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International Economic Law and Asia

Wang Jiangyu

lawwjy@nus.edu.sg

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Simon Chesterman, Hisashi Owada and Ben Saul (eds), *Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, Oxford, forthcoming 2019)

Chapter 10

International Economic Law and Asia

Wang Jiangyu

1. Introduction

International Economic Law ('IEL'), which is based on liberal economic theories,¹ holds a special meaning for Asia because it has been associated with colonization, modernization and globalization ever since it was first encountered by countries in the region. Asian countries' subscription to IEL is thus a historical journey. The 'Most Favored Nation' ('MFN') principle in world trade law always reminds the Chinese people of their bitter initial engagement with international economic rules, which were violently imposed on them as part of the system of unequal treaties with the Western powers in the 19th and early 20th centuries. Even today, Chinese textbooks of history, international law and political education describe such MFN as 'biased (against China), [a] unilateral MFN' [*pianmian zuihuiguo daiyu*], which only made China suffer from foreign invasion and exploitation.²

Japan likewise accepted the same MFN obligation, which was '*unilateral* in obligation, *unlimited* in scope, and *unconditional* in operation', first in the Treaty of Peace and Amity 1854 between the United States ('US') and Japan, which 'opened' Japan's door to the outside world.³ India's encounter with the Western rules of the international economic system started with its colonization by the British Empire. It is important to note that, in those times, peoples of Asia, alongside the natives of Africa, the Americas and the Pacific, were excluded from enjoying the benefits of international law by the prevailing 'standard of civilization' doctrine.⁴

In the more recent times, IEL has played an instrumental role in helping Asian countries to achieve modernization. Generally, Asia's participation in the making of IEL has been rather limited, but a number of Asian countries, including Japan, Korea, China, India and certain Southeast Asian countries (which are the countries covered in this chapter), have benefited from the Western-dominated international economic order by making use of its rules, though at different times of history.

¹ Tomer Brode, 'At the End of the Yellow Brick Road: International Economic Law Research in Times of Uncertainty' in C B. Picker and others (eds.), *International Economic Law: the State and Future of the Discipline* (Hart 2008), pp. 17-18.

² See eg, Yang, Gongsu: *Wanqing Waijiaoshi [Diplomatic History of the Late Qing Dynasty]* (Peking University Press 1991), pp. 102-104.

³ Shinya Murase, 'The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905' (1976) 70:2 AJIL 273, 274-275.

⁴ Simon Chesterman, 'Asia's Ambivalence About International Law and Institutions: Past, Present, and Futures' (2016) 27:4 EJIL 945, 948.

This chapter considers the state and future of Asian countries' participation, compliance and contributions with respect to IEL and highlights issues that may prompt future research. These issues are possibly caused by Asia's historical and contemporaneous position in the international economic system. It begins by examining how the selected Asian countries were integrated into the modern world economic system and subjected to the IEL that sustains it. It then looks at Asia's participation and compliance records in IEL, followed by an examination of regional international economic organizations and rules in Asia, which has largely been developed through regional economic integration. The chapter then turns to several recent IEL related initiatives in Asia, including the Asian Infrastructure Investment Bank ('AIIB'), the New Development Bank ('BRICS Bank') and China's Belt and Road Initiative. It concludes by summarizing the theoretical and practical challenges raised by the rise of Asia in the development of IEL.

2. IEL and Asia's Modernization

As noted, Asia's encounter with IEL started with Western invasion and/or colonization, which featured, *inter alia*, unequal treaties and unilateral MFN treatment. Before that, the Chinese world order dominated East Asia, based on the traditional system of suzerain-vassal relations between the Middle Kingdom and the peripheral countries (including Korea). Japan lived in the shadow of the Chinese world order, but largely maintained its own independence. India was occupied by hundreds of small kingdoms waiting to be united into one colony by the British. Asian countries were, however, gradually brought into the modern international economic order in the past century and a half. Japan was the first major Asian nation which was accepted by the West into the world of the 'civilized' nations.

In the European-dominated discourse, this integration process embodies the 'civilizing mission' which set China and other Asian countries in the 19th and the 20th centuries on a historical course towards a modernized Asia.⁵ Thus, for most Asian countries, the agonies they suffered in their journeys to independence – which were associated with tremendous injustices – were the prices they paid for modernization, especially for its economic and social dimensions. In the end, they were expected to join the liberal international order whose economic dimension relies on IEL to exist and operate. As G John Ikenberry has argued, this system is open to all states and able to integrate outsiders into its framework.⁶

Japan was the pioneering Asian country to be integrated into the liberal economic system. Its progress accelerated after World War II ('WWII'), when Japan fully surrendered to the US-led international economic order, from which it benefited from (re)industrialization and modernization.⁷ Japan quickly recovered from the trauma of the war and become one of the world's most important economic powers and a full member of the Western-dominated world economic system.

India's post-independence development, however, offers a contrasting example. Being a former British colony, independent India initially adopted a three-decade long socialism-inspired economic model, which featured, to a substantial extent, economic planning, state

⁵ Chesterman (2016), 948.

⁶ G. John Ikenberry, 'The Rise of China and the Future of the West. Can the Liberal System Survive?' (2008) 87:1 *Foreign Affairs* 23, 30.

⁷ Terutomo Ozawa, *Insitutions, Industrial Upgrading, and Economic Performance in Japan* (Edward Elgar 2005) 34 (noting 'Japan was the very first of Asian countries to exploit the growth stimuli of the Pax Americana, initially by pursuing labour-driven industrialisation and exporting labour-intensive goods to the West').

ownership and protectionist foreign trade and investment policies.⁸ During that period, India was, however, fully embraced by the liberal international system by serving as a full member in almost all of the major international economic organizations, including the General Agreement on Tariffs and Trade 1948 ('GATT'). India's economic liberalization started in 1991, which was also the turning point in India's relations with the liberal international economic order. In the following decade, a globalizing India embarked on both domestic and foreign economic liberalization. For instance, peak import tariffs on non-agricultural tariffs were reduced from 150 per cent in 1992 to 15 per cent in 2002-03.⁹ The reward for the liberalization was an average annual growth of above 6 per cent in the same period. As remarked by an Indian observer, 'in the case of India, globalization has been a boon. India has made critical use of it ... to restructure its economy and leverage growth'.¹⁰ India's most dynamic export sector is information technology (IT) enabled services for global companies, which doubtlessly has benefited from the General Agreement on Trade in Services 1994 ('GATS').

China, in its modern Reform era, is usually regarded as one of the biggest beneficiaries of the international economic system. In the late 1970s, long before India's economic liberalization, China began to open its door to international trade and investment, thus voluntarily subjecting itself to IEL. Nicholas Lardy noted that, even before China's accession to the World Trade Organization ('WTO') in 2001, it had already significantly changed and liberalized its original plan economy-based foreign trade regime to allow more trading rights to Chinese enterprises in importing and exporting, lower import tariffs, reduce non-tariff barriers, and enable more flexible exchange rates and capital controls.¹¹ China's WTO accession was even a greater game changer in reshaping not only China's own trade regulation but also China's position in the international economic system. In addition to general obligations such as the universal, unconditional MFN for all WTO members and the pledge to administer all its laws in a 'uniform, impartial and reasonable manner' and ensure transparency in its legal system, China committed to open its markets by relaxing or eliminating over 7,000 tariffs and non-tariff barriers. For example, China agreed to bind all of its tariffs (that is, not to increase duties above agreed levels) and accepted an average bound rate of 8.9 per cent for industrial goods, which was lower than that of India, Brazil and most developing countries. It also agreed to open important services sectors to foreign investors.¹²

3. Asia's Participation in IEL and Institutions

3.1 Country Models of Participation in the International Economic System

Participation in IEL means countries' involvement in IEL's making and enforcement. Participation takes the forms of negotiating for market access and rule-making in international

⁸ For instance, India's peak tariff was 350% before 1991, one of the highest in the world. See Omkar Goswami, 'Elephants can Dance: India's Responses to Globalization and the Challenges She Faces' in David A. Kelly and others (eds.), *Managing Globalization: Lessons from China and India* (Singapore: World Scientific 2006) 75.

⁹ Goswami (2006), 83.

¹⁰ Kaushik Basu, 'India Globalizing' in David A. Kelly and others (eds.), *Managing Globalization: Lessons from China and India* (Singapore: World Scientific) 55, 57.

¹¹ Nicholas R. Lardy, *Integrating China into the Global Economy* (Brooking Institution Press 2002) 32-62. See also Jiangyu Wang, 'The Evolution of China's International Trade Policy: Development through Protection and Liberalization' in Y.S. Lee (ed.), *Economic Development through World Trade* (Kluwer International 2007) 191, 196-197.

¹² Jiangyu Wang (2007), 198-199; Lardy (2002), 79.

governmental forums, using international economic dispute resolution mechanisms, representation and partaking in international economic organizations, and other IEL related initiatives. Overall, Asia may have benefited most from the global economic architecture underpinned by IEL, but its under-participation and under-representation in IEL and its institutions are conspicuous. Of course, this is consistent with Asia's general practice in international law.¹³ However, several initiatives taken by China may pose some degree of systemic challenge to the international economic order.

There are loosely four models of participation in the postwar international economic system by Asian countries, represented respectively by Japan, India, Singapore and China. Japan embraced the Western-led international economic system ostensibly with its whole heart but developed a differently styled capitalism. India has never been viewed as an outlier of the liberal international order but pursued protectionism in the name of development until recent years. China was a self-proclaimed representative and leader of the developing world, but in practice took up a neoliberal developmental approach, and may now intend to establish parallel institutions to compete for dominance in the international economic order. Singapore represents some smaller Asian economies in Asia which committedly abide by both the rules and spirit of the liberal international economic order.

