provision in the Peru BIT extended to 'any other issues normally inherent to an expropriation, including whether the property was actually expropriated (...)'.²⁹⁹ It was not persuaded by evidence that China had

²⁹⁴ *ibid* 320-22.

²⁹⁵ 'Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Promotion and Reciprocal Protection of Investments 1995' art 8 (1-3) <http://unctad.org/sections/dite/jia/docs/bits/peru_china.pdf> accessed 12 Aug 2012.

²⁹⁶ Wei Shen, *ibid* (n 198) 73.

²⁹⁷ 'Vienna Convention on the Law of Treaties 1969' art 31 <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> accessed 12 Aug 2012.

²⁹⁸ *Tza Yap Shum*, *ibid* (n 190) *ibid* paras 151-53.

²⁹⁹ *ibid* paras 174-88

rejected Peru's attempt to broaden the dispute resolution provision.³⁰⁰ Similarly, it declined to draw inferences from China's reservation contained in her ratification of the ICSID Convention, finding that, in and of itself, the declaration was not conclusive.³⁰¹ The implications of these findings remain uncertain, since the decisions of ICSID private arbitrators have persuasive rather than precedential force and are altogether a low order source of IL.³⁰² Further, there is no consensus on the legal implications of a notification filed at the time of ratification.³⁰³ Furthermore, case law on the construction of a quantum restriction is divided. Thus, the *Saipem* and *Telenor Mobile Communications AS* awards articulated a broad interpretation that extends jurisdiction to the existence and/or lawfulness of an expropriation.³⁰⁴ Similarly, in *European Media Ventures* the tribunal agreed that the phrase 'concerning compensation' restricted jurisdiction. The arbitrators nevertheless held that it was broad enough to allow a decision on whether expropriation in fact took place.³⁰⁵ By contrast, however, the tribunals in *RosInvest* and *Berschader* reached an opposite conclusion, restricting their jurisdiction to the amount of compensation.³⁰⁶ The *Tza Yap Shum* tribunal bypassed disagreements by asserting that the restriction in the Peru BIT did not prove a firm national policy.³⁰⁷ Unpersuasive as this reasoning may be, the *Tza Yap Shum* decision demonstrates the way by which an expansionist tribunal that is intent on promoting a desired practice, may undermine China's public policy aimed at shielding her sovereignty from transnational incursion.³⁰⁸

The tribunal's finding on the question of the operation of the 'fork in the road' provision, and the objective meaning technique it applied to this end, similarly

³⁰⁰ *ibid* paras 135-6, 170-1.

³⁰¹ *ibid* 163-5.

³⁰² Sornarajah, *ibid* (n 175) 84.

³⁰³ For a discussion of this point see Wei Shen, *ibid* (n 198) 82-83; Guang Hong, *ibid* (n 170) 11-12.

³⁰⁴ *Saipem S.p.A. v Bangladesh* ICSID Case No. ARB/05/07, Decision on Jurisdiction 21 March 2007; *Telenor Mobile Communications A.S. v Hungary* [2006] ICSID Case No ARB/04/15 Award 13.

³⁰⁵ *European Media Ventures v Czech Republic* [2007] EWHC 2851 (Comm), UNCITRAL Award 15 May 2007 (unpublished).

³⁰⁶ *Berschader v The Russian Federation* Stockholm SCC Case No. V080/2004 Award 21 April 2006; *RosInvest Co. UK v The Russian Federation* SCC Case No V070/2005 Award October 2007.

³⁰⁷ *Tza Yap Shum*, *ibid* (n 190) paras 174-76.

³⁰⁸ Wei Shen, *ibid* (n 198) 74.

indicate what Wei Shen describes as a functionalist interpretative methodology, - one that is driven by a pre-set goal of producing expansive jurisdiction.³⁰⁹ Peru argued that the three dispute resolution options in Article 8 of the Peru BIT were intended to operate as a three-step vertical process, whereby each option was to follow the other chronologically. Once pursued, such option became exhausted.³¹⁰ The tribunal pointed to the word 'may' in Article 8(2) of the Peru BIT to find the argument weak. This was notwithstanding that the word in the prevailing English text was a mandatory 'shall'. It characterised the 'fork in the road' process as horizontal, thereby rendering the court procedure provided for in Article 8(2) an exception to the arbitral mechanism in Article 8(3). Mr Tza was entitled to arbitrate without having to first exhaust the preceding local courts option.³¹¹ In reaching this conclusion, the tribunal abandoned the 'plain meaning' method of construction in favour of establishing the 'objective meaning' of Article 8 in the overall context of the BIT.³¹² Once again it invoked the treaty's function to promote investment. Since the investor could have instituted local court proceedings in any event, it reasoned, Article 8(2) was 'unnecessary'. Thus, the purported 'objective meaning' of Article 8 was to 'extend the rights and protections of investors (...) by incorporation of protections of international law'.³¹³ It followed that, were Article 8 to be construed as a three-step vertical process, the purpose of the treaty would have been defeated. Given the persuasive force of arbitral awards, it is possible China's 'fork in the road' policy may be circumvented by what appears to be private arbitrators' tortuous reasoning en route to a desired outcome.

Finally, it fell to the tribunal to consider the multiplying effect of the MFN standard in relation to procedural rights. Awards on whether or not the operation of the MFN clause extends to arbitration agreements are divided.³¹⁴

³⁰⁹ *ibid* 78.

³¹⁰ *Tza Yap Shum*, *ibid* (n 190) para 158.

³¹¹ *ibid* para 149.

³¹² *ibid* para 187.

³¹³ *ibid*.

³¹⁴ See for example *Emilio Agustin Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7 and *Plama Consortium Limited v Bulgaria*, ICSID Case, No ARB/03/24; in the first the tribunal held that the MFN clause applied to procedural rights. In the second the tribunal reached the opposite conclusion.

In this case the tribunal found that the evidence adduced in relation to the Peru BIT negotiations did not sustain Peru's argument of a categorical agreement to a narrow interpretation of the MFN provision. It held that the clause 'seems to be open to broader interpretation, which may include access to procedural protections more favourable for alleged violation (...)' ³¹⁵ However, it concluded, the specific provision relating to arbitration of expropriation claims superseded the general MFN clause, thereby precluding the application of arbitration provisions from other BITs. ³¹⁶

In sum, ICSID was instituted under the auspices of the World Bank. The World Bank participates in structural adjustment programs. These propagate strong contract and private property institutions, so as to shape national regulatory interiors. ³¹⁷ Arguably, therefore, it has a rules making capacity, albeit one that may appear informal, possibly indirect and not always immediately apparent. As the Bank also possesses a dispute resolution mechanism, it can be said to fall within Snyder's definition of a site of governance. The *Tza Yap Shum* case thus may be taken to constitute an instance of a dialogue between three sites of governance, those of China, Peru and the World Bank. China and Peru brought to the table a treaty instrument that was reflective of their desire for co-operation, and the balance they wanted to strike between this desire and other policy related considerations. The Bank via the tribunal proffered its own pro-investors perspective. ³¹⁸ What followed was not a process of cross-fertilisation. Rather, the tribunal appeared at pains to impose on the treaty before it a desired normative content, so as to potentially shape the litigants' BITs practice. This is of course only one case. Nevertheless, it serves to demonstrate that

³¹⁵ *Tza Yap Shum*, ibid (n 190) para 213.

³¹⁶ ibid paras 213-16, 220; for a critique of the tribunal's reasoning see Andrew Newcombe 'Another Misapplication of MFN? *Tza Yap Shum v The Republic of Peru*' [21 Oct 2009] Kluwer Arbitration Blog; Wei Shen, ibid (n 198) 84-88.

³¹⁷ Janet Dine, *Companies, International Trade and Human Rights* (Cambridge Studies in Corporate Law, CUP 2005) 157-161; Dani Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform' (2006) XLIV Journal of Economic Literature 978-979; Sornarajah, ibid (n 285) 206.

³¹⁸ World Bank 'Articles of Agreement' art 1
<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:50004943~menuPK:64020045~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> accessed 17 Aug 2012.

dialogues between sites of governance are not necessarily conducive to pluralism and may in reality flow in the opposite direction.

CHAPTER 5: Harmony with Chinese Characteristics – Unity in Diversity and the Ethics of Profit

Introduction

In June 2008, Lin Yifu, a Chinese economist and founding director of the Beijing University China Centre for Economic Research became the first developing country national to be appointed chief economist of the World Bank.¹ To his new position he brought a PhD in economics from the University of Chicago, the cradle of American neoliberalism, and ‘The Great Harmony’, a scroll of Confucian wisdom.² From Milton Friedman, Lin said, he acquired valuable methodology.³ Confucius philosophy, he told the Financial Times a few months later, was the inspiration for his vision of a World Bank that is at the service of a strife free human community in which everyone cares for and trusts each other.⁴

Three years earlier, as private capital was being carved an ever-greater role in China’s economy, the CCP launched a campaign to revive the study and research of Marxist literature.⁵ The aim was to redefine Marxism and formulate policies capable of addressing what the then Chinese Communist Party (CCP) leader Hu Jintao described as ‘changes, contradictions and problems in all fields’.⁶ Yet, the year 2005 also saw the Hu Jintao-Wen Jiabao leadership launch the Harmonious

¹ Justin Yifu Lin, *The Quest for Prosperity: How Developing Countries Can Take Off* (Princeton University Press 2012) x.

² Annie Maccoby Berlof, ‘Economic Confucian’ [18 Nov 2011] Financial Times <http://www.ft.com/cms/s/2/a6b75ecc-0c69-11e1-8ac6-00144feabdc0.html#axzz29k84Lylb> accessed 19 Oct 2012.

³ Lin Yifu, interview to TVO ‘Exporting China’s Economic Model’ [4 Jan 2011] <http://theagenda.tvorg/justin-yifu-lin-exporting-chinas-economic-model> accessed 19 Oct 2012.

⁴ Berlof, *ibid* (n 2).

⁵ In 2013 China recorded over 10 million private enterprises representing a yearly increase of 12.6%. ‘China has 10m private enterprises’ [2 Feb 2013] China Daily.com.cn http://www.chinadaily.com.cn/bizchina/2013-02/02/content_16195827.htm accessed 6 Feb 2013; recent estimates attribute 70% of GDP to China’s private sector. See for example Victor Nee and Sonja Opper, *Capitalism from Below: Markets and Institutional Change in China* (Harvard University Press 2012); Kellee S. Tsai, *Capitalism Without Democracy: The Private Sector in Contemporary China* (Cornell University 2007).

⁶ Giovanni Arrighi, *Adam Smith in Beijing: Lineages of The Twenty-First Century* (Verso 2007) 17.

Society and Harmonious World paradigms.⁷ The former addressed issues, such as internal wealth polarisation, inadequate welfare and growing social tensions.⁸ The latter introduced the themes of worldwide 'lasting peace and common prosperity' to include principles, such as interstate equality and co-operative development.⁹ These themes and principles notwithstanding, against a backdrop of US growing encirclement and declared policy of naval build up in the Asia-Pacific region, on 8 November Hu announced to the Chinese Communist Party (CCP) 18th National Congress the importance of China acquiring maritime capabilities, such that can protect her national interest and are commensurate with her international standing.¹⁰ Some three weeks earlier, on 19 September 2012, China's biggest financial services company, Ping An Insurance made history when it became the first mainland company to file ICSID arbitration proceedings. Ping An is claiming against Belgium a loss of US\$2.3 billion occasioned by the financial crisis-induced nationalisation of the Belgium-Dutch bank, Fortis.¹¹ According to the New York Times, the biggest source of the US\$2.7 billion fortune amassed by the family of China's premier, Wen Jiabao - equivalent to the GDP of Burundi - came from investments in Ping

⁷ Jean-Marc F. Blanchard and Sujian Guo, "Harmonious World" and China's New Foreign Policy' in Sujian Guo and Jean-Marc F. Blanchard (eds) *"Harmonious World" and China's New Foreign Policy* (Lexington Books 2008) 1-2.

⁸ 'The 17th National Congress of the Communist Party of China: Harmonious Society' [29 Sept 2007] People's Daily <<http://english.people.com.cn/90002/92169/92211/6274603.html#>> accessed 14 March 2013.

⁹ Hu Jintao, 'Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society' [15 Oct 2007] Report to the 17th National Congress of the Communist Party of China 16 -17 <<http://www.china.org.cn/english/congress/229611.htm>> accessed 22 Aug 2012.

¹⁰ 'China Bares Plans to be a Naval Power' [9 Nov 2012] Inquirer Global Nation <<http://globalnation.inquirer.net/55590/china-bares-plan-to-be-a-naval-power>> accessed 9 Nov 2012.

¹¹ *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium* (2012) ICSID Case No ARB/12/29.

An.¹² More recently, the family of China's new leader, Xi Jinping was reported to be worth hundreds of millions.¹³

These facts may appear disparate. Yet, they invoke a sense of perplexity. Can neoliberal methodology and practice, as manifested in the convergence of capitalist and political elites, ICSID proceedings and participation in IFIs, inhabit a world of equal and sovereign development; can socialism exist cheek by jowl with marketisation and privatisation; is lasting peace congruent with interstate competition?

In the face of the intricacies of reforms, confusion seems to have pervaded the considerable literature spawned by the Chinese phenomenon.¹⁴ Harvey, for example, concludes that the country has definitely moved in the direction of economic neoliberalisation and towards the reconstitution of class power.¹⁵ For Amin, the concept of 'socialist market economy' masks a passage to a capitalist institutional order. However, for him, as long as equal access to land is maintained, such passage remains incomplete and vulnerable to on-going social struggles.¹⁶ Echoing Amin's focus on direct producers' control over the means of production, Arrighi posits that the marketization of China's economy does not necessarily signify adherence to Washington Consensus prescriptions.¹⁷ In contrast, Lemos' field research leads him to surmise that the PRC is now run by the wealthy for the wealthy.¹⁸ The triumph of Chinese capitalism, postulates Li

¹² 'The Wen Family Empire' [25 Oct 2012] The New York Times <http://www.nytimes.com/interactive/2012/10/25/business/the-wen-family-empire.html?emc=eta1> accessed 27 Oct 2012; Yun Kreigler, 'China's premier turns to lawyers from Jun He and Grandall amid New York row' [28 Oct 2012] The Lawyer <http://www.thelawyer.com/1015249.article?cmpid=TL13&cmptype=newsletter&email=true> accessed 29 Oct 2012.

¹³ 'Xi Jinping Millionaire Relations Reveal Fortunes of Elites' [29 June 2013] Bloomberg <http://www.bloomberg.com/news/2012-06-29/xi-jinping-millionaire-relations-reveal-fortunes-of-elite.html> accessed 6 Feb 2013.

¹⁴ Arrighi, *ibid* (n 6) 17.

¹⁵ David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 151; on Chinese class formation see He Qinglian, 'A Listing Social Structure' in Chaohua Wang (ed), *One China, Many Paths* (Verso 2003) 163-88; see also Mingqi Li, *The Rise of China and the Demise of the Capitalist World Economy* (Pluto Press 2008) x-xi.

¹⁶ Samir Amin, 'China, Market Socialism, and US Hegemony' (2005) 28 3 Review A Journal of the Fernand Braudel Center 259 at 274-75.

¹⁷ Arrighi, *ibid* (n 6) 24, 353-54, 359.

¹⁸ Gerard Lemos, *The End of the Chinese Dream: Why Chinese People Fear the Future* (Yale University Press 2012) 1.

Mingqi, was an important factor in the longevity of global neoliberalism, and prolonged what otherwise would have been a short-lived project.¹⁹ China is not and will not be a conventional status quo country, argues Pan Zhongqi. Rather, she has gradually evolved from a challenger to a supporter and 'proactive shaper' of the world order.²⁰ Notwithstanding the vast accumulation of private capital and deceptively familiar capitalist features, Fan, Morck and Yeung say, China did not embrace capitalism. She emulates institutional forms of market economy, but remains at heart socialist, with Lenin's commanding heights firmly under the control of the CCP. She is a 'to date successful stir-fry of markets, socialism and traditional China that is fully none of the three (...)'.²¹ Frank doubts whether there is such a thing as capitalism. He invites us to remove our Eurocentric lenses, so as to observe the cyclical continuities of the world-system, whereby parts of East Asia were dominant until 1800 and any ascent is in fact that of the West, one that 'came late and was brief'.²²

Perhaps, in a topography that is strained by contingencies and fissures, such confusion is both inevitable and functional. It spurs us to follow a spectrum of threads in the intricate tapestry that is China's progress from a subaltern at the periphery of the modern world-system to a strategic semi-peripheral state with a predicted advance to the core.²³ For a country is approaching the inner sanctum of global governance whose story unfolded for a long time outside the historical trajectory of global capitalism, one that was at the centre of a non-

¹⁹ Mingqi Li, *ibid* (n 15) 60-72; for an analysis of capitalism with Chinese characteristics see for example Yasheng Huang, *Capitalism with Chinese Characteristics: Entrepreneurship and the State* (CUP 2008).

²⁰ Zhongqi Pan, 'China Changing Image of and Engagement in the World Order' in Sujian Guo and Blanchard, *ibid* (n 7) 57.

²¹ Joseph Fan, Randall Morck & Bernard Yeung, 'Capitalizing China – Translating Market Socialism with Chinese Characteristics into Sustained Prosperity' [15 Dec 2011] 1 and generally <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972735> accessed 27 Oct 2012; for a journalistic style summary of China's economic rise and its contradictions see Jonathan Fenby, *China Today, How It Got There and Where It is Heading: Tiger Head Snake Tails* (Simon and Schuster 2012) 1-84.

²² Andrew Gunder Frank, *ReOrient: Global Economy in the Asian Age* (University of California Press 1998) xix, xxiv.

²³ See for example generally Martin Jacques, *When China Rules the World: The Rise of the Middle Kingdom and the End of the Western World* (Allen Lane 2009); Suisheng Zhao, 'The China Model: Can It Replace the Western Model' (2010) 19 issue 65 *Journal of Contemporary China* 419; for an analysis of the world system see generally Immanuel Wallerstein, *World-System Analysis: An Introduction* (Duke University Press 2004).

Roman type ancient empire, arose out of the ashes of being partially colonised and, who for a while at least, sought her national salvation within the non-capitalist camp. A stranger and the other, she is also familiar – she appears to speak the language of transnational capitalism and to adopt its aspirations, as well as concomitant economic and juridical arrangements. Yet, simultaneously she invokes the uniqueness of her ways and challenge orthodoxies of which she is an unexpected consequence.²⁴

Further, it seems the complexities of deciphering transformations are not confined to onlookers. The China observed by Shambaugh is a conflicted nation, one that is engaged in an unparalleled self-reflection.²⁵ Consequently, as in the case of Chinese BITs, here too, one encounters a discursive plurality that cuts across official, semi-official and unofficial school of thoughts about the implications of being a rising power.²⁶ Wang Yiwei, for example, points to four identities in need of harmonious fusion - socialist, oriental, developing and emerging power.²⁷ The love-hate relationship that seems to permeate Western literature about the country is reproduced in Chinese intellectuals' introspection. The US is conceptualised as a leader in the art of modernity on the one hand, and an empire that threatens world peace on the other.²⁸ Much as the HWP embodies a general consensus around issues such as China's peaceful intentions, culture and normative leadership, it also proved more contested than previous themes in the CCP charter:²⁹ for the Chinese right it essentially represents a declaration of support for globalisation, while for the

²⁴ Jinhua Dai, 'Forward' in Xiaomei Chen, *Occidentalism: A Theory of Counter-Discourse in Post-Mao China* (2nd ed, Rowman and Littlefield Publishers Inc. 2002) ix;

²⁵ David Shambaugh, 'Coping with a Conflicted China' (2011) 34 1 *The Washington Quarterly* 7 at 8 <<http://csis.org/files/publication/twq11wintershambaugh.pdf>> accessed 22 Aug 2012.

²⁶ *ibid* 8, 9.

²⁷ Wang Yiwei, 'Clash of Identities: Why China and the EU are Unharmonious in Global Governance' (2010) No 24 UNISCI Discussions Papers 101 at 103-04.

²⁸ William A. Callahan, *Contingent States: Greater China and Transnational Relations* (University of Minnesota Press 2004) xvii.

²⁹ Yongnian Zheng and Sow Keat Tok, "'Harmonious Society' and 'Harmonious World': China's Policy Discourse under Hu Jintao' (2007) Briefing Series – Issue 26 The University of Nottingham China Policy <[Institute http://nottingham.ac.uk/cpi/documents/briefings/briefing-26-harmonious-society-and-harmonious-world.pdf](http://nottingham.ac.uk/cpi/documents/briefings/briefing-26-harmonious-society-and-harmonious-world.pdf)> accessed 27 Oct 2012.

left its focal point is China's response to inequalities, and support for redistribution and sustainability.³⁰

It is perhaps a reflection of the discursive hold enjoyed by Westerncentric perspectives that the tide of commentaries about China's impact on the world order has relatively little to say about the country's own search for a place in this order.³¹ Yet, it is arguably this search that should be the starting point for understanding the potential for change. This chapter seeks to step into the lacuna by looking at the country's paradigm and the various interpretive possibilities it conjures up.

The first section of this work looked at ODI's institutional and discursive underpinnings. The neoliberal paradigm and BITs appeared broadly consistent and mutually legitimising. Both are predicated on asymmetric incorporation into developmentalism that is anchored in the political, financial, juridical and ideological arrangements conceptualised as the globalised West. In the second section of this enquiry the gaze turned to China. In the first part of this second section, the Chinese BITs network was examined. It was found to be diverse, though with a trajectory towards the Western practice. Against this backdrop, I now turn my attention to the imperatives of the Chinese paradigm - the discursive logic that ordinarily would coalesce with law, in the mutually legitimising embrace that animates Foucault's eco-political-juridical ensemble.³²

The previous chapter focused on China's interface with the world beyond her borders, viewed through the lens of outward direct investment (ODI) related treatification. Correspondingly, the interest of this chapter lies in the outward projections of her paradigmatic logic. In other words, of the three questions posited above, it is the first and the third that primarily engage us. I say

³⁰ Jean-Marc F. Blanchard and Sujian Guo, "'Harmonious World' and China's New Foreign Policy' in Sujian Guo and Blanchard, *ibid* (n 7) 9; Yongnian Zheng and Tok, *ibid*.

³¹ Wang Gungwu and Zheng Yongnian, 'Introduction' in Wang Gungwu and Zheng Yongnian (eds), *China and the New International Order* (Routledge 2008) 3.

³² Michel Foucault (tr), *The Birth of Biopolitics: Lectures at the College De France 1978-1979* (Palgrave Macmillan 2008) 162.

'primarily' because, as noted in earlier chapters, history testifies to a degree of transference between internal and external systemic arrangements. China is no exception. The HWP is the 'alter ego' of a Harmonious Society paradigm.³³ Both are predicated on national configurations that are conducive to interdependency. The nuances of China's integration into capitalist globalisation are inextricable from the question of whether or not she herself has rotated towards a capitalist mode of development. Indeed, Wang and Zheng identify in the interface between the domestic and the international arenas an instance of historical continuity, whereby intertwinement can be traced back to China's tributary system - a time when, according to Fairbank, 'external order was so closely related to her internal order that one could not long survive without the other'.³⁴ Thus, examination of the country's outward projections necessitates at least some consideration of the dynamics of her domestic scene.

