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# China and Comparative International Law: Between Social Science and Critique

Matthew S. Erie\*

## Abstract

*This Essay brings Abebe, Chilton, and Ginsburg's Lead Essay into conversation with the literature on comparative international law to ask whether the social scientific approach to international law is "international." In particular, this Essay takes the case of scholarship on international law in China to examine why or why not particular methodological and theoretical perspectives on international law may gain traction in certain jurisdictions' legal academies. There are a number of linguistic, pedagogic, institutional, and, ultimately, political reasons why the Chinese scholarship that uses social science to understand international law is still nascent. At the same time, critical approaches to international law in the Chinese literature are ascendant. This Essay explains these divergent trends through a sociology of knowledge lens and offers provisional thoughts about future trajectories for the study of international law in a period during which China's influence on the international system will most likely grow.*

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## Table of Contents

I. Introduction.....	61
II. A Thumbnail History of Chinese International Law Scholarship .....	63
A. Real-World Problems.....	63
B. Trends in the Academy .....	64
III. Probing the Double Firewall.....	68
IV. Conclusion.....	70

## I. INTRODUCTION

Is the social scientific approach to international law “international?” This Essay brings some of the findings of Abebe, Chilton, and Ginsburg’s *The Social Science Approach to International Law* into conversation with the literature on “comparative international law.”<sup>1</sup> Specifically, I do so through the case of China, a country poised to shape international law and global governance,<sup>2</sup> to inquire whether the social science approach has gained traction in the Chinese legal academy. The short answer is “not yet.” The longer answer, and particularly, *why* there may not be a parallel “social scientific” turn in Chinese scholarship on international law, however, opens up a number of important questions about the relationship between international law, academic knowledge production, and ascendant non-democratic states, that may shed light on possible future trajectories of international law and its study.

A few caveats: first, this Essay is not directed toward making normative claims about the social scientific turn in international legal scholarship; rather, it is an exercise in comparison between perspectives on international law. Second, due to space constraints, this Essay is not a literature review; I merely flag major trends which will hopefully mark out new terrain that can be further explored through subsequent empirical, contextual, and historiographical studies. Third, my focus is on the scholarship of mainland China (i.e., the People’s Republic of China or PRC) and not that of Hong Kong, Taiwan, or the Chinese diaspora.

To help frame this Essay and its orientation, I open with an exchange between the Party-State and the Chinese legal academy, a relationship that lies at the heart of understanding why and how Chinese scholarship on international law assumes the forms it does. In 2017, Chinese Communist Party (CCP) General Secretary and President of the PRC Xi Jinping made a high-profile visit to the China University of Political Science and Law (CUPL) on its sixty-fifth anniversary.<sup>3</sup> He met with senior legal academics and made a speech during which he exhorted the students to contribute to building “global rule of law” (*shijie fazhi*).<sup>4</sup> Reciprocally, Professor Huang Jin, Vice Dean of CUPL, has proposed that

<sup>1</sup> See generally Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 385, 387 (2011); ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017); ANTHEA ROBERTS ET AL., COMPARATIVE INTERNATIONAL LAW (2018).

<sup>2</sup> See, e.g., He Zhipeng (何志鹏), *Guojifa de Zhongguo lilun (国际法的中国理论)* [A Chinese Theory of International Law] (2017).

<sup>3</sup> Zhongyang xinwen gongzhonghao (中央新闻公众号) [Central Television Public No.], Xi Jinping wusi qianxi kaocha Zhongguo Zhengfa Daxue hua qingchun tan chuxin jiang fazhi (习近平五四前夕考察中国政法大学) [Xi Jinping Visited China University of Political Science and Law on the Eve of the May Fourth Movement to Discuss Youth, Aspiration, and Rule of Law], XINLANG CAIJING (新浪财经) [SINA FINANCE] (May 3, 2017), <https://perma.cc/93VN-QSQK>.

<sup>4</sup> Zhongyang xinwen gongzhonghao (中央新闻公众号) [Central Television Public No.], *supra* note 3.

international law be elevated to a “first-level academic discipline” (*yiji xueke*) in China, effectively calling for a greater standing of international law scholars in the Chinese academy.<sup>5</sup> Professor Huang is also one of the main advocates of Xi Jinping Thought as applied to international law.<sup>6</sup>

The picture that emerges from this exchange is that the Party-State and international law scholars mutually access each other for their own benefit. The former obtains expert commentary which is aligned with its political and geostrategic aims. The latter earns access to data and government funding. This relationship of mutual access is not unique to China and may be found in more muted forms in the United States and elsewhere.<sup>7</sup> Further, it is important to note that not all Chinese legal academics speak with the same voice, and there is a diversity of views and intellectual debates.<sup>8</sup>

Nonetheless, Chinese legal scholars operate within a certain set of parameters largely shaped by the Party-State. As a result of this restriction and other factors, the social scientific approach has not earned a following in Chinese international law studies; however, where the Chinese legal scholarship has been very active is in producing critical views of international law. Critical orientations hold that international law is a product of Western states and mostly hegemonic; as part of China’s global expansion, it is the task of international law scholars to articulate new rules in line with China’s interests.

