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China, Natural Resources, Sovereignty and International Law

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Abstract: *This article explores China's attitudes towards the regulation of key natural resources by international law, domestically and at the trans-boundary and international levels. It considers the impact of international law on China's own practices, and the contribution of China towards shaping international law. The article suggests that popular conceptions of a relatively isolated, sovereign absolutist China do not accord with contemporary legal realities, including in its dealings with natural resources. While China's construction of strong sovereignty shapes its attitudes towards legal regulation, practice also suggests that China adopts a nuanced approach which includes legal compromise, and a commitment to multilateral regulation or bilateral diplomatic settlement of issues previously within the competence of national governments. China is often an active and constructive participant in contemporary law-making, even if – like all countries – it also seeks to instrumentally use international law.*

Keywords: *China*, *natural resources*, *international law*, *South China Sea*, *Tibet*, *environment*

Introduction

China's approach to international law is commonly critiqued for its preoccupation with defending a relatively absolutist understanding of sovereignty and the rights flowing from it. China's attitude is seen as a barrier to both the penetration of international norms within China and transnational cooperation on shared problems. China is thus constructed as a recalcitrant: resistant to human rights and democracy; cautious about humanitarian intervention, sanctions, involvement in internal conflicts and collective security; opposed to the International Criminal Court; aggressive in asserting territorial

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rights (in Taiwan, Tibet or the South China Sea); and prioritising economic development over political rights, the environment or climate action. When coupled with China's growing economic and military power, and creeping diplomatic and economic influence abroad, China's perceived reluctance to be socialised by international law leads to its ready portrayal as a growing strategic threat, coupled with much angst about the declining fortunes of the United States.

On its part, China resents such criticisms as foreign interference in its sovereign choices, which fails to appreciate China's special historical circumstances, material level of development, and a normatively and procedurally unequal international playing field. As a current Chinese judge of the International Court of Justice writes, "China's adherence to the principle of sovereignty is simply misinterpreted in the west as a disregard of the development of international law, or worse still, considered an excuse to evade its international responsibilities" (Xue, 2007, p. 84).

This article explores China's attitudes towards the regulation of natural resources by international law, whether domestically or at the transboundary and transnational levels. It will consider both the impact of international law on China's own practices and the contribution of China towards shaping international law. At the outset, efforts to understand Chinese attitudes towards the regulation of natural resources are situated within two frames of reference: first, China's experience of international law generally; and secondly, international law's own limited approach to regulating natural resources. The article will suggest that popular or realist conceptions of a relatively isolated, sovereign absolutist China do not accord with contemporary legal realities. While China's construction of strong sovereignty inevitably shapes its attitudes towards legal regulation, practice also suggests that China often adopts a nuanced approach which includes legal compromise, and a commitment to multilateral regulation or bilateral diplomatic settlement of key issues that were hitherto within the competence of national governments. China is often an active and constructive participant in contemporary international law making, even if its socialisation is not necessarily linear (Mushkat, 2011, p. 45), and even if – like all countries, and especially powerful ones – it also seeks to instrumentally use or change international law to secure its own interests and attain a comparative advantage.

This article is foremost grounded in the discipline of international law and its modest objective is to consider the extent to which China's dealings with natural resources can be explained within the accepted modes of international legal reasoning. As such, it does not purport to contribute to international relations theory explaining or critiquing China's behaviour (such as through notions of "compliance" or "cooperation"), which has been considered elsewhere (Chan, 2006; Kent, 2007; Mushkat, 2011). A clearer understanding of China's legal claims, and how they square with international law argumentation, is timely and important against a background of much commentary and controversy about the propriety or otherwise of China's approaches to natural resources.

China and International Law

China's approach to the international regulation of natural resources can only be understood in the context of China's experience of international law generally, which has shaped its contemporary understanding of sovereignty and power relations. China's historical experience of receiving international law is not a positive story. In the

nineteenth century, the expansion of European commercial, military and colonial power is perceived to have "unfairly imposed" a "western [international] legal order" on China (Xue, 2005, p. 134), which had hitherto been relatively isolated from deep relations with European powers (Jia, 2010, p. 26). The then law of nations did not forbid the use of military force to pursue foreign policy goals such as colonial expansion, territorial acquisition, commercial exploitation, or even the punishment of a delinquent State. China's encounter with the law of nations brought by European expansion was felt as acute political and cultural humiliation, involving the forcible imposition of unequal treaties; foreign leases, territorial concessions, and commercial and diplomatic privileges; punitive military expeditions; and excessive war reparations (Xue, 2005, p. 134). Japanese imperialism in the 1930s brought further turmoil and little effective protection by international law or institutions. From the nineteenth to the mid-twentieth centuries, then, China experienced international law as a relatively unstructured, laissez-faire system which rewarded the powerful, especially as regards the forcible appropriation of natural resources in foreign territory.