3.2 Japan

Japan was excluded from the creation of the Bretton Woods institutions including the GATT, the World Bank and the International Monetary Fund ('IMF') because it was one of the major enemy states during and for a short while after WWII (in contrast, Nationalist China and India (in the name of British Raj) attended the Bretton Woods Conference in 1944). Japan's economic growth tremendously benefited from the reduction in trade and investment barriers brought by the Bretton Woods system.¹⁴ By the early 1970s Japan emerged as one of the wealthiest and technologically advanced industrial nations and was an important member in all international economic institutions of the time. Japan joined the World Bank and IMF in 1952, and hosted the Annual Meeting of the World Bank Group and the IMF in 1964, which marked its full return to the Western-dominated international economic community. It became the second largest member of the World Bank in 1984. Japan has contributed generously to the IMF's lending capacity and technical assistance, and has possessed a quota of 6.15 per cent in the Fund, which is the second largest after the US.¹⁵

Japan applied to join the GATT in 1952 but its application was initially opposed by the existing GATT members. It became a provisional GATT member in 1953 and a full member in 1955, with the strong support from the US. It subsequently participated in the successive rounds of multilateral trade negotiations (including the 'Tokyo Round' of 1973-79). The sheer size of its economy made Japan a member of the 'Quadrilateral' or 'Quad' meeting, which brought together trade ministers from the US, European Union, Japan and Canada, which were regarded as the most important trading nations of the time.¹⁶ Japan, however, was not active in using

¹³ See generally Chesterman (2016).

¹⁴ Marcus Noland, 'Japan and the International Economic Institutions', paper prepared for the Centre for Japanese Economic Studies with Biennial Conference "Can the Japanese Change? Economic Reform in Japan", Macquarie University Sydney, Australia (Washington D.C.: Peterson Institute for International Economics 2000), at www.piie.com.

¹⁵ Information available at www.imf.org.

¹⁶ 'Statement by Renato Ruggiero on the 'QUAD' Meeting', WTO 1995 Press Releases, Press/27, 23 October 1995.

GATT's dispute settlement mechanism.¹⁷ Even when anti-dumping investigative authorities in the US ruled against Japan in numerous anti-dumping cases, 'neither the Japanese firms nor the Japanese government ever formally protested these rulings by petitioning GATT'.¹⁸

The establishment of the WTO in 1995, of which Japan is a founding member, marked a turning point in Japan's attempt to proactively defend its trade interests and pursue international trade leadership. Japan believes the WTO offers powerful tools to help it resist discriminatory trade protection measures by its trading partners.¹⁹ Immediately in 1995, Japan requested, pursuant to the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), consultations with the US on an automobile dispute, establishing one of the few disputes initiated in the first year of the WTO's dispute settlement body.²⁰ The US opted to settle the case.²¹ As of this writing, Japan has brought 23 cases to the WTO as complainant and appeared as respondent in 15 cases and as a third party in 173 cases.²² Still, overall, Japan was habitually believed to 'punch below its weight' for decades, as Japan's influence on the global economic policy architecture was relatively small and disproportionate to the size of its economy, which used to be the second largest in the world.

3.3 India

India presented a different story in the global economic system. India, of course, has never been an outlier of the postwar international order. It is a pluralistic, constitutional democracy and currently an important economic partner with a liberalizing economy.²³ However, in most of the years after its independence in 1947, India did not fully subscribe to the liberal spirit of the international economic order. In global economic institutions, India has focused on the issue of development, in addition to defending its own protectionist trade policies. As early as the Bretton Woods Conference of 1944, the Indian delegation, which represented the then British-run government of India but was largely treated as an independent mission, pushed for special and differential treatment for poor countries because of their developmental needs: 'Countries like India and China with a large population and a comparatively low standard of life should be given special considerations in any international plan'.²⁴ In line with its development strategy, India adopted an import-substitution based international trade policy, which 'had the direct effect of limiting its participation in world trade' by taking on heavy import tariffs and non-tariff barriers such as quantitative restrictions ('QRs'), although India was one of the 23 founding contracting parties of the GATT in 1947.²⁵

India cast a hard-line posture towards multilateral liberalization in the Uruguay Round of trade negotiations from 1986 to 1994. It consistently demanded special and preferential treatment

¹⁷ Marcus Noland (2000).

¹⁸ Masahiro Okuno-Fujiwara, 'Industrial Policy in Japan: A Political Economy View' in Paul Krugman, *Trade with Japan: Has the Door Opened Wider?* (Chicago and London: The University of Chicago Press 1991) 271, 286.

¹⁹ Marcus Noland (2000).

²⁰ *US – Imposition of Import Duties on Automobiles from Japan under Section 301 and 304 of the Trade Act of 1974 – Request for Consultations by Japan*, WT/DS6/1, 22 May 1995.

²¹ Marcus Noland (2000).

²² 'Membership Information: Japan and the WTO', available at www.wto.org.

²³ Kanti Prasad Bajpai, 'India in the International Order: Challenger and Stabilizer' in David A. Kelly and others (eds.), *Managing Globalization: Lessons from China and India* (Singapore: World Scientific 2006) 319-321.

²⁴ Eric Helleiner, 'India and the Neglected Development Dimensions of Bretton Woods' (2005) *Economic and Political Weekly* (18 July 2015) 31, 34 (quoting Indian delegate N R Sarkar).

²⁵ T.N. Srinivasan and Suresh D. Tendulkar, *Reintegrating India with the World Economy* (Institute for International Economics 2003) 14.

for developing countries, and was vehemently opposed to the introduction of new issues including, ironically, the inclusion of trade in services under GATT, although it eventually accepted the final agreement.²⁶ In the WTO, it was also mainly the India's delegation's relentless effort that led to the emphasis on 'development' in the new round of trade negotiations, which was even named the 'Doha Development Round'.²⁷ This came after India threatened to boycott the so-called Singapore Issues (including transparency in government procurement, trade facilitation, competition policy and trade and investment). The WTO's Ministerial Conference in Geneva in July 2008, which was intended for WTO members 'to settle a range of questions that would shape the final agreement of the Doha Development Agenda',²⁸ collapsed because of the lack the agreement between India, whose position was supported by China, and the US on the special safeguard mechanism ('SSM'), which would have allowed developing countries to raise tariffs temporarily in response to import surges and price falls. The US Trade Representative ('USTR') hence accused India and China of having 'thrown the entire Doha round into the gravest jeopardy of its nearly seven-year life' by 'controlling a large group of even poorer nations'.²⁹

One may argue that India has made significant contributions to the development of IEL simply because of its agitated promotion of the institutionalization of the special treatment for developing countries in various forums, but mainly in GATT/WTO law.³⁰ India already played a prominent role in rule-making in the GATT period. It was a driving force behind the introduction of the development provisions in GATT in the 1960s and the negotiations of the Generalized System of Preferences ('GSP') at the UN Conference on Trade and Development ('UNCTAD'), 'which established the norm that developed countries should provide preferential tariff treatment to developing countries on a generalized, non-reciprocal and non-discriminatory basis'.³¹ The GSP was later incorporated into the GATT and became the foundation for the GATT Enabling Clause in 1979, which allows for derogations to MFN treatment under GATT Article I. It was also India's resistance to the introduction of new issues in the Uruguay Round that helped to limit the scope of the rules on investment and intellectual property to their trade-related aspects.³² In short, India has played a leading role in championing the cause of developing countries and legislating the development rules in world trade law. The enforceability of the development rules is admittedly rather weak and can hardly be effectively subject to the GATT/WTO's dispute settlement mechanism. However, the codification of the development needs of developing countries in IEL at least marked the Western-dominated world economic community's recognition that developing countries do have to be treated specially and more favorably even in a liberal international economic order.

India became an active participant in trade dispute settlement after the WTO's establishment in 1995. It has to date appeared in 23 cases as complainant, 24 cases as respondent, and 129 cases as third party. That is, India is directly involved in at least two cases every year, one

²⁶ Suparna Karmakar, 'From Uruguay to Doha: India at the Negotiating Table' in Suparna Karmakar and others, *India's Liberalisation Experience? Hostage to the WTO?* (New Delhi: SAGE Publications 2007) 69. See also Debashis Chakraborty and Amir Ullah Khan, *The WTO Deadlocked: Understanding the Dynamics of International Trade* (New Delhi: SAGE Publications 2008) 5.

²⁷ Paul Blustein, *Misadventures of the Most Favored Nations* (New York: PublicAffairs 2009) 127-130.

²⁸ 'The July 2008 Package', at https://www.wto.org/english/tratop_e/dda_e/meet08_e.htm.

²⁹ Lim, C.L. and Jiangyu Wang, 'China and the Doha Development Agenda' (2010) 44:6 *Journal of World Trade* 1309, 1310.

³⁰ Julia Ya Qin, 'China, India and WTO Law', pp. 167-216, in Muthucumaraswamy Sornarajah and Jiangyu Wang, *China, India and the International Economic Order* (Cambridge: Cambridge University Press 2010) 167, 194.

³¹ *Id.*, 195.

³² *Id.*, 195.

brought by itself and the other against it. Still, India's approach to dispute resolution in the WTO tends to be 'to settle rather than litigate'.³³ India lodged its first WTO dispute by requesting consultation with Poland concerning Poland's preferential treatment of the European Communities in its scheme on automobiles. The case was quickly settled in 1996 after Poland agreed to a modest import quota favourable to Indian products.³⁴ As a matter of fact, only a minority of the WTO cases involving India led to the final decision of a panel or the Appellate Body.