The subject matter of this chapter is China's positioning at the level of ideas and norms.³⁵ Its focus is on the Chinese official paradigm rather than on its Western conceptualisation in Ramo's notion of a 'Beijing Consensus'.³⁶ The designation of a consensus may assist in positing Ramo's exposition as a counter discourse to the Washington Consensus. However, it also points to the possibility of different understandings. For the word signifies a hegemonic meeting of minds, a universal rationality that, argues Mouffe, is intrinsic to the liberal parlance. In other words, in the interest of reconciled societies, the conflictual dimension that is constitutive of collective life is delegitimised.³⁷ In its translation into Chinese (*gongshi*), consensus conveys a slightly different meaning. It denotes common or mutual recognition rather than agreement per se. Thus, *gongshi* allows space for the coexistence of differences, a central theme of the HWP. Indeed, China's government is at pains to emphasize that it does not promote a

³³ Yongnian Zheng and Tok, *ibid* (n 29) 3.

³⁴ Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 4-5.

³⁵ Zhongqi Pan, *ibid* (n 20) 55.

³⁶ Joshua Cooper Ramo, *The Beijing Consensus: Notes on the New Physics of Chinese Power* (The Foreign Policy Centre 2004) 60.

³⁷ Arif Dirlik, 'Beijing Consensus: Beijing "Gongshi." Who Recognizes Whom and to What End' *Globalization and Autonomy* 1

<http://globalautonomy.ca/global1/position.jsp?index=PP_Dirlik_BeijingConsensus.xml> accessed 9 Nov 2012; Chantal Mouffe, *On the Political* (Routledge 2005) 2.

prescriptive prototype, or in the words of Deng Xiaoping to Ghana's president Jerry Rawlings in 1985: 'Please don't try to copy our model. If there is an experience on our part, it is to formulate policies in light of one's own national conditions'.³⁸

The contingencies that arise on the way to implementation mean that developments on the discursive level may prove unreliable indicators of realities.³⁹ Indeed, the inevitability of change is one of the HWP's premises.⁴⁰ However, this is not to say that discourse is not deserving of attention. For within it lies a commitment to the particularities of a power structure. At the time of writing, we may be witnessing the unfolding of Arrighi's analysis of the US as entrapped in a state of financialisation, the last stage in the rise and decline of systemic cycles of accumulation (SCAs).⁴¹ With the US hegemonic path increasingly veering towards exploitative domination and away from adjustment and accommodation, China's rise has arguably become 'an essential condition for a non-catastrophic transition to a new world order'.⁴² The direction her ascent may take is as yet uncertain. The country's internal special interests reconstitution, and external integration into the neoliberal agenda, may already be too far gone for her to be able to provide solutions to systemic predicaments.⁴³ However, at the very least, the HWP offers a starting point, an attempt at theorising some key issues.

With this in mind, this chapter will begin with an outline of the main constituents of the HWP. It will then seek to contextualise it historically by invoking the theme of the continuities and ruptures that played a role in its formation. It will argue that China's watershed point was not Deng's reforms,

³⁸ Justin Yifu Lin, *ibid* (n 1) xvii; see also Barry Sautman and Yan Hairong, 'Friends and Interests: China's Distinctive Links with Africa' in Dorothy-Grace Guerrero and Firoze Manji (eds), *China's New Role in Africa and the South: A Search For a New Perspective* (Fahamu- Networks for Social Justice 2008) 100.

³⁹ Arrighi, *ibid* (n 6) 12.

⁴⁰ Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 7.

⁴¹ Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (new edn, Verso 2010) 277-308 and generally.

⁴² Giovanni Arrighi and Beverley J. Silver, *Chaos and Governance in the Modern System* (University of Minnesota Press 1999) 288-99.

⁴³ *ibid*.

but rather the violent encounter of the Opium Wars. It was this trauma that, in the vein of neoliberal shock therapies, 'depatterned' China's identity and made her receptive to a new one, this time constructed for her by the West.⁴⁴ Against this background, the HWP will then be problematised by looking at the way it interfaces with the neoliberal order, including through the BITs program.

Harmonious World

Peace and prosperity in process

It may be telling that the HWP (*hexie shijie*) was internationally inaugurated not at the core of the world-system, but at its periphery and semi-periphery - a mention at the Jakarta Asian-African Summit in April 2005 and in a joint statement issued by China and Russia on the occasion of Hu's visit there some two months later.⁴⁵ The periphery and semi-periphery were followed in quick succession by a stage of international governance - Hu Jintao's speech to the UN in September 2005, and more recently, his December 2011 key address to the General Debate of the 64th UN General Assembly entitled 'Work Together to Build a Common Future'.⁴⁶ It seems a direct pitch to the core was bypassed altogether, albeit that in the US the HWP went on to form part of foreign policy debates.⁴⁷ The place of diffusion appears congruent with substantive content. For at its core, the HWP is a discrete treatise about the political economy of globalisation, about the systemic inequality in access to the world's wealth, and the capacity of transformations to take place peacefully.⁴⁸ It is a rising, yet developing power's promise to avoid the road of expansion and aggression

⁴⁴ On 'depatterning' in shock therapy see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane 2007) 25-38.

⁴⁵ Sienho Yee, 'Toward a Harmonious World: The Roles of the International Law of Co-Progressiveness and Leader States' (2008) *Chinese Journal of International Law* 7 (1) 99.

⁴⁶ *ibid* 100; 'Working Together to Build a Harmonious World Is Socialist China's World Outlook' [1 December 2011] People's Daily Online <<http://english.peopledaily.com.cn/100668/102793/102813/7662583.html>> accessed 29 Oct 2012.

⁴⁷ Dongsheng Di, 'Continuity and Changes: A Comparative Study of China's New Grand Strategy' (2007) 12 *Historia Actual Online* 7.

⁴⁸ Arrighi, *ibid* (n 6) 289-95.

trodden by its predecessors.⁴⁹ Within the developed/developing dichotomy that is at the core of globalised contradictions, China positions herself firmly in the developing camp with which she declares solidarity, where she will remain 'for a long time to come',⁵⁰ and from where, being the biggest of them all, she calls for a Confucian 'unity without uniformity' in the collaborative endeavour of reconstituting an order of 'commonly prosperous world'.⁵¹

Thus, the HWP's preoccupation is with the historically well-rehearsed issues of development and peace. However, it is neither a Kantian prescription for the establishment of peace where the 'natural state is one war',⁵² nor is it the neoliberal discourse of Fukuyama's end-point of historical evolution.⁵³ Rather, it is a less ambitious theorem about where we are now, and what we may potentially achieve by acting in harmony with existing dispositions. Where we are now is not a reflection of a universalised law of nature. Instead, it is a product of 'the international balance of power' that is currently changing 'in favour of the maintenance of world peace', but the immanent dynamic of which may lead to a different disposition.⁵⁴ For '[i]n the ever-changing world of today, all doctrines, systems, models and paths are subject to the test of the time and practice'.⁵⁵ What we may potentially achieve is driven by a desire for peace that is inextricable from the right to subsistence – the primary right from which all

⁴⁹ *ibid* 291; 'What China's Peaceful Development Means to the Rest of the World' in 'China's Peaceful Development' (2011) White Paper Chinese Government Official Web Portal Gov.cn <http://english.gov.cn/official/2011-09/06/content_1941354_2.htm> accessed 20 Aug 2011.

⁵⁰ 'China's Path to Peaceful Development is a Choice Necessitated by History' in White Paper, *ibid* (n 49) 1.

⁵¹ 'Working Together to Build a Harmonious World', *People's Daily*, *ibid* (46).

⁵² Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch 1795'; But see Samuel S Kim 'China and Globalization: Confronting Myriad of Challenges and Opportunities' (2009) 33 *3 Asian Perspectives* 41 at 55 <<http://www.constitution.org/kant/perpeace.htm>> accessed 22 Aug 2012; Dongsheng Di, *ibid* (n 47) 13.

⁵³ Francis Fukuyama, 'The end of History?' (Summer 1989) *The National Interest* <<http://courses.essex.ac.uk/GV/GV905/IR%20Media%202010-11/W4%20Readings/Fukuyama%20End%20of%20History.pdf>> accessed 3 July 2011; Francis Fukuyama, *The End of History and The Last Man* (Penguin Books 1992) xii, xv.

⁵⁴ Hu Jintao, Report, *ibid* (n 9); but Hu goes on to say that however the international disposition might change 'the Chinese government and people will always pursue common development, cooperation and a peaceful, independent foreign policy'.

⁵⁵ White Paper, *ibid* (n 49) 1.

other rights derive.⁵⁶ In other words, 'peace and development' is conceptualised as a current trend, a choice between wellbeing and perishing,⁵⁷ and the object of the global undertaking. Peace is both a prerequisite for and the outcome of development transiting to a stage of 'common prosperity'.⁵⁸

In this structural triangulation - present conditions, the strategy that these conditions call for and the end result of its successful implementation - resonates the triangular logic of what Qin terms Chinese 'harmonious dialectics':⁵⁹ a process of appropriate responses that implicates relational identities, situational dispositions and the immanence of change. Understanding this reasoning, argues Qin, is pivotal to grasping the logic of the HWP discourse.⁶⁰ Central to it, he says, is the differentiation between the Hegelian concept of a fixed being and the Chinese notion of becoming - The fluid process through which society and institutions are constantly shaped and re-shaped through their mutual interactions. If in Hegelian dialectics, A and B represent separate, determinate and independent entities, engaged in a conflictual contest that can only be resolved through domination or annihilation, in Chinese dialectics A is inclusive of non-A, so that one evolves into the other through an evolutionary dynamic of engagement.⁶¹ Being interdependent and complementary, essential properties are not self-standing. Rather, they are determined by the constant and transformative motion that is forever in process.⁶² This reconciliatory, non-zero gaming relational process, in which each includes, complements and absorbs the other, is the essence of a harmonic systemic whole.⁶³ Thus, China's instigation of market economy does not

⁵⁶ Human Rights in China, 'The Right to Subsistence - The foremost Human Right The Chinese People Long Fight For' [2009] White Paper <<http://www.china.org.cn/e-white/7/index.htm>> accessed 23 Aug 2012.

⁵⁷ 'China's Path to Peaceful Development is a Choice Necessitated by History', in White Paper, *ibid* (n 49) 1.

⁵⁸ *ibid*; Su Hao, 'Harmonious World: The Conceived International Order in Framework of China's Foreign Affairs' in The National Institute for Defence Studies Joint Research Series 3 29 at 31. <http://www.nids.go.jp/english/publication/joint_research/series3/series3.html> accessed 10 Nov 2012.

⁵⁹ Qin Yaqing, 'International Society as a Process: Institution, Identities, and China's Peaceful Rise' (2010) 3 *The Chinese Journal of International Politics* 129 at 144.

⁶⁰ *ibid* 131.

⁶¹ Qin Yaqing, *ibid* (n 59) 131, 133.

⁶² *ibid* 138.

⁶³ *ibid* 131, 133, 138, 144.

represent a conflictual departure from planned economy. Market economy and central planning are mutually inclusive opposites that are free of an either or logic. A 'socialist market economy' is not an oxymoron because, in the words of Deng Xiaoping, 'there are elements of market economy in socialism and elements of planned economy in capitalism'.⁶⁴ It follows that any encounter is not 'necessarily violent and confrontational, unless we make it so'.⁶⁵

'We make it so' when the relational process departs from three key concepts: harmony, the situational disposition and becoming.

The premise of harmony (he)

Here the assumption is that 'any two opposites in a process are fundamentally non-conflicting, and that contradictions can be solved through complementary interaction before a new synthesis is born'.⁶⁶ Importantly, harmony is the opposite of uniformity. For it arises, not out of sameness, but from the interconnectedness of complementary differences, to form what Angle terms 'engagement despite distinctiveness'.⁶⁷ Harmony is similarly averse to uncritical obedience. Since the welfare of people is the government's ultimate aim and the sole test of its morality,⁶⁸ its long-term harmoniousness requires active disapproval of bad decisions and mistreatment.⁶⁹ In the words of Confucius: 'The gentleman agrees with others without being an echo; the small man echoes without being in agreement'.⁷⁰ The echo of disagreement in the HWP may be found in its conceptualisation of globalisation as a cooperative endeavour, one that strives for, and is legitimised, by peoples' welfare – improved international trade and financial systems, fairness, justice and continuing solidarity with developing countries.⁷¹ Thus, China remains committed to increasing market access, in accordance with internationally

⁶⁴ *ibid* 150.

⁶⁵ *ibid* 147.

⁶⁶ *ibid*.

⁶⁷ Stephen C. Angle, 'Human Rights and Harmony' (2008) 30 *Human Rights Quarterly* 76 at 78.

⁶⁸ D.C. Lau, 'Introduction' in Confucius (tr), *The Analects (Lun Yu)* (Penguin Books 1979) 32-36.

⁶⁹ Angle, *ibid* (n 67) 186-88.

⁷⁰ Confucius, *ibid* (n 68) 122.

⁷¹ Hu Jintao, Report *ibid* (n 9) 17.

recognized economic and trade rules,⁷² and to advancing the liberalisation of trade and investment.⁷³ Yet, she also appears to distance herself from the neoliberal notion of an interstate system that is driven by competition, and in which welfare has been made subsidiary to market compulsions.⁷⁴ In other words, as underscored by Stiglitz, in the Chinese paradigm, trade and investment liberalisation is not an end in itself. Rather, it is the means by which the end – peoples' welfare – is to be achieved.⁷⁵

Situational disposition (shi)

Zhu Liqun posits the concept of situational disposition as key to understanding China's relationship with the external.⁷⁶ Lin Yifu gave it a modern makeover when he talked about the principle of adapting to a changing environment.⁷⁷ *Shi* refers to the disposition of things. It is a disposition that permanently sways between the static and the dynamic, but the movement of which has little in common with Western understanding of 'cause and effect', 'means to an end', Hegelian thesis/antithesis and aspirations for a final truth.⁷⁸ Its state of perpetual movement originates from its inherent potential for change rather than from human initiative.⁷⁹ It follows that 'the only proposition that does not change is that everything else is subject to change'.⁸⁰ For Deng and Moore, China's assessment of the potential for global transformation is premised on

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ A. Claire Cutler, *Private Power and Global Authority* (Cambridge University International Relations Series, CUP 2003) 4.

⁷⁵ Joseph Stiglitz, *Globalization and its Discontents* (Norton 2002) 125-26.

⁷⁶ Zhu Liqun, 'China's Foreign Policy Debates' (Sep 2010) 121 Chaillot Papers, European Union Institute for Security Studies 15 at 17-18 <http://www.iss.europa.eu/uploads/media/cp121-China_s_Foreign_Policy_Debates.pdf> accessed 21 Aug 2012.

⁷⁷ Lin Yifu, lecture at the April 2010 Cambridge University conference entitled 'The Economic Crisis and the Crisis in Economics' [3 June 2011] Lecture by Dr. Eddie O'Connor, 'China's 12th Five Year Plan: Settling the Global Agenda' The Institute of International and European Affairs Dublin 21-22 <<http://www.iiea.com/events/the-12th-chinese-five-year-plan-setting-the-global-agenda?gclid=CLfd56ev4rICFRPLtAodwG8AtA>> accessed 2 October 2012.

⁷⁸ Francois Julien (trs), *The Propensity of Things: Towards a History of Efficacy in China* (Zone Books 1995) 11, 17-18. The term that comes close to 'truth' in Confucian thoughts is the Way (*dao*). It denotes the sum total of truths about the universe and man. Lau, *ibid* (n 68) 11.

⁷⁹ Julien, *ibid* 13.

⁸⁰ *The Book of Change: A New Translation of the Ancient Chinese I Ching* (tr), (Allen & Unwin 1965); Zhu Liqun, *ibid* (n 76) 17-18; Wang Gungwu, 'China and the International Order: Some Historical Perspectives' in Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 23.

confidence in the international interstate system's ability to accommodate her upward mobility.⁸¹ This observation may however be misreading the paradigm's tenor of transformative spontaneity - the unavoidable movement that is independent of external intervention, yet calls for corresponding action. It is not that China seeks to rise and influence, or that she is endowed with US style exceptionalism.⁸² Rather, being 'the biggest developing country' to have made the correct strategic choice of following the new path of 'peaceful development and mutually beneficial cooperation', and against the backdrop of globalised disposition, her historical role cannot but be such, that its impact 'will manifest itself over time'.⁸³

The *shi* calls for understanding the international system's distinctive features, its power configuration and the direction of its historical movement.⁸⁴ Seen through the lens of the HWP, three main themes emerge: peace, development and cooperation, the pursuit of which forms the 'irresistible trend of the times';⁸⁵ the related 'irreversible' progress toward a multipolar world that is attendant upon deepening globalised interdependence and technological advances;⁸⁶ and the residual threat to peace and development that is associated with the operation of hegemonic power politics and its concomitant conflicts, imbalances and ever widening North-South gap.⁸⁷

Thus, China's conceptualisation of the current international configuration articulates an understanding of globalisation as a 'double edge sword', dialectical process.⁸⁸ On the one hand, peace promoting development and reformative opportunities are opened up by a technologically innovative, integrated and internationalised system of production.⁸⁹ On the other hand,

⁸¹ Yong Deng and Thomas G. Moore, 'China Views Globalization: Towards a New Great-Power Politics?' [2004] *The Washington Quarterly* 117 at 121.

⁸² On American exceptionalism see for example, Reinhold Niebuhr, *The Irony of America's History* (The University of Chicago Press 1952).

⁸³ 'What China's Peaceful Development Means to the Rest of the World', *ibid* (n 49) 1.

⁸⁴ Zhu Liquan, *ibid* (n 76) 17-18.

⁸⁵ Hu Jintao, Report *ibid* (n 9) 16; 'China's Foreign Policies for Pursuing Peaceful Development' in White Paper *ibid* (n 49).

⁸⁶ Hu Jintao, Report *ibid* (n 9) 16.

⁸⁷ *ibid*.

⁸⁸ Deng and Moore, *ibid* (n 81) 118-21.

⁸⁹ 'What China's Peaceful Development Means to the Rest of the World', *ibid* (n 49) 1.

developing countries are increasingly impoverished, marginalised and subjugated because this same globally integrated production system is under the hegemonic control of developed countries and their TNCs'.⁹⁰ In other words, globalisation as a peace enhancing co-operative endeavour is posited against the residues of imperialist and exploitative past, the remains of the unethical rule of might that once inflicted such great sufferings on the Chinese people.⁹¹ For Long Yongtu, deputy foreign trade minister who was responsible for negotiating China's entry into the WTO, hegemonism and globalisation combined, represent 'a worldwide industrial restructuring'. Such restructuring is implemented by developed countries through the agency of their TNCs.⁹² Developing economies are placed in a subordinate position, whereby the survival of their economies is put in the hands of others.⁹³ This rather unremarkable observation is rendered more interesting when accompanied by the proposition that, neither hegemonism and big powers politics nor unequal development, are intrinsic to globalisation. Rather, they are a reflection of how globalisation is managed.⁹⁴

New management necessitates a change to power configurations. It is here that a multipolar power dynamic is posited as a solution, and the route away from the conflicts attendant upon the hegemon's propensity to flatten differences.⁹⁵ The emergence of new centers of decision thus facilitates pluralistic, non-conflictual globalisation, opens up opportunities for the creation of new partnerships,⁹⁶ and enables structural and institutional reforms from within.⁹⁷ It provides the framework necessary for 'winning without fighting'.⁹⁸ Further,

⁹⁰ Jenny Clegg, *China's Global Strategy: Towards a Multipolar World* (Pluto Press 2009) 84-85.

⁹¹ Zhu Liqun, *ibid* (n 76) 23.

⁹² Clegg, *ibid* (n 90) 84-85 citing from Thomas Moore, 'China and Globalisation' in Samuel S. Kim (ed) *East Asia and Globalization* (Rowan and Littlefield 2000) 116; but see Kim, *ibid* (n 52) 52 arguing that by 2001 multipolarity has become disconnected from the concept of globalisation.

⁹³ Clegg, *ibid*.

⁹⁴ Clegg, *ibid* (n 90) 105; Deng and Moore, *ibid* (n 81) 122.

⁹⁵ Jacques, *ibid* (n 23) 142; for a discussion of Chinese debates on hegemonism see Zhu Liqun, *ibid* (n 76) 23-26.

⁹⁶ For a discussion of China's partnerships diplomacy see Su Hao, *ibid* (n 58) 37-47.

⁹⁷ Deng and Moore, *ibid* (n 81) 121-25.

⁹⁸ Clegg, *ibid* (90) 71; for a discussion of multipolarisation see Zhang Yongjin, 'Understanding Chinese Views of the Emerging Global Order' in Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 150-52; see also Jean-Pierre Cabestan, 'Learning from the EU? China's changing outlook toward multilateralism' in Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 203-10.

multipolarity is not static. Its immanent dynamism will eventually turn it into a multilateral order that is similarly centred on co-operative harmonious diversity.⁹⁹ 'Multilateralism, mutually beneficial co-operation and the spirit of inclusiveness', Hu Jintao told the Plenary Meeting of the UN, 'should be upheld in realizing common security and prosperity and in building a harmonious world'.¹⁰⁰ This view of multipolarity as the route to a truly free and pluralistic world was articulated in 2004 by the People's Daily as follows:

The multipolarisation of the world is a reflection of the diversity of the world. The world is a colorful and varied in posture, and the mode of development is diversified. There should not and cannot be such a phenomenon that when 'my flowers blossom, a hundred other flowers will wither away' (....). Imposing a country's concept of value and mode of development on other countries and pushing this through by force is bound to trigger conflicts with other countries and civilizations. This can only be the way of causing disorder. The fact is that world multipolarisation (....) has brought to view its contour: A unified Europe is rising; the fallen Russia is regaining its vital energy; the ASEAN countries are forging ahead hand-in-hand; India and China are undergoing rapid development; Africa has also begun to take off and march towards unity and self-improvement. Only this is the balance favourable to peace and the democratization of international relations, and is the developmental trend of history.¹⁰¹

⁹⁹ Zhu Liquan, *ibid* (n 76) 27.

¹⁰⁰ Jiang Zhuqing, 'Hu calls for harmonious world' [16 September 2005] *China Daily* <<http://www.highbeam.com/doc/1P2-8836323.html>> accessed 15 Nov 2012; for an analysis of China's embrace of multilateral institutions see Kai He, 'China Peaceful Rise and Multilateral Institutions: In Search of a Harmonious World' in Sujian Guo and Blanchard, *ibid* (n 7) 65-78.

¹⁰¹ 'The Falsehood of Monopolar Theory' [30 July 2003] *People's Daily*.

Becoming (bian)

Here, actors and institutions transform and are transformed as part of their interactive identity formation, and in line with the disposition of the situation.¹⁰² Thus, China's integration into the global order represents a fitting response to the post-cold war world period, a time when no single power is wholly independent and capable of unilateral problems solving. Consequently, cooperation replaced conflict as the appropriate dispositional response. China reacted accordingly by opening up, and replacing the policy of 'be prepared for war' with a focus on economic development and interaction with the international community.¹⁰³ She changed. By so doing, she is transforming the world around her.

Peace and prosperity – diverse international community

In sum, Hu Jintao conceptualised his vision of a harmonious world in eight characters – *daijiu heping, gongtong cairong* meaning 'lasting peace and common prosperity'.¹⁰⁴ Implicit in this conceptualisation is an emphasis on economic imperatives. Countries and their people are bound together by a consciously shared value system. At its core lies the aspiration to realise their sovereign right to economic prosperity.¹⁰⁵ Within this overarching common interest in, and entitlement to development, diverse civilizational values and national permutations will continue to operate also a matter of right – 'the right of the peoples of each State to freely choose their social system and their path of development' without external interference.¹⁰⁶ In this recognition of the existence of an internationally shared values system the HWP meets Bull's definition of an international society, and articulates one of the two limbs which

¹⁰² Qin Yaqing, *ibid* (n 59) 144, 149.