The normative shifts in the postwar United Nations (UN) Charter of 1945 did not immediately alter realities for China, which remained mired in a civil war until the communist victory in 1949. At that time, China terminated existing unequal treaties and sought to re-establish unified sovereign control over its territory. China did not, however, immediately participate fully in the fruits of the postwar order. For a start, mainland China did not assume its seat in the UN until 1971, and it took some time to normalise diplomatic relations with many countries. It was accordingly excluded from key multilateral law-making processes for more than two decades after the war. Further, China's internal difficulties limited its engagement with international law; during the Cultural Revolution (1966–76), "formal legal institutions and legal education were totally abandoned for ten years" (Xue, 2005, p. 135) and relative isolationism marked China's foreign relations. Even though mainland China was not part of the UN until 1971, and had scarcely participated in the creation of international law, China nonetheless indicated its acceptance of much of the postwar international legal order. It did so not only because it had to as a condition of recognition and participation in international social life, but also because "fundamental principles of the legal system as enshrined in the UN Charter reflected certain values they had been fighting for: sovereignty, equality, democracy and self-determination" (Xue, 2007, p. 85). The Charter system was viewed as a shield for weaker States from external interference, and a means of freely pursuing an indigenous system: "a last resort for the developing countries to defend their political system, economic policy, or social stability" (Xue, 2007, p. 85).

Once China was admitted to the UN, its engagement with the development of international law accelerated with participation in major multilateral initiatives such as the 1972 Stockholm Conference on the Environment and the UN Conference on the Law of the Sea. With China's "open policy" of economic reform after 1978, an "ideological emancipation" which challenged traditional views of socialism and development (Xue, 2005, p. 135), China became more and more enmeshed in international legal frameworks and processes and has been part of the evolution of international law to embrace a wider spectrum of interests (Jia, 2010, p. 27). Whereas China's acceptance of international law was initially instrumental – "to increase its international status and promote its interests" – over time its engagement has become "deeper, more meaningful" (Kent,

2006, p. 4). It is currently investing heavily in international law training and education, with the State supporting initiatives such as the Xiamen Academy of International Law and the Xi'an Jiaotong University Silk Road Institute of International Law.

The striking feature of contemporary Chinese foreign policy is not how comparatively aloof China remains from international legal norms, but how quickly it has integrated itself into them. As one Chinese writer notes, "for Europeans, the [Westphalian international legal] system by now is over 360 years old, but for non-European countries, particularly for the Asian and African countries, it is only 60 years old" (Xue, 2007, p. 84).[1] Despite this, China is now a party to almost 300 multilateral treaties (more than 90 per cent of which were adopted in the 30-odd years since 1978) (Xue, 2005, p. 136), and a member of more than 130 international organisations (compared with only 20 in 1978) (Wang and Hu, 2010, p. 194). Further, China has adopted more than 100 bilateral legal cooperation and extradition treaties (Wang and Hu, 2010, p. 195), embraced norms concerning transnational organised crime and anti-corruption (Wang and Hu, 2010, p. 199), and acceded to membership of the World Trade Organisation. China's approach is encapsulated by its doctrine of the "harmonious world": observing UN Charter principles and purposes, complying with international law, and promoting democracy, harmony and "win-win" cooperation in international relations (Wang and Hu, 2010, p. 197).

China's embrace of international law cannot of course be "proxied" by its formal treaty commitments (Mushkat, 2010, 518). China's domestic law too has been increasingly influenced by international standards in areas such as public and administrative law, criminal law, judicial cooperation in civil and commercial matters (Xue, 2005, p. 136–37; Jia, 2010, p. 42), and (as discussed below) world trade law. International treaties occasionally take priority in some areas of law, and unclear domestic laws may be interpreted consistently with international obligations (Gao, 2007, pp. 18–19; Wang and Hu, 2010, p. 194; Jia, 2010, p. 44). "Soft" international norms have also influenced China's domestic policy, including on sustainable development, poverty alleviation, gender, food security and the Millennium Development Goals (Xue, 2005, p. 137).

More controversially, China has maintained distinctive legal positions at variance with those of certain liberal States. It has shown little enthusiasm for UN support for democratisation (not, incidentally, an obligation of States under international law). Further, while committing to universal human rights – and China has signed most treaties (Xue, 2005, p. 136) – China has warned that civil and political rights should not come at the expense of economic, social and cultural rights (Chinese Government, 2005, p. 697), or interfere in domestic affairs. China has often resisted international supervision of human rights (for instance, by the International Labour Organisation or UN treaty bodies), arguing that it is an infringement of its sovereignty (Kent, 2006, p. 10). Many other States (including western ones) have also had tense relationships with global human rights bodies for similar reasons, and China's attitude is a matter of degree, not of kind. Chinese human rights protection will remain limited until there is genuine political reform (Wan, 2007, p. 728). Nonetheless, the domestication of rights has changed behaviour by introducing formal legal and administrative constraints, structuring political discretion, raising public awareness, and raising the costs of non-compliance. China has also participated in bilateral dialogues on human rights (for instance, with Australia) (Van Ness, 1992; Kent, 2001; Fleay, 2008), which have

provided an alternative means of socialisation, albeit one more malleable and limited than supervision by multilateral mechanisms.