However, a number of the cases involving India resulted in landmark decisions, representing India's contributions to WTO jurisprudence. For instance, two India-related cases, *US–Wool Shirts and Blouses*³⁵ and *EC–Tariff Preferences*,³⁶ have shaped the jurisprudence on burden of proof. In *US–Wool Shirts and Blouses*, the Panel and Appellate Body ruled that India, as the complainant, had to establish a presumption of inconsistency of US safeguard measures with the Agreement on Textiles and Clothing 1994 ('ATC') but the US, the respondent, had the obligation to produce evidence to rebut the presumption.³⁷ In *EC–Tariff Preferences*, India claimed that the EC's tariff preferences in favor of the ATC countries were inconsistent with the principle of non-discrimination under the Enabling Clause. India argued that, as the complainant, it only needed to make a prima facie case of the EC's violation of GATT Article I:1. The Panel agreed with India, but its decision was reversed by the Appellate Body, which ruled that India had the good faith obligation to identify which provisions in the Enabling Clause that the EC practice was alleged to have contravened.³⁸

These two decisions articulated a clear standard on the burden of proof in WTO settlement. In addition, *EC–Tariff Preferences* was the first case in GATT/WTO history to elaborate on the Enabling Clause.³⁹ India's effort in the *US–Shrimp* case (along with Thailand, Mexico and Pakistan) to push back against the adoption of *amicus curiae* submissions was not successful because the Appellate Body ruled that the panel had the right to accept them.⁴⁰ However, in a special meeting of the WTO General Council in 2000, a majority of WTO members that spoke voiced objection to the Appellate Body's acceptance and consideration of *amicus* briefs.⁴¹ To a large extent, this could be viewed as a contribution of India (along with other developing countries) to the rule-making in the WTO's dispute settlement in a negative sense, namely, by blocking the adoption of unfavorable rules. In addition, *US–Shrimp* was also the first case in GATT/WTO history to recognize that environmental protection falls within the objectives of the world trading system.⁴²

³³ Abhijit Das and others, Introduction: WTO Dispute Settlement at Twenty: Insiders' Reflections on India's Participation" (2016) 1, 8.

³⁴ 'Poland – Import Regime for Automobiles – Notification of Mutually Agreed Solution', WT/DS19/2, 11 September 1996.

³⁵ 'US – Measures Affecting Imports of Woven Wool Shirts and Blouses from India', WT/DS33/AB/R (25 April 1997).

³⁶ 'European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries', WT/DS246/AB/R (7 April 2004).

³⁷ WT/DS33/AB/R, 14.

³⁸ WT/DS246/AB/R, para. 118.

³⁹ Qin (2010), 200.

⁴⁰ See generally C.L. Lim, 'The Amicus Brief Issue at the WTO' (2005) 4:1 Chinese Journal of International Law 85-120.

⁴¹ WT/GC/M/60, 22 November 2000.

⁴² Qin (2010), 200.

Apart from its active participation in the WTO, India is not particularly lively in other Western-dominated global economic institutions such as the IMF or World Bank. It has been observed that:

India has been a more important and influential player in the trade institution than in the financial institutions. This was in part an inherent consequence of the fact that in the financial institutions creditor nations have more power than borrowers, while in the WTO power stems from market size; while India has always been a borrower in the Bank and the Fund, it has been a relatively attractive market despite the closed nature of its policies. As a result, India has been more actively involved in issues of a systemic nature in the WTO than in the financial institutions.⁴³

India and the IMF will be further examined in a following section on Asia and IMF reform. Suffice to say that, since India embarked on economic liberalization in 1991, it is becoming increasingly open to global economic cooperation and less sensitive on absolute protection of sovereignty in international economic affairs. It may even ease its usual rigid position on trade and development in the future. India's change in mindset and practice in the international economic system might have a profound impact on the evolution of IEL, especially with respect to development issues.

3.4 China

Every Asian country is unique in its approach to the international economic system, and China's experience in this regard is incredibly full of twists and turns. The Republic of China was a founding member of all three major international economic institutions, namely, the IMF, World Bank and GATT. After the People's Republic of China ('PRC') was established in 1949, the Nationalist Chinese Government in Taiwan continued to occupy Chinese seats in those institutions for decades and the PRC was not officially involved in the World Bank and the IMF before 1980. It applied to 'resume' its GATT membership in 1986, but had to join the WTO as a new member in 2001.

Accession to global international economic institutions was a result of China's determination to conduct market-oriented economic reform at home and open to foreign trade and investment after the disastrous Cultural Revolution of 1966-76, which brought the Chinese economy to the verge of collapse. It was also a gesture that China was willing to be bound by the rules of IEL and to rise within the liberal international economic system. China's remarkable economic development and growing influence since it began integrating into the world economy prove that it is one of the largest beneficiaries of the US-led international economic order. On the other hand, acceptance of China into global economic institutions shortly after it embarked on path of Reform and Opening-up Policy 1979 certainly evidenced the openness of the Western dominated liberal international economic order.

China's performance in global economic institutions has never been radical and dramatic since it became a member of those institutions, but it is indeed sending mixed signals. In many respects, it is a good global citizen, which has been using international economic organizations 'to gain more goods and information from the international system'⁴⁴ so as to push for domestic economic reform. In this process, China has also embedded itself intensively in the global

⁴³ Arvind (2007). Arvind Subramanian, "India and Global Economic Policy Making" (India in Transition, 3 September 2007) <<https://casi.sas.upenn.edu/iit/asubramanian>> accessed 25 December 2017.

⁴⁴ Marc Lanteigne, *Chinese Foreign Policy: An Introduction* (London and New York: Routledge 2009) 57.

networks of institutions. China however is far from being a rule-maker in this system, which means it actually does not possess the ‘structural power’ to ‘influence rules, norms and the “structure” of the relationship patterns’ within the existing Western-dominated international system.⁴⁵

Nevertheless, China has been perceived by many as a potential challenger and even a threat to the system, possibly with the intention to overhaul it some day in the future. This impression stems in part from China’s own ability. After all, it has become the second largest economy in the world and is expected to be the largest in a few years. But it is also in part based on the widely perceived Chinese intention to make changes to the governance structures and rules of international institutions in China’s favour, so that it may acquire dominance in those institutions. A closer examination of Chinese practice in the various institutions will help to understand China’s evolving attitude towards IEL.

John H Jackson remarked in 2001 that China’s accession ‘is the most significant activity in the WTO’s seven-year life so far’.⁴⁶ As mentioned, China paid a huge price by making immense concessions to other WTO members in its 15-year negotiations to join the world trade community. But China certainly also understood the tremendous benefits it would reap from WTO membership. In the year of its WTO accession, China was the sixth leading exporter and importer in world merchandise trade.⁴⁷ In a decade, it became the world’s second largest economy, the second largest importer and the largest exporter.⁴⁸ As Chinese President Hu Jintao remarked on the tenth anniversary of China’s accession to the WTO,

China’s accession to the WTO is a milestone in China’s reform and opening-up, bringing us into a new era to further open up. To join the WTO was a major strategic decision based on our comprehensive analysis of the situation at home and abroad in order to push forward China’s reform and opening-up and socialist modernization drive.⁴⁹

China’s role in the WTO was initially described as a ‘system-maintainer’ rather than a ‘system reformer’, let alone a ‘revisionist power’,⁵⁰ with the only ‘exception being its behavior on issues seen to impinge on its sovereignty and dignity’.⁵¹ Another study of the record of China’s first decade of membership in the WTO even indicated that China appeared to be a ‘stubborn status quo power’ that was becoming ‘a key player within, and not as a challenger to, the existing multilateral system’.⁵² With respect to trade negotiations and rule-making, Chinese performance in the first decade of its WTO membership certainly conforms to the ‘low profile’ impression. As this author observed elsewhere,

⁴⁵ Lanteigne (2009), id. See also generally Susan Strange, ‘The Persistent Myth of Lost Hegemony’ (1987) 41:4 International Organization.

⁴⁶ John H. Jackson, ‘The impact of China’s accession on the WTO’ in Deborah Z. Cass and others, *China and the World Trading System: Entering the New Millennium* (CUP 2003) 19.

⁴⁷ World Trade Organization, *International Trade Statistics 2002*, 24.

⁴⁸ China trade profile can be found at www.wto.org.

⁴⁹ Cited Permanent Mission of China to the WTO, “China in the WTO: Past, Present and Future” (a presentation about the Tenth Anniversary of China’s Accession to the WTO (2001.12-2011.12)) <www.wto.org> accessed 25 December 2017.

⁵⁰ Margaret M. Pearson, ‘China in Geneva: Lessons from China’s Early Years in the World Trade Organization’ in Alastair Iain Johnston and Robert S. Ross (eds.), *New Directions in the Study of China’s Foreign Policy* (Stanford University Press 2006) 242.

⁵¹ Id.

⁵² James Scott and Rorden Wilkinson, ‘China as a System Preserving Power in the WTO’ in Dries Lesage and Thijs Van de Graaf (eds.), *Rising Powers and Multilateral Institutions* (Palgrave Macmillan 2015) 199, 200.

Although China has been active in the Doha negotiations, it has not become ‘a leader of diplomacy, with a potential for coalition-seeking’. It has not sought to ‘rewrite some of the rules of the game in the international arena.’ Instead, China has been fairly described as ‘a constructive member working to pursue its interests which for the most part correspond to the organization’s goals of greater multilateral liberalization’.⁵³

China’s attitude of not seeking leadership and not being a trouble-maker changed in the WTO’s mini-ministerial conference in 2008, when China firmly sided with India on the special safeguard mechanism at the end of the negotiations and was blamed by the US Trade Representative (‘USTR’) for causing the whole talks to collapse.⁵⁴ Indeed, post-2008 the WTO may have seen a more aggressive China, but its contribution to WTO rule-making is still not conspicuous. For sure, it has made many submissions to reform WTO rules, which however opportunistically focused on those rules unfavourable to China’s own interests. For instance, it toughly called for the abolition of the non-market economy status provisions in the Anti-Dumping Agreement 1994, which, coupled with the corresponding provisions in China’s WTO Accession Protocol 2001, caused Chinese companies to suffer from discrimination in dumping margin calculations. With respect to the procedural rules in WTO dispute settlement, China also appealed to developed countries to ‘exercise due restraint’ in cases against developing countries.⁵⁵

China’s experience in WTO dispute settlement went through an interesting learning curve. In the first few years after its WTO accession, China adopted a rather conciliatory approach in dispute settlement. Between 2001 and 2008, it only initiated three cases against other WTO parties, but was sued in 13 disputes. In those 13 cases in which China was the respondent, mutually agreed solutions were reached in six. This ‘quietude’ began to change in 2009. Seven of the 14 cases filed in that year involved China, while China alone brought three cases to defend its trading rights. To date, it has brought 15 cases against other WTO members, and appeared as respondent in 39 cases and as a third party in 142 cases.⁵⁶ The profound implication of ‘China’s emergence as a major player in dispute settlement is the most significant change in the identity of the system’s top participants since the establishment of the WTO’.⁵⁷

In terms of the contribution China may have made to WTO jurisprudence, one has to distinguish between the cases filed by China and those filed against it. China does intend to establish jurisprudence in the WTO concerning the discriminatory treatment of China as a ‘non-market economy’ (‘NME’) through repeatedly bringing legal action against developed economies, in particular the US and European Union. One of the most significant cases is *US–Anti-Dumping and Countervailing Duties*, in which the Appellate Body found much in China’s favour. It systematically clarified the definition of ‘public body’ in WTO agreements, and ruled that that ‘double remedies’ – namely the application of anti-dumping duties and countervailing duties to the same imported products – were generally invalid under the Agreement on Subsidies and Countervailing Measures 1994.⁵⁸ Most recently, China initiated two requests for

⁵³ Lim and Wang (2010), 1309-1310.