¹⁰³ *ibid* 148.

¹⁰⁴ Blanchard and Sujian Guo, *ibid* (n 30) 3.

¹⁰⁵ Hu Jintao, Report, *ibid* (n 9) 17.

¹⁰⁶ 'China's Foreign Policies for Pursuing Peaceful Development' *ibid* (n 85) 1; Hu Jintao, Report, *ibid*.

for Bederman are essential to understanding the process of globalisation.¹⁰⁷ Yet, it is a shared values system that shies away from normative universalism as in Kant's notion of ubiquitous Western representative democracies and Fukuyama's 'end of history'.¹⁰⁸ On the contrary, peace and development are contingent on the preservation of cultural, economic and political particularities.

Similarly, the HWP appears to distance itself from the state-centric approach that forms the second limb of Bull's definition and Bederman's essential understanding of international community.¹⁰⁹ The language mostly used instead is one of nations and people. This choice of words may be seen as serving two purposes. First, it bypasses the Westerncentric discourse that posits sovereignty and globalisation as exclusive to the European invention of nation-states, while ancient states are repudiated as polities lacking in self-determination.¹¹⁰ Thus, the Silk Road and Zheng He's seven voyages to the Western seas during the Ming Dynasty can be advanced as examples of globalised dealings that go back to antiquity. They testify to China's ancient national identity and essential capacity for peaceful, co-operative, respectful and exchange-based interactions with people of different civilizations.¹¹¹ Second, it supports an understanding of rights as collective rather than individual – the collective right of people to self-determined national configurations, to material wellbeing and to equal, just and fair treatment.

Implicit in the notions of collective rights and shared values is the recognition that there is a world order to which China is and will continue to be integral.¹¹² It is an order in process, one in which change is inevitable, and where individual nations and the order they produce are mutually transformative.¹¹³ This

¹⁰⁷ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Macmillan 1977) 13; David J. Bederman, *Globalization and International Law* (Palgrave Macmillan 2008) 3; Hu Jintao Report, *ibid* (n 9) 17.

¹⁰⁸ Bederman, *ibid* 16.

¹⁰⁹ Bederman, *ibid*; Hu refers to 'states' in the context of equal participation in and democratization of the international arena.

¹¹⁰ *ibid* 4.

¹¹¹ 'China's Path to Peaceful Development is a Choice Necessitated by History', *ibid* (n 57) 1.

¹¹² Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 6, 10.

¹¹³ *ibid* 6-7, 10; Wang Gungwu, *ibid* (n 80) 23.

fluidity may offer at least a partial explanation for the high level of abstraction and corresponding in-built manoeuvrability that typifies China's worldview.¹¹⁴ Contingencies are thus accommodated through congenital flexibility within which progressive adjustments can take place. However, the implications of fluidity go further than that. If all doctrines, systems, models and paths merely rest on temporary dispositions – nothing is forever so to speak – at first blush the HWP seems to distance itself from doctrinal thinking. Rather, as suggested by Clegg and Deng and Moore, it appears confined to being a prototype for the management of the global space,¹¹⁵ Van Ness's model of collaborative order and win-win negotiated solutions, to be contrasted with the US led competitive, zero- sum order with its prescriptive neoliberal policies.¹¹⁶

Striking in Van Ness's comparative analysis of the two models is the degree to which they converge in their preoccupation with the process of management. It is arguable that the HWP does not altogether foreclose Mouffe's sphere of the political. It does envision a new power design in the shape of pluralistic multipolarity.¹¹⁷ In addition, in its focus on people, one may even detect a residue of Marxist solidarity that transcends nation-states in the pursuance of workers led polities.¹¹⁸ Yet, the central question, to which Wallerstein attributes the difficulties encountered by socialist movements in power, remains unanswered.¹¹⁹ That is, which of the various groups that form the collective is to constitute the 'people' - might they be the neoliberal consumers of Chicago School orthodoxy?¹²⁰ Might it be that, again in a neoliberal vein, it is their purchasing power that occupies morality's commanding heights? Further, what will constitute justice and fairness? The HWP is assisted in hedging these questions by invoking the harmonic logic of perpetual transformation. Yet, at

¹¹⁴ Su Hao, *ibid* (n 58) 29.

¹¹⁵ Clegg, *ibid* (n 90) 88; Deng and Moore, *ibid* (n 81) 122.

¹¹⁶ Clegg, *ibid* 63; Peter Van Ness, 'Conclusion' in Mel Gurtov and Peter Van Ness (ed), *Confronting the Bush Doctrine: Critical Views from the Asia-Pacific* (Routledge Curzon 2005) 266; Simon Bromley, 'American Power and the Future of the International Order' in William Brown, Simon Bromley and Suma Athreya (eds), *Ordering the International: History, Change and Transformation* (Pluto Press in association with the Open University 2004) 180.

¹¹⁷ Mouffe, *ibid* (n 37) 52.

¹¹⁸ Bederman, *ibid* (n 107) 16; the word used in the Chinese version is 'renmin' which refers to a collective rather than individual notion of people.

¹¹⁹ *ibid* 81.

¹²⁰ Chapter 3 text to n 146-47 pp 108.

the same time, the technical management of the world order appears to be excluded from such logic. Processwise, we are told, it is the system as it is, that is to inform the way power is exercised and rights are to be realised. Thus, a market economy with increasing interdependency at all levels, and a liberalised trade and investment regime, represent not only where we are now, but also the parameters within which future changes are to be affected.¹²¹ It is here that the issues identified at the outset resurface.

Before turning our attention to these issues, to reduce the risk of an understanding that is limited to short term contingencies, it is necessary to first examine the historical landscape that China traversed on her way to the HWP. Historical contextualisation may help to throw better light on the two forces that animate the country's attempts at dealing with the external, and underpin the possibility of being simultaneously the same and different, incorporated and reformist – China's ancient identity and the process of its adaptation to Westernised modernity.

The Watershed

Harmony incorporated

The power of gunboats

The polemic associated with the temporal designation of beginnings surfaced in earlier chapters, when I examined the capitalist order's progression towards neoliberalism and the related emergence of the BITs network. The view canvassed was that neither represents revolutionary occurrences. Rather, they embody innovative inflections in a historical continuum, the foundations of which can be traced back to the Roman Empire, but in the course of which a specific capitalist civilization came into being.¹²² I followed Foucault and

¹²¹ Wang Gungwu, *ibid* (n 80) 28.

¹²² Chapter 2 text to n 14-20 pp 45-46; chapter 3 text to n 31-57 pp 92-95.

Polanyi in attributing the origins of this specificity, and its evolvement into a full-fledged dogma of market liberalism, to the 18th 19th centuries.¹²³ It is in the nature of historical chronicles that this dating should be controversial.¹²⁴ Still, it provides a fitting temporal framework for the purpose of this discussion. It was around this time that capitalism matured into its industrialised form.¹²⁵ It was also the moment when Polanyi's 'Great Transformation' collided with China's 'Great Divergence', and propelled the country via a 'century of humiliation' towards her own rupture:¹²⁶ from the centre to the periphery of the world-system, from a thriving and innovative civilization to the 'sick man of East Asia' and from a diffuser to a recipient of norms and structures.¹²⁷

The effect of this rupture on China was profound. Indeed, the view taken here is that it represented the beginning of China's own Great Transformation, a watershed point at which the course of her development changed in a fundamental way. In other words, it was a break of exogenous and forcible origins that triggered a spectrum of indigenous responses, revolutionary and otherwise. Such responses were in turn shaped to a great degree by the encounter that precipitated them. It is therefore the moment by reference to which, what came before and what was to follow is to be posited. That moment, says Li Mingqi, was the Opium Wars (1839-42 and 1856-60), when a defeated and humiliated China was first drawn into the orbit of the capitalist world-economy.¹²⁸ It is a fitting point at which to start, since it brings together the three forces that combined to turn into a violent rupture what, according to the HWP, could have been an instance of a non-conflictual interactive identity formation: capitalism and its related processes of war and incorporation.

¹²³ Chapter 3 text to n 52-53 p 95; but see Frank questioning the existence and meaning of capitalism. Frank, *ibid* (n 22) 330-32.

¹²⁴ Samir Amin, *Global History: A View From the South* (Pambazuka Press 2011) 12; Arrighi, *ibid* (n 41) 37-48; Ellen Meiskins Wood, *The Origins of Capitalism: A Longer View* (Verso 2002) 3; Frank, *ibid* (n 22) 328-29.

¹²⁵ Wood, *ibid*.

¹²⁶ Jacques, *ibid* (n 23) 72.

¹²⁷ Li Xing, 'Introduction The Rise of China and the Capitalist World Order: The "Four-China" Nexus' in Li Xing (ed), *The Rise of China and the Capitalist World Order* (Ashgate 2010) 5; the term 'Great Divergence' was coined by Ken Pomeranz to denote the divergence in the political and economic fortunes of Europe and East Asia. Kenneth Pomeranz, *The Great Divergence: Europe, China and the Making of the Modern World Economy* (Princeton University Press 2000).

¹²⁸ Mingqi Li, *ibid* (n 15) 6; see also Wang Yiwei, *ibid* (n 27) 102.

Of these three constituents, it is the second that is least contested. Even Frank acknowledges that the culmination of China's decline passed via the military campaigns and conquests of the Opium Wars.¹²⁹ Indeed, for Arrighi as for Marx, it was real gunboats rather than the artillery of cheap commodities that ultimately was the 'true "midwife"' of China's subordination to the imperatives of the "endless" accumulation of Western Capital'.¹³⁰

Continuities and ruptures

The remaining two elements are more problematic. For Frank for example the rise of the West and the decline of the East were systemically related occurrences. Both were the product of contingencies and inflections in a cyclical and integrated world economy rather than the manifestation of any qualitative rupture of European innovative origins. In reality, he argues, there has always been a single system, of which for two thousand years China (together with the rest of Asia) was the predominant region.¹³¹ She was never a world into itself.¹³² The tale of her withdrawal from international trade from the 15th century onwards, adds Hobson, is no more than a Eurocentric myth.¹³³ Rather, Chinese markets and trade-based productive system remained at the forefront of world development until the moment when the country suffered 'a relatively brief but deeply felt eclipse'.¹³⁴ Industrialisation was thus not European specific. It occurred in China some six hundred years ahead of Britain.¹³⁵ Thereafter, conditions conflated to displace it from the East to the West.¹³⁶

¹²⁹ Frank, *ibid* (n 22) 274; see also for example Michael Howard, 'The Military Factor in European Expansion' in Hedley Bull & Adam Watson, *The Expansion of International Society* (Clarendon Press 1985) 33-40.

¹³⁰ Giovanni Arrighi, 'China's Market Economy in the Long Run' in Ho-fung Hung (ed), *China and the Transformation of Global Capitalism* (The Johns Hopkins University Press 2009) 24 citing from Karl Marx, *Capital* (Foreign Languages Publishing House 1959) 751.

¹³¹ Frank, *ibid* (n 22) 5.

¹³² *ibid* 108.

¹³³ John M. Hobson, *Eastern Origins of Western Civilization* (CUP 2004) 61-74.

¹³⁴ Gilbert Rozman, 'The East Asian Region in Comparative Perspective' in Gilbert Rozman (ed), *The East Asian Region: Confucian Heritage and its Modern Adaptation* (Princeton University Press 1991) 6.

¹³⁵ Hobson, *ibid* (n133) 51-61.

¹³⁶ Frank, *ibid* (n 22) 283-94.

Focusing on Frank's account, it is one of circular processes in which specificity is absorbed into a notion of an all-encompassing flow. Such flow is in turn conceptualised as of greater magnitude and as more deserving of attention. Indeed, a footprint of the HWP logic may be identified in his assertions that continuity does not mean uniformity and uniformity does not exclude diversity.¹³⁷ Instead, an integral system exists, the actors of which define and are being defined through reciprocal influences.¹³⁸ Capitalism as an analytical unit is rejected. Obsessing about its origins or even its existence, he argues, is both futile and pointless. There was no linear progression of modes of production. Rather, all along, they coexisted and intermingled within and outside national borders.¹³⁹ It follows that any talk about China's incorporation into the world order is no more than an expression of misguided Eurocentric historical imaging, one that views the rest as entrapped behind closed doors of stagnation or, in modern parlance, lack of development.

There is much that is attractive in this world-system approach to regional interactions. First, it is supported by detailed empirical research that puts to rest the Marxist/Weberian's type chronicle, whereby Chinese history was reconstructed using European victor's terms of reference and deemed an evolutionary failure.¹⁴⁰ The Frank type narrative on the other hand starts from an analytical basis that avoids the privileging of European categorization. In this respect, he (as do Hobson and Wong) fulfils the function of a truth-teller, whose account invites us to contest and resist a hegemonic discourse. Second, such narrative avoids the erraticism associated with an analytical model that posits China as a secluded civilizational totality to be contrasted with the exceptionalism of a Western totality. Particularly when viewed through the cultural lens of Confucianism and so-called Confucian Capitalism, the China v the West narrative tends to fluctuate between the 'negative and positive and

¹³⁷ *ibid* 347, 357, 359.

¹³⁸ Amin, *ibid* (n 124) 25.

¹³⁹ Frank, *ibid* (n 22) xxiv, 331.

¹⁴⁰ R. Bin Wong, *China Transformed: Historical Change and the Limits of European Experience* (Cornell University Press 1997) 2, 4, 14-15; Hobson, *ibid* (n 133) 1-28; for an account of the changes in Western discourse of China see Gregory Blue, 'China and Western Social Thought in the Modern Period' in Gregory Blue and Timothy Brook (eds), *China and Historical Capitalism: Genealogies of Sinological Knowledge* (Studies in Modern Capitalism Series, CUP 1999) 57-109.

back again': China as a place where tradition inhibited the dynamics of change, as opposed to China as the land of opportunity, as against China as a challenger and the 'other' in Huntington's clash of civilizations.¹⁴¹

Yet, detailed as it is, Frank's exposition suffers from incompleteness. First, focusing on similarities to the exclusion of distinctive dynamics risks a level of abstraction that leaves out qualitative mutations in developmental paths. True, all history is human and in this respect is imbued with a universality of recurring exploitation and wars. However, this does not exclude the possibility of qualitative ruptures that every so often interrupt quantitative processes. Such ruptures operate to inject a new rationality into the motion of accumulative development, so as to divert it in a new direction. In his analysis of globalisation and its relations with IL, Bederman, for example, observes a circular historical movement between globalisation and its reversal. Yet, at the same time he also acknowledges the operation of linear, qualitatively transformative processes from an age of empire, to the age of beliefs to the age of imperialism and finally, to the contemporary age of universalism.¹⁴² There is a fundamental difference, observes Ardent, between the localised, predictable power politics of national conquests and imperialism's limitless accumulation of power for accumulation sake.¹⁴³ Second, Frank's account is essentially one of an economist who challenges our knowledge of the real object, and seeks to invalidate its discursive construct by proffering a new version of economic knowledge. It is silent, however, on the operation of power in the regulation of our education.¹⁴⁴ It invites us to question our understanding of China's place in the world, but does not confront the origins and purpose of this understanding. In other words: first, the premise of a symbiotic link between the West and progress cannot be fully displaced without also addressing the power that constructed this link in the first place; second, it was possible for a qualitative break to have occurred even within an overarching framework of circuitry; and

¹⁴¹ Callahan, *ibid* (n 28) xvii; for a discussion of Confucian Capitalism see 10-11.

¹⁴² Bederman, *ibid* (n 108) xi -51.

¹⁴³ Hanna Ardent, *Imperialism: Part Two of the Origins of Totalitarianism* (A Harvest/HBJ Book) v, vi.

¹⁴⁴ On the relationship between knowledge, language and discourse see Michel Foucault (tr), *Archeology of Knowledge* (Routledge Classics 2002).

third, the fixation of such rupture on a superiority/inferiority dichotomy represented a hegemonic discursive construct formulated by the power structures born out of this same rupture. Such tailored discourse/knowledge was then presented for acceptance to its subjectivities, both European and Chinese. As will be seen later, implicated in this acceptance was a process of internalisation that functioned not only as a tool of legitimisation and domination at the specific moment of rupture, but continues to animate China's soul searching about her place in the world. Wang Hui's observation on this point was made as a commentary on history that is constructed by reference to Confucianism. However, it applies in this context too. History that is constructed purely by reference to circular continuities, he says, 'obscures the unbreakable connection between the entire process of modernization and the history of colonialism'.¹⁴⁵ Masked is 'the basic motive power of the formation of modern history: the regulation and standardization imposed by global markets on the economic relationships of nations-states'.¹⁴⁶

Capitalist conquest

It was thus that, in reality, up to early 19th century, the world economy was Asian based with the European 'very belatedly, slowly, and marginally' trying to 'attach themselves to the Asian economic train.'¹⁴⁷ Endless wars were fought for control over sea-lanes to the East, perceived not only as the path to wealth, but also the key to domination over the entire commercial world.¹⁴⁸ It was only in the early 19th century that capital, amassed by means of profits repatriation from free slave/cheap indigenous labour and mining investments in the Americas finally facilitated a European economic 'take off'. A periphery of the world-system until then and now awashed with money, Europe was in a position to take advantage of a period of systemic destabilization engendered by preceding economic dislocation in China, so as to rise to the centre.¹⁴⁹

¹⁴⁵ Wang Hui, *China's New Order: Society, Politics, and Economy in Transition* (Harvard University Press 2003) 162.

¹⁴⁶ *ibid.*

¹⁴⁷ Frank, *ibid* (n 22) 277.

¹⁴⁸ Arrighi, *ibid* (n 130) 26-27.

¹⁴⁹ Frank, *ibid* (n 22) 264-67, 277-83.

Further, China's 18th century peace, prosperity demographic growth, ethics and institutions were an inspiration to the leading figures of European Enlightenment, inspiration which the great leap forward in Western military power reversed and ultimately forcibly resolved in Europe's favour.¹⁵⁰ China also led the way in innovations, science, technology and medicine.¹⁵¹ Yet, in the discourse that was constructed around European colonialist/imperialist ambitions, her technological repertoire and its important contributions to the development of modern European science were marginalised.¹⁵² Denied was the fact that rather than a testimony to European superiority or capitalist advantage, Europe's ascent in the world-system implicated climbing 'up the Asian shoulders'.¹⁵³ Such shoulders included, not only the provision of markets to absorb the silver mined in the Americas, but also the assimilation of Eastern technologies, ideas and institutions, as well as the appropriation of land, labour and markets.¹⁵⁴ As pointed out by Hobson, the West's economic 'take off' would have been inconceivable without the East.¹⁵⁵

And so, a 19th century design emerges of West to East flow that consisted of military conquests and a discourse, in which a 'pristine West' was posited at the centre stage of progress. The East was relegated to a place of irrelevancy.¹⁵⁶ But what engendered and was served by this discursive design? Further, what were its implications for its Chinese recipients?

These questions take us back to Wang Hui's observation about the specificity of modernity's preoccupation with the universalisation of economic relations and the power employed to this end. In other words, wars and discourse were merely means to an end. Rather than an irrelevancy as suggested by Frank, the real export was that of capitalist modernity. Implicit in this statement are a number of propositions. Namely, that capitalism represent a specific and

¹⁵⁰ Arrighi, *ibid* (n 6) 3-4; Li Xing, *ibid* (n127) 3.

¹⁵¹ *ibid*.

¹⁵² *ibid* 4.

¹⁵³ Frank, *ibid* (n 22) 277-83.

¹⁵⁴ See generally Hobson, *ibid* (n 133).

¹⁵⁵ *ibid* 2-3.

¹⁵⁶ *ibid* 1-5.

historically unique system of social relations with its singular logic;¹⁵⁷ that its creation and expansion are products of agency rather than the natural and unavoidable evolution of commercial activities;¹⁵⁸ and that at the point of her encounter with the West, China was a non-capitalist society.¹⁵⁹ This is not to say that the pre-Opium Wars Middle Kingdom did not have markets or that she did not engage in international trade. As seen above, at the time when Europe was the backwater of the world-system, China already enjoyed advanced commercial networks, highly developed trading systems and innovative institutions and technologies, all of which were responsive to market opportunities.¹⁶⁰ Indeed, a tradition of trade and markets formation was integral to her historical development, no less than that of Europe. Hobson concludes that 'East and West have been fundamentally and consistently interlinked through globalisation ever since 500 ce'.¹⁶¹ Fast forwarding to the 17th century, after a short and temporary decline, by the end of that century the commercial, industrial and agricultural expansion of China was again fuelled by imports of Spanish, American and Japanese silver. They created thriving markets in cash crops, rice and handicrafts along the Yangzi River and in South and Southeast China. In Guangdong province the expansion of commercialised agriculture meant an increase in the amount of imported rice.¹⁶² Further, China was unrivalled in the exportation of porcelain and silk, and since the Ming dynasty's discontinuation of money paper to avoid the inflationary consequences of overprinting, became the 'sink' for the world's silver.¹⁶³

Non-capitalist empire

Yet, systemic similarities, and the operation in China between the 16th and 19th centuries of what both Arrighi and Wong identify as Smithian processes, did not

¹⁵⁷ See for example Wood, *ibid* (n 124) 2-3, 6-7, 75-80, 189, 194-95.

¹⁵⁸ For a critical analysis of the 'commercialisation model' see Wood, *ibid* (n 124) 10-34; for an analysis of the historical beginnings of capitalism see Wood, *ibid* 74-165; Robert Brenner, 'Agrarian Class Structure and Economic Development in Pre-Industrial Europe' (1976) 70 *Past and Present*; Arrighi, *ibid* (n 41) 86-148.

¹⁵⁹ Amin, *ibid* (n 124) 6.

¹⁶⁰ Wong, *ibid* (n 140) 9.

¹⁶¹ Hobson, *ibid* (n 133) 2; Li Xing, *ibid* (n 127) 3-4.

¹⁶² Wong, *ibid* (n 140).

¹⁶³ Frank, *ibid* (n 22) 111.

produce the same trajectory as that found in Europe.¹⁶⁴ Understanding this divergence, argues Arrighi, requires that capitalism and markets formation processes be distinguished.¹⁶⁵ For, the capitalist market is a specific device marked by its own particularities. It is predicated on a historically unique type of contract-based social relations, one in which access to the means of life is contingent on entering into market interactions.¹⁶⁶ It is charged with a supervisory role over the production of all goods and services, down to the most essential necessities of life, and over all distribution and investment processes previously conducted other than via a market.¹⁶⁷ It mediates between producers and their means of production, starting with the separation between peasants and land and corresponding commodification of labour.¹⁶⁸ In other words, the capitalist market is a theoretical construct, the function of which goes beyond that of a place where profitable exchanges take place.¹⁶⁹ Rather, it represents a specific institutional rationality - society's site of truth reproduction, whereby all relations and practices are embedded in the economy.¹⁷⁰ The political and ideological are correspondingly marginalised.¹⁷¹ By contrast, in what Amin classifies as a family of tributary systems, it was mostly the religious in its broad sense that occupied the systemic commanding heights.¹⁷² Thus, in the Middle Kingdom Confucian ideas formed a 'state orthodoxy' that was then disseminated downwards in a process of transformative moral instruction.¹⁷³ A body of ethics dictated social relations. Governability was guided by the moral principle of people's welfare. The aim was to promote social harmony through proper instruction for elites and common people alike, and the provision of material aid at the level of local

¹⁶⁴ Wong, *ibid* (n 140) 15, 17-22; Arrighi, *ibid* (n 6) 13-68.