China's growing power has brought with it China's own awareness of its role in contributing to international public life. China is active in UN peacekeeping (Xue, 2007, p. 88), with 12 missions in Africa since 1990 involving more than 4,000 people. It has actively contributed to debates about UN reform, arguing for stronger representation of developing countries in the Security Council; strengthening the General Assembly as a democratic body; and reinvigorating the UN Economic and Social Council's role in development (Chinese Government, 2005, p. 697). On collective security, China has cautiously endorsed attention to "new" security threats or "human security" issues (Chinese Government, 2005, p. 697; UN General Assembly, 22 April 2005), but called for "reversing the trend" of the UN prioritising security over development in a post-9/11 world, noting that development is the "bedrock" of collective security (Chinese Government, 2005, p. 697). China has also cautioned against "reckless" interventions, and argued for prudent, collective control of security measures (Chinese Government, 2005, p. 694) – understandable after the illegal aggression against Iraq of 2003. It is not a party to the International Criminal Court (ICC), and has warned against an overly powerful ICC, which would be "likely to be abused and politicised by powerful States … and would thus become an instrument for violating the rights and interests of small countries under the pretext of human rights and justice" (Wang and Hu, 2010, p. 200). At the same time, China's practice is not dogmatic; for instance, it did not veto the Security Council's referral of Sudan and Libya to the ICC, or veto international military intervention in Libya, or UN and African Union deployments in Sudan. Its formal adherence to strong sovereignty has given way to pragmatic responses to individual humanitarian crises, where the host State consents or there is Security Council authorisation (Davis, 2011). Its positions can, however, be inconsistent; in 2011 China invited President Bashir of Sudan to visit China, despite acquiescing in the Security Council's earlier referral to the ICC. China has also taken a very cautious approach to universal criminal jurisdiction (Chinese Government, 2011b). It resisted international efforts to deal more firmly with the Assad regime during the Syrian civil war of 2011–12, or to pressure Sri Lanka on accountability for civil war crimes.

Despite the common depiction of a resource-hungry China coddling nasty regimes such as Sudan, the reality is more nuanced: a leading empirical study shows that there is little correlation between China's resource interests and its position on security matters in the Security Council (Houser and Levy, 2008). Indeed, China has been far less obstructive generally of the UN Security Council than other permanent members: between 1971 and 2006, the United States vetoed 76 resolutions to China's four (Houser and Levy, 2008, p. 66). Consensus between China and the United States has grown on the Council in recent decades (Houser and Levy, 2008, p. 64). It has also been actively involved in multilateral arms control efforts concerning nuclear, chemical and biological weapons, and North Korea (Kent, 2006, p. 5), but resistant to controls on land mines, cluster munitions and conventional weapons.

This brief survey of China's engagement with international law reveals that China's historical suspicion of international law (as a tool of colonialism) gradually gave way to endorsement of key features of the modern law (including sovereign equality, non-interference, multilateralism, peaceful resolution of disputes, democratisation of

international governance, and the international rule of law) (Jia, 2010, p. 34). It also comes as no surprise that "certain publicly held positions of China are shared by States, in general" (Jia, 2010, p. 60), including, for instance, a strong notion of sovereignty, and a preference for diplomatic settlement of disputes over binding adjudication. China has not accepted the compulsory jurisdiction of the International Court of Justice (ICJ) under article 36(2) of the ICJ Statute. As is well accepted, however, submission to ICJ jurisdiction is hardly the litmus test of whether a State takes international law seriously: Austinian command and control theories of "law" went out of fashion half a century ago. Around two-thirds of all States (including the US, Russia and France) have not submitted to the ICJ's jurisdiction; and judicial settlement of transnational disputes is not always appropriate. At the same time, China is hardly leading from the front in supporting the UN's primary judicial organ – one may expect more leadership from powerful States – though Chinese judges are routinely on the Court and one (Judge Shi) has served as President.

Overall, while China was largely a "responsive rule-taker during the formation of the existing international legal order" (Qi, 2008, p. 337), it has also attempted to improve unjust elements of it (Wang and Hu, 2010, p. 200), and is increasingly active in law-making. The next section of this article considers China's engagement with international law in relation to the regulation of key areas of natural resources, in light of China's historical experience and its conception of sovereignty.

China, International Law and Natural Resources

Territorial resources: Land and sea

China has been much criticised for its perceived aggressive territorial acquisitions or ambitions in Tibet, Taiwan and the South China Sea. All States have a vital sovereign interest in securing their territorial integrity and China is no exception. Effective control over national territory is, after all, an incident of statehood under international law (Montevideo Convention, 1933, Article 1). China's approach to safeguarding its territorial resources can largely be explained within a conventional international law framework. There is little evidence that China has pursued expansionist territorial ambitions beyond the level to which it believes it is entitled under international law, even if its interpretation of the law is contested in some cases. China also tends to pursue peaceful rather than forcible settlement of its disputes.

For China, the flashpoints of Tibet, Taiwan and the South China Sea can all be explained by a proper analysis of China's title to territory under international law. Tibet has long been considered historically part of China, and there is considerable historical evidence to support that position. While Tibet exercised considerable autonomy at various times, it was not treated as an independent State prior to the Chinese "invasion" in 1951 (Crawford, 2007, p. 325) – even if its status was largely determined by external powers. Militant resistance to China in the 1950s, and later political efforts, failed to establish Tibetan secession. While there are plausible arguments in favour of Tibet's historical independence, the international community uniformly endorses China's position. There is negligible support from other States or the UN for Tibetan independence and statehood, and the international community does not regard Tibet as either foreign occupied territory or involving a "people" entitled to exercise self-determination – as

evidenced, for instance, by an absence of United Nations General Assembly or Security Council resolutions to that effect. Tibet is treated by the international community as the sovereign territory of China. Even the Dalai Lama and the Tibetan Prime Minister do not claim independence for Tibet, as opposed to genuine internal autonomy. China is, however, evidently responsible for serious and systemic violations of human rights in Tibet, including the repression of the political and religious freedoms of minorities and arbitrary detention. Some of its legal positions are also unsupportable expressions of paranoia, such as its declaration that foreign politicians are interfering in China's internal affairs and infringing its sovereignty by meeting with the Dalai Lama (Chinese Foreign Ministry, 2011a).