⁵⁴ See *supra* note 29 and the accompanying text.

⁵⁵ Pasha L. Hsieh, ‘China’s Development of International Economic Law and WTO Legal Capacity Building’ (2010) 13:4 *Journal of International Economic Law* 997, 1027-1028.

⁵⁶ ‘China and the WTO’, available at www.wto.org (accessed 15 November 2017).

⁵⁷ Matthew Kennedy, ‘China’s role in WTO dispute settlement’ (2012) 11:4 *World Trade Review* 555, 559.

⁵⁸ ‘US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China’, WT/DS379/AB/R, 11 March 2011.

consultations, which paved the way for it to bring the US and European Union to the WTO's dispute settlement body, to challenge provisions in their trade laws for determining the normal value of NME countries in anti-dumping proceedings involving products from China.⁵⁹

Nonetheless, it is those cases brought against China which demonstrate the extensive impact IEL can have on China. In *China–Auto Parts*,⁶⁰ the Panel and Appellate Body, at the request of the European Communities, the US and Canada, found that Chinese measures of levying a 25 per cent tariff on auto parts imported for production/assembly in China violated China's obligations under GATT and the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 ('TRIPs') as well as China's WTO commitments. This is the first case in which China opted to go through the whole legal process to obtain an Appellate Body report, although the final legal defeat had been expected. China fully implemented the WTO decision by calling a stop to the WTO-inconsistent measures, indicating its willingness to act within the world trading system and comply even with unfavourable rulings. However, the realities of China's compliance depend also on whether the nature of the WTO decision contradicts the core of the Chinese government's governing philosophy.

China also lost to the US in *China–Publications and Audiovisual Products*,⁶¹ in which the Panel and Appellate Body found that Chinese measures restricting the importation and distributions of publications, audiovisual home entertainment products, sound recordings and films for theatrical release violated China's obligations under its Accession Protocol, GATS and GATT. Immediately after the ruling, China informed the Dispute Settlement Body ('DSB') of its intention to implement the decision and it reached an agreement with the US on the reasonable period of time needed for implementation. China subsequently stated several times at the DSB that it had ensured full implementation of the decision. This was, however, questioned by the US, which refused to acknowledge that China had fully complied with the Appellate Body report's recommendations and rulings.⁶²

But overall, China has appeared to be a responsible player in WTO dispute settlement. It 'has played the role of a system-maintainer under the DSU, not that of a reformer or of a transformer', and has generally complied with the dispute settlement body's decisions when its trade measures were found to be WTO-inconsistent.⁶³ China's compliance record with some DSB recommendations and rulings might be ambivalent, but it has never refused to accept the DSB's jurisdiction, challenged the composition of a panel, raised objections to the procedures, or blocked the DSB agenda. This is in stark contrast with the well-known four 'No's, namely 'non-acceptance, non-participation, non-recognition and non-enforcement', that China proffered in the South China Sea Arbitration, concluded under the UN Convention on the Law of the Sea 1982 dispute settlement procedures in 2016.⁶⁴ China is not even so obedient in the IMF, which is discussed in the next section.

3.5 WTO-plus Obligations and Rule of Law in the International Economic System

⁵⁹ WTO cases DS515 (United States — Measures Related to Price Comparison Methodologies) and DS516 (European Union — Measures Related to Price Comparison Methodologies), both were instituted by China in December 2016.

⁶⁰ DS339.

⁶¹ DS363.

⁶² See WTO's information page on DS363 at www.wto.org.

⁶³ Kennedy (2012), 588.

⁶⁴ See generally Jiangyu Wang, 'Legitimacy, Jurisdiction and Merits in the South China Sea Arbitration: Chinese Perspectives and International Law' (2017), 22:2 *Journal of Chinese Political Science* 185-210.

One issue in the package of legal obligations China accepted for WTO membership is worth highlighting, as it may have profound implications for the development of world trade law. Julia Ya Qin observes that the Protocol on China's WTO accession (hereinafter the China Protocol) is a rather unique legal document because it 'has significantly revised WTO rules of conduct when applied to China' by containing 'a large number of special provisions that elaborate, expand, modify or deviate from the existing WTO agreements',⁶⁵ with respect to, in particular, transparency, judicial review, uniform administration, national treatment, foreign investment, market economy status and transitional review.⁶⁶ Some of these commitments are not found in any of the existing provisions of the WTO Agreements and are hence 'WTO-plus' obligations. Qin argues that such country-specific 'WTO-plus' obligations, which apply only to China, may have some positive implications, such as providing a new standard for WTO rules and trade liberalization,⁶⁷ but they also generate negative 'grave implications' for the WTO legal system, because they damage 'the uniformity of WTO rules of conduct and new dispute settlement system'.⁶⁸ In other words, discriminatory treatment against China directly undermines the spirit of the rule of law which the WTO system intends to promote. Further, the many special, WTO-plus provisions in the China Protocol, which were made on *ad hoc* basis in the accession negotiations, remarkably lack clarity and consistency, and many of them are unlikely to be followed and enforced.⁶⁹

3.6 Asia and the IMF Governance Reform

The IMF, the 'central institution of global financial cooperation',⁷⁰ has been facing a crisis of being marginalized in the international economic system and hence is working on reforming itself to improve its legitimacy and efficiency. One of the key issues is IMF governance reform, which requires action in three areas: 'representation on [the] IMF Executive Board, realignment of IMF voting shares, and ... procedures to choose IMF management'.⁷¹

The governance structure of the IMF is disconnected from current world economic realities as it does not give adequate weight in its decision-making processes to rising Asian economies, including China and India. Historically, leading industrial economies including the US, European Union and Japan have held a majority of the total votes, which enables them to pass many decisions by simple majority. In addition, the US always holds more than 15 per cent of the votes so that it can veto major decisions concerning the structure of the IMF, the adoption of which require an 85 per cent threshold.

Major rising economies in Asia are significantly under-represented in the IMF. Before 2008, China held 2.928 per cent of the total IMF votes, which put it on the par with Canada but after the US (17.023 per cent), Japan (6.108 per cent), Germany (5.968 per cent), France (4.929 per cent), United Kingdom (4.929 per cent), Italy (3.242 per cent), and Saudi Arabia (3.210 per cent). The voting shares of India, South Korea and Singapore were, respectively, 1.916 per cent, 0.760 per cent and 0.406 per cent. A reform in 2008 increased China's voting share to 3.803

⁶⁵ Julia Ya Qin, 'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol' (2003) 37:3 Journal of World Trade 483.

⁶⁶ Id, 491-509.

⁶⁷ Id, 512-513.

⁶⁸ Id, 514.

⁶⁹ Id, 517-518.

⁷⁰ Edwin M. Truman, A Strategy for IMF Reform (Institute for International Economics 2006) 2-3 (quoting IMF Managing Director Rodrigo de Rato).

⁷¹ Id, 9.

per cent and India's to 2.336 per cent.⁷² At that time, however, Chinese economy was about to overtake Japan as the second largest in the world. On the other hand, European economies were drastically over-represented in the IMF (with about 30 per cent of the total voting rights).

In December 2010, the IMF, mandated by a G20 conference, approved a package of 'landmark' reforms,⁷³ which called for shifting a 6 per cent quota share to emerging economies and reducing representation of advanced European economies on the IMF Executive Board. This reform package was approved by the US Congress in December 2015. As a result, China's quota share is now 6.41 per cent and voting share is 6.09 per cent, while India's voting share is 2.64 per cent. The US still maintains its veto power by holding 16.52 per cent of the total votes, followed by Japan's 6.15 per cent.⁷⁴

This modest reform certainly still does not reflect the increasingly economic importance of emerging Asian economies. The Chinese economy is now about two-thirds of the US economy and several times of GDPs of Japan and the major European powers, but its voting share is still lower. In addition, the tradition of leadership selection mandates that the President of the World Bank is always appointed by the US and the Managing Director of the IMF always comes from Europe (but has to be accepted by the US).

From China's perspective, it seeks, with loud rhetoric, to increase its influence in the IMF but has not been particularly rigorous in pursuing this objective. It takes what is given to it by the IMF, but does not have confidence that it will be fairly treated within it. It was happy about the inclusion of its currency, the Renminbi, into the SDR basket as fifth currency from 1 October 2016 because this inclusion marked a milestone in Renminbi's long march toward internationalization⁷⁵ However, its disappointment at the modest increase of its quota, as well as the slow approval of the 2010-reform by the US Congress (which hesitated to increase Chinese influence in the IMF), might covertly lead China to establish alternative international financial institutions in which it can play a leadership role, which is examined below.