¹⁶⁵ Arrighi, *ibid* (n 6) 24.

¹⁶⁶ Wood, *ibid* (n 124) 6-7.

¹⁶⁷ Immanuel Wallerstein, *Historical Capitalism* (Verso 1983) 15; *ibid* 2.

¹⁶⁸ Wood, *ibid* (n 124) 2-3.

¹⁶⁹ But see P Schouten, 'Theory Talk 13: Immanuel Wallerstein on World-Systems, The Imminent End of Capitalism and Unifying Social Science' arguing that the capitalist market is a hypothesis that does not really exist in the capitalist system [2008] Theory Talks <<http://www.iwallerstein.com/wp-content/uploads/docs/THYTLK13.PDF>> accessed 1 Feb 2012.

¹⁷⁰ Foucault, *ibid* (n 32) 32; Wood, *ibid* (n 124) 23.

¹⁷¹ Amin, *ibid* (n 124) 15.

¹⁷² *ibid* 27, 32; for a general discussion of tributary systems see 31-48.

¹⁷³ Patricia Ebrey, 'The Chinese Family and The Spread of Confucian Values' in Rozman, *ibid* (n 134) 45; Lau, *ibid* (n 68) 32-37.

communities. An example is the Qing dynasty's granaries system aimed at counteracting cyclical market price fluctuations.¹⁷⁴ It was a society premised on the rule of virtue rather than the rule of law and economics, a civilization in which social harmony took precedence over competition, and where wealth accumulation was made subject to state supervision.¹⁷⁵

Turning to the issue of access to the means of production, European peasants were dispossessed of their customary use rights to communally held resources.¹⁷⁶ In China, on the other hand, many peasants remained direct producers and active participants in market exchanges. Most, either owned or rented land that was in turn worked primarily at the household level. It was within this institutional framework that industrialisation and technological innovations – China's 'industrious revolution' – took place.¹⁷⁷ Indeed, the Imperial centre had an interest in preserving peasants' possession of their land, so as to circumvent potential challenge from powerful landed classes.¹⁷⁸ Rather than power being a derivative of accumulated wealth, in the Middle Kingdom, wealth derived from the power of office.¹⁷⁹ This difference represented a systemic, non-contingent divergence. For, through notions of productivity and exchange value as depositors of rights to ownership, European capitalist dispossession acquired two distinct features: first, it was absolute. That is to say, though legally free, direct producers became wholly dependent on owners for their survival. Second, appropriation of surplus was executed by economic means.¹⁸⁰ This difference between appropriation by economic means – the opaque process of the seizure of profit or rent by dominant capital – and the

¹⁷⁴ Wong, *ibid* (n 140) 117; Arrighi, *ibid* (n 6) 328.

¹⁷⁵ Ebrey, *ibid* (n 173) 45; Lau, *ibid* (n 68) 32-37; Arrighi, *ibid* (n 6) 329, 332; for a discussion of virtue and justice in Confucian philosophy see Erin M. Cline, *Confucius, Rawls, and The Sense of Justice* (Fodham University Press 2013) 119-67.

¹⁷⁶ Wood, *ibid* (n 124) 108-15.

¹⁷⁷ Amin, *ibid* (n 124) 163; Wong, *ibid* (n 140) 45; Wood, *ibid* (n 124) 96, 105-15; on China's 'industrious revolution' see Arrighi, *ibid* (n 6) 33-35; on the enclosures in England see Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1957) 36-39.

¹⁷⁸ Ellen Meiskins Wood, *Empire of Capital* (Verso 2003) 27-28.

¹⁷⁹ *ibid* 27; Amin, *ibid* (n 124) 13.

¹⁸⁰ Wood, *ibid* (n 124) 96.

transparent exercise of tributary taxation for distribution by political power, argues Amin, is 'qualitative and decisive'.¹⁸¹

Similarly 'qualitative and decisive' is capitalism's immanent compulsion for self-expansion. With endless capital accumulation as the primary and arguably the only objective of economic activity, 'capitalism can and must constantly expand in ways and degrees unlike any other social form'.¹⁸² As observed in relation to markets, here too, expansion is made distinct, not by the fact of its existence but by its logic. In what Arrighi conceptualises as territorial logic, power is identified with the extent of its geographical and populous domain. Wealth is either the means for, or the by-product of expansion. By contrast, in the capitalist logic, territorial acquisitions are the means and by-product of the dictates of capital accumulation.¹⁸³ Consequently, it is not the size of Giddens' 'container of power' that matters. Rather, size is subsidiary to content, e.g. resources and markets.¹⁸⁴ Yet, the endlessness of capitalist accumulation, the fact that it has no aim other than its own self-enlargement also means that '[i]t can and must constantly accumulate, constantly search out new markets, constantly impose its imperatives on new territories and new spheres of life, on all human beings and the natural environment'.¹⁸⁵ The quest for territorial control must not only continue uninterrupted but, is of little use unless the controlled territory is also prized open and transformed – closed doors are unlocked in the name of 'improvement' so as to prevent impediments to the spatial flow of capital.¹⁸⁶ To this end, by a variety of means - military conquests, structural adjustments, economic warfare, hegemonic discourse - consent is constructed, voluntariness is imposed, alternatively coercion applied, so as to implant capitalism and its political and legal institutions on non-capitalist societies. And so, one by one divergent developmental paths were truncated.¹⁸⁷

¹⁸¹ Amin, *ibid* (n 124) 161-62.

¹⁸² Wood, *ibid* (n 124) 97; Wallerstein, *ibid* (n 167) 14.

¹⁸³ Arrighi, *ibid* (n 41) 34-35.

¹⁸⁴ *ibid* 34.

¹⁸⁵ Wood, *ibid* (n 124) 97.

¹⁸⁶ David Harvey, *The New Imperialism* (OUP 2003) 139-40; on the ideology of 'improvement' see Wood, *ibid* (n 124) 156-61.

¹⁸⁷ Wood, *ibid* 153, 195; Amin, *ibid* (n 124) 160; for a discussion on the construction of consent see Harvey, *ibid* (15) 39-63.

The outcome is a world empire of unprecedented size and uniformity, albeit one that is occasionally variegated and often resisted.

It is this absence of capitalist logic of power, rather than lack of capabilities, that for Arrighi explains why Zheng He's voyages – now advanced by the HWP as evidence of cultural attributes and the possibility of a different form of global interaction - did not progress in the direction of conquests.¹⁸⁸ In contrast to the European on-going expansionist drive and overreach, by the second half of the 15th century, China's territorial logic dictated that neither geographical enlargement, nor East-West long distance trade and their associated cost were systemically essential to self-reinforcement.¹⁸⁹ Thus, once military campaigns achieved the objectives of securing and pacifying peripheral borders, by the 1760s territorial expansion ceased.¹⁹⁰ From then on, self-reinforcement was to be found in the building of an integrated national economy, capable of functioning as a political centre to its vassal states on whose allegiance and integration systemic stability depended.¹⁹¹ Such allegiance was constructed around co-operative exchanges, and bound together by a balanced combination of normative communality and states' autonomy.¹⁹² Absent was the European structural dynamic of incessant interstate military competition and overseas systemic expansion.¹⁹³ Nor did extraction of surplus define core/peripheries exchanges. The cost expended by the Imperial Court in the purchase of allegiance exceeded the value of tributes paid by vassal states. The Qin and Han dynasties did not engage in tax collection, notwithstanding the unified taxation system they established. With the sole exception of the Yuan dynasty, after the Tang dynasty vassal states' gifts were merely symbolic.¹⁹⁴ Thus, in reality, tributary relations were more reciprocal than the word tribute suggests. This is not to say that homogenisation of conditions throughout the Empire was not actively pursued. However, it did mean that the acute core/periphery

¹⁸⁸ Arrighi, *ibid* (n 41) 35-37.

¹⁸⁹ Arrighi, *ibid* (n 130) 25-26; Arrighi, *ibid* (n 6) 37.

¹⁹⁰ Arrighi (n 130) 25.

¹⁹¹ *ibid* 27.

¹⁹² Arrighi, *ibid* (n 6) 314-15.

¹⁹³ *ibid* 315, 316.

¹⁹⁴ *ibid* 324.

polarisation inherent to the modern capitalist system was not produced.¹⁹⁵ The outcome was a system of innovative capacity to respond to threats and difficulties, one that delivered exceptional stability, and continuous peace and prosperity for the whole of twenty centuries.¹⁹⁶

Harmony incorporated: the power of discourse

Reversed consensus

The encounter between China and the West went beyond issues of trade balancing, to encompass a contest between civilizational rationalities. Further, for the rationality that won this contest, conquest was incomplete unless it was attended by the imposition of its imperatives on the conquered land. Military success was thus supplemented by the construction and diffusion of a new discourse, one that was reflective of the rising power's aims and priorities.¹⁹⁷ Like Wang Hui, Blue assigns the reversal in European consensus about China to the era of colonialism and imperialism.¹⁹⁸ The shift was not one of a qualitative change in knowledge but one of a perspective – China's deviation from a purported Western model.¹⁹⁹ Thus, her negative identity was produced by reference to the idealisation of capitalism as a pinnacle of development, a testament to Western civilization's unique advance to which all others should aspire.²⁰⁰ A novel emphasis on the idea of progress was used to depict China's temporary weakness as an inherent condition, a permanent state of backwardness that was the antithesis of historically codified Western advancement.²⁰¹

¹⁹⁵ Amin, *ibid* (n 124) 162-63.

¹⁹⁶ *ibid*, 50, 168; Arrighi, *ibid* (n 6) 327.

¹⁹⁷ Blue, *ibid* (n 140) 57.

¹⁹⁸ *ibid* 70.

¹⁹⁹ *ibid* 71, 73.

²⁰⁰ Gregory Blue and Timothy Brook, 'Introduction' in Blue and Brook, *ibid* (n 140) 5; Gregory Brook, 'Capitalism and the Writing of Modern History in China' in Blue and Brook, *ibid* (n 140) 113.

²⁰¹ Blue, *ibid* (n 140) 74, 77; Brook, *ibid* 114.

It was a discursive strategy of negativity with a purpose.²⁰² The production of a non-European inferior identity enabled a corresponding construction of a superior European identity, a superiority that in turn could be used to legitimise colonial and imperialist expansion, universalise its imperatives and posit the European nation-state as the bearer of capitalist modernity and political unity.²⁰³ It was a tool of domination, whereby the colonised other was to import and internalise a self-depiction that was constructed for them by the coloniser.²⁰⁴ An orientalised Orient was created in Europe and transported back to the East.²⁰⁵ Indeed, statements about Oriental peoples being barbarians or children despite their antiquity were typical weapons in the armoury of European expansive motion.²⁰⁶ Precisely because China was not as yet subordinated to colonial domination, she 'became the object of heavy ideological onslaught as India was being brought under Western control politically and militarily.'²⁰⁷

When administered to a patient shocked by defeat and related societal disintegration, the force of this discursive therapy was considerable. For China, the rupture occasioned by her encounter with the Great Transformation went beyond poverty, opium and forcible subjugation, to encompass a civilizational trauma, far in excess of the relatively modest foreign presence in her territory.²⁰⁸ As Europe was rewriting Chinese history by reference to her own reinvention, China responded by engaging in a similar exercise, only the other way round. The country was now revisiting her past and reviewing her present by reference to European discourse of capitalism and modernity.²⁰⁹ A search was on for the source of power in the contemporary world.²¹⁰ Implicated in this search was complicity with a European methodology that posited history as

²⁰² Michael Hardt, Antonio Negri, *Empire* (Harvard University Press 2000) 131.

²⁰³ *ibid* 96, 124; Arrighi, *ibid* (n 41) 35.

²⁰⁴ See generally Edward W. Said, *Orientalism* (25th Anniversary edn, Vintage Books Edition 1979).

²⁰⁵ Hardt Negri, *ibid* (n 202) 125.

²⁰⁶ Blue, *ibid* (n 140) 73.

²⁰⁷ *ibid*.

²⁰⁸ *ibid* 112.

²⁰⁹ Brook, *ibid* (n 200) 112- 14.

²¹⁰ Maurice Meisner, *Mao's China and After: A History of the People's Republic of China* (3rd edn, The Free Press 1977) 13.

comprising universalised stages of evolutionary progress towards science-based material prosperity. In this rationality, the West was accorded a core position. China was relegated to the periphery as a place plagued by evolution inhibitors, such as the 'Asiatic Mode of Production' and 'despotism'.²¹¹ From there it was only a short distance to a conclusion that the past had to be transcended. To enable China to be written into this version of history, traditional values and culture were first discarded and later condemned as the roots of the country's peculiarities.²¹² From the Christian egalitarianism of the Taipei Rebellion of 1850-1864, to the New Culture Movement's call for the total destruction of tradition and past values (1915-1919), to the science and democracy slogan of the Fourth May Movement (1919), to the introduction of Marxism and Darwinism in the late 19th century, to the campaign against Lin Biao and Confucius in the early 70s, Western theories and ideologies were made the main protagonists in an iconoclastic project of new consciousness and national regeneration.²¹³ Western ideas of progress, struggle and conquest of nature were hailed by Yan Fu and Liang Qiqiao, spokesmen for the Chinese intelligentsia at the turn of the 20th century, as the key to the harnessing of individual energies, so as to achieve economic growth.²¹⁴ New words to denote capitalism (*zibenzhuyi*) and modernisation (*xiandaihua*) were introduced into the Chinese language. They conveyed a break from a pre-modern past that was posited as essentially different from European modernity's 'grand narrative' of linear progression.²¹⁵ In search of reform and self-strengthening, and so as to combat Western military might, the Qing government diffused Western science and technology through translation bureaus and language schools. In the process, China's intellectuals also learnt about Western social and political institutions.²¹⁶ Of these, modernity's signatory institution was the nation-

²¹¹ Brook, *ibid* (n 200) 114, 117; Peter Moody, *Conservative Thought in Contemporary China* (Lexington Books 2007) 4; Jacques Hersh, 'The Eastern Will Not Subside: China's Long March Back to the Future?' in Li Xing, *ibid* (n 127) 33.

²¹² Meisner, *ibid* (n 210) 13.

²¹³ *ibid* 3, 4, 14, 17-19; Brook, *ibid* (n 200) 18; the May Fourth movement was triggered by the handing over of German 'concessions' in China to Japan. Moody, *ibid* (n 211) 4-5, 18-19, 24.

²¹⁴ Meisner, *ibid* (n 210) 13.

²¹⁵ Brook, *ibid* (n 200) 111-13, 115; Wang Hui, *The End of The Revolution: China and the Limits of Modernity* (Verso 2009) 69.

²¹⁶ Brook, *ibid* 119.

state.²¹⁷ For it was within this apparatus of capitalist organisation, so went the European discourse, that technology and material wealth prospered. Further, it was by reference to such technological and material advances that a nation was to be ranked in the international order.²¹⁸ Less emphasized were China's pre-modern scientific and technological contributions, or for that matter, the technological repertoire of all societies that did not reach a nation-state capitalist denouement.²¹⁹ Thus, Chinese nationalism was born out of imported ideologies and itself was an imported concept.²²⁰ Contrary to nationalist movements' inherent propensity to celebrate a glorified past, Chinese nationalism sought to bury it.²²¹ It was also an intensely statist one.²²² Against the threat of partition, it was a nation-state, modern and sufficiently developed to have a foothold on the international hierarchical order, that was to guarantee national survival in 'a world dominated by predatory imperialist nations-states'.²²³

We may want to pause here to make two further observations. First, iconoclasm was not the only response to the violence and humiliation of China's encounter with the West. From the 1904 anti-modernist Society for the Preservation of National Essence, to young liberals in search of communality between Chinese traditions and Western development, to the 1930s Confucianism of the Guomindang, the search for identity in the face of foreign penetration also produced nativist reactions.²²⁴ Even post-1949, discourse was interwoven with the language of Confucian harmonious logic.²²⁵ We find it for example in Mao's treatise on the handling of contradictions:

²¹⁷ *ibid* 113.

²¹⁸ Francesca Bray, 'Towards a Critical History of non-Western Technology' in Brook and Blue, *ibid* (n 140) 158-59.

²¹⁹ Li Xing, *ibid* (n 127) 3; Bray, *ibid* 162.

²²⁰ Zheng Yongnian, 'Nationalism: Dynamics of domestic transformation and international relations in China' in Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 33.

²²¹ Meisner, *ibid* (n 210) 12-13.

²²² Zheng Yongnian, *ibid* (n 220) 33.

²²³ Meisner, *ibid* (n 210) 12.

²²⁴ Brook, *ibid* (n 200) 128-29; Moody, *ibid* (n 211) 21.

²²⁵ Jacques, *ibid* (n 23) 198.

Marxist philosophy holds that the law of the unity of opposites is the fundamental law of the universe (...). Between the opposites in a contradiction there is at once unity and struggle, and it is this that impels things to move and change (...).²²⁶

Second, it was a view from the periphery. From where China stood at the point of encounter, the landscape to which she was exposed was as menacing as it was enticing. Incorporation thus implicated processes of both mimicking and defiance, with the result that 'the intellectual allegiance to Marxism was as much a way of entering the Western-defined modernity as of resisting it'.²²⁷ Perhaps because the conquest of China was never complete, the battle was not for the dismantling of the rationale that underpinned European's superiority. Rather, it was a campaign that sought a place within this rationale, yet simultaneously articulated the struggle of the oppressed other.²²⁸ Thus, the liberal tenor of the May Fourth movement had to be jettisoned by virtue of liberalism's association with imperialism.²²⁹ By contrast, the socialist critique of imperialism offered a niche in which Western rationality could be simultaneously absorbed and disputed.²³⁰ There is disagreement as to whether, as argued by Schwartz and Meisner, Chinese communism articulated an indigenous anti-imperialist nationalism, or whether, as maintained by Dirlik and Cold War narratives, it implicated active intervention on the part of the Soviet Union.²³¹ Whatever the truth of it, as expressed in Mao's slogan that 'only socialism can save China', the country's main concern was one of national regeneration.²³² Regeneration was in turn bound with socialism, now re-

²²⁶ Mao Zedong, 'On the Correct Handling of Contradictions Among the People' (27 Feb 1957) Speech at the Eleventh Session (Enlarged) of the Supreme State Conference in *Selected Works of Mao Tse-Tung* <http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_58.htm> accessed 12 Feb 2012.

²²⁷ Blue, *ibid* (n 140) 115.

²²⁸ *ibid* 117.

²²⁹ Moody, *ibid* (n 211) 5, 34-36.

²³⁰ *ibid* 5.

²³¹ Arif Dirlik, *The Origins of Chinese Communism* (CUP 1989) vii-viii.

²³² Brook, *ibid* (n 200) 112; Hersh, *ibid* (n 211) 41.

conceptualised in a non-Marxist fashion as a superior route for speedy development.²³³

The quest for modernity

It was the impulse for collective survival by reference to modernity, industrialisation and national wealth and power - the transformation of mass mobilisation for liberation to mobilisation for production - that was to prove the more enduring strand of continuity.²³⁴ Thus, unlike the utopian vision that characterised the Russian revolution, a strong state and economic construction were the CCP's primary aims from the outset. The relegation of socialist ideals to an unspecified future could already be found in the 50s. Indeed, it is arguable that not much separated the policies instituted by the CCP in its early days from the 'social policy' type socialism that characterised the thinking of Sun Yatsen's followers in the preceding Guomindang government, and that of Jiang Kanghu, founder of the Chinese Socialist Party.²³⁵ Chinese capitalism was to be allowed to remain, so as to hasten economic development. Yet, it was to be controlled and kept within egalitarian boundaries.²³⁶ China, declared Mao 'must utilize all elements of urban and rural capitalism that are beneficial and not harmful to the national economy (...). Our present policy is to control, not to eliminate, capitalism'.²³⁷ For Wang Hui, the 'fantasy of development' and the 'myth of transition' serve the purpose of masking current inequality. This strategy, he says, remains 'the crucial unspoken premise of the contemporary discourse on Chinese society'.²³⁸

The coalescence of conformity and resistance produced a fault line that manifested itself in an on-going simmering conflict between opposing camps within the CCP. There was Mao's camp of collectivised, egalitarian, anti-

²³³ Eric Hobsbawm, *How to Change the World: Tales of Marx and Marxism* (Abacus 2011) 7.

²³⁴ Hardt and Negri, *ibid* (n 202) 247.

²³⁵ Meisner, *ibid* (n 210) 55-57, 81; Paul A. Cohen, 'Reflection On A Watershed Date: The 1949 divide in Chinese history' in Jeffrey N. Wasserstrom (ed), *Twentieth-Century China: New Approaches* (Rewriting Histories Series, Routledge 2003) 30; Dirlik, *ibid* (n 231) 20.

²³⁶ Meisner, *ibid* (n 210) 59; Dirlik, *ibid*.

²³⁷ Meisner, *ibid* (n 210) 59; in 1953 53% of industrial output came from the private sector.

Mingqi Li, *ibid* (n 15) 27.

²³⁸ Wang Hui, *ibid* (n 145) 43, 104.

bureaucratic, socialist modernity, in which society was to be constantly renewed through perpetual revolution. Then there was the CCP bureaucracy for whom, in the spirit of Western social democracy traditions, these goals represented no more than reckless utopianism.²³⁹ It was a hidden fissure that came to a head with the Great Leap Forward campaign, torn the CCP apart in the Cultural Revolution and, in what Li Mingqi alludes to as a coup instigated by Hua Guofeng and involving the arrest of Maoist leaders, brought about a reversal in power upon Mao's death.²⁴⁰ With the coup came a turnaround in discourse. A new consensus was constructed around a critique of radicalism and a narrative of inefficient SOEs, privileged workers and failed Maoist socialism.²⁴¹

Yet, throughout and for all, at issue was the best way for catching up with the West rather than a denial of the need to catch up, ideological conceptualisation of science and technology rather than the necessity for a technological revolution, and the form of modernity rather than modernity itself. The Great Leap Forward campaign, for example, was intended to bring about the industrialisation of the countryside, and a technological revolution 'so that we may overtake England in 15 years'.²⁴² In this closing of the gap type developmentalism Woodrow Wilson's plans for the Third World met those of Lenin.²⁴³ The difference between the Great Leap Forward and present day emphasis on technology is that for Mao, it was intertwined with self-reliance. The capital that was to bring about a technological revolution was to be found in the energy of the masses rather than foreign investment.²⁴⁴ Wang Hui summarises this aspect of the Chinese revolution as follows:

²³⁹ Wang Hui, *ibid* (n 145) 149; Meisner, *ibid* (n 210) 149; Hobsbawm, *ibid* (n 233) 9-10, 14.

²⁴⁰ Hersh, *ibid* (n 211) 41; Mingqi Li, *ibid* (n 15) 28, 60; Meisner, *ibid* (n 210) 149.

²⁴¹ Mingqi Li, *ibid* (n 15) x.

²⁴² Mao Zedong, [1 June 1958] *Red Flag* (*hongqi*) 3.

²⁴³ Immanuel Wallerstein, *After Liberalism* (The New Press 1995) 13-14.

²⁴⁴ For a discussion of the economics of the Great Leap Forward see Meisner, *ibid* (n 210) 204-12.