China's position on Taiwan is even stronger under international law. At first sight, Taiwan appears to operate as a State, with an effective government exercising control over a permanent population and territory, and entering into agreements with other States. Yet territorial Taiwan is not recognised by the UN or any country as an independent sovereign State (Crawford, 2007, pp. 198–221). Taiwan itself has not consistently claimed that territorial Taiwan is an independent State separate from mainland China, but has historically (and ineffectively) claimed to be the government of a single unified Chinese State. Most States deal in formal terms with (the People's Republic of) China as the relevant State, even if they maintain practical diplomatic relations with the Republic of China (Taiwan) (and only a handful of small States (about 23) recognise Taiwan as the government of the Chinese State as a whole). Most States and international organisations deal with Taiwan as a *sui generis*, limited legal entity for specific, practical purposes, for instance as a fishing or aviation entity (Crawford, 2007, p. 220). China's "One China" policy and its view of the status of Taiwan (as part of Chinese territory) are generally accepted, though there is disagreement over the terms (such as the extent of autonomy) and means (by war or peace) of reunification.

In strict terms, Taiwan is the defeated rump of an earlier Chinese nationalist government deposed in a civil war. Under international law, the newly established communist government of mainland China, initially de facto (from 1949) and de jure (from 1971) may even be entitled to forcibly suppress an insurgency in its own territory. China's designs on Taiwan are not about territorial expansion or resource acquisition, but a conventional legal attempt to unify governance of sovereign territory. China might be understandably puzzled at the US's defensive strategic posture over Taiwan, given the US acquiescence in China's more contestable claim to Tibet.

On both Tibet and Taiwan, it may be that China presents interpretations of factual and historical situations which best suit its case. Others may contest those claims, and the evidence is both mixed and unsettled by adjudication. But China's views by and large are not only plausible, but reasonable (in international law terms, which does not always accord with substantive justice), and supported by many States and international jurists. Far from reflecting a "land grab" or a naked appropriation of foreign resources, China has been careful to articulate its claims within an international law framework. It has also contributed reasoned and principled legal views to external judicial processes which touch upon the substantive issues at stake in both Tibet and Taiwan. Recently, before the International Court of Justice in the *Kosovo Advisory Opinion* case, China argued that Kosovo's declaration of independence was contrary to the principle of State sovereignty and territorial integrity, and that remedial self-determination was not

available (quoted in Jia, 2010, p. 46). It also argued that Kosovo's claim was inconsistent with the negotiated mode of settlement stipulated by the relevant Security Council resolution. China's legal position was shared by quite a few States, and reflects a conventional and widespread analysis. The Court itself did not license remedial self-determination, finding only that no international rule prohibits unilateral declarations of independence. The latter view is itself controversial, and not in accordance with the views of a significant number of States.

In other situations, China has often utilised peaceful methods of resolving territorial disputes. It has, for instance, completed peaceful border demarcation negotiations with Russia, Central Asian countries and Vietnam (Wang and Hu, 2010, p. 195). It is true that China fought a war with India in 1962 over disputed Himalayan borders. But that conflict (and before it, China's intervention in the Korean War in 1950 – fighting *against* UN forces) cannot be seen as an aggressive or acquisitive war of territorial expansion, as it was seen at the time by western eyes preoccupied with containing communism. Rather, it involved a more conservative Chinese effort to assert and defend sovereignty over presumed Chinese territory, in a factually complex situation marked by unclear historical titles and confusion on the ground about India's intentions. It is striking that the war did not escalate beyond the frontier, demonstrating China's limited goals; and today China is peacefully negotiating with India to resolve outstanding border issues (Chinese Foreign Ministry, 2011b).

China's conventional understanding of sovereignty as unified territorial control has, however, been tempered by a certain pragmatism in practice. With the end of British and Portuguese colonialism in Hong Kong and Macao respectively, China's innovative "one country, two systems" doctrine preserved distinctive, relatively autonomous legal regimes in those territories, including towards their prior treaty obligations (Xue, 2005, p. 139). Such creative flexibility was not required by international law, since sovereignty over national territory does not come encumbered with obligations to confer internal autonomy in postcolonial situations (in contrast, for instance, to minority or indigenous regimes). China's progressive approach has struck a "balance between important values of sovereignty and the ideal of the rule of law" (Jia, 2010, p. 61) by preserving "extra-sovereign" values there which are not part of life in the same way, or to the same extent, on the mainland. Maritime disputes in the South China Sea remain prominent and unresolved. The Chinese view is that "China has simply been safeguarding what's rightfully her own", based on good historical title over other claimants (Shen, 2002, p. 157). China's claims there are undoubtedly driven by resource interests and strategic defence, but they remain underpinned by arguments made by reference to principles of international law, even if some claims are more tenuous than others. The international law of the sea, and of title to territory, do not give easy answers to many of the maritime disputes involving China (Hsiung, 2007, pp. 136–48; Ramos-Mrosovsky, 2008; Manjiao, 2011), both because of uncertainties in the law and hard disputes about the facts. Maritime disputes involving competing, distant and often tenuous historical claims are notoriously difficult to determine; the flaring dispute with Japan over the Senkaku/Diaoyu Islands is a case in point, with credible claims on both sides (Schoenbaum, 2008, pp. 45–47; Shaw, 2008). Further, the periodic, isolated military confrontations over island territories are not solely attributable to China, but also flow from the robust assertion of competing claims by various other States. The maritime disputes are,

however, dangerously fuelled by popular nationalism in China (and other States), and embedded in wider political, cultural and historical enmities with its neighbours (Suganuma, 2007), which makes Chinese behaviour unpredictable as it reacts to domestic constituencies.