3.7 The Rise of China-led International Economic Institutions

The single most significant development in IEL in Asia in recent years is China's drive to establish and lead new international economic institutions. The first multilateral institution that China proposed creating (in October 2013) was the Asian Infrastructure Investment Bank (AIIB), which was launched in December 2015 with 57 founding members and now has 80 members from Asia and Europe. The stated purpose of the AIIB is to provide financing for 'investing in infrastructure and other productive sectors' so as to 'foster sustainable economic development, create wealth and improve infrastructure connectivity in Asia'.⁷⁶ Having 'Asian' in its name, the AIIB is a multilateral development bank ('MDB') – and even a 'multilateral financial institution' as stated in its Articles of Agreement – headquartered in Beijing, and is hence an Asian-based international economic institution.

⁷² International Monetary Fund (2011).

⁷³ 'IMF Survey: G-20 Ministers Agree 'Historic' Reforms in IMF Governance'(IMF Survey Online, 23 October 2010) <<https://www.imf.org/en/News/Articles/2015/09/28/04/53/sonew102310a>> accessed 25 December 2017.

⁷⁴ 'IMF Members' Quotas and Voting Power, and IMF Board of Governors' <<http://www.imf.org/external/np/sec/memdir/members.aspx>> (updated 31 December 2017).

⁷⁵ 'IMF Adds Chinese Renminbi to Special Drawing Rights Basket' (IMF News, 30 September 2016)<<http://www.imf.org/en/News/Articles/2016/09/29/AM16-NA093016IMF-Adds-Chinese-Renminbi-to-Special-Drawing-Rights-Basket>>.

⁷⁶ AIIB Articles of Agreement, Article 1:1.

The AIIB can be characterized as a ‘regional’ international economic institution. It obviously hopes to be valued as an Asian institution by Asians and, at the same time, regarded as a global institution worldwide. It does so by dividing membership into regional members, which are located in Asia and Oceania, and non-regional members. Its 38 regional members, including Australia, New Zealand and Russia, now hold 79.0685 per cent of the subscriptions of the AIIB’s total capital stock and 77.1190 per cent of the total votes. The 20 non-regional members from Europe and Africa are assigned 22.8810 per cent of the total voting power.⁷⁷ According to its Articles of Agreement, AIIB lending can be extended to member countries or entities in member territories, as well as international or regional agencies for development.⁷⁸

The AIIB has been touted as a rival to existing Bretton Woods institutions such as the US-led World Bank or Japan-led Asian Development Bank (‘ADB’). Putting aside China’s motivation for creating the AIIB, it does have the most influential position in the Bank through institutional arrangements. First, China is its largest shareholder, contributing half of the Bank’s US\$100 billion capital and holding 27.4499 per cent of voting shares. India, the second largest member state, owns 7.9 per cent of the total votes. The disparity in voting power between China and other member is unparalleled in the world of MDBs.⁷⁹ With such capital holding, China has veto power in the AIIB.⁸⁰ However, in the negotiations with European countries China reportedly committed to forgo the veto power by agreeing to lower its shareholding to below 25 per cent in order to invite more new members to join the Bank and proposing that no single country dictate decision-making.⁸¹ Secondly, the AIIB does not have a resident Board of Directors and so its day-to-day management is delegated to its Beijing-based President, officers and staff. In addition, more decision-making power is given to regional countries and its largest shareholder, China.⁸²

Another China-driven multilateral development institution is the New Development Bank (‘NDB’), also known as the BRICS Development Bank. It was an initiative of the BRICS countries (Brazil, Russia, India, China and South Africa) in 2013 and was formally established in July 2015, a year before the AIIB’s inauguration. Headquartered in Shanghai, the NDB is also a MDB mandated to ‘mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging economies and developing countries’.⁸³ It has an initial authorized capital of US\$100 billion and subscribed capital of US\$50 billion, which is ‘equally distributed amongst the founding members’.⁸⁴ Thus, each BRICS country holds 20 per cent of the NDB’s total capital stock as well as the same share of the total votes. The founding members’ shareholding – together with the voting power – will change with the admission of new members but should not be reduced to below 55 per cent.⁸⁵ Clearly, the capital structure and voting system determine that decision-making in the NDB is equally weighted amongst Brazil, Russia, India, China and South Africa, although China is the largest member economy. However, the facts that the NDB is based in Shanghai, and that its first President is an Indian, demonstrate the relatively large influence of Asia’s two emerging economies, especially

⁷⁷ See AIIB’s membership information at www.aiib.org.

⁷⁸ AIIB Articles of Agreement, Article 11:1(a).

⁷⁹ Martin A. Weiss, *Asian Infrastructure Investment Bank (AIIB)*, Congressional Research Service Report R44754 (2017) 9.

⁸⁰ AIIB Articles of Agreement, Article 28:2(ii).

⁸¹ Wei and Davis (2015).

⁸² Weiss (2017), 8-11.

⁸³ NDB Articles of Agreement, Article 2.

⁸⁴ NDB Articles of Agreement, Article 7.

⁸⁵ NDB Articles of Agreement, Article 8.

China's leadership position in the BRICS group. The NDB's location is certainly a geographical signal that development financing is moving east.

3.8 Rising Asia's Impact on IEL and International Economic Order

Taking a holistic view, the following general observations may be made about Asia, IEL and the international economic order. The first point must be that Asian countries are generally good citizens in the contemporary US-led international economic system and rule-takers in IEL. They have benefited from the system, prospered within it, and are largely satisfied with the status quo of the international economic order. Asian countries which have conducted market-based liberalization and been integrated into the system seldom challenged the rules of system explicitly, and, apart from India's notable contribution to the development rules in the WTO, they have not made much visible contribution to agenda-setting, norm-creation and rule-making in the international economic order. Asian countries are also significantly under-represented in international economic institutions.

Second, notwithstanding the discriminatory 'WTO-plus' obligations applied to China, Vietnam and possibly other Asian countries, the development models adopted by Asian countries, at least in their initial stages, might not be consistent with the 'spirit' of the liberal international economic order. That is, they might have made use of the 'loopholes' or 'grey areas' of IEL, however contrary to the liberal order's objective of a market economy and trade liberalization. Japan's development model, characterized as 'classical developmentalism' in the first few decades after WWII, is such an example. It was observed that 'Japan had a government that used industrial policy to protect infant industries and restrict foreign capital's access to the domestic market, while actively cultivating strategic industries for export to foreign markets.'⁸⁶ China's economic policy in the Reform Era was arguably termed as 'neo-liberal developmentalism' because it introduced bold market forces to remodel its old planned economy.⁸⁷ But China is also known for the extensive use of protectionist tools including industrial policy, subsidies and non-tariff measures, to promote economic development.⁸⁸

Generally, the economic modernization in East Asia has been portrayed as the 'East Asia Model' ('EAM').⁸⁹ The EAM has several strands of policy choices, and those which are related to international trade and investment include, *inter alia*, flexible exchange rate policies to reinforce export competitiveness, strong state-business connections to coordinate national economic strategy and market competition, and governments' activist policies (which include selective use of tariff measures and export incentives to buttress industrialization and exportation).⁹⁰ Arguably, these policies went against the liberal 'spirit' of the post-war international economic system. However, Asian countries, most notably China, are still being accused of using the same or similar industrial policies to charge competition at the expense of

⁸⁶ Bai Gao, 'Neoliberal and Classical Developmentalism: A Comparative Analysis of the Chinese and Japanese Models for Economic Development' in Xiaoming Huang (ed.), *Modern Economic Development in Japan and China* (Palgrave Macmillan 2013) 69.

⁸⁷ *Id.*, 72.

⁸⁸ See e.g. Ling Liu, *China's Industrial Policies and the Global Business Revolution: The Case of the Domestic Appliance Industry* (Routledge 2005), Chapter 2. See also Dwight H. Perkins, 'Industrial and Financial Policy in China and Vietnam: A New Model or a Repay of the East Asian Experience?' in Joseph E. Stiglitz and Shahid Yusuf (eds.), *Rethinking the East Asia Miracle* (OUP and World Bank 2001).

⁸⁹ See generally World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (OUP 1993).

⁹⁰ Shahid Yusuf, 'The East Asian Miracle at the Millennium', in Joseph E. Stiglitz and Shahid Yusuf (eds.), *Rethinking the East Asia Miracle* (OUP and World Bank 2001) 1, 5-7.

the developed markets.⁹¹ In a recent public hearing by the USTR, a USTR Assistant Secretary unequivocally spoke of the need ‘to find effective ways to address those Chinese government practices that may violate the spirit of the WTO that nevertheless may not fall squarely within the WTO disciplines’.⁹²

These concerns must raise some fundamental questions about belief in the universality of IEL. If WTO law, being one of the most important pillars of IEL today, is not able to govern national trade practices, and major trading nations believe that they must resolve their trade disputes outside of the WTO, the collapse of IEL would then be highly probable. On the other hand, if the international economic system (of the WTO or other international or regional arrangements) cannot develop rules to govern the major trade disputes between trading nations, IEL might deserve to have its fate signed and sealed. To some extent, this might be the greatest challenge – coming from Asia – to world trade law in particular and IEL in general.

Third, a fundamental question should be asked about the impact of the rise of China-led, Asia-based international economic institutions on the orientation of global economic governance and the stability of the international economic system. Will these institutions help China to posit itself as a new hegemonic power in a new international economic order (and eventually a new China-led world order) with a different system of rules of law? This kind of concern may be overly-anxious at this stage for a few reasons. One may maintain that an Asian approach in general – and the Chinese approach in particular – tends to conduct reform in a gradual, non-threatening and cooperative manner, with a view to seeking partnership and mutual benefit. This can be seen in the governance structure of the China-led institutions such as the NDB and AIIB, discussed earlier, in contrast to US dominance in the World Bank and IMF.

On the other hand, the lending policy and practice of these China-led MDBs will have a significant impact on the landscape of infrastructure financing, at least in the developing world. Financing from the traditional Bretton Woods institutions is known for the ‘conditionalities’ attached to the loans, which had created a situation where ‘a succession of economic crises in Russia, Asia and Latin America along with growing disparities in wealth within the developed world led to disillusionment with neo-liberal policies and the engines of globalization which profited from it’.⁹³ In contrast, the AIIB and NDB articles of agreement do not mention any conditionalities. Indeed, the AIIB has announced the proposal not to attach any conditions to its loans. Developing countries are likely to turn towards these China-led institutions because they believe this approach would help rebalance the international economic order towards economic growth based on partnership and cooperation, not Washington Consensus based liberalization imposed upon them by the traditional lenders and donors. The proliferation of this development philosophy will in turn put pressure on the traditional Bretton Woods institutions and may compel them to compromise on conditionalities.