The Chinese socialist movement was one of resistance, but was also one of modernization that unfolded via a nation-building movement and the process of industrialization, so its historical experiences and lessons are closely linked to the process of modernization itself (...). Thus we cannot on the one hand critique and reject our socialist history while, on the other hand, use this same critique and rejection to justify our process of modernization in the contemporary period.²⁴⁵

In other words, from the point of encounter onwards, capitalist modernity was a constituent of China's transformation, albeit one that proved profoundly dialectical. On the one hand, imperialist penetration triggered a nationalist revolutionary response. On the other, it was nationalism that sought its own substitution.²⁴⁶ So, by the time Mao and Deng's advocated a 'particular Chinese road to socialism and communism' 'Chineseness' was already contaminated by Western normativity,²⁴⁷ such that embroiled China in a disciplinary regime of first, socialist modernisation and later, the global capitalist markets. 'China's perception of its own international role,' says Zhu 'is driven to a great extent by outside factors'.²⁴⁸ Examples include notions, such as being a stakeholder and having responsibility for the global interstate system, both of which were formulated in the exterior and then incorporated into Chinese official and non-official discourse.²⁴⁹ Thus, Westad's reference to the internationalisation of China over the last 250 years is in reality an allusion to her Westernisation²⁵⁰

²⁴⁵ Wang Hui, *ibid* (n 145) 133, 134.

²⁴⁶ Meisner, *ibid* (n 210) 4.

²⁴⁷ Xiaomei Chen, *ibid* (n 24) 1.

²⁴⁸ Zhu Liqun, *ibid* (n 76) 39.

²⁴⁹ *ibid* 39-40; the allusion to China as a 'stakeholder' originated from Robert Zoellick, former US Deputy Secretary of State and president of the World Bank.

²⁵⁰ Odd Arne Westad, *Restless Empire: China and the World Since 1750* (The Bodley Head 2012) 204, 439.

or, in the words of Wang Hui, her eventual 'amalgamation into the America-led economic order'.²⁵¹

I say 'on the face of it' because, as we saw, even when propelled by the operation of power, civilizational interactions implicate processes that are more complex than immediately apparent from their surfaces. They mesh together similarities and differences in a manner difficult to decipher. A case in point is the debate as to which - as between psychological innovation and a change in the realities of power - constitutes the initial prerequisite for systemic change. This debate cuts across geographical and ideological boundaries.²⁵² The Cultural Revolution provides an example. This campaign was constructed around the notion of a desired human consciousness that is to be created by the power of ideas and experiences. Yet, such notion was not a Maoist invention. The Chinese New Culture Movement of early 20th century also looked to the power of ideas. For them too, changes in consciousness had to precede economic and political transformations.²⁵³ Going further back in time, it was also found in the process of moral instruction that characterized the Confucianisation of ancient Chinese society. Moving westward, it was similarly an essential part of Hayek's neoliberal grand strategy.²⁵⁴ The HWP offers another example. Its themes of sovereign autonomy and peaceful interstate cooperation can be traced back to China's tributary system. Then as now, the country is designated a leadership position by virtue of her size and relative sophistication of her national economy, rather than the strength of her industrial-military complex.²⁵⁵

It is thus that the paradigm shift, which followed on from Mao's death implicated a re-positioning of varied historical legacies, both indigenous and exogenous.²⁵⁶ As the country once again grows in power and global influence, her heritage of Confucian rationality is moved to the centre in a bid to formulate

²⁵¹ Wang Hui, *ibid* (n 145) 75.

²⁵² For a discussion of this debate see Wallerstein, *ibid* (n 23) 68-7.

²⁵³ Meisner, *ibid* (n 210) 13, 295.

²⁵⁴ F.A. Hayek, *The Constitution of Liberty* (Routledge Classics 2006) 97-99.

²⁵⁵ Arrighi, *ibid* (n 6) 346.

²⁵⁶ Wang Hui, *ibid* (n 215) xviii; Dirlik, *ibid* (n 37) 6.

a unique model of modernisation that bypasses the theoretical confrontation between capitalism and socialism, and raises the possibility of a non-Westernised path to modernisation.²⁵⁷ The country's Marxist tradition became an oppositional group within the CCP research institutes and academia.²⁵⁸ From there, it articulates an attachment to the socialist legacy that has played such a crucial role in the success of the reforms era, and which refuses to go away despite efforts to erase it.²⁵⁹

By proffering the possibility of a reformed world order, one that is expressed by reference to the specificity of Chinese traditional logic, the HWP appears to seek to divert the one directional flow by which China's contemporary encounter with the West was characterised. In other words, she is not, she says, Anghie's self-reforming native who has consented to seek her own transformation.²⁶⁰ Nor is she Wallerstein's peripheral country engaged in a compliant struggle for a foothold on the next rung of a hierarchical interstate ladder.²⁶¹ Rather, in operation is Chen Xiaomei's Occidentalism – the phenomenon whereby importation of normative constructs provokes active modifications and adaptations so as to produce indigenous parlance,²⁶² and the dynamics of Potter's 'selective adaptation'.²⁶³ In the context of this enquiry, in issue is not the sincerity of this endeavour, but rather the extent to which adaptations may deliver real difference. If they do, can the reforming power of a rising China be peacefully reconciled with a capitalist hegemony? It is to these questions that I now turn my attention.

²⁵⁷ Wang Gungwu and Zheng Yongnian, *ibid* (n 31) 29; Wang Hui, *ibid* (n 145) 163.

²⁵⁸ Shambaugh, *ibid* (n 25) 10; David Shambaugh, *China Goes Global: The Partial Power* (OUP 2013) 26-30.

²⁵⁹ Dirlik, *ibid* (n 37) 2; for an argument that the Maoist legacy contributed to the success of China's reforms, see Alvin Y So, 'Rethinking the Chinese Developmental Miracle' in Ho-fung Hung, *ibid* (n 130) 50-64.

²⁶⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 146.

²⁶¹ Wallerstein, *ibid* (n 23) 56.

²⁶² Xiaomei Chen, *ibid* (n 24) 2.

²⁶³ Pittman B. Potter, 'Public Regulation of Private Relations: Changing Conditions of Property Regulation in China' in Guanghai Yu (ed) *The Development of the Chinese Legal System: Change and Challenges* (Routledge 2011) 51-681.

Harmony and the Neoliberal Order

Same bed....

It seems then that, much like its predecessors, the HWP has remained anchored in the systemic framework. This time however paradigm has shed off its radical, revolutionary twist. If, for Mao, the unity of opposites was 'conditional, temporary and transitory, and hence relative, whereas the struggle of opposites is absolute', ²⁶⁴ now the unity of opposites enjoys permanence that is predicated on ideological fluidity. Such fluidity includes the convergence of people's common wellbeing with globalised markets. In other words, China can remain a leader of the developing, and a country in the primary stage of socialism - a working class-led, workers and peasants alliance-based people's democratic dictatorship.²⁶⁵ Simultaneously, she can also be a member of the WTO, sign BITs, invite foreign capital into her SOEs, merge them in line with the competitive crusade for economics of scale, and dispatch private capital on a profit-making mission overseas.²⁶⁶ In the circumstances, it is unsurprising that the HWP makes no mention of either capitalism or neoliberalism. Nor does it proffer any analysis of their constitutive structures, the social capacities they generate, the power that underscores them, and the resistance they provoke. And so, much of the way the HWP is understood implicates a degree of conjecture. With this in mind, let me start by examining the proposition of a fluid conflation between two different types of social relations, that of capitalism and socialism.

Managing capitalism

As seen above, ideas about the possibility of a relationship between capitalism and socialism that is non-conflictual and amenable to political management are

²⁶⁴ Mao Zedong, *ibid* (n 226).

²⁶⁵ 'Judicial Reform in China' [Oct 2012] Information Office of the State Council The People's Republic of China 1, 2.

²⁶⁶ Belén Balanyá and others, *Regional & Global Restructuring & the Rise of Corporate Power* (new edn Pluto Press 2003) 9-10, 20; 'China Unveils Merger Targets to Upgrade Industry' [23 Jan 2013] Xinhua News Agency <http://news.xinhuanet.com/english/china/2013-01/22/c_132120613.htm> accessed 24 Feb 2013.

not unique to post-reforms China. Arguably, they occupied a place in official discursive space longer than the two decades or thereabout of Mao's version of 'permanent revolution'.²⁶⁷ Nor for that matter are they China specific. The Marxist bequest, points Hobsbawm, naturally bifurcated into reformist and revolutionary responses.²⁶⁸ In this respect, China's notion of market socialism – the suggestion that state legislation and social rights implementation open up a sphere of choice between the benefits of markets and their destructive consequences – fits into a wider 20th century debate about what socialist economies should look like.²⁶⁹ In practice, we now have the benefit of some past experiences, as opposed to the improvisation by which the realisation of socialist ideology was first characterised. We know, for example, that once revolutionary movements were seized of state power, they found it difficult to resist the co-opting pressures exerted on them by the capitalist ecology within and outside their borders.²⁷⁰ We also know that in the context of Western type democracies, once social democratic parties became parties of government, most settled into operating within the parameters of the capitalist economy, subject to acting as parliamentary spokesmen for narrowly defined trade unionism.²⁷¹ In other words, their identity was formulated, not in terms of a positive and homogenised deference, but by reference to equivalence with surrounding structures and norms.²⁷² As Mao Zedong bemoaned in a letter written to his wife, Jiang Qing in 1966: 'There are more than one hundred [communist] parties in the world, most no longer believe in Marxism-Leninism. Marx, Lenin, have been broken into pieces, not to say ourselves (...)'.²⁷³ Further, even reformative inflections such as the Keynesian welfare state and the US New Deal triggered a counter-response on the part of capital, one that diffused a sense of risk and the pathos of freedom to propel capitalism towards its current

²⁶⁷ For a discussion of Mao's version of 'permanent resolution' see Meisner, *ibid* (n 210) 191-202.

²⁶⁸ Hobsbawm, *ibid* (n 233) 6.

²⁶⁹ *ibid* 7; Wood, *ibid* (n 124) 196-97.

²⁷⁰ Wallerstein, *ibid* (n 243) 5; Wallerstein, *ibid* (n 167) 69, 87, 109.

²⁷¹ Hobsbawm, *ibid* (n 233) 10.

²⁷² For a review of social democracy and a discussion of 'relations of equivalence' see Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Strategy* (2nd edn, Verso 1985) 71-75, 127-34.

²⁷³ Lu Shui (ed), 'Guanyu Wuchanjieji Wenhua Geming de Zhongyao Zhishi' (Important Propositions of Chairman Mao on the Proletariat Great Revolution) (Henan Federation of Trade Union 1976) cited in Li Mingqi, *ibid* (n 15) 66.

neoliberal progression.²⁷⁴ Thus, the hegemonic discourse with which China's HWP is to engage is one that has already excluded the role that workers' resistance historically played in the shaping of capitalism. All substitutions – be it revolutionary or reformative – are designated failures and despotic impediments to the free expansion of markets based commodification.²⁷⁵ The aim is to bring capitalism back to form.

Such reversal could not be achieved without a great deal of power.²⁷⁶ And so, neoliberalism's spatial advance was inextricable, not only from productive power in the form of manufactured discourse, but also from compulsory power.²⁷⁷ Its expansion was attendant by crises, was 'written in shocks'²⁷⁸ and implicated both overt and covert intervention, such as the neutralization of the UK labour party between 1979 and 1997,²⁷⁹ and the bloody experimentation in its imposition on South America in the 70s.²⁸⁰ At a time when China signals her acceptance of the rule of IL as a governing institution of the global arena, in the high command of the neoliberal order, IL is already taking a back seat, alternatively manipulated. Calls are made for a return to global governance of colonial or imperial rule,²⁸¹ an organisation of the global eco-political space that is increasingly militarised,²⁸² a commercialised campaign of 'war without end'

²⁷⁴ Kean Birch & Vlad Nykhnenko (eds) *The Rise and Fall of Neo-liberalism: The Collapse of an Economic Order?* (Zed Books 2010) 3.

²⁷⁵ Wallerstein, *ibid* (n 167) 117-18; for an analysis of workers resistance see for example Laclau and Mouffe, *ibid* (n 273) 79-85.

²⁷⁶ Mark Laffey and Jutta Welds, 'Policing and Global Governance' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge Studies in International Relations: 98 CUP 2008) 60.

²⁷⁷ Michael Barnett and Raymond Duvall, 'Power in Global Governance' in Barnett and Duvall, *ibid* 3-4.

²⁷⁸ Naomi Klein, *ibid* (n 44) 19.

²⁷⁹ David Miller, 'How Neoliberalism Got Where It is: Elite Planning, Corporate Lobbying and the Release of the Free Market' in Birch & Nykhnenko, *ibid* (n 275) 27-33.

²⁸⁰ Klein, *ibid* (n 44) 75-97.

²⁸¹ Himadeep Muppidi, 'Colonial and Postcolonial Governance' in Barnett and Duvall, *ibid* (n 277) 275.

²⁸² But see Nye's argument that the use military force is increasingly costly for states to use. Joseph S. Nye Jr, *The Future of Power* (Public Affairs 2011) 29.

in which assassinations by drones are posited as a moral advance,²⁸³ and a convergence of state, war and profit-making that is ever more intimate.²⁸⁴

The HWP problematised

All of which raises questions about the soundness of the HWP's analysis of the contemporary '*shi*', and what catching up is actually likely to implicate.²⁸⁵ It is perhaps this latter question that most fundamentally problematises the HWP. For if one is to accept, as I do here, that (i) capitalism is a distinct and a specific form of social relations; (ii) its essential and irreducible nature, indeed its survival, is contingent on the endless opening up of new frontiers within a hierarchical structure of statist centres of capital accumulation; (iii) such opening up necessitates a uniform imposition of its economic imperatives; and (iv) its immanent compulsion for value producing commodification imposes strict limits on the freedom to operate in any other way, then the proposition of flexible responses to situational dispositions emerges as an existential barrier. Thus, the attempt to explain capitalist globalisation by reference to the Confucian notion of Great Harmony (*da tong*) is taxing.²⁸⁶ A harmonious unity without uniformity and central control capable of tolerating peripheral autonomy may have been possible in China's non-capitalist empire, with its absence of capitalist compulsions for intrasystemic military competition and extrasystemic expansion. However, one will be hard pressed to point to manifestations of *Da Tong* in historical capitalism. As pointed by Silver and Lu Zhang 'where capital goes conflict follows' and, as opined by Wallerstein, 'it would be a very curious reading of historical capitalism that suggested that the outcome has been harmony'.²⁸⁷ To revisit Qin Yaqing's elucidations, Confucius'

²⁸³ Geoff Dyer, 'Brennan Defends Drone Attacks' [7 Feb 2013] Financial Times <http://www.ft.com/cms/s/0/16f12f74-717c-11e2-9056-00144feab49a.html#axzz2KZdZcUge> accessed 11 Feb 2013.

²⁸⁴ For a discussion of imperialism and 'war without end' see for example, Wood, *ibid* (n 178) 143-63.

²⁸⁵ A view that the Iraq war ushered a 'new imperialism' and marked the end of Deng Xiaoping's era of 'peace and development' is to be found among Chinese scholars including Fang Ning, director of the CASS Institute of Political Science. Shambaugh, *ibid* (n 259) 30.

²⁸⁶ Wang Hui, *ibid* (n 145) 86.

²⁸⁷ Beverly J. Silver and Lu Zhang, 'China as an Emerging Epicenter of World Labour Unrest' in Ho-fung Hung, *ibid* (n 130) 177; Wallerstein, *ibid* (n 167) 34, 109.

harmonious diversity and Hegel's conflictual thesis and antithesis represent different civilizational rationalities that are in all probability non-transferrable and may well implicate a choice between one or the other. For, more often than not, the motivations and interests that guide agents of capitalist logic contrast with those of territorial logic and, by virtue of their operational elusiveness are less amenable to political control.²⁸⁸

With this in mind, let me now examine the HWP. China's strategy, she asserts, is one of ever deepening opening up and integration, but such that produces win-win solutions.²⁸⁹ Implicit in the promise of win-win solutions is the proposition that global wealth polarisation is a management issue, not an immanent feature of the 'law of globalised value'.²⁹⁰ Poverty, explains Lin Yifu, represents countries' individual malaise.²⁹¹ Solutions, he posits, must be market-based, free from protectionist, inward-looking impediments, and led by government-capital cooperation that operates within the framework of a modern state structure.²⁹² To this, the HWP adds a layer of global organisational reforms, so as to assist in the equalisation of the core-periphery power asymmetry. Overlooked is the possibility that asymmetry is structural, including the transfer of surplus from peripheral producers in the Global South to the core monopolies of the North.²⁹³ In other words, one cannot remain rich unless the other remains poor. Yet, the HWP declares its support for the preservation of developed countries' prosperity.²⁹⁴ Further, profit imperatives dictate that capitalist power cannot be confined to prescribed limits. As Arendt points out, the never-ending accumulation of property necessitates structures that facilitate the never-ending accumulation of power.²⁹⁵

This contest between capital's compulsions and their political management can already be observed in China. For example, administration of ODI projects is

²⁸⁸ Harvey, *ibid* (n 186) 27-31.

²⁸⁹ Hu Jintao, Report, *ibid* (n 9) 17.

²⁹⁰ On the 'Law of Globalised Value' as inextricable from underdevelopment see Amin, *ibid* (n 124) 4, 71-2, 87, 109, 131, 150.

²⁹¹ Justin Yifu Lin, *ibid* (n 1) 9.

²⁹² *ibid*.

²⁹³ Wallerstein, *ibid* (n 23) 18, 28; chapter 3 text to n 195-208 pp 116-17.

²⁹⁴ White Paper, (n 49) 1.

²⁹⁵ Hannah Ardent, *ibid* (n 143) 23.

found in a licensing system that seeks to regulate the conduct of Chinese corporations overseas. They are required to 'be well informed of and abide by the relevant laws, regulations, rules and policies both at home and abroad and comply with the principle of mutual benefit'.²⁹⁶ This is repeated in China's 12th Five Year, pursuant to which 'The enterprises that are going out and their overseas cooperation projects should bear corporate social responsibility in mind in order to bring benefits to the local people'.²⁹⁷ Yet, a question arises as to how corporate conduct is to be controlled, now that public ownership is increasingly fused with capital. Further, all the while, capital's quest for control over profit generation intensifies. The All China Private Enterprises Federation (ACPEF) is already lobbying for structural changes that will facilitate its greater bite of the cherry.²⁹⁸ Externally, petroleum transnational corporations are warning against the implications for FDI of China adopting binding targets for environmental protection.²⁹⁹

Furthermore, as marketisation gathers momentum, the separation between government and special interest groups that enabled the pursuance of common interests during China's socialist period, is being replaced with greater closeness between the two.³⁰⁰ In the state apparatus, economic and political elites – altogether some seven million people, equivalent to a mere 1 per cent of the working population – are gradually fusing through organised lobbying and political appointments.³⁰¹ The CCP has remained relatively isolated from economic activities.³⁰² Yet, even there, Jiang Zemin's 'three represents' theory opened the party doors to capitalists, now classified as 'the most advanced

²⁹⁶ Ministry of Commerce, 'Measures for the Administration of Overseas Investment' (2009) Decree No. 5 art 3.

²⁹⁷ 'China Twelfth Five Year Plan (2011-2015) – The Full English Version' [11 May 2011] CBI China Direct <http://cbi.typepad.com/china_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html> accessed 25 Feb 2015; for a discussion of corporate social responsibility (CSR) in China see generally Jingchen Zhao, *CSR in Contemporary China* (manuscript to *Corporate Social Responsibility in Contemporary China* Edward Elgar Publishing Ltd 2014).

²⁹⁸ Song Shenxia, 'Guidelines not enough' [10 July 2012] People's Daily.

²⁹⁹ Balanya et al, *ibid* (n 267) 159.

³⁰⁰ Wang Hui, *ibid* (n 215) xxiv-xxv.

³⁰¹ In 1996 more than 5,400 private entrepreneurs were selected or recommended as members of the People's Congress above county level, more than 8,500 as members of the PCC and eight entered the National's People Congress itself. He Qinglian, *ibid* (n 15) 166-68.

³⁰² *ibid* xxxi.

productive forces'.³⁰³ By 2012, 145 entrepreneurs were selected as party delegates for the 18th National Congress of the CCP. This represented 52 per cent of all newcomers.³⁰⁴

Furthermore, Chinese and Western media, think tanks and academia increasingly converge in the formulation of discourse. Transnational capital is seeping into the country's social, economic, political and cultural fabric, as well into her legislative processes.³⁰⁵ The way such seeping is mediated was observed in the previous chapter. In the US Model BIT 2012, the discourse of transparency is used to legitimise foreign capital's participation in internal legislative processes.³⁰⁶ Similarly, the pressure to extend NT to the pre-establishment stage threatens to dismantle an administrative construct aimed at preserving sovereign control over the entry of FDI.

Finally, successful penetration notwithstanding, China does not readily fit into Western framework of understanding.³⁰⁷ Internally, with a strengthened state fiscal and managerial capacity, and the introduction in 2005-6 of 'building a new socialist countryside' and 'harmonious society' policies, she appears to be retreating from the neoliberal dogma of Jiang Zemin's presidency.³⁰⁸ Externally, she projects a sense of shallow integration that is all the more disturbing for the fact of her rising power.³⁰⁹ Uneasiness is already being translated into power posturing through increased military attention on the part of the US,³¹⁰ and a promise of resistance on the part of China.³¹¹ Ruan Rongze, an influential foreign policy adviser, reiterated the country's commitment to peaceful

³⁰³ Mingqi Li, *ibid* (n 15) 104.

³⁰⁴ 'Top 10 News Items for Chinese Firms in 2012' [20 Jan 2012] Global Times <<http://www.globaltimes.cn/content/757044.shtml>> accessed 24 Feb 2012.

³⁰⁵ Jinhua Dai, *ibid* (n 24) xxi.

³⁰⁶ Chapter 4 text to n 86-87 p 138.

³⁰⁷ Li Xing, *ibid* (n 127) 15.

³⁰⁸ So, *ibid* (n 260) 53-57.

³⁰⁹ Wang Zonglai and Hu Bin, 'China's Reform and Opening-up and International Law' [2010] Chinese Journal of International Law 139 at 201.

³¹⁰ Elizabeth Bumiller and Thom Shanker, 'Obama outlines new military strategy for US' [6 Jan 2012] The Boston Globe <<http://www.bostonglobe.com/news/nation/2012/01/06/obama-outlines-new-military-strategy-focusing-asia-pacific-region-and-middle-east/bwYBkrOn6fyjzvWJliuWO/story.html>> accessed 11 Feb 2013.

³¹¹ John Garnaut, 'Shun US 'tiger' and Japanese 'Wolf' Chinese Colonel warns' [22 Jan 2013] National Times <<http://www.smh.com.au/opinion/political-news/shun-us-tiger-and-japanese-wolf-chinese-colonel-warns-20130122-2d52d>> accessed 11 Feb 2013.

dialogue in the management of the East China Sea brewing tension, and stated that China did not see her rise through the lens of US demise. Yet, simultaneously, he also asserted the imperative of military self-strengthening.³¹² Thus, for all China's efforts to draw a line under the turbulence engendered by her initial encounter with the West, and signal her shift from resistance to peaceful accommodation, the fundamentals of the neoliberal world order she is joining are such, that the country may well find herself once again an unwilling actor in conflictual relationships. For the words of an anonymous Chinese author written in 1836 ring as true now as they did on the eve of the first Opium War:

There is, probably, at the present no more infallible a criterion of the civilization and advancement of societies than the proficiency which each has attained in 'the murderous art', the perfection and variety of their implements for mutual destruction, and the skill with which they have learnt to use them.³¹³

It appears then that in the neoliberal campaign for the maintenance of an oligopolised transmission belt of globalised value, even partial integration attracts conflictual and power based responses. Incorporation that is strewn with instances of adaptations, and talk about a new non-hegemonic globalisation raise the spectre of loss of privileges and a break with the practices and structures that underpin them. Such loss of privileges is unlikely to be legitimised through peaceful co-existence or two-way relational redefinitions.³¹⁴ Shambaugh's latest exposition on what he terms China's

³¹² Benjamin Carlson, 'Chinese Insider: "China's rise is not America's demise"' [25 Jan 2013] Global Post <<http://www.globalpost.com/dispatch/news/regions/asia-pacific/china/130124/china-japan-tensions-Senkaku-Islands-conflict-zone-ruan-zongze>> accessed 12 Feb 2013.