Far from seeking to resolve disputes mainly by force, however, China has committed to ongoing maritime boundary discussions (Wang and Hu, 2010, p. 195), including through the 2002 *ASEAN Joint Declaration and Code of Conduct*, aimed at maintaining the peace and peacefully settling disputes through negotiations, and the 2011 *Agreement on Basic Principles Guiding Settlement of Sea Issues* with Vietnam. China has also negotiated fisheries agreements with Japan and South Korea, and seabed joint development with Japan (pending delimitation) (Gao, 2008), signifying a preference for practical cooperation over legal confrontation. As the most powerful State in the region, negotiated outcomes will necessarily benefit China (Duong, 2006) more than independent, adjudicated settlements, but its approach is within the accepted modes of consensual dispute settlement under international law. Negotiation may even be preferable in some situations because it would produce cooperation and workable compromise (Wu and Zhang, 2010, pp. 148–49) rather than winners and aggrieved "losers" in adjudication (Schoenbaum, 2008, p. 25). By contrast, China has more forcefully defended its controversial legal demand for prior authorisation of foreign warships transiting through its territorial sea (Zou, 2005), resulting in provocative incidents involving US warships. The US objects that such a requirement infringes upon the protected freedom of navigation under international law (Franckx, 2011, p. 191). The Chinese position is *prima facie* inconsistent with the UN Convention on the Law of the Sea 1982 (UNCLOS) to which China is a party, although China has reserved its legal obligations under that treaty.

It is nonetheless significant that China's assertion of a strong sovereignty over its maritime territory is cast in elaborate legal terms, and does not take the form of simple rule-breaking. Moreover, China is a party to UNCLOS, whereas the principal objector to its legal stance, the US, is not, though (like many States) China is reluctant to utilise its binding dispute resolution mechanisms. It is also hard to imagine the US viewing favourably any future Chinese practice of transiting its blue navy warships through US waters – as the US does in Chinese waters – and which may ultimately provoke a change in China's own position over time, as it gains capabilities to project its naval power.

A review of China's attitudes towards territorial resources suggests that, for the most part, China accepts and espouses a fairly conventional understanding of international law, which largely accords with its preference for strong sovereignty. There is little evidence of China as a territorially expansionist, resource acquisitive law-breaker. China's behaviour concerning Tibet and Taiwan can be analysed consistently with a fairly mainstream international law approach, whereas in the South China Sea it is perhaps pushing the boundaries further. Peaceful bilateral negotiation and multilateral governance have featured more prominently than forcible solutions. Normatively, China's strong sovereignty has occasionally ceded ground, as in the decentralised approach to Hong Kong and Macao. Farther afield, it is also noteworthy that China accepts certain international law doctrines which are predicated precisely on a rejection of strong national sovereignty over resources. For instance, under the Law of the Sea,

China accepts the notion that the deep seabed is the common heritage of mankind [humanity] (Chinese Government, 2011a); and endorses the special international regime governing Antarctica, which suspends sovereign territorial claims and precludes resource extraction (Chinese Ambassador to Argentina, 2011).

The historical evidence suggests, therefore, that China's emphasis on strong sovereignty is a defensive rather than aggressive concept, one which is geared towards reclaiming or defending sovereign territory and resources, rather than directed outwards to acquiring those of others. China's growing power, and the increasing needs of its population, do not necessarily change that historical equilibrium by bringing demands for territorial expansion or forcible resource acquisition. In a modern economy where secondary and tertiary industries are important, and primary industries such as land are less significant, "intensive development through economic growth [and trade] is generally preferable to military and extensive expansion" (Rosecrance, 2006, p. 33). China is heavily integrated into and dependent on the global economy and it is in China's interests not to disrupt those beneficial arrangements (Rosecrance, 2006, pp. 34–35). As discussed below, China's foreign investment strategies in Africa and elsewhere enable it to acquire the resources it needs on market terms. Moreover, the military, economic and political costs of acquiring and holding foreign territory are exorbitant (Rosecrance, 2006, pp. 32–33) and a strong disincentive. Securing its needs through multilateral economic cooperation is a far more efficient and desirable means than territorial expansion, even in a world of resource scarcity. In addition, as a member of the Security Council, China is socially constrained by relatively robust multilateral institutions which curb tendencies towards aggression.

Permanent sovereignty over natural resources

As Anghie observes, "[t]he end of formal colonialism ... did not result in the end of colonial relations" (2008, pp. 44–45), because of the persistence of international economic laws which preserve the economic dependency of newly decolonised States, whether through unequal trading arrangements or foreign commercial control over natural resources (for instance, through long-term resource concessions on unfavourable terms). One of the achievements of the postwar international legal order was recognition of the right of independent States to assert permanent sovereignty over natural resources, in the interests of national economic development (Jia, 2010, p. 18).