⁹¹ David Lawder, 'USTR Lighthizer: Trump challenging China's industrial policies – radio interview', Reuters (Washington, 26 July 2017) <<https://www.reuters.com/article/us-usa-trade-china-lighthizer/ustr-lighthizer-trump-challenging-chinas-industrial-policies-radio-interview-idUSKBN1AB0DR>> accessed 25 December 2017. See also ‘What might a trade war between America and China look like?’ (*The Economist*, 5 February 2017) <www.economist.com> accessed 25 December 2017.

⁹² David Lawder, 'U.S. business groups say WTO unable to curb many Chinese trade practices' (Reuters, 5 October 2017) <<https://www.reuters.com/article/us-usa-china-trade/u-s-business-groups-say-wto-unable-to-curb-many-chinese-trade-practices-idUSKBN1C92UL>> accessed 25 December 2017.

⁹³ Muthucumaraswamy Sornarajah and Jiangyu Wang, *China, India and the International Economic Order* (CUP 2010) 3.

In the long run, more profound changes might happen to the international economic system with the continuing rise of Asia in general, and China and India in particular, in international relations. The new international economic institutions may be used by emerging Asian economies to project their economic power, learn rule-making skills, institutionalize their newly acquired international status and expand their geopolitical influence. For instance, it was widely believed that the AIIB is used to finance the ‘One Belt, One Road’ (‘OBOR’) initiative, a Chinese grand strategy of boosting the links between China and dozens of countries along a land route and the sea route, to make China the hub of the Asia-Europe area.⁹⁴ However, it is fair to say that these new initiatives are still conducted within the existing IEL framework. Whether the emerging Asian giants, especially China, will rise within the international order or impose a new consensus for international economic relations remains to be seen.

4. Internalizing IEL in Asia: Regionalism and Regional Economic Institutions

Asian countries rarely appear collectively on the world stage. Unlike Europe or even Latin America, Asia does not have extensive networks of regional institutions binding the countries together. Karns and Mingst note that three factors underlie the development of regionalism: identity, internal or external threats, and leadership.⁹⁵ In this sense, ‘Asian regionalism has been both belated and limited’.⁹⁶ Though geographically close to each other, Asian states do not have shared perception of being part of a definable region with which they can align their national interests. Many Asian countries were former European colonies and gained their independence only after WWII. Even as colonies or semi-colonies, many of them suffered the brutal invasion from the Japanese Empire. These experiences generated strong attachment to state sovereignty and fear of Asia’s domination by any single power. In addition, competition among China, the US, Japan and now India prevents any single power from exercising effective leadership to keep Asian countries together.

Nevertheless, Asian countries have jumped on the third wave of regionalism and appear to be proactive in strengthening regional organizations and pushing for regional integration. It was observed that ‘Asian and Asia-Pacific regional institutions tend to be informal with specific rules, no binding commitments, small secretariats, and an emphasis on consensus decision-making.’⁹⁷ Asian practice in the recent wave of regionalism still keeps the essential characteristics of this ‘Asian way’ of doing things, but seems also to be open to more legalism embodied in the new generations of free trade agreements (‘FTAs’).

4.1 Asia’s Traditional Regional Economic Institutions

There are three major traditional regional economic institutions: the Asian Development Bank (‘ADB’), Asia-Pacific Economic Cooperation (APEC), and Association of Southeast Asian Nations (‘ASEAN’), discussed below. In addition, the eight member-state⁹⁸ South Asian Association for Regional Cooperation (‘SAARC’), established in 1985, can be more briefly mentioned in an economic context. SAARC members signed a regional Agreement on South Asian Free Trade Area (‘SAFTA’) in 2004 with a view to exchanging tariff concessions

⁹⁴ Weiss (2017), 2.

⁹⁵ Margaret P. Karns and Karen A. Mingst, *International Organizations: The Politics and Processes of Global Governance* (Lynne Ripener Publishers 2004) 148-149.

⁹⁶ *Id.*, 189.

⁹⁷ *Id.*, 190.

⁹⁸ Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

through product-by-product or positive-listing approach. The process of trade liberalization through SAFTA has, however, been rather slow, and hamstrung by political disagreements.

4.1.1 Asian Development Bank

The ADB is the oldest surviving regional multilateral institution in Asia and the Pacific. Opened in Manila in 1966, originally with 31 members, it was tasked to finance development and foster economic growth and cooperation in developing Asia (excluding the socialist countries). It currently has 67 members, with 48 of them from the Asia-Pacific. Its Charter mandates that 60 per cent of the decision-making power must be retained by regional members.

The ADB had been a Japan-driven institution since its establishment, building upon a Japanese proposal in 1963. It was mainly staffed by Japanese in its early days, and still has the informal rule of always electing a Japanese president. A close connection between the ADB and Japan's Ministry of Finance since the ADB's earliest days makes it possible to channel 'Japanese regional economic and financial objectives into the Bank's policies'.⁹⁹ However, internal power struggles for leadership between Japan and the US increasingly introduced the latter as also a dominant player in the Bank.¹⁰⁰ Currently the US and Japan tie for first place in the Bank's decision-making system, each holding 15.607 per cent of its total subscribed capital and 12.784 per cent of its voting power. China and India take the third and fourth positions in the Bank, having 5.454 per cent and 5.363 per cent of the voting power respectively.¹⁰¹

The ADB's biggest challenge today is how to compete with the AIIB in Asian development financing. It would not be surprising if many of the ADB's traditional clientele go to the AIIB for support. It also faces another unprecedented challenge: the retreat of US leadership from the ADB, as the Trump Administration has not appointed a US ambassador to the ADB Board of Directors. These may be signs that the ADB has entered a new era which is witnessing the rise of both China and 'America First'.

4.1.2 Asia-Pacific Economic Cooperation

APEC was created in 1989 to facilitate trade and discuss economic policies among its now 21 member state economies. Its organizational nature is self-defined as the following:

APEC operates as a cooperative, multilateral economic and trade forum. Member economies participate on the basis of open dialogue and respect for views of all participants. In APEC, all economies have an equal say and decision-making is reached by consensus. There are no binding commitments or treat obligations. Commitments are undertaken on a voluntary basis and capacity building projects help members implement APEC initiatives.¹⁰²

Despite the rather cynical criticism about APEC that '[i]t is difficult to think of another institution that has gone from the enthusiasm of creation to the disillusionment of stagnation quite so rapidly',¹⁰³ APEC has actually made significant contributions to IEL in at least two

⁹⁹ Wesley (2003), p 27.

¹⁰⁰ Id, 28-29.

¹⁰¹ ADB (2016).

¹⁰² 'About APEC', at www.apec.org.

¹⁰³ Nick Bisley, 'APEC: Asia-Pacific Economic Cooperation' in Mark Beeson and Richard Stubbs (eds.), *Routledge Handbook of Asian Regionalism* (Routledge 2012) 350.

areas: regional community building and promotion of trade liberalization – ideas which have led, and will lead, to more significant regional and international free trade initiatives.

On regional community building, the establishment of APEC gave the Asia-Pacific a more concrete identity by creating a forum for leaders and ministers to regularly communicate on economic cooperation and policy coordination. It is distinguishable among international organizations in that it also brings business leaders together to have dialogue with state leaders, through the APEC Business Advisory Council.¹⁰⁴ Further, APEC has the important function of engaging the US, as a Pacific Rim country, in Asia.¹⁰⁵

APEC's promotion of trade and investment liberalization has achieved mixed results, regarded by some as its 'biggest failure'.¹⁰⁶ I would argue, however, that the liberalization ideas and projects promoted by APEC have already had tremendous impact on both the discourse and practice of transnational economic activities in Asia and globally. APEC included trade and investment facilitation in its agenda decades ago, which paved the way for the adoption of the Trade Facilitation Agreement ('TFA') at the WTO's Bali Ministerial Conference in 2013. The concept of 'open regionalism' adopted by APEC, which emphasizes open membership and unilateral liberalization ('concerted unilateralism'), has increasingly become a norm in international economic relations.¹⁰⁷

The grand idea of a Free Trade Area for the Asia-Pacific ('FTAAP') also came from APEC in a study of 2004, since then endorsed by the US, China and APEC leaders. If realized, the FTAAP would ideally consolidate the piecemeal free trade arrangements into one mega-FTA, thus avoiding the overlap and fragmentation of rules and standards in Asia's existing FTAs.

4.1.3 Association of Southeast Asian Nations

The ten-member state ASEAN, discussed in chapter 3, is probably the most developed and influential regional organization in Asia. With a combined GDP of US\$2.6 trillion, ASEAN is now the sixth largest economy in the world, and the third largest in Asia (after China and Japan). While it started as a limited political association for regional peace and stability, over time it has promoted ASEAN-centred trade agreements (discussed in the next section). ASEAN's weakly institutionalized structure is intended to facilitate the famous 'ASEAN Way', which describes a distinctive ASEAN approach to regional cooperation based on consultations and consensus rather than Western-style legalism and formalism.¹⁰⁸

4.2 Trade Regionalism: The Proliferation of FTAs in Asia

4.2.1 The Rise of Regionalism in Asia

For Asian countries, regional integration makes sense both economically and geostrategically.¹⁰⁹ But, major Asian economies, including China, Japan, Korea, and ASEAN

¹⁰⁴ Bisley (2012), 359.

¹⁰⁵ Hu Weixing, 'Building Asia-Pacific Regional Institution: the Role of APEC'(2013) 77 *Procedia – Social and Behavioural Sciences* 65, 67.

¹⁰⁶ Bisley (2012), 356 (stating 'APEC's biggest failure to date has been its trade liberalization programme').