³¹³ Arrighi, *ibid* (n 6) 4.

³¹⁴ Samir Amin, *Ending the Crisis of Capitalism or Ending Capitalism?* (Pambazuka Press 2011) 12, 27.

partial power is a case in point. Shambaugh distinguishes his work by pointing to its comprehensiveness and multi-dimensional exploration of the horizontal spread of China's power rather than her vertical ascent. Nevertheless, the book remains anchored in the dominant discourse, one that assesses, measures, evaluates and pronounces on the power implications of China's rise. Much like in the 18th century, Western narrative tends to overlook what can be learnt from China's experiences, how might we be enriched by her difference and experimentation, or for that matter, what it tells us about ourselves. Rather, its preoccupation is with the question of whether her power is such, that she may no longer fit into the agenda of a Western capitalist model; alternatively, that her difficulties are such, that she is unlikely to pose a threat to hegemonic expansion.³¹⁵ It should perhaps come at no surprise that the HWP was first addressed to the periphery, and it is there that one may now find echoes of its worldview, as in the late Chavez's letter written from his sickbed on the occasion of the second annual summit of the Community of Latin American and Caribbean States (CELAC). 'We are' he wrote, '(...) an example for the world of unity in diversity, for justice, social well-being, and happiness'.³¹⁶

Different dreams

Non-capitalist vision

The power responses that difference seems to attract within the capitalist/neoliberal logic invite a further unpacking of the divergence that the HWP purports to invoke. The proposition that it derives from a conflation between capitalism and socialism was examined above. But there is another possibility. Namely, that no such conflation is intended, and that the globalisation contemplated is in fact a non-capitalist one. In other words, that the marketisation envisioned by the HWP will be of a type that is subordinate to non-economic imperatives, and does not involve societal subjugation to the

³¹⁵ But see Ann Lee, *What the US Can Learn From China: An Open-Minded Guide to Treating Our Greatest Competitor As Our Greatest Teacher* (Berrett-Koehler 2012).

³¹⁶ Tamara Pearson and Ewan Robertson, 'CELAC Strengthened by Second Annual Summit' [29 Jan 2013] Venezuelanalysis.com <<http://venezuelanalysis.com/news/7652>> accessed 13 Feb 2013.

command of an ever-growing army of fictitious commodities.³¹⁷ Such an understanding is congruent with Wood's negation of the commercialisation model, and the distinction drawn by Arrighi between markets and capitalism. It follows that the mere removal of impediments to the operation of markets does not in itself signify a capitalist social relations.

A number of the HWP's tenets appear to point in this direction. Indeed, its core themes, those of peace and development and balanced globalisation, seem to invoke the attributes of the Chinese empire and China's socialist period more persuasively than the crises, imbalances and dispossession of the world's neoliberal interlude.³¹⁸ For such crises, imbalances and dispossession do not represent unintended consequences. In the absence of non-economic constraints, the compulsion of endless accumulation necessitates perpetual expansion that in turn disrupts any inclination towards equilibrium.³¹⁹ Particularly at a point of over accumulation, when capital risks idleness, new assets must be brought on stream, so as to be put into profitable use. Profit imperatives require that such new assets be first devalued. This in turn signifies processes of dispossession in some form or another. Thus, the system is periodically rationalised through orchestrated crises.³²⁰

Turning to the HWP's appeal for cooperative interactions, here we are reminded of the cooperation, reciprocity and obligation to foster welfare that delivered the remarkable peacefulness and stability of interstate relations in the Chinese empire. Thus, non-capitalist markets were complementary rather than competitive.³²¹ Such complementarity was encouraged and competition on the whole deliberately eliminated, so as to maintain stability and avoid trade disarray.³²² The discursive equation between competition and disruption, violence and undesired outcomes of human quest for material gain, can be

³¹⁷ Polanyi, *ibid* (n 177) 81.

³¹⁸ Josef Borocz, 'The "Rise of China" and the Changing World Income Distribution' in Ho-fung Hung, *ibid* (n 130) 95-100.

³¹⁹ Harvey, *ibid* (n 186) 95.

³²⁰ *ibid* 150.

³²¹ Wood, *ibid* (n 124) 22.

³²² *ibid*.

found in the political philosophy of China's pre-Qin thinkers such as Xunzi.³²³ Like Confucius and Mencius, Xunzi saw peace as contingent on human rapacity being constrained through systemic norms of morality.³²⁴ In other words, whether or not boundless rapacity was inherent to human nature, a point on which opinions differed,³²⁵ for pre-Qin thinkers, as indeed for Aristotle, co-existence required that the motive of limitless gain not be divorced from non-economic social relations, so that they may restrain it.³²⁶ Similarly, if analytically different, denunciation of competition is shared by all socialist school of thoughts, and was integral to China's socialist period.³²⁷

Concomitant with cooperation was the Confucian virtue of reciprocity.³²⁸ It signified fairness, inclusiveness and sensitivity to the concerns and circumstances of others. When combined with the virtue of righteousness, it formed a constituent of a sense of justice.³²⁹ This infusion of reciprocity with moral normativity offered a framework within which, economic productive and distributive activities were to be guided by a host of motives. These were made subject to general, non-economic and non-bilateral behavioural principles.³³⁰ Further, reciprocity did not necessarily implicate equality of bargain. As posited by Arrighi, tributary interstate relations were predicated on what Keohane and Kapestein term 'diffused reciprocity' – an unequal exchange pursuant to which, distribution of benefits is reflective of difference. It is guided by the requirements of justice, fairness and stability, rather than equality as a primary consideration.³³¹ In the same vein, contemporary Yang Xuetong calls on China to abandon the false and conflict producing narrative of equal reciprocity. The correct structure, he argues, will dispense with absolute equality, and will

³²³ Yan Xuetong, *Ancient Chinese Thought, Modern Chinese Power* (eds trs), (The Princeton-China Series Princeton University Press 2011) 34.

³²⁴ *ibid* 36.

³²⁵ *ibid* 34.

³²⁶ Polanyi, *ibid* (n 177) 57.

³²⁷ Isaac Deutscher, 'Socialist Competition' (1952) 30 No 3 *Foreign Affairs* 376.

³²⁸ On reciprocity in interstate relations in China's tributary system see Arrighi, *ibid* (n 6) 324.

³²⁹ Cline, *ibid* (n 175) 155.

³³⁰ Polanyi, *ibid* (n 177) 50, 57, 64.

³³¹ For a discussion on reciprocity see Ethan B. Kapstein, 'Power, Fairness and the Global Economy' in Barnett and Duvall, *ibid* (n 279) 90-94.

replace it with norms that take into account the special needs of weaker states.³³²

In contrast, competition is immanent to capitalist/neoliberal property relations.³³³ Theorised as the only route to best outcomes, it forms an indispensable condition for accumulation.³³⁴ Further, by divorcing competition from non-economic, non-bilateral social norms, the interaction engendered cannot but be polarised between losers and winners - a zero-game mechanism for distribution in reverse.³³⁵ With unrestrained accumulation and corresponding unrestrained commodification as the overarching purposes of competitive behaviour, true welfare becomes an impediment. Welfare that is not confined to consumers' wellbeing implicates a process of de-commodification. Certain areas of social and economic activities are placed outside the realm of competition, and thereby impose limits on its free operation.³³⁶ As underscored by China's ancient philosophers and socialist analysts, the consequence is a susceptibility to crisis and conflict. For the endless search for competitive advantages generates 'a state of perpetual motion and chronic instability in the spatial distribution of capitalist activities as capitalists search for superior (i.e. lower costs) locations'.³³⁷ Further, once the balance of power between the hegemon and competing states is disturbed, international competition is likely to translate into geopolitical confrontations, be it in the form of a military clash or trade and currency wars.³³⁸ China is a case in point. Through the release of a massive amount of assets hitherto kept by the state, and the offer of an army of cheap labour, China's opening up restored the global profit rate, and played an important role in the global triumph of neoliberalism.³³⁹ Yet, as her competitive successes appear to exceed systemically acceptable limits, her share of surplus and resources threatens to

³³² Yang Xueting, *ibid* (n 324) 213-14.

³³³ *ibid* 36, 97.

³³⁴ Mingqi Li, *ibid* (n 15) 4.

³³⁵ Harvey, *ibid* (n 186) 37.

³³⁶ Ronnie D. Lipschutz, 'Global Civil Society and Global Governmentality'; 'The Search For Politics and the State Amidst the Capillaries Of Social Power' in Barnett and Duvall, *ibid* (n 279) 233.

³³⁷ Harvey, *ibid* (n 186) 95.

³³⁸ *ibid* 124; Mingqi Li, *ibid* (n 15) 23.

³³⁹ Harvey, *ibid* (n 186) 149; Mingqi Li, *ibid* 16, 27 69, 91.

bite into that of the hegemon, her ODI expands globally, and harmonious society policies corrode TNCs' profit margins, cheer leading is giving way to notions of containment. Thus, as well as a military muscles flexing in the form of the US Pacific pivot, the Transatlantic Trade Partnership (TTP) excludes China. The free trade agreement offered by Obama to the EU in early February 2013 is said to prescribe how third party countries such as China be dealt with. Both agreements may be seen as defensive moves against her ascent.³⁴⁰

Finally, there is the notion of a multipolar world. What form multipolarity is to take and what will be its essential constituents is yet to be unveiled.³⁴¹ However, at the very least, within the framework of a harmonious world, multipolarity points to a political space that comprises a multiplicity of autonomous, yet interactive, decision centres.³⁴² China, say Wang Zonglai and Hu Bin, 'opposes any restrictions on State sovereignty that are non-reciprocal, non voluntary and based on power politics'.³⁴³ Institutionally, neoliberal key ideas that currently structure the way the global sphere is organized and regulated³⁴⁴ will presumably make way to a diversity of voices. However, it would be a non-antagonistic political space. For, the HWP's proposition that internationally shared values and human common destiny can and should accommodate the autonomy to be different, cuts across space and time. It invokes both the formula that made China's tributary system so successful, as well as Mouffe's 'agonism'. Here, challenges and conflicts take place, but the challenger is a legitimate adversary rather than an enemy.³⁴⁵

³⁴⁰ On the US Asia 'pivot' see for example Bonnie G. Glaser, 'Prepare for Unintended Consequences' [2012] Global Forecast Center for Strategic and International Studies 22 <http://csis.org/files/publication/120413_gf_glaser.pdf> accessed 19 Feb 2013; on the TTIP see DB Research, 'An Early Good Luck to the US-EU Free Trade Agreement' Deutsche Bank <http://www.dbresearch.de/servlet/reweb2.ReWEB?addmenu=false&document=PROD0000000000301841&rdShowArchivedDocu=true&rwnode=DBR_INTERNET_DE-> accessed 26 Feb 2013.

³⁴¹ For a discussion of the different perspectives of multipolarity see Mouffe, *ibid* (n 37) 90-118.

³⁴² *ibid* 116.

³⁴³ Wang Zonglai and Hu Bin, *ibid* (n 310) 197.

³⁴⁴ Barnett and Duvall, *ibid* (n 278) 7; since opening up China's participation in international organisations has increased from 20 to 130. Wang Zonglai and Hu Bin, *ibid* (n 310) 193.

³⁴⁵ Mouffe, *ibid* (n 37) 20.

The depth of normative and institutional change envisioned by the HWP is, as yet, a matter for speculation. Ren Xiao, for example, views China as a 'reform minded status-quo power' that seeks to change only the unjust and unreasonable components of the system.³⁴⁶ Yan Xuetong, on the other hand, predicts that 'in the future she will prefer to establish new institutions rather than reform existing ones.'³⁴⁷ Some indicators as to the country's intentions are already available, such as her promise to reform international financial services and rationalise the international currency system.³⁴⁸ More generally, the additional responsibilities that are congruent with China's status of an emerging 'leader state', say Yee and Chen, mean that the formulation of policies in the country's interior must take into account their impact on others and ensure that it is a positive one.³⁴⁹

It is perhaps in its promotion of pluralistic multipolarity that the HWP is potentially at its most contesting, since both multipolarity and diversity proffer the possibility of a new design of diffused power and non-consensual politics. The contrasting capitalist/neoliberal dependency on power accumulation and related spatial spread of a pseudo-universal single system, have been discussed at some length before.³⁵⁰ I would however want to expand on the role of institutions/organisations in the creation of a neoliberal ecology, as this will lead us back to the problematisation of the HWP, and forward to its consideration through the lens of BITs.

³⁴⁶ Ren Xiao, 'A Reform Minded Status Quo Power? China, the G-20 and Changes in the International Monetary System' (2012) RCCPB Working Paper 25 Indiana University Research Center for Chinese Political and Business

<<http://www.indiana.edu/~rccpb/pdf/Ren%20RCCPB%2025%20G20%20Apr%202012.pdf>> accessed 16 Feb 2013.

³⁴⁷ Yan Xuetong, 'Chinese Views of China's Role in Global Governance' [Aug 2011] Lecture at the George Washington University <<http://china.usc.edu/ShowEvent.aspx?EventID=3131>> accessed 16 Feb 2013.

³⁴⁸ China Twelfth Five Year Plan, *ibid* (n 298).

³⁴⁹ Yee, *ibid*, (n 45) at 103-05; Chen Zhiming, 'International Responsibility and China's Foreign Policy' in 'China Shift: Global Strategies of the Rising Power' No 3 The National Institute for Defence Studies Joint Research Series 61.

³⁵⁰ Wallerstein, *ibid* (n 167) 51-52, 83.

The HWP problematised - institutions

By means of rule-making and norms dissemination, neoliberal institutions are designed around organisations and key ideas, such as marketisation, privatisation and free trade and investment.³⁵¹ The corollary is a process of depoliticalisation that forecloses contest, reduces the need for compulsory power and replaces both with notions of consensus.³⁵² Thus, alluding to Haas, Muppidi offers a view of institutional incorporation as comprising a process of locking in and ensuring that the door is finally shut.³⁵³ Power then becomes elusive and resistance correspondingly difficult. I already observed how neoliberal policies were conceptualised as derivatives of consensus, one that had its origins in the institutional organisations of the US Treasury and the US dominated IFIs. As adverse outcomes threatened implementation, it was to institutional design that efforts turned, this time at the national level.³⁵⁴ Similarly, when multilateral negotiations failed to produce the outcome desired by core states, 'locking in' was diverted towards individualised trade and investment arrangements.³⁵⁵

Corresponding processes may be identified in China. Writing for the World Bank, Yang Yao echoes the Washington Consensus' emphasis on institutions as important vehicles for policy implementation. Thus, he says, they have to be adapted in a manner that motivates stakeholders to buy into the overriding task of reforming the country.³⁵⁶ Also in the name of reforms and development, attempts at dismantling socialist structures in the face of popular attachment were facilitated and legitimised through membership of the WTO and a prolific BITs program.³⁵⁷ Incorporation that was historically brought about by means of compulsory power could now be posited as a voluntary, indigenous choice.

³⁵¹ For the role of TNCs in restructuring the EU around these ideas see generally Balanya and others, *ibid* (n 267).

³⁵² Mark Rupert, 'Class Power and the Politics of Global Governance' in Barnett and Duvall, *ibid* (n 278) 22.

³⁵³ Muppidi, *ibid* (n 283) 279.

³⁵⁴ Chapter 3 text to n 119-29 pp 104-06.

³⁵⁵ Chapter 2 text to n 36-47 pp 49-51.

³⁵⁶ Yang Yao, 'What Explains China's Economic Success' (2011) 13 issue 1 Development Outreach 28

http://elibrary.worldbank.org/docserver/download/deor_13_1_26.pdf?expires=1362902433&id=id&accname=guest&checksum=CA75 accessed 10 March 2013.

³⁵⁷ Chapter 4 text to n 37 p 130.

Thereafter, institutional power would safeguard the consequences of such choice. In terms of China's worldview, the HWP may uphold diversity and difference, but at least for now the country's institutional participation unavoidably puts limits on the normativity it is able to articulate. In other words, China can hardly be a WTO member and at the time oppose free trade. She cannot sign BITs and at the same time critique foreign investment, or resist the unhindered movement of capital. She cannot participate in the IFIs and simultaneously be reticent about the benefits of privatisation and marketisation. She may advocate the primacy of law over power, but as argued by Anghie, what is IL but the product of that same hegemonic power which the HWP seeks to negate? Further, in the face of adaptations, institutional power is brought to bear upon the terms of the country's integration. Real responsibility, pointed Zoellick, requires China to truly absorb norms that support and sustain the US led international system and, to this end, take on new identities.³⁵⁸

China may decline to take on new identities. Yet, as in the case of socialism, institutional reforms are designated a time in the future. For now, they remain a matter for conjecture. In a way that is reminiscent of Western social democratic parties' failure to assert a positive and comprehensive distinction, the HWP is short of homogenised discourse of difference, one that confronts analytically the logic of capitalist/neoliberal globalisation, including the exploitative aspects of interdependency, the social movements of resistance it produces and its potential for participation in social oppression. In this respect, the HWP encapsulates Laclau and Mouffe's logic of equivalence, whereby divergence is defined solely by reference to something external, and is therefore always reversible.³⁵⁹

There is much in the HWP that is reminiscent of the neoliberal imaging of a post-political, non-conflictual order.³⁶⁰ The institutions advocated by the HWP,

³⁵⁸ Shambaugh, *ibid* (n 259) 131; Robert B. Zoellick, 'Whither China: From Membership to Responsibility?' [Sep 2005] Remarks to the National Committee on the US and China Relations <http://www.disam.dsca.mil/pubs/INDEXES/Vol%2028_2/Zoellick.pdf> accessed 16 Feb 2013.

³⁵⁹ Laclau and Mouffe, *ibid* (n 273) xiii, 127.

³⁶⁰ Mouffe, *ibid* (n 37) 1.

e.g. the rule of law are much the same as those that underpin Foucault's liberal regime.³⁶¹ Further, the notion of win-win solutions that favour everyone is integral to the neoliberal parlance of a 'third way' and consensual politics. Negative impacts on matters, such as employment, local companies and the environment give way to a tailored success narrative.³⁶² The promotion of innovations as instruments of progress - understood in terms of increased competitiveness and improved business environment for TNCs - is similarly to be found in the European Roundtable of Industrialists' (ERT) lobbying efforts vis-à-vis the EU.³⁶³ Absent are the conflicts attendant on social divisions, and the operation of power in designating pluralism to the confines of a legitimate/illegitimate taxonomy.³⁶⁴ For example, when American politicians were themselves slaves owners, the 'political slavery' of an unrestrained monarchy was unacceptable, while property relations-based slavery was.³⁶⁵ Corporate power enabled the expansion of property rights to life's process of reproduction, while farmers' property rights are delegitimised as 'seeds piracy'.³⁶⁶ The result is a neoliberal type technical approach to political problems and a systemic depiction that is 'strikingly apolitical and far too cosy'.³⁶⁷

Indeed, many of the values that appear to delineate the HWP also form part of neoliberal pseudo-universal discourse – e.g. scientific rationality, the rationality of free trade, developmentalism and progress.³⁶⁸ Such values invoke capitalist logic: progress alludes to the ethics of profit- yielding improved productivity;³⁶⁹ a free market is the yardstick by which such progress is measured; scientific

³⁶¹ Foucault, *ibid* (n 32) 32.

³⁶² Mouffe, *ibid* (n 37) 31-32; Laclau and Mouffe, *ibid* (n 273) xiv-xv; Balanya and others, *ibid* (n 267) 29 referring to the 1999 report 'The East-West Win-Win Business Experience' published by the ERT to promote the eastwards enlargement of the EU.

³⁶³ Balanya and others, *ibid* 26, 31-33.

³⁶⁴ See for example, Mouffe's critique of Rawls in Chantal Mouffe, 'The Limits of John Rawls' Pluralism' (2005) 4 no 2 Political, Philosophy & Economics 221
<<http://ppe.sagepub.com/content/4/2/221.abstract>> accessed 1 Jan 2013.

³⁶⁵ Domenico Losurdo, *Liberalism: A Counter History* (Verso 2011) 1-7 and generally; Laclau and Mouffe, *ibid* (n 273) xv.

³⁶⁶ Laffey and Weld, *ibid* (n 277) 68-69.

³⁶⁷ Andrew Hurrell, 'Power, Institutions, and the Production Of Inequality' in Barnett and Duvall, *ibid* (n 279) 33.

³⁶⁸ See for example Hu Jintao, Report *ibid* (n 9) 5-7.

³⁶⁹ Wood, *ibid* (n 124) 106-08.

rationality masks 'the irrationality of endless accumulation'.³⁷⁰ We saw how these concepts were grafted onto the Chinese society in what Wallerstein identifies as the gift of universalism - the process by which the powerful bestows on the powerless the opportunity to join in.³⁷¹ As with institutional participation, this gift has now been reinvented as an independent, voluntary choice.

BITs of harmony

BITs articulate the HWP's commitment to the integration of production systems and the free flow of globalised investment. These are to take place within a framework of IL that is, in turn, promoted as guarantor of transparency and stability. The revived commitment to IL may be found, for example in MOFCOM's pledge to assist Chinese enterprises resolve problems via the country's network of investment treaties.³⁷² Chinese BITs' reticence about the application of IL external standards to her domestic regulatory regime is being gradually phased out. An application to the National Development and Reform Commission (NDRC) for a licence to invest overseas must meet, inter alia, a requirement that the investment does not violate IL.³⁷³ An unrestricted commitment to IL has also made its way into the recent Canada BIT. Further, this treaty, finally signed in September 2012 after some 24 years of negotiations, joins the Mexico BIT in recognizing the IMS. It requires that the FET accords with international rather than municipal law, and limits its normative content by reference to the IMS.³⁷⁴ Furthermore, disputes are to be governed by the treaty and applicable rules of IL, with domestic law to be taken

³⁷⁰ Wallerstein, *ibid* (n 167) 83-85.

³⁷¹ *ibid* 85.

³⁷² MOFCOM, 'Measures for the Administration of Overseas Investment 2009' art 28.

³⁷³ Basil H. Hwang, Le Yu and Salina Wong, 'Outbound Investments from China - the Chinese domestic requirements' [2013] Lexology Association of Corporate Counsel 2
<http://www.lexology.com/library/detail.aspx?g=2bb843c4-d41b-4952-b917-8de40b8c16b8&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Other+top+stories&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2013-03-18&utm_term=> accessed 29 April 2013.