Conceptually central to the economic sovereignty of developing countries were the 1962 General Assembly Resolution on Permanent Sovereignty over Natural Resources (UN General Assembly Resolution 1803 (XVII) (1962)), and the subsequent 1974 Charter of Economic Rights and Duties of States (UN General Assembly Resolution 3281 (XXIX) (1974)), to which China has been consistently committed (Jia, 2010, pp. 19–21). Such norms were consistent with both socialist and developmental agendas in China. Further critical efforts by developing countries to construct a New International Economic Order (to balance the market's emphasis on efficiency with other values such as fairness and distributive equity) (Gathii, 2008, p. 255) and a "right to development" (the latter still supported by China) were not successful. Even so, various substantive and procedural concessions were extracted along the way which moderated some global inequalities. Utilising its natural and human resources, China has lifted hundreds of

millions of people out of poverty and sustained an average annual growth rate of more than 9 per cent over the 25 years since 1980 (Xue, 2005, p. 137). China's utilisation of resources has, of course, been socially uneven in its dividends, involved violations of civil and political rights, and led to environmental degradation.

Domestic, transboundary, and transnational regulation of resources

The growth of international environmental law partly moderates the pro-development principle of permanent sovereignty over natural resources. Through the principle of sustainable development, the domestic use and management of natural resources is elevated beyond exclusive sovereign, domestic jurisdiction to an international concern and subject to international regulation, even if uncertainty remains about its scope and its relationship to human rights and international economic law (Birnie and Boyle, 2002, p. 85). The subsidiary principle of sustainable utilisation, use and conservation of natural resources, and the precautionary principle, aim to preserve scarce resources and challenge the classical approach to resources as infinitely exploitable.

China has formally adopted the principle of sustainable development, as is evidenced by official statements such as this:

> China is a responsible country. Our government sticks to the path of sustainable development, steadfastly pursues the policy of reducing resource consumption and preventing environmental pollution, and works energetically to build a society that is resource-efficient and environment-friendly (Ma, 2008, p. 569).

Since the 1980s, China has adopted strong domestic environmental laws, but enforcement in practice remains poor for many reasons (Beyer, 2006, p. 185). There is also increasing interest in "corporate social responsibility" in China (Lin, 2010), including laws and guidelines.[2] The problem is not a normative rejection of environmental norms, but their domestic implementation. China's attitude towards transboundary environmental governance is more mixed. China actively complied with global efforts concerning ozone protection (Kent, 2006, p. 8). Certain transboundary harm emergencies, such as the Song Hua River pollution incident, have been dealt with according to the established principles of international law (Wang and Hu, 2010, p. 195). There is some evidence of China's cooperative participation in transboundary river management, as in "soft" cooperative regulatory approaches to the Tumen River (involving China, Russia, Mongolia and the Koreas) (Marsden, 2010). Less successful is China's approach to the Mekong River Basin, which originates in Tibet. China is not a member of the Mekong River Commission, and China's upstream development of hydropower dams has been pursued with relative disregard for less powerful downstream riparian States in Southeast Asia. Chinese officials have protested against external interference in China's exploitation and utilisation of its water resources (Ma, 2007, p. 769). China's attitude is not atypical, however, given that control over scarce water resources is a sovereign concern globally and few States have leapt at the opportunity to strengthen multilateral governance by adopting the *UN Transboundary Watercourses Convention*. At the same time, China has demonstrated progressive instincts in some law-making processes. For example, in the International Law Commission's work on State responsibility for

transboundary harm from hazardous activities, China sought to widen State responsibility (Ma, 2008, p. 568). In other environmental areas, China has played a creative role in brokering new norms. China's support for the principle of "common but differentiated responsibilities" (Wang and Hu, 2010, p. 198) was important in securing global agreement on climate change. The principle recognises the historical responsibility of developed countries for carbon pollution, while enabling developing countries to "catch up" without bearing an unfair burden for mitigating emissions too soon. China has made considerable efforts to reduce its carbon emissions and energy intensity (Meidan, 2010, pp. 308–13), without agreeing to binding reductions targets (Kent, 2006, p. 9), even if its efforts are as much directed to reducing air pollution, improving energy security, and enhancing economic productivity. Its commitments at the policy level are not always matched by implementation, however, and measures announced thus far will not stop the growth in emissions (Garnaut et al., 2008, p. 182).

While the principle of differentiated responsibilities arguably aligned with China's reality at Kyoto in 1997, the reality by Copenhagen in 2007 was quite different. Not only is China's economic position now much stronger, and its carbon pollution much higher (now the world's largest emitter), but China's approach at Copenhagen divided developing countries, many of whom no longer regard themselves in the same class as a richer, higher polluting China. It remains to be seen whether China adapts its negotiating position to its new status – or whether it continues to instrumentally rely upon a principle now ill-suited to its changing responsibilities. Recently China protested, for instance, the legality of European Union measures to address climate change which impact on the Chinese aviation industry (Chinese Civil Aviation Administration, 2011). In addition to domestic and transboundary environmental regulation, one further area deserves mention. Chinese State companies and private investors are increasingly doing business in foreign States, particularly in regards to China's rapidly growing engagement with natural resources in Africa (Zweig and Bi, 2005) and Myanmar (especially in gas, oil, hydrocarbon and related transport and trade infrastructure). Foreign corporate activity is not directly regulated by international law. There is no international treaty requiring States to regulate the extraterritorial activities of their companies; States have been reluctant to view their human rights obligations as requiring the regulation of companies abroad; corporate social responsibility is often voluntary and non-binding; and there are few forums in which those affected by corporate or investor harms can seek remedies.