¹⁰⁷ See generally C Fred Bergsten, 'Open Regionalism' (1997) 20:5 *The World Economy*, pp. 545-565.

¹⁰⁸ Amitav Acharya, 'Ideas, Identity, and Institution-building: from the "ASEAN Way" to the "Asia-Pacific Way"?' (1997) 10:3 *The Pacific Review* 319, 329.

¹⁰⁹ Asian Development Bank, *Emerging Asian Regionalism: A Partnership for Shared Prosperity* (Manila: The Asian Development Bank) 13.

countries, were already busy with negotiating and concluding FTAs of their own before regional-level integration achieved some meaningful progress. When national ambitions and regional ideas are intertwined, the regionalization process is inevitably complicated by national interests, nationalist sentiments in historic and contemporary bilateral relations, and power politics.

On the other hand, regional integration is also necessarily a legalization progress. Through FTAs, countries establish rules and standards to govern their external economic relations, and agree to bind themselves to legal obligations under IEL. A particular model of bilateral or regional economic arrangements, once it is codified into regional trade agreements or FTAs as part of IEL, will impose constraints on state behavior. That is probably why, knowing the consequence of legalization, none of the major economies in Asia would easily subscribe to the regional integration model proposed by others given their complicated bilateral relations as well as each country's peculiar relations with the US.

The 'battle of models' leaves great room for power politics, as there is little doubt that 'the prevailing great powers at this historical moment are keen to use legal rules and institutions to advance their interests and institutionalize their power',¹¹⁰ both regionally and globally. Thus, Asian regionalism is one of the best examples through which one can investigate 'the role of law in shaping international politics', 'the role of politics in shaping international law',¹¹¹ as well as the possibility of using international (economic) law to limit injurious power politics.

4.2.2 ASEAN-based Trade Liberalization

Regionalism in East Asia dates back to the formation of the ASEAN Free Trade Area ('AFTA') in 1992.¹¹² The AFTA, however, could not be taken as the serious beginning of regionalization as its performance was rather 'dismal'¹¹³ and 'had minimal economic impact'.¹¹⁴ As such, '[b]efore 2000, regionalism in the Asia-Pacific region was distinguished by its absence.'¹¹⁵ At the end of the 1990s, highly trade-dependent countries in ASEAN, most notably Singapore, began to look at FTAs in response to recent events including the 1997-98 Asian Financial Crisis, the collapse of the WTO's meeting in Seattle in 1999, and China's anticipated accession to the WTO in 2001. The first bilateral FTA, the Japan-Singapore Economic Partnership Agreement ('JSEPA'), was signed in January 2002, after being studied since late 1999.

The landmark regional integration initiative that kicked off a wave of regionalism in Asia was the ASEAN-China FTA ('ACFTA'), which, surprisingly, was proposed by the then Chinese Premier Zhu Rongji at the ASEAN-China Summit in November 2000. In November 2002, China and ASEAN countries were able to sign a Framework Agreement for the ACFTA. The ASEAN-China Free Trade Area, which is based a range of agreements between China and ASEAN on trade in goods, services, investments and other matters, came into being on 1

¹¹⁰ Anne-Marie Slaughter, *International Law and International Relations*, Recueil des cours, vol. 285 (Hague: Hague Academy of International law, 2000) 9, 199.

¹¹¹ *Ibid.*, at 198.

¹¹² Rahul Sen, 'New Regionalism' in Asia: A Comparative Analysis of Emerging Regional and Bilateral Trading Agreements involving ASEAN, China and India' (2006) 40:4 *Journal of World Trade* 553, 554.

¹¹³ Lay Hong Tan and Samtani Anil, 'The Shifting Paradigm in Regional Economic Integration: The ASEAN Perspective' (2002), at 1, available at SSRN: <http://ssrn.com/abstract=325484>

¹¹⁴ Richard Pomfret, *Regionalism in East Asia: Why Has It Flourished since 2000 and How Far Will It Go?* (Singapore: World Scientific, 2011) 25.

¹¹⁵ *Id.*

January 2010, as the world's biggest regional trade deal measured by population and the third largest by nominal GDP.

The ACFTA set the framework and precedent for the FTAs that ASEAN signed with Korea in 2007, Japan in 2008, Australia and New Zealand in 2009, and India in 2009.¹¹⁶ In Asia, China, Japan and Korea were newcomers to regionalism, but the ASEAN+1 FTAs signed by them show that 'the three major East Asian countries have undergone a strategic policy change from favoring the multilateral approach for global free trade to actively participating in regional grouping in order to regain their growth momentum after the [Asian Financial Crisis]'.¹¹⁷ In tandem with pursuing the ACFTA, by 2010, the number of FTAs China entered into totaled ten, with economies including Pakistan, Chile, New Zealand, Singapore, Peru, Hong Kong, Macau, Taiwan and Costa Rica.¹¹⁸

4.2.3 The Battle of Regionalism Models

From the beginning of this wave of regional economic integration, Asian countries were struggling with identifying its geographical scope, out of mainly geopolitical concerns. Several regional groupings were proposed but favoured by different major powers. China initially indicated its willingness to negotiate a trilateral FTA among China, Japan and South Korea. The concern about strong domestic opposition within the three Northeast countries led them to agree that ASEAN would be an ideal bridge to hold East Asia together, which led to the idea of an ASEAN+3 model of regionalism. The ASEAN+3 FTA was officially proposed by China¹¹⁹ and favored by South Korea and ASEAN, at least initially.¹²⁰

The ASEAN+3 model of regional cooperation commenced when China, Japan and South Korea were invited to the informal ASEAN Leaders' Meeting in December 1997 amid the Asian Financial Crisis.¹²¹ Since then, numerous inter-governmental initiatives have been developed under the umbrella of ASEAN+3, including successful regional financial cooperation through the Chiang Mai Initiative (which is Asia's only regional liquidity support arrangement), a regional economic surveillance process, and an Asian bond market.¹²² It was also the model envisaged by the East Asian Vision Group in its 2001 report which recommended the establishment of an East Asian Free Trade Area ('EAFTA') embracing the ASEAN+3 grouping.¹²³

¹¹⁶ In the case of the ASEAN-Japan FTA, it was noted that, '[p]rompted by the China + ASEAN framework agreement, Tokyo followed suit'. See Khairy Tourk, 'The Political Economy of East Asian Economic Integration' (2004) 15 *Journal of Asian Economics* 843, 857.

¹¹⁷ Jong-Wha Lee and Innwon Park, 'Free Trade Areas in East Asia: Discriminatory or Non-discriminatory?' (2005) 28:1 *World Economy* 21, 23.

¹¹⁸ See Jiangyu Wang, 'China and East Asian Regionalism' (2011) 17:5 *European Law Journal* 611, 613.

¹¹⁹ Masahiro Kawai and Ganeshan Wignaraja, 'Multilateralizing Regional Trade Arrangements in Asia' in Richard Baldwin and Patrick Low (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System* (CUP 2009) 501.

¹²⁰ Khairy Tourk, 'The Political Economy of East Asian Economic Integration' (2004) 15 *Journal of Asian Economics* 843, 858.

¹²¹ Masahiro Kawai and Ganeshan Wignaraja, 'ASEAN+3 OR ASEAN+6: Which Way Forward?' ADB Institute Discussion Paper No. 77 (Manila: Asian Development Bank, 2007) 6 <<https://www.adb.org/sites/default/files/publication/156716/adbi-dp77.pdf>> accessed 25 December 2017.

¹²² Id.

¹²³ East Asian Vision Group Report 2001, 'Towards an East Asian Community: Region of Peace, Prosperity and Progress' <<http://www.mofa.go.jp/region/asia-paci/report2001.pdf>> accessed 26 December 2017.

China has been a firm supporter of the EAFTA and East Asia's regional integration, on the condition, however, that it is based on the ASEAN+3 model. With its rapidly growing economic might, China seemed to be confident that a '10+3' FTA would eventually run in China's favour and strengthen its dominance in the region, even though Japan and Korea were economically much more developed than China. China's enthusiasm for this model was well received by ASEAN and was written into a Joint Declaration signed by Chinese Premier Wen Jiabao and the heads of the 10 ASEAN governments in October 2003. Through it China and ASEAN agreed to '[m]ake the ASEAN Plus Three mechanism as the main channel to move forward cooperation and regional economic integration in East Asia as a whole so as to promote sustainable development and common prosperity there'.¹²⁴

Japan initially supported the idea of ASEAN+3, but quickly backed down from it.¹²⁵ Instead, Japan proposed a bigger regional deal, or the ASEAN+6 grouping, which covers ASEAN+3 plus Australia, New Zealand, and India.¹²⁶ The China-Japan rivalry appeared to be more visible in 2004-05. ASEAN leaders, by a suggestion of the East Asian Vision Group, convened the First East Asia Summit ('EAS') in Kuala Lumpur on 14 December 2005. Arguments about whom to invite – China or Japan – preceded it: 'China favoured a guest list limited to ASEAN+3. Japan, seeking counterweights to China's influence, argued successfully for Australia, India and New Zealand to be included.'¹²⁷ The EAS has since become a pan-Asia forum for the 16 countries, known as ASEAN+6.

Obviously, Australia, New Zealand and India were brought into the EAS to check the growing influence of China, despite China's Premier Wen Jiabao's call that East Asian regionalism should be 'led by the East Asian countries'.¹²⁸ In that sense, the first EAS 'can be seen as a significant setback for Chinese diplomacy'.¹²⁹ On the other hand, China's lack of interest in participating in negotiations for an ASEAN+6 based Comprehensive Economic Partnership in East Asia ('CEPEA'), proposed by Japan in 2006 as a counter-proposal to China's idea of an ASEAN+3 FTA, was one of the main reasons that the ASEAN+6 regionalism made little progress in 2007-09. The politicization of regionalism turned economic integration in Asia into word games: '[i]t is now understood that the core of East Asian cooperation lies in ASEAN as the "driving force", with ASEAN+3 as the "main vehicle" for the realization of an eventual East Asian economic community, with the EAS as "an integral part of the overall evolving regional architecture."' ¹³⁰ In fact, regional economic integration conducted by Asians themselves stalled at that time, thanks to the lack of East Asia's indigenous leadership, due to the China-Japan rivalry.