³⁷⁴ 'Agreement Between the Government of Canada and the Government of the People's republic of China for the Promotion and Reciprocal Protection of Investments 2012' art 4 (1) (2)
<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=en&view=d>> accessed 18 March 2013.

into consideration only 'where relevant and as appropriate'.³⁷⁵ Consent to ICSID arbitration is subject only to certain essentially procedural conditions precedent and a qualified 'fork in the road' provision.³⁷⁶

BITs' core premise that the imperatives of free flow necessitate shielding foreign capital is similarly echoed in China's promise to protect the rights of foreign companies.³⁷⁷ Paradigm and treaties thus coalesce in their formulation of a state-law-market relationship, in which the state's agreement to limit its regulatory powers is translated into law and validated by the imperatives of development. In particular, the reference to foreign companies as possessors of rights invokes a neoliberal type discourse, pursuant to which corporations are abstracted as persons so that their treatment may be assessed by reference to standards applicable to people.³⁷⁸

Both the HWP and BITs signal greater integration and enhanced international participation. Yet, proclaims the HWP, it is a participation that does not exclude reformative efforts. The Canada BIT for example introduces a number of interesting innovations. Altogether the treaty is longer and more detailed, thereby reducing the typical vagueness that leaves so much room for adjudicative discretion. Notably, the preamble limits the investment the parties are to promote to 'investment based on the principles of sustainable development'.³⁷⁹ The MFN provision injects clarity by expressly excluding dispute resolution mechanisms from its scope of application.³⁸⁰ In and of itself, the fact that a measure has an adverse effect on the economic value of an

³⁷⁵ *ibid* art 30 1.

³⁷⁶ *ibid* art 21-23, Annex C.21 stipulating that entitlement to arbitration may be revived provided court proceedings are withdrawn prior to a judgment having been delivered.

³⁷⁷ 'What China Aims to Achieve by Pursuing Peaceful Development' in White Paper, *ibid* (n 49) 1.

³⁷⁸ Under China's Company Law a company is defined as an enterprise legal person [2005] art 3 Companies Law of the People's Republic of China
<http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898292.htm> accessed 18 March 2013. The implications of people-corporation equalisation can be found for example in the expansion of the IMS from the realm of personal injury to investment protection.

³⁷⁹ But see Wood, *ibid* (n 124) 197-98 arguing that capitalism is incapable of promoting sustainable development.

³⁸⁰ Canada BIT, *ibid* (n 374) art 5 3.

investment is insufficient for it to qualify as indirect expropriation.³⁸¹ Arbitrators are required to be versed, inter alia, in public IL.³⁸² The stipulation that genuine health, safety and environmental conservation measures do not give rise to credible claims is stronger than that found in NAFTA.³⁸³

Such innovations may assist in dislodging the prediction that, as China transforms into a home country, she will seek greater protection for her investors. However, they also indicate the possible limits of reformative attempts. Novel provisions may point to a move in the direction of Cai Congyan's balanced paradigm.³⁸⁴ Yet, they remain within systemic terms of reference. Indeed, the continuing enlargement of China's BITs program signifies reforms that shy away from withdrawal as in the case of Bolivia³⁸⁵ and Ecuador.³⁸⁶ Nor does the country appear minded to follow the path of collective challenge to the terms of incorporation, such that is to be found in the PSNR and CERDS resolutions.³⁸⁷ It is perhaps in this shift from collective to individualised resistance, and the adoption of a case-by-case type approach, that the HWP most clearly departs from its socialist predecessor. Instead, it coalesces with BITs and their underlying neoliberal paradigm. BITs with developing countries may be guided by the specificity of divergent national conditions.³⁸⁸ Both paradigm and treaties may adhere to the Five Principles of Peaceful Coexistence (the Five Principles) that for China continue to represent the overarching

³⁸¹ *ibid* Annex B.10 2 (a).

³⁸² *ibid* art 24 1 (a).

³⁸³ Mathew Kronby, 'Some Facts and Perspectives on Canada-China Bilateral Investment Treaty: A Response to the Domsayers' [31 Oct 2012] <<http://www.ccbc.com/2012/10/some-facts-and-perspective-on-the-canada-china-bilateral-investment-treaty/>> accessed 19 March 2013.

³⁸⁴ Cai Congyan, 'China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications' (2009) 12 (2) *Journal of International Economic Law* 457 at 459.

³⁸⁵ 'Bolivia Submits a Notice Under Art 71 of the ICSID Convention' [16 May 2007] ICSID News Release <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>> accessed 7 March 2011.

³⁸⁶ Fernando Cabrera Diaz, 'Ecuador prepares for Life After ICSID, While Debate Continues Over Effect of Its Exit from Centre' [2 Sep 2009] *Investment Treaty News* <<http://www.iisd.org/itn/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre/>> accessed 7 March 2011.

³⁸⁷ For a discussion of the Resolutions and their implications for IL see chapter 2 text to n 230-49 pp 80-83.

³⁸⁸ Kong Qingjiang, 'Bilateral Investment Treaties: The Chinese Approach and Practice (1998-1999)' in 8 *Asian Book of International Law* 113.

norms for interstate relations.³⁸⁹ However, the aim of the Five Principles is confined to transcending differences in social systems and ideologies.³⁹⁰ They thus leave unanswered the substantive question of what China's leadership within such diversity actually means - in what way does it extend, if at all, beyond an obtuse promise of reforms, the HWP and BITs' assertions of mutual benefit, and the country's incorporation into the aid sector.³⁹¹ One answer may be found in An Chen and Dong Chen's call for a critical, vigorous and unequivocal self-positioning in the camp of the disadvantaged, one that is not confined to being 'an ameliorator of the existing order or an intermediary of the South-North contradiction'.³⁹² It is a call for the reconstitution of a NIEO, one that derives from a South-South collective self-reliance. Such self-reliance does not implicate a closing of the door. Rather, it introduces an important policy detail into notions of incorporation, multilateralisation and democratisation of the global space. A boundary is drawn, beyond which incorporation transmutes negatively into dependency. For An Chen and Dong Chen, the nature of the neoliberal order is such, that actively pursuing the NIEO is the only way for achieving both the change sought by China and her own objective of peaceful rising.³⁹³ An ambiguous discourse of reforms will not do. Rather, the country's future and the harmonious world she advocates are contingent on her resolutely following her own path through the 'smoke and mirrors' that mask neoliberalism's sole purpose of furthering the interests of transnational monopolies.³⁹⁴

Support for An Chen and Dong Chen's observations about neoliberalism and China's stance towards it, can be found to the internal realities of BITs. Here,

³⁸⁹ Ministry of the Foreign Affairs of the People's Republic of China, 'China Introduction of the Five Principles of Peaceful Co-Existence' [17 Jan 2000] <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18053.htm> accessed 17 March 2013; Hu Jintao, Report, *ibid* (n 9) 17.

³⁹⁰ Ministry of Foreign Affairs, *ibid*.

³⁹¹ For a study of China as an actor in the aid sector see Paul Opoku-Mensah, 'China and the International Aid System: Transformation or Cooptation?' in Li Xing, *ibid* (n 127) 71-86.

³⁹² An Chen and Dong Chen, 'What Should be China's Strategic Position in the Establishment of New International Economic Order: With Comments on Neo-Liberalistic Economic Order, Constitutional Order of the WTO and Economic Nationalism's Disturbance of Globalization' (2009) 10 *3 The Journal of World Investment and Trade* 359 at 396.

³⁹³ *ibid* 359-60.

³⁹⁴ *ibid* 382.

coalescence with the HWP turns into inconsistency. Thus, if the HWP's flagship is diversity and the peaceful co-existence of differences, BITs operate so as to lock in governments and people into uniformity, and facilitate optimal universalisation of economic imperatives.³⁹⁵ If the HWP envisions a world of equalised progress and common prosperity, BITs are designed to benefit the core and its corporate elites. If the HWP cherishes truly independent and equal sovereignty, BITs are sovereignty reducing devices. They do mobilise nation-states sovereign power, but only so as to put the seal of consent on the appropriation of these same powers. The HWP's discourse is one of co-operation and support. Yet, BITs' systemic augmentation is inextricable from the fragmentation of Global South solidarity, and the pitching of state against state in competition over promises to invest. Theirs is the logic of interstate competitiveness.³⁹⁶ Further, since they impose duties but confer no rights on the host state, their claim to reciprocity is illusory. TNCs remain a shadowy beneficiary, one that has no obligations whatsoever. If the HWP underscores the importance of localised solutions, BITs operate to internationalise them. The HWP attributes the strife that besieges the global space and growing North-South gap to the operation of hegemonic powers. Yet, China's integration into the BITs program signalled her incorporation into and acceptance of a 'particularly American conception of investment rights'.³⁹⁷

³⁹⁵ Wood, *ibid* (n 124) 22.

³⁹⁶ Birch & Mykhnenko, *ibid* (n 275) 7.

³⁹⁷ James Petras and Henry Veltmeyer, *Multinationals on Trial: Foreign investment Matters* (Ashgate Publishing Ltd 2007) 111.

CHAPTER 6: CONCLUSION

The Political-Economic Dualism

A recent New York Times article reported on the success of Chinese investment and trading in post invasion Iraqi oil.¹ The article records two main facts. First, China's share is approaching half of all oil accessed, and is set to increase.² Second, Chinese corporations accept contractual arrangements that allow greater income for the government of Iraq, notwithstanding that they are left with minimal profits.³

Let us consider how these facts are constituted within the neoliberal discursive field. One aspect is that of entitlement to the oil. China, we are given to understand, lacks such entitlement because it was American effort and sacrifice that made the reserves accessible.⁴ Implied in the notion of access is the opportunity – or Wood would say compulsion – for a commercial and productive use. Here we are reminded of Lock's proposition that rights to property stem from augmentation of exchange value.⁵ Also comes to mind is Nozick's notion that justice in distribution is founded not on outcomes, but on the legitimacy of entitlement to the holdings so distributed.⁶ It will be recalled that Lock's philosophical musings were historically used to justify not only capitalist enclosures in England, but also overseas expropriations.

Then there are the themes of competition and profit. Chinese SOEs enjoy governmental financial support. This enables them to accept lower profits and thereby disadvantage competitors.⁷ Two premises may be extracted. First, the relationships among those accessing Iraqi oil, as well as between them and the

¹ Tim Arango and Clifford Krauss, 'China Is Reaping Biggest Benefits of Iraq Oil Boom' [2 June 2013] The New York Times <<http://www.nytimes.com/2013/06/03/world/middleeast/china-reaps-biggest-benefits-of-iraq-oil-boom.html?emc=eta1&r=0>> accessed 9 June 2013.

² *ibid* 1.

³ *ibid* 1-2.

⁴ *ibid*.

⁵ John Lock, 'Of Property' in Matthew Clayton and Andrew Williams (eds), *Social Justice* (Blackwell Readings in Philosophy, Blackwell Publishing 2004) 30.

⁶ Robert Nozick, *Anarchy State and Utopia* (Basic Books Inc. 1974) 151.

⁷ *ibid*; the statement that SOEs are government financed and are not subject to profit imperatives is taken here to be discursive rather than truth.

government who owns it, are or at least should properly be competitive. Second, since profit maximisation is the overriding purpose of such competition, a deflected mechanism must be in operation in relation to Chinese corporations. It is identified as the infiltration of the political into the economic. Thus, Chinese companies are posited as the creatures of governmental foreign policy rather than truly corporatised, honest brokers of market imperatives.⁸ By contrast, the link between US foreign policy and US corporate entitlement is hinted at by reference to the presence of American 5th Fleet and air force, but other than that is left unspoken.⁹ Finally, implied in the report is a greater US prescribed-order that is being undermined by Chinese divergence. Chinese Collaboration with the Iraqi government weakens Western policy of resisting its profit expectations by cutting separate deals with Iraq's semi-autonomous Kurdish region.¹⁰

But there is another fact, so self-evident that it is easily overlooked. It takes us back to the discourse of politics and economics. Both Western and Chinese corporations are in Iraq. Both are accessing resources from a market that was forcibly prized open. Both are nationals of countries that profess commitment to IL. Yet, the fact that the opportunity for resources extraction was secured by means of, at best legally prohibited use of force and, at worse an international crime, does not seem to override economic imperatives. Implied in this incongruity is segregation between politics and economy. As between the two, the latter prevails. For Wood, it is this that constitutes the specificity of new imperialism.¹¹ As seen in chapter 3, US led new imperialism shies away from the risk and cost of colonialist naked force, in favour of informal economic impositions. To maintain power and control, economic self-determination had to be carved out of the sovereignty gifted to the colonies.¹²

⁸ Arango and Krauss, *ibid* (n 1) 2.

⁹ *ibid*.

¹⁰ *ibid*.

¹¹ Ellen Meiksins Wood, 'The Imperial Paradox: Ideologies of Empire' [11 April 2013] lecture at the School of Oriental and African Studies.

¹² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 196-99.

Power thus appears to be mediated in two spheres that are constructed discursively as distinct and separate. Property relations are imbued with universalism, whereas the political is purportedly permitted a degree of self-determination.¹³ In practice, the two are symbiotic. Since states must be put at the service of capital, it follows that, sooner or later, economic constraints cannot but be translated into political ones. We saw this in the way a market fundamentalist Washington Consensus evolved into a second-generation paradigm of institutional fundamentalism, so as to penetrate the political sphere. Symbiosis also revealed itself in private authority's cross over from its natural habitat of markets to the realm of governance and juridification. Grotius, widely held as the father of IL, was also a lawyer to the Dutch East India Company and wrote many of his works in support of their interests.¹⁴ Business lobbies such as the ICC and the US Council of International Business worked alongside Western governments to promote a multilateral investment protection treaty.¹⁵ The proposal that the WTO remit should also include a multilateral investment code was put forward 'at the insistence of influential American business group'.¹⁶ Importantly, it was the privately led 1959 Draft Convention on Investment Abroad (also known as the Abs-Shawcross Draft Convention) that, for the first time, introduced the concept of direct investor-state arbitration. It is generally viewed as the progenitor of contemporary BITs program.¹⁷ Hermann Abs, the Director-General of Deutsche Bank headed the initiative. Lord Shawcross was the UK Attorney General. Thus, by means of private lobbies and state/corporations revolving doors, TNCs are able to integrate state decision-making with capital accumulation rudiments.¹⁸ Within BITs practice, this integrative dynamic is found in the manner by which the treaties blur IL's traditional public-private binary and privatise, not only the management of investor-state interaction, but also the state itself. To this end, jurisprudential devices are employed, such as linguistic vagueness that

¹³ Wood, *ibid* (n 11).

¹⁴ Anghie, *ibid* (n 12) 224.

¹⁵ Gas Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, OUP 2007) 19.

¹⁶ *ibid* 20.

¹⁷ *ibid* 36; see also Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 20-22.

¹⁸ David Harvey, *The New Imperialism* (OUP 2003) 76-77.

facilitates capacious interpretations, and consent that is detached from its circumstances, so as to enable the legitimization of harm.

Thus, it is paramount that nation-states toe the line. To ensure such toeing of the line, dominance is pursued by means of Gramscian processes of force and consent, with institutional participation serving as a final lock in mechanism. The outcome is interstate equality-inequality dualism, the sustenance of which depends on subterfuge. Here democracy steps in. It is well suited to this task. For, it holds the banner of citizenship and rule of law-based equality, but is impervious to class and interstate differences.¹⁹ It provides a construct, within which economic inequality and the dominance of capital are neutralised by the formalities of political egalitarianism.²⁰

Traces of this dualism can be also discerned in the HWP. On the one hand, people of the world are equalised through their collective rights to welfare and developmental self-determination. Countries too are to enjoy sovereign equality, stated to encompass both the political and the economic arenas. Yet, the two spheres are treated separately. In relation to the latter there is, in addition, a commitment to a specific order of interdependency and globalised, market-based free trade and investment. In other words, it is a commitment to the same order that poses such difficulties to notions of equality and sovereignty. By now, we know that rather than a trickling down effect, this order engenders wealth gap both within and among states. If fragmentation was previously attained in the main by restricting the flow of funds, collective action difficulties are now exacerbated by developmental differentials, and the formation of new coalitions.²¹ For as vividly illustrated by the BITs program, tenets of unimpeded capital mobility and the free transfer of profits are productive of power-based hierarchies and wealth concentration. Yet, discursively, they align capitalist imperatives and TNCs' interests with those of

¹⁹ Wood, *ibid* (n 11).

²⁰ *ibid*.

²¹ Balakrishnan Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Developments as a Third World Strategy' in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish 2008) 63.

developing countries so as to suggest a win-win formula.²² Here, continuity may be identified. For colonialism too was associated with a discourse of mutual benefit and progress rather than conquest and extraction. The British Empire articulated its desire for legalised opium trade as an aspiration for honourable commerce and an opportunity for the Chinese nation to wake up from a deep slumber.²³

The HWP expressly acknowledges the operation of domination and power politics in interstate relations. It rejects them as an aberration of contemporary trends. Nor can the paradigm itself be said to be hegemonic. That is to say, it does not claim to be enunciating any principles of natural or universal dimensions so as to accumulate additional power.²⁴ The vision of globalised trade and investment interdependency does not purport to be a statement of truth. Rather, it is an expression of individual national commitment. In other words, it articulates China's position as things stand now rather than any hegemonic mission. Further, uniformity is neither required nor desirable, and the path to great harmony leads through preserved differences. Furthermore, the HWP is predicated on notions of relational fluidity, immanently transformative situational dispositions, and responses that must therefore retain flexibility if they are to remain appropriate.

Arrighi elucidates that hegemonic dominance comprises not only power, but also leadership. The two cross-fertilise in the sense that power is attendant on the ability to credibly propagate leadership in the interest of all.²⁵ The HWP does claim leadership, at least in relation to developing countries. But it is leadership that is expressed as circumstantial and provisional. The ultimate aim is equality, to be attained when the rest catch up. Further, the world order best functions when diversity translates into multiplicity of balanced and dialoguing

²² James Petras and Henry Veltmeyer, *Multinationals on Trial: Foreign investment Matters* (Ashgate Publishing Ltd 2007) 129-30.

²³ Jane Burbank and Fredrick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton University press 2010) 287; Julia Lovell, *The Opium War* (Picador 2011) 3, 12.

²⁴ Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (Verso 2010) 29. Arrighi borrows from Gramsci's conceptualisation of hegemony but adapts it to interstate relations.

²⁵ *ibid* 30-31.

centres of decisions. Viewed through the lens of Harvey's taxonomy of power, in issue is the application of collective power as against neoliberal distributive power. The latter denotes a zero-sum game, in which competition is applied so as to take power away from others, and thereby improve the position of the hegemon. By contrast, the former entails leadership that benefits all, since it is predicated on collective interactions that in turn enhance collective power.²⁶

Yet, much like the neoliberal paradigm, the HWP too is problematised by a hierarchical division between politics and the economy. When historically contextualized, this division may be posited as an instance of inflection. Mao's Theory of the Differentiation of the Three Worlds and the HWP may be constant in their opposition to hegemonism and war.²⁷ However, in the former, attainment of peace and development necessitates 'the broadest possible united front in world-wide revolutionary struggles to strike the chief enemy'.²⁸ In other words, politics and the economy are inextricable. As between the two, it was political solidarity that was to form a contesting force, the success of which would deliver peace and related economic development. In issue was what Kirby describes as the most ambitious international project of the era – that of creating a worldwide socialist political economy.²⁹

By contrast, in Deng's version of internationalism, individual national development is a condition precedent to global activism. Implied in this order of priorities is a conflation with neoliberal type dualism, albeit one that may be qualified. For in the HWP, Mouffe's political sphere cannot be altogether foreclosed if the envisioned economic order is to be more equitable. Nevertheless, as between the struggle against hegemonism and the task of modernisation, it is the latter that takes precedence. Since China's international

²⁶ Harvey, *ibid* (n 18) 37.

²⁷ Mao Zedong, 'Build the Broadest International United Front and Smash Superpower Hegemonism and War Policies' in 'Chairman Mao's Theory of the Differentiation of the Three Worlds is a Major Contribution to Marxist-Leninism' [1977] Editorial Department of Renmin Ribao (People's Daily) <<http://www.marxists.org/history/erol/ncm-5/theory-3-worlds/section5.htm>> accessed 13 June 2013.

²⁸ Joshua Cooper Ramo, *The Beijing Consensus* (The Foreign Policy Centre 2004) 60.

²⁹ William C. Kirby, 'China's Internationalization in the Early People's Republic: Dreams of a Socialist World Economy' in Julia Strauss (ed), *The History of the PRC* (1949-1976) (The China Quarterly Special Issues series No 7 CUP 2007) 16 and generally.

role is to be determined by her economic growth, said Deng, everything depends on the work at home being done well first.³⁰ Iraq is not the only case in point. At least seven Chinese geological agencies have already arrived in gold rich Mali, notwithstanding that her opening up to foreign resources extraction was facilitated by foreign intervention.³¹ BITs are another example. For China participates in their conclusion, even though they are non-reciprocal, unequal instruments of global hierarchical structures on which surplus transfer relies.

Qin Yaqing explains this inflection by reference to the transformative nature of the international *shi*. Mao's prediction of inter-hegemonic war did not materialise. Instead, it was substituted by economic interdependency and multipolarity. China appropriately responded by focusing on cooperative economic development. This explanation, however, only serves to highlight the dualism within the country's response. For, the collaboration the HWP calls for implicates complicity with a Western design in which economic sovereignty has been carved out of political self-determination. Further, China's immediate task is to climb up Wallerstein's interstate ladder, so as to secure a position powerful enough to enable her to work towards the dismantling of its core/periphery binary. It follows by implication that the same power that is posited as derogatory is also that which is aspired to, at least in the first instance.

Where then within the HWP legitimisation may be found? Here it is not democracy that is called upon. Rather, IL is posited as an institutional pillar of an envisioned harmonious world.³² In other words, the forcible intervention in Mali is presumably validated by the Security Council resolution that authorized it. BITs are presumably similarly endorsed by the fact that their conclusion implicates the voluntary exercise of sovereignty. Here we are reminded of Wang Zonglai and Hu Bin's assertion that the country 'opposes any restrictions on

³⁰ Deng Xiaoping (tr) , *Selected Works of Deng Xiaoping* (1975-1982) (University Press of the Pacific Honolulu 1983) 225.

³¹ 'Mali Gold Splendour for Foreign Firms, Misery for Malian Miners' [10 June 2013] Russia Today <<http://rt.com/news/mali-gold-foreign-corporations-450/>> accessed 13 June 2013.

³² Hu Jintao, 'Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society' [15 Oct 2007] Report to the 17th National Congress of the Communist Party of China 17 <<http://www.china.org.cn/english/congress/229611.htm>> accessed 22 Aug 2012.

State sovereignty that are non-reciprocal, non-voluntary and based on power politics'.³³

Yet, absent from this assertion is a recognition of the complexities of voluntariness and consent. If democracy serves well the neoliberal dualism by reason of its neutrality in matters such as class and economic inequality, opposition to power politics achieves similar results by reason of power's capacity for elusiveness. The image invoked by the WHP is that of compulsory power. Yet, as pointed by Barnett and Duvall, it may also assume less obvious expressions.³⁴ In particular, the economic sphere and its 'international private regimes' lend themselves to surreptitious power mediation.³⁵ In Gallagher and Robinson's free trade imperialism, informal power in the shape of trade and investment are superior to political intervention. Not only is such informality less costly and risky, but it also benefits from the illusion of withdrawal.³⁶

So when Wang and Hu speak of opposition to non-voluntary restrictions on sovereignty, the question arises as to how non-voluntariness is to be understood. China's vision of a harmonious world is predicated on the maintenance of an institutional framework, albeit one that is to be reformed in due course. Yet, participation in neoliberal institutions is particularly vulnerable to the guise of voluntariness. It masks the power differentials that lurk behind signature, and cloaks imposition with the appearance of independent, consensual election. Further, capitalism compulsion for expansion means that attempts at reforms are likely to meet with forceful resistance rather than peaceful accommodation.

³³ Wang Zonglai and Hu Bin, 'China's Reform and Opening-up and International Law' [2010] Chinese Journal of International Law 139 at 197.