Local legal systems in some of the destinations for Chinese investment are often inadequate because of poor regulatory controls, weak enforcement, corruption or vulnerability to Chinese business or diplomatic pressure. At the same time, some countries increasingly prefer to deal with Chinese companies precisely because they come with fewer strings attached. The insistence of the World Bank, Asian Development Bank, and western governments on compliance with social, environmental or rights-based conditions has in some cases resulted in their displacement by Chinese companies and a loss of influence by those actors, even if the effectiveness of conditionality may be overstated (Alden and Alves, 2009, p. 19). Chinese exploitation of resources is thus causing potentially greatest harm not in China or its neighbours, but rather through transnational operations further afield. Even so, there are signs of change, as China responds to international and local pressures to improve its practices. From 2007

onwards, the State Council and various ministries have increasingly sought to regulate Chinese foreign investment; the Export-Import Bank of China has issued environmental and social impact policies; and there are agreements between China and the International Finance Corporation on environmental matters, and the World Bank on exchanging project information (Alden and Alves, 2009, p. 20). Despite progress in standard setting, there remains a lack of enforcement on the ground (Alden and Alves, 2009, p. 20). The adoption of the *UN Guiding Principles on Business and Human Rights* in 2011 may gradually help to change the behaviour of Chinese entities doing business abroad. The UN Human Rights Council resolution 17/4 (2011) endorsing the *Principles* was adopted without a vote, implying China's acceptance of them as a Council member. The former UN Special Representative for Business and Human Rights, John Ruggie, notes that China understands that poor corporate behaviour abroad reflects badly on it, and its companies are on a steep learning curve in improving operations (Business and Human Rights, 2011, p. 119). There has also been push back from affected States, with Myanmar suspending a Chinese dam project on the Irrawaddy River in 2011, even if Chinese exploitation of Burmese resources is a substantial problem, particularly in the border regions (Shee, 2002, p. 44).

China's engagement in Africa illustrates some of these tensions and trends. On the one hand, Chinese investment in African natural resources, particularly energy and mining, has been criticised for not respecting environmental and labour standards; using Chinese instead of local workers; and corruption (Alessi and Hanson, 2012). China's preferred method of trading infrastructure for resources, typically on a bilateral basis (Alden and Alves, 2009, p. 9, p. 10, p. 16), does not always optimise the developmental dividend for an African State. China has been more interested in profit and less interested in governance reform, and its interests in Africa's primary commodities replicates earlier (and continuing) neo-colonial relations with western States and companies (Alden and Alves, 2009, p. 18). At the same time, Chinese capital has "emboldened" some African States to pursue policies which would be opposed by international institutions or the West (Alden and Alves, 2009, p. 18). The picture is, however, more nuanced than is often portrayed. African States have often been willing participants in this mode of development, not least because it diversifies their investors and counterbalances the eco-political dominance of the US and EU (Alden and Alves, 2009, p. 9). China's involvement in Africa is not new, but a deepening of old geopolitical ties cemented since the 1960s, when China supported African liberation movements and developmental aspirations (Alden and Alves, 2009, pp. 7–8). Recently, some States, such as Angola, have grown by utilising Chinese investment while simultaneously pursuing governance reform and improving transparency (Alden and Alves, 2009, pp. 18–19). China's provision of "hard" infrastructure has been beneficial in many States, as has the expansion of Chinese aid and development assistance. China can also be responsive to international pressure to be a "responsible stakeholder", including through international efforts to enhance governance, transparency and sustainability of resource development (Alden and Alves, 2009, p. 20, p. 21), even if there is a long way to go.

Economic integration

Another key frame of reference in China's dealings with resources concerns its participation in world trade, and its approach to resolving commercial disputes. Some Chinese

critics observe that China's entry into the World Trade Organisation (WTO) in 2001 was under "exceptionally unfavourable, non-reciprocal and asymmetric terms of membership" (Wu, 2011, p. 227), including less than full treatment as a developing country. Certainly its accession was a site of political leverage for powerful actors such as the US and EU. Even so, China's WTO accession has brought considerable economic benefits to China and helped it to become the world's largest exporter, including through "most-favoured-nation" status with the US (Wu, 2011, p. 237).

WTO membership is attractive because it brings "stability, certainty and predictability" in China's trade relations. At the same time, "the WTO framework respects the State sovereignty of its members, and leaves it to internal domestic policy to control national security, environmental protection, redistribution of wealth, public morals and culture" (Wu, 2011, p. 232). The WTO was not designed to realise the theories of those who believe that economic integration inevitably brings political democratisation, and such transformative consequences are modest in China to date (Guo, 2008, pp. 354–55). WTO membership nonetheless involves considerable sovereign concessions in exchange for trade benefits. First, there is a dramatic internal reform aspect to WTO membership: since 2001 China has modified 3,000 domestic laws and regulations (Xue, 2005, p. 138) and up to two million local regulations (Guo, 2008, p. 344) to comply with its WTO obligations, suggesting a deep reshaping of domestic laws. Implementation is more problematic, particularly at the local level and in the absence of an independent judiciary (Guo, 2008, p. 343). But an important feature of internal reform may be a gradual rule of law dividend, with increased regulatory transparency, public consultation in law-making, and administrative review of governmental action, sometimes with spill-over effects into law and legal institutions more generally (Wu, 2011, p. 233).