4.2.4 The Rise and Demise of the Trans-Pacific Partnership ('TPP')

¹²⁴ 'Joint Declaration of the Heads of State/Government of the Association of Southeast Asian Nations and the People's Republic of China on Strategic Partnership for Peace and Prosperity', Bali, 8 October 2003.

¹²⁵ Kawai and Wignaraja (2009, at 501) noted that, for the cautiousness Japan hold about the ASEAN+3 FTA proposed by China, '[Japan's] official view is that, before negotiating an FTA/EPA, China must clearly demonstrate that compliance with all the commitments made in WTO accession negotiations'.

¹²⁶ Ibid.

¹²⁷ Pomfret (2011) 95.

¹²⁸ Philip Bowring, 'Towards an 'Asian Union'', *The New York Times* (18 June 2005) <<http://www.nytimes.com/2005/06/18/opinion/philip-bowring-toward-an-asian-union.html>> (visited 20 May 2017).

¹²⁹ Id.

¹³⁰ Kawai and Wignaraja (2009) 509.

When the TPP negotiations were concluded by 12 Pacific Rim states in February 2016, it was immediately recognized as the ‘largest regional trade accord in history’, with its members representing roughly 40 per cent of global GDP and one-third of world trade.¹³¹ It included the Asian states of Singapore (which initiated it in 2003), Japan, Malaysia, Vietnam and Brunei, plus neighbouring Australia and New Zealand. However comprehensive and significant it may be, the US-led TPP is now dead (at least in its original form) as a result of US President Trump’s executive order to pull the US out of it in January 2017, on the basis that the US prefers to deal bilaterally with other states.¹³² The fall of the TPP saw the rise of the negotiations for Regional Comprehensive Economic Partnership (‘RCEP’), discussed below.

4.2.5 Regional Comprehensive Economic Partnership (RCEP)

The RCEP is basically the ASEAN+6 model of Asian regionalism. This is no coincidence: most of the TPP’s Asian members are also parties to the RCEP. Contrary to popular media belief that the RCEP is a China-led trade deal to counter-balance the TPP, the RCEP is actually an ASEAN-driven mega-FTA project launched in November 2012, with a view to maintaining ‘ASEAN Centrality’ in the development of Asian regionalism.¹³³ With the US’ departure from the TPP, the RCEP is those Asian countries’ only choice for establishing a Pan-Asian free trade area. This trade deal is strongly supported by China, while the US is not taking part. The 16 participating countries account for ‘almost half of the world population, 31.6% of global output, 28.5% of global trade and a fifth of the global foreign direct investment inflows in 2016’.¹³⁴

Compared with the TPP, the RCEP is more limited in scope and may lead to a shallower degree of regional economic integration. One of the principles that guides the RCEP negotiations is that this FTA will take into consideration ‘the different levels of development of the participating countries’ and accommodate ‘appropriate forms of flexibility including provision for special and differential treatment, plus additional flexibility to the least-developed ASEAN Member States’.¹³⁵ The incorporation of the development dimension differentiates the RCEP from almost all other FTAs, which possess the singular objective of promoting market openness.

The conclusion of the RCEP has been repeatedly delayed. The differences and difficulties arising out of the distrust and different levels of economic development of RCEP partners are likely to lead to the conclusion of a low-grade FTA, if an agreement can be reached at all. Still, if completed, the RCEP will be a historical deal in regional integration in Asia. First, it will instill confidence in free trade and globalization. The retreat from the TPP and the resort to economic nationalism of the Trump Administration have undermined such confidence.

¹³¹ Kevin Granville, ‘The Trans-Pacific Partnership Accord Explained’, *New York Times* (5 October 2015) <<http://www.nytimes.com>> accessed 26 December 2017. The twelve countries are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, US, and Vietnam.

¹³² ‘Presidential Memorandum Regarding Withdrawal of the US from the Trans-Pacific Partnership Negotiations and Agreement: Memorandum for the US Trade Representative’ (the White House, 23 January 2017) <<https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>> accessed 26 December 2017.

¹³³ See generally Yoshifumi Fukunaga, ‘ASEAN’s Leadership in the Regional Comprehensive Economic Partnership’(2014), 2:1 Asia & The Pacific Policy Studies 103 (stating ‘One of the biggest motivations in proposing the RCEP was ASEAN’s desire for its centrality’).

¹³⁴ ‘Joint Leaders’ Statement on the Negotiations for the Regional Comprehensive Economic Partnership (RCEP)’, 14 November 2017, Manila, Philippines (the 2017 ‘Joint Leaders’ Statement’), paras. 3 and 6.

¹³⁵ ‘Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership’, Principle 4.

Secondly, even though the RCEP becomes an agreement for shallow integration, it can still ‘keep markets open, deepen economic integration and narrow the development gap among the member states’.¹³⁶ Importantly, the RCEP model ‘may not be equivalent to the “gold standard” that the TPP espoused to be, but it will provide a clear pathway toward that goal’.¹³⁷

Further, the RCEP will provide a platform to consolidate all the ASEAN+1 agreements, thus doing away with the ‘noodle-bowl’ effect by unifying the different rules of origin and other regulatory formalities. Lastly, and probably most significantly, the RCEP will be the first Pan-Asia FTA to bring together all the major economies in East, South and Pacific Asia into an integrated market, with profound implications for the building of both a common market and common Asian identity. In the long run, however, the exclusion of the US and other Asia-Pacific countries is not desirable, for both economic and geopolitical reasons. Asian regionalism should be Asia-Pacific oriented in the long run, eying also countries on the Americas side of the Pacific. The path to regionalism in this vast area is ineludibly the FTAAP, an agreement that covers possibly all the Pacific Rim economies.

5. Conclusion

Asia is an interesting and increasingly important player in the international economic system. The relationship between IEL and Asia has entered an unprecedented stage. The following offers a summary of the increasingly complex factors in this relationship. First, while Asian countries have different models of development, Asia overall has benefited from the postwar liberal international economic order and the legal system that underpins it. It historically used IEL to foster its economic growth and is now lending support to the universality of IEL in an age of rising populism and anti-globalization sentiment. Complying with IEL provided opportunities for Asian economies to be treated as ostensibly equal participants to enjoy market access, non-discrimination and the rules-based world economic order. Despite their rather depressed initial conditions, most Asian countries have been transformed by IEL into market economies or economies in which the market increasingly plays a decisive role.

Secondly, major Asian economies’ participation in international trade dispute settlement has generated important or even landmark decisions in WTO jurisprudence. On the other hand, Asian countries have not yet secured a place in the centre stage of the world economy with respect to rule-making and agenda-setting. They are, in the main, rule-takers in the international economic order. Apart from India’s contribution to the development aspect of international trade law, major Asian economies played an insignificant role in norm-creation, rule-making and agenda-setting in IEL. Even for dispute settlement, they seemed to be mainly objects whose trade policies provided many negative examples of what should not have been done by WTO members. Japan’s and India’s performance in the international economic system demonstrated that Asia was not able to translate economic might or international influence (among developing countries) into norm entrepreneurship or rule-making power. It remains to be seen whether the rise of China and India will change the situation.

Thirdly, Asian countries are depressingly under-represented in international economic institutions, which substantially limits their roles in global economic governance. Meaningful reforms to reconnect global institutions such as the IMF and World Bank to the realities in the

¹³⁶ Rebecca Fatima Sta Maria, ‘RCEP more relevant than ever’ (*The Jakarta Post*, 20 February 2017) <<http://www.thejakartapost.com/academia/2017/02/20/rcep-more-relevant-now-than-ever.html>> accessed 21 May 2017.

¹³⁷ Ibid.

international economic system have proven to be exceedingly difficult, as this would involve extorting concessions from the adamant vested interests in those institutions. This dilemma is having two consequences. One, international economic organizations are gradually losing not only their efficiency in dealing with crises but also their legitimacy. Two, rising powers unhappy with the status quo are moving to build their own global economic organizations in direct competition with the Western-dominated Bretton Woods institutions. In this regard, the rise of the China-led institutions such as the AIIB and NDB postulates profound challenges and it is an open question whether Asia and the West can work together to integrate these alternative competing financial institutions into the liberal international economic order. An even bigger challenge – with tremendous uncertainties – is what a new international economic order will be if the existing liberal order has to be modified markedly to accommodate the geopolitical ambition and different development philosophies of the rising Asian powers, especially China.

Fourthly, Asia has experienced dramatic proliferation of FTAs in the recent two decades without, however, momentous regional economic integration even in East Asia, let alone a Pan-Asian free trade area. Successful regionalism requires the pursuit of common identity and leadership. In the sense that regionalization is also a legalization process, the development of trade regionalism has contributed to the incremental construction of a rules-based economic order in Asia. On the other hand, the lack of political will to cooperate has generated a battle between different integration models led by different powers. Asia's bumpy path to regional economic integration suggests that legalization of regional economic relations is, after all, premised on the development of cooperative international relations.

Finally, the rise of populism, economic nationalism and anti-globalism in Europe and the US has put Asia in a crucial place to defend free trade and globalization. Factors such as relatively fast economic growth and stable domestic environments help keep Asian economies inclined to maintain the status quo in the international economic system. On the other hand, this new development is also pushing Asia into the spotlight: Asian economic systems and state-led development models, which used to be ignored or tolerated by the liberal international economic order, have now become the focus of attention in Western foreign policy debates, including whether they are consistent with IEL.

From a most optimistic perspective, in the end it is a gaming process in which competing ideas about development philosophies may work together to produce a set of more inclusive rules in IEL. In the best scenario, the rise of Asia has at least offered an opportunity for Asia and the West to work together to make the international economic system and its underlying IEL more inclusive and possibly more just and efficient. This in turn may provide a legal framework to address the new disputes among trading nations. A rising Asia will be able to provide increasing input into this process.