³⁴ Michael Barnett and Raymond Duvall, 'Power in Global Governance' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge Studies in International Relations: 98 CUP 2008) 1-32.

³⁵ A. Claire Cutler, 'Private International Regimes and Interfirm Cooperation' in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge Studies in International Relations CUP 2002) 29.

³⁶ John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) Second Series VI 1 The Economic History Review 3
<<http://www.mtholyoke.edu/acad/intrel/ipe/gallagher.htm>> accessed 25 Sep 2010.

Furthermore, in the interiors of power, the economy and politics that neoliberalism and HWP are at pain to separate, in fact converge. Arguably, nowhere is this convergence more prominent than in the concept of development, so central to the HWP. The discourse of development resides primarily in the realm of economic. Yet, it legitimises political impositions. As pointed by Rajagopal, at least in its neoliberal contextualisation, development limits capacities for self-determination by prescribing who needs to be developed and in what direction.³⁷ It also provides the criterion by which closeness to the core of the interstate power hierarchy is regulated. Taking Greece as an example, in 2001 she was classified as a 'developed country'. Following on from her subjugation to EU and IMF dictates, she was recently downgraded to the status of 'emerging market'.³⁸ By contrast, based on World Bank figures, US external debt is estimated at 99.46% of GDP.³⁹ Yet, there is no suggestion of exposing this country to external compulsions, or for that matter downgrading her status of a leading economy. It is telling that both Greece's original positioning and subsequent downgrading emanated from a fund manager, namely the private sphere.⁴⁰ Thus, it seems that a country's classification as developed or otherwise is attendant, inter alia, on autonomy vis-à-vis international institutions, or in Wallerstein's terms – her place on the ladder of interstate relations, and the extent to which she is the diffuser or recipient of systemic dictates. Yet, autonomy, or lack of it is expressed by reference to a discourse of development that is in turn advanced as purely economic.

Let me now examine these propositions in the context of BITs. Both the draft statutes for the establishment of a foreign investment arbitral tribunal or court, and the 1949 ICC Code originated from the private sector. They have not been

³⁷ Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish 2008) 73.

³⁸ 'Greek reclassified to 'emerging market' from developed' [14 June 2013] The Telegraph <<http://www.telegraph.co.uk/finance/economics/9904969/Greece-reclassified-to-emerging-market-from-developed.html>> accessed 14 June 2013.

³⁹ 'The World's Biggest Debtor Nations' CNBC.com <<http://www.cnbc.com/id/30308959>> accessed 24 June 2013.

⁴⁰ *ibid* (n 38).

adopted, but their significance was to prove long lasting. For they signalled a conceptual shift, whereby a notion of protection for the purpose of development was to replace IL's traditional function of protecting aliens and their property.⁴¹ Since then, the discourse of development as contingent on the shielding of private property rights was institutionalised in the preamble of BITs and the ICSID Convention.⁴² Such institutionalisation goes beyond law to form a political premise. For, as pointed by Sornarajah, the assumption that only developing states are in need of development, and that such need is best dealt with by means of law designed specifically for them, meant that the developed/developing binary itself became embedded in IL.⁴³

The HWP takes issue with this understanding of development and seeks to substitute it with a combination of individual national autonomy and people's collective right to wellbeing. Thus, China's participation in the BITs program is undertaken under the policy banner of the 'Five Principles of Peaceful co-existence' to include sovereignty, equality and mutual benefit.⁴⁴ Investment treaties are posited as a mechanism for South-South cooperation, one that has the potential to be transformed from a device for unmitigated capital accumulation into a vehicle for equitable development. Distributive power will thus transform into a collective one. This proposition may or may not be feasible. It nevertheless reveals a vision, in which profit is not the only imperative, and power is accumulated for the benefit of all, rather than at the expense of most. Further, it demonstrates that, within the HWP, the segregation between the economic and the political is not hermetic, so that the latter persistently lurks in the former's wings.

As against this, it is also the case that Chinese treaties display a trajectory towards conflation with neoliberal formulations. As between An Chen and Dong

⁴¹ Newcombe and Paradell, *ibid* (n 17) 21.

⁴² M. Sornarajah, *The International Law on Foreign Investment* (3rd edn CUP 2010); see for example the *Amco v Indonesia* award in which the tribunal held that 'to protect investments is to protect the general interests of development and developing countries'. *Amco v Indonesia* [1984] ILM 352 at 369 para 23.

⁴³ Sornarajah, *ibid* (n 42) 51.

⁴⁴ Kong Qingjiang, 'Bilateral Investment Treaties: The Chinese Approach and Practice (1998-1999)' in *8 Asian Book of International Law* 110.

Chen's call for a return to a NIEO, and Cai Congyan's reformatory approach in the direction of a balanced paradigm, divergence appears to veer towards the latter. Further, the interconnection between the political and economic spheres means that the former's lurking in the wings may not suffice. And so we are back to Mao's counter discourse of resistance and collectivist responses. In this respect, the HWP's abstract language and view of change as on going and determinative, mean that the door is left open. Reluctant as China may be at this juncture, neoliberal power retaliations to even limited reforms may necessitate a change in response. It remains to be seen how the dice will fall.

The Boundaries of Resistance

How we are then to understand what may be described as China's equivocal stance? Or, to paraphrase Bush's famous dictate: she appears to be neither with us nor against us. She appeases and integrates. At the same time she retains loyalty to and confidence in her national specificity and historical normativity.

An explanation often found in Western writings is that the invocation of a paradigm was triggered by a perceived need to respond to the cauldron of anxiety about the country's ascent. Such need is linked to the importance of peace for the continuation of her development; hence, the desire to placate and reassure. Yet, this is coupled with a growing sense of empowerment. Yee for example argues that China has already surpassed the status of a 'great state' to become an emerging 'leader state', a term he links to three essential characteristics: responsibility toward the international system, promotion of the rule of law and the championing of a vision for the global order.⁴⁵ For Men Honghua, it is the rise from the camp of the developing that confers on the country a role in the reconstitution of the world order.⁴⁶ Chinese leaders, says Yan Xuetong, are now beginning to think about what kind of leadership China

⁴⁵ Sienho Yee, 'Toward a Harmonious World: The Roles of the International Law of Co-Progressiveness and Leader States' (2008) 7 1 Chinese Journal of international law 99-105.

⁴⁶ Men Honghua, 'China Rise and The International Condition' (*zhongguo jueqi yu guoji zhixu*) (2004) 2 Pacific Journal (Taipingyang Xuebao) 11

can provide and realise it implicates moral considerations. For, beyond structural change, a new international order also requires new norms.⁴⁷

China's path to modernity offers a lens through which such norms may be examined. In its tale of leadership, demise, struggle and renaissance, two civilisational rationalities faced each other. The encounter that followed was inharmoniously violent and coercive. It engendered identity depatterning - the outcome of a trauma of gunboats and orientalist discourse applied in unison. It was to prove a trauma of long lasting implications. On the one hand predatory capitalism set the country on a quest for national reinvention, such that would secure its survival. Yet, reinvention was predicated on self-dislike and the substitution of tributary identity with the trappings of capitalist modernity. Thus, empowerment was linked to wealth creation through the adoption of Western logic of scientific rationality, improvement, progress and human conquest over nature. Into the space produced by identity disintegration stepped the predator's attributes. Or put differently, the boundaries of resistance were mapped out by the internalisation of that which was to be resisted. Simultaneously, for resistance to be persuasive, it had to be also distinguished from that which was being resisted. The outcome was a process of adaptation, in which integration was fused with opposition. Opposition, in turn, drew on both exogenous and indigenous interpretive methodologies.

Chinese contemporary discourse about hegemony may serve as an example. The pejorative connotations articulated in the HWP are associated with the country's bitter historical experience, such that interrupted a preceding worldview, and diverted it in a new direction. In tributary China, hegemonic rule was accepted provided it was not a negative 'rule by force' (*ba dao*), but a positive 'rule by virtue' (*wang dao*).⁴⁸ The conflict between equality and dominance was thus legitimised through a commitment to public benefit

⁴⁷ Yan Xuetong (ed) (tr), *Ancient Chinese Thought, Modern Chinese Power* (The Princeton-China Series Princeton University Press 2011) 204, 216.

⁴⁸ Zhu Liqun, 'China's Foreign Policy Debates' (Sep 2010) 121 Chaillot Papers, European Union Institute for Security Studies 15 at 23 <http://www.iss.europa.eu/uploads/media/cp121-China_s_Foreign_Policy_Debates.pdf> accessed 21 Aug 2012.

abstracted as a 'mandate of heaven'.⁴⁹ Implied in the concept of a mandate was a notion of morality-based conditionality. Simultaneously, the belief in human authority over everything under heaven also implied a claim to world leadership.⁵⁰ Following the country's introduction to capitalist modernity, in contemporary official discourse hegemony remains predominantly derogatory. However, in scholarly counter-discourses, ancient precepts seem to be resurfacing. Hegemony is attributed with the potential to be a stabilising force that is judged by its consequences. Critique focuses not on hegemonic power per se, but on the way it is exercised and the outcomes it produces. Thus, IMF led privatisation is proffered as an instance of US dominance that causes destabilisation and infringes the public good.

Importation that is infused with traditions of welfare, mutual benefit and the avoidance of societal harm was also identified in China's understanding of the BITs program and related property rights. In this respect, corporate social responsibility (CSR) similarly originates from the West, but acquires distinct content when posited in a Chinese context. Here, specificity is attendant on the active role imparted to the government, an underlying belief that the aggression of economic growth should not be allowed to override popular and environmental wellbeing, a desire for development that does not lose sight of its human orientation.⁵¹ Chinese CSR is further animated by Confucian morality that is predicated on the natural love and mutuality of obligations found in relations of kingship. Confucian ethics and, presumably also socialist heritage, thus impact on business management, not as a conflictual force that competes with profit compulsions but as an integral part of a values-based whole.⁵² The role played by the Chinese government in ensuring CSR compliant conduct overseas is found, for example in the Guidelines for Environmental Protection in Foreign Investment and Cooperation issued in February 2014 by the Ministry of Commerce (MOFCOM) and the Ministry of Environmental Protection (the

⁴⁹ Wood, *ibid* (n 11).

⁵⁰ Yan Xuetong, *ibid* (n 47) 218.

⁵¹ Jingchen Zhao, *CSR in Contemporary China* ((manuscript to *Corporate Social Responsibility in Contemporary China* Edward Elgar Publishing Ltd 2014) 4, 36, 75.

⁵² *ibid* 40.

Guidelines).⁵³ The language adopted by the Guidelines is instructive. First, ODI is invariably referred to together with cooperation. Second, environmental protection and sustainable development are linked to the directive of mutual benefit. Third, protection is conceptualised expansively. It extends to religious beliefs, cultural customs and the interests of labour. Companies are to 'promote harmonious development of the local economy, the environment and the community and carry out cooperation on the basis of mutual benefit'.⁵⁴ Fourth, companies are to collaborate with both the host government and the community in accordance with municipal law and international guidelines.⁵⁵ Finally, CSR is linked to the national interest in the sense of its implications for the international image of the country's enterprises.⁵⁶

Liu Wenbing's analysis of China National Petroleum Corporation's (Petrochina) 2005 acquisition of Kazakhstan Petroleum (Petrokazakhstan) provides an insight into the way Chinese style CSR is expressed at the management level of SOEs.⁵⁷ Liu is director of the mergers and acquisitions bureau at China's State Assets Supervision Administration Commission (SASAC). SASAC is the governmental organ in which ownership of SOEs is vested. It can therefore be seen as a conduit for the two-way flow of national and corporate perspectives. This finds expression in the way Liu navigates a path between capitalist style commercial imperatives of competitive profitability and HWP's prescriptions. Prior to the merger, Liu Wenbing elucidates, Petrokazakhstan, a listed company incorporated in Canada but located in Kazakhstan, had enhancement of shares value as its primary aim. Her acquisition by Petrochina meant that such aim had to be mitigated by the requirements of mutual benefit and harmonious development, taking into account national resources, CSR and political

⁵³ Ministry of Commerce of the People's Republic of China, 'Notification of the Ministry of Commerce and the Ministry of Environment Protection on Issuing the Guidelines for environmental Protection in Foreign Investment and Cooperation' [18 Feb 2013] <<http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml>> accessed 16 June 2013.

⁵⁴ *ibid* art 3,9, 13,14.

⁵⁵ *ibid* art 8, 22.

⁵⁶ *ibid* art 1.

⁵⁷ Liu Wenbing, *zhongyang qiye binggou zhenghe anli qingxuan (State Owned Enterprises Mergers and Acquisitions Case Studies)* (China State Council Assets Supervision and Administration Commission 2012) 22-32.

responsibility.⁵⁸ Whereas Petrokazakhstan's management style was permeated with Western scientific and behavioural theories, he argues, Chinese management is predicated on Confucian, Daoist and other divergent traditions. Commercial success thus necessitated cultural fusion that was based on mutual recognition and respect, reciprocity of learning, good will and a search for communalities.⁵⁹ Friendship at both the interstate and individual levels is posited as conducive to the efficiency of commercial interaction.⁶⁰

Speaking about the thirty five-year concession granted to China Ocean Shipping Company (COSCO) in November 2008 for the management of a containers terminal at the port of Piraeus, Liu alludes to COSCO's general manager, Fu Chengqiu's assurance that the company's true aim in investing in Greece is not to deprive people of their livelihood, but rather to introduce operational improvements. In pursuing this objective, COSCO was guided by the principle of 'think globally operate locally'. It meant that a balance had to be struck between global considerations and local economic, political and social requirements, so as to achieve 'win-win development'.⁶¹

In sum, the trauma inflicted on China by the combined means of compulsory and productive power did result in disintegration. However, unlike the outcomes desired by the shock doctrine, it did not create a tabula rasa on which compliance could be implanted at will. The patient's resistance was indeed shaped by being subjected to overwhelming power. Nevertheless, she survived forcible imposition, and is now struggling to find her own expression. A process of adaptation was triggered by a historical break. It implicated identity searching, in the course of which Chinese officialdom and scholarship grappled with a multiplicity of indigenous and Western discourses and counter discourses.⁶² Thus, at least for now, Huntington's clash of civilisations appears to take place more in the country's interior than in the globalised arena of

⁵⁸ *ibid* 22-23.

⁵⁹ *ibid* 24.

⁶⁰ *ibid*.

⁶¹ Liu Wenbing, in conversation 20 June 2013.

⁶² For a comprehensive and informative discussion see Wang Hui (ed), *China's New Order: Society, Politics and Economy in Transition* (Harvard University Press 2003) 41-78.

empire. The difference in the way such clash is to be managed is however telling. If Huntington's polemic posits clash as a power-based contest, for China it invokes a quest for harmonious resolution.⁶³

This is not to say that power does not play a role within this quest. For Schill's assumption of equality in BITs negotiations overlooks the operation of informal and covert power attendant on integration, e.g. the impact that penetration of foreign investment has on the country's political and cultural interior, the authority of domestic and international elites converged, the lock in dynamics of participation in neoliberal institutions, and the general pressure exerted by a capitalist environment that is immanently averse to divergence. It may be said that China was under no compulsion to go down this path, since years of self-reliance policy and the success of her socialist production meant that she was not externally indebted.⁶⁴ Yet, keeping apart in the context of increasingly uniformed interstate ecology implicates no less powerful pressures that those produced by integration.

Thus, the rupture of a Great Transformation continues to manifest itself in alternating dynamics of continuity and discontinuity that veer between revolutionary socialism and a focus on national economic empowerment, submission to, alternatively retreat from a neoliberal model.⁶⁵ Adaptations are not easily deciphered. In both the West and China, CSR is set out in voluntary guidelines. Yet, in each instance voluntariness is differently contextualised. In the West it may be said to denote a soft option, one that is devoid of legal force and consequently implicates an individual discretion. By contrast, in China CSR operates within a tradition of Confucian and socialist instruction. Its diffusion goes beyond the rule of law to encompass compulsion that derives from

⁶³ Wang Yiwei, 'Clash of Identities: Why China and the EU are Unharmonious in Global Governance' (2010) No 24 UNISCI Discussions Papers 101.

⁶⁴ In the years 1952 to 1957 Chinese industry grew at an annual rate of between 16-18%. Maurice Meisner, *Mao's China and After: A History of the People's Republic* (3rd edn The Free Press 1977) 113, 414.

⁶⁵ Wang Hui, *ibid* (n 63) 43.

collective tutelage in morality, national discipline and value building.⁶⁶ Voluntariness thus may be associated with compliance that is not exclusively dependent on juridical imperatives.

Similarly, sustainable development, now incorporated into the Canada BIT is a Western/China shared concept. In both instances its ultimate aim may be said to facilitate systemic perpetuation by purporting to alleviate harm, and thereby take the edge off resistance. However, as Wood points out, in the context of capitalist endless accumulation, sustainability represents an impossible aim. Capitalism may be capable of producing technological innovations that may in turn assist in reducing the strain on resources. However, this type of argument overlooks a core issue. Namely, that the essential obstacle to sustainable development resides in the *raison d'être* of capitalist production, being the creation of exchange-value rather than value, profit rather than the wellbeing of people or the earth.⁶⁷ Thus, Western corporate directors' primary duty is to produce value for their shareholders. By contrast Chinese companies and their board of directors are required to 'observe social morality, uphold principles of good faith under the supervision of the government and the public and assume social responsibility'.⁶⁸ Similar references to ethics and the preservation of social harmony are found in the Shenzhen Stock Exchanges guidelines to listed companies.⁶⁹ Further, the absence of boundaries between policymaking and processes of capital accumulation mean that, in the West, sustainable development has become a 'new battlefield', in which corporate lobbying forge partnerships with international institutions.⁷⁰ In China, by contrast, sustainable development can be said to have remained, at least for now, within the realm of state commands and to form part of an overall political vision. The same applies to the country's BITs program and related notions of rule of law and property rights. Contrary to neoliberal notion of legitimacy as detached from its

⁶⁶ For a discussion of mass campaigns in 1949-1956 see generally Julia Strauss, 'Morality, Coercion and State Building by Campaign in the Early PRC: Regime Consolidation and After, 1949-1956' in Julian Strauss, *ibid* (n 29).

⁶⁷ Ellen Meiksins Wood, *The Origins of Capitalism: A Longer View* (Verso 2002) 197.

⁶⁸ The Company Law of the People's Republic of China 2005 Art 5.

⁶⁹ Jingchen Zhao, *ibid* (n 52) 72-73.

⁷⁰ Belén Balanyá and others, *Regional & Global Restructuring & the Rise of Corporate Power* (new edn Pluto Press 2003) xxi-xxiv, 150-154.

outcomes, for China the legitimacy of all three relates to and indeed may be determined by non-economic considerations of equity and societal benefit.

Summary

Can the HWP then be said to constitute a counter-discourse to the neoliberal/Washington Consensus hegemonic discourse? It certainly appears to be in a number of core respects. Indications may be found in a different understanding of universalism, such that is not equated with inalterable laws of nature, human or otherwise. Indeed, the reverse is true. If there is an inalterable law, it is that all is subject to the permanence of change. It follows that neither uniformity nor constancy of reaction are desired. It also follows that the neoliberal impulses for universalised uniformity stand in the way of appropriate responses. Further, harmonious convergence is contingent on the preservation of diversity rather than its elimination. Furthermore, the ethics of profit, whereby the creation of exchange value constitutes the only purpose of production, is made subordinate to what may be identified as the ethics of values. That is to say, wealth generation is not the final terminal. Rather, it is only a stop on a road towards common prosperity. In all these respects, the HWP challenges tenets that go to the essence of that which makes the neoliberal discourse what it is.

In the HWP power is conceptualised as collective rather than distributive. Structurally, it is to emanate, not from a single hegemonic core, but from disparate yet dialoguing centers of decision-making. This vision of structurally diffused power diverges from the uniformity and interstate hierarchy on which Wood's empire of capital is predicated.

Yet, the HWP also declares a commitment to a globalised order of free trade and investment. Here too it retains a claim to divergence by maintaining that different management may be constitutive of novel outcomes. In other words, by means of divergent management, neoliberal globalisation may be inverted from poverty enhancing, environmentally harmful, predatory and violent

interstate order to one of lasting peace and common prosperity. The way this proposition problematises the interior of the HWP was considered above. But further than that, it weakens the HWP's counter-discursive force in that now it has one foot in the hegemonic discourse, with only one foot remaining resistant.

This weakening that is attendant on being simultaneously in and out takes me to another, though related question. Put simply, can a discourse that is only partially 'counter', so to speak, survive the ecology of hegemonic power? Here I find myself facing a methodological difficulty. From what perspective is this question to be considered? If a Western rationality is to be applied, examination is to be predicated on a competitive 'either or logic', whereby each of neoliberalism and the HWP will be vying for hegemony in a conflictual process of domination and annihilation. If Confucian dialectics is to be applied, the process will be one of mutually constituting interaction. The Chinese solution may be found in the concept of adaptation. Adaptation implicates the co-existence of sameness and difference, and as seen above, is to be found throughout the country's response to imposed transformation. Yet, Western capitalist expansionism proved incapable of Chinese style appropriate responses, and seems unable to be anything other than violently conflictual.

And so, whether or not the HWP so desires, it appears an encounter is brewing once again. As the capitalist crisis persists, neoliberal policies deepen. As yet, Wang Yizhou's expectation that the China threat theory would naturally subside has not materialised.⁷¹ Nor is there reason to think that it would. This is so, unless the country retreats from the path of national empowerment and residual divergence in favour of unreserved integration. Such integration would require uniformity, financial fusion, and the subjugation of national competitive potential to limits dictated by the US.

The trajectory of the Chinese BITs program unveils the possibility of China going down this path. Such trajectory is reinforced by the recent enlisting of private capital to the task of ODI, and the promise of protection by means of

⁷¹ Susan L. Shirk, *China Fragile Superpower* (OUP 2007) 107.

more BITs. Another potentially indicative trajectory is that of the rise in overseas M&As, particularly in the European manufacturing sector, so as to take advantage of depressed assets value.⁷² In Africa China has already become the third biggest M&As player.⁷³ As observed in chapter 3, investment in the form of M&As is more profitable for investors, but less conducive to development. Either way, it is a far cry from China's solidarity based pre-reforms infrastructure projects in poor countries. Further, the compulsion for competitiveness that underpins the BITs program now forms part of Chinese ODI rationality. Thus, the reasons listed by Liu Wenbing in support of SOEs going global focus on enhanced competitiveness.⁷⁴ Furthermore, competition at home with an expanding institution of private capital means that SOEs must acquire overseas assets, if they are to remain the backbone of the domestic economy.⁷⁵ The analogue processes of home and abroad resurface once more to make public ownership paradoxically dependent for its survival on acquisitions and attention to profit. The direction these developments will take is yet to be revealed.

⁷² Cai Xiao, 'Outbound M&A Activity Mounts up' [11 March 2013] China Daily <http://europe.chinadaily.com.cn/business/2013-03/11/content_16296376.htm> accessed 18 June 2013.

⁷³ Cai Xiao, 'China is 3rd biggest M&A Player in Africa' [9 July 2013] China Daily <http://www.chinadaily.com.cn/cndy/2013-07/09/content_16749438.htm> accessed 8 Aug 2013.

⁷⁴ Liu Wenbing, *ibid* (n 58) 2-7.

⁷⁵ Liu Wenbing, *zhongyang qiye guoji jingzhengli yanjiu: binggou chongzu de shijiao* (Study of Centrally Owned Enterprises' International Competitiveness: a Mergers and Acquisitions Restructuring Perspective) (China Economic Publishing House 2010) 120.

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