Secondly, as a condition of membership, China submitted to the binding dispute resolution mechanisms of the WTO, including in cases brought by the US, largely due to the reciprocal economic interests involved in being a good economic citizen. China is participating actively in the procedures when claims are brought against it, and after a slow start, is bringing its own claims. By June 2012, China was complainant in eight cases, respondent in 26 cases, and a third party in 89 cases (WTO, 2012). China has enjoyed success in claims against the US (for example, in *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China*, 2011) giving it confidence in the WTO procedures. At the same time, claims brought against it in controversial areas provide a structured means of defusing escalating trade disputes, as in the case brought by the US, EU and Japan in March 2012 against China's export quotas on rare earth minerals (*China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, 2012), and which China partly defends on environmental grounds (Gu, 2011, p. 774). That case followed China's loss in a raw materials case brought by the EU (*China – Measures Relating to the Exportation of Various Raw Materials*, 2011), which led to China reforming its practices in order to comply with the ruling. China's submission to binding dispute settlement is significant, given that in commercial disputes before national courts, it is increasingly isolated as one of the few States to insist on a doctrine of absolute immunity for State companies before foreign courts (Qi, 2008, p. 326). China has also recently resorted to the International Centre

for Investment Disputes for the settlement of that category of commercial disputes (Heymann, 2008).

Like many countries, China has increasingly pursued bilateral free trade agreements (FTAs) alongside the multilateral WTO system. By May 2012, China had concluded nine FTAs, with a further five under negotiation and four feasibility studies under way; 31 countries are included in these arrangements (Chinese Ministry of Commerce, 2012). On the one hand, this might be seen to weaken the multilateral trading system, by going outside it and creating a differentiated web of bilateral arrangements. But FTAs are a lawful and common device for expanding a State's trade opportunities, and in China's case were initially borne out of frustration at the slow pace of WTO accession. They are also an understandable response to the unequal terms of China's WTO membership, and allow China to enjoy greater bargaining power and diversify its trading relationships (Gao, 2007, pp. 27–28). Its FTA with ASEAN has significantly boosted trade and economic activity in Southeast Asia (Xue, 2012, p. 208).

WTO membership is also an opportunity for China to express its sovereign preferences by working to restructure the world trade system. Within the WTO China has played a constructive role in seeking to improve the fairness of trade, specifically by the elimination of agricultural subsidies and reducing protectionism (Chinese Government, 2005, p. 687). Liberalisation of trade in agriculture has floundered since the Doha Round, even though it is widely agreed that it is an essential component (and a plank of the Millennium Development Goals) of a market-based approach to economic growth and development. China has also argued for reform of the international financial system to make it more equal and mutually beneficial (Chinese Government, 2005, p. 687); third world debt relief; and the strengthening of South–South cooperation as an alternative framework of cooperation. China's historical experience as a recipient of foreign aid, and now increasingly as a donor, gives it particular authority to also speak on development assistance, as a policy-oriented "soft" process of resource redistribution. Thus China has described freedom from want as the "most urgent task" for the UN (Zhang, 2005) and emphasised the importance of achieving the Millennium Development Goals (Wang, 2005). Balancing its approach to strong sovereignty and its desire to contribute as a good international citizen, China supports the UN national target for Official Development Assistance of 0.7 per cent of GDP. China argues, however, that development assistance should be more sensitive to national conditions, including by respecting the participation and autonomy of recipient countries (Chinese Government, 2005, p. 687).

Conclusion

International law has slowly grown on China, from difficult beginnings (in which law was an apologia for foreign exploitation) through a rapid socialisation into largely beneficial norms from the 1980s onwards. China is now far more law-abiding than law-breaking, including as regards its defensive territorial claims, and is increasingly enmeshed in thicker global social relations. It accepts the basic elements of the international legal order and UN system, and has internalised key rules which suit its interests (such as permanent sovereignty over natural resources, sustainable development, or world trade obligations).

It is no surprise that China embraces international law when some of it is conservatively State-centric rather than transformative of social and power relations. China has interpreted some norms (such as sovereignty) or facts (such as historical ties to territory) according to its own understandings; worked to modify or block norms which do not suit it or with which it is out of step (as in the navigational rights of warships, restrictive immunity, or aspects of UN reform); and cooperatively developed norms to address common new situations (as with aspects of transboundary harm). Along with many States, it has sometimes been rather inert on issues where there are convenient regulatory lacunae (such as in corporate activity abroad) or weak institutions (as in transboundary river governance). Practice reveals that China is also less dogmatic than is commonly thought and has embraced creative compromises (as in Hong Kong and Macao, or in climate change policy) to balance competing legal interests.

On the whole, China takes international law seriously (Wang and Hu, 2010, p. 200), and views sovereign equality and multilateralism – including the protection of the weak from the strong – as positive social values. That is a good sign in a world where China is rising, and resources are becoming scarce. It is also cause for optimism, in contrast to the bleak narrative of future superpower competition between China and the US, unrestrained by international law, which some predict (Posner and Yoo, 2006).

Notes

1. That observation underestimates the extent to which international law did, in fact, deeply shape relations (positively and negatively) between European and non-European powers prior to 1945, and between non-European powers, but it illustrates a dominant perception amongst Chinese elites.
2. Including Article 5 of the 2006 Chinese Company Law (requiring companies to "undertake social responsibility"); the Chinese Ministry of Commerce's 2008 *Guidelines on Corporate Social Responsibility for Foreign Invested Enterprises*; and the Chinese Academy of Social Sciences' (Research Centre for Corporate Social Responsibility) 2009 *Blue Book Report on Corporate Social Responsibility.*

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