In this Essay, I use, broadly, a sociology of knowledge lens to explain why there has (or has not) been cross-fertilization between the Anglophone and Sinophone scholarship regarding certain approaches to international law. My focus is not just to draw attention to the absence of a given approach, but to also underscore which approaches are flourishing in Chinese legal scholarship. The structure of this Essay mirrors that of Abebe, Chilton, and Ginsburg’s Essay and proceeds with, first, a thumbnail history of China and international law scholarship, including a concern with practical issues and how international law scholarship reflects trends in the academy. As part of these trends, I highlight critical approaches to international law. I then explain the divergence between the

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<sup>5</sup> Huang Jin (黄进), *Ruhe jiaqiang waifazhi rencai peiyang* (如何加强涉外法治人才培养) [How to Strengthen the Training of Personal for Foreign-Related Law], *ZHONGGUO LÜSHI WANG* (中国律师网) [CHINA LAWYERS NET] (Nov. 22, 2019), <https://perma.cc/5EFJ-HDCD>.

<sup>6</sup> Li Weihong (李伟红) et al., *Zhongguo wei guojifa de chuangxin fazhan zuochu zhongyao gongxian* (中国为国际法的创新发展作出重要贡献) [China Has Made Important Contributions to the Innovation and Development of International Law] *RENMIN RIBAO* (人民日报) [PEOPLE’S DAILY] (Apr. 17, 2019), <https://perma.cc/Z8FL-SQ5Q> (quoting Professor Huang as saying Xi Jinping’s concept of “a community with a shared future for mankind” is a “new contribution to global governance and the international rule of law”).

<sup>7</sup> *See generally* David W. Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT’L L. J.* 1 (1988).

<sup>8</sup> *See generally* SAMULI SEPPÄNEN, *IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES* (2016).

relative nascence of social scientific approaches and critical ones and offer concluding thoughts about future directions.

## II. A THUMBNAIL HISTORY OF CHINESE INTERNATIONAL LAW SCHOLARSHIP

One of the foundational insights of comparative international law scholarship is that scholars in any given country may have particular ways of conceptualizing international law given that country's historical position in the international system.<sup>9</sup> The social scientific approach to international law appears to have a particular provenance, specifically, that of European and American legal scholars during the long twentieth-century, a period during which those same powers effectively built the modern international legal order. Abebe, Chilton, and Ginsburg begin their Essay with Lassa Oppenheim's *The Science of International Law: Its Tasks and Methods*, which the German jurist published in 1908, calling for a scientific approach to international law.<sup>10</sup> The contemporaneous scholarship in China shows a different picture.

### A. Real-World Problems

In 1908, the Qing dynasty was in decline and collapsed three years later. Despite or because of the political and economic tumult, this period witnessed the genesis of international law scholarship in China.<sup>11</sup> It was China's rough entry into the international law system through the "unequal treaties" signed with the United Kingdom and other states that accelerated its study of international law.<sup>12</sup> The kinds of real-world problems Chinese jurists faced were existential (e.g., foreign extraterritoriality, sovereign integrity, regime survival, economic modernization, etc.), and the result was that core ideas of international law entered Chinese lexicon.<sup>13</sup> Shen Jiaben, the Head of the Bureau of the Revision of Qing Law, was one of these early architects for constructing a new legal order in China, one commensurate with that of states beyond China.<sup>14</sup> Charged with systematizing Qing law and translating foreign law, Shen, it should be noted, advocated not

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<sup>9</sup> See ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL?, *supra* note 1, at 7.

<sup>10</sup> Lassa Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 AM. J. INT'L. L. 313, 313–14 (1908).

<sup>11</sup> Suzanne Ogden, *Sovereignty and International Law: The Perspective of the People's Republic of China*, 7 NYU J. INT'L L. & POL. 1, 3–6 (1974).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Matthew S. Erie, *Custom in the Archive: The Birth of Modern Chinese Law at the End of Empire*, in EMPIRE AND THE SOCIAL SCIENCES: GLOBAL HISTORIES OF KNOWLEDGE 93, 100 (Jeremy Adelman ed., 2019).

science as the method for studying international law, but rather classical Chinese textual analysis (*kaojin*).<sup>15</sup>

Following nearly half a century of relative isolationism, it was not until the 1970s that modern China, the PRC, began integrating into the international legal order. The PRC joined the United Nations in 1971, began signing bilateral investment treaties with other states, and acceded to the World Trade Organization in 2001.<sup>16</sup> In the early 2000s, China, while still the major capital importer in the world, made a shift to becoming one of the largest capital exporters globally, a transformation that has raised a host of international law issues. These include private international law issues in the course of Chinese companies conduct of cross-border business, sovereign immunity for Chinese state-owned enterprises, the resolution of commercial and state-investor disputes, maritime and territorial conflicts, scrutiny of China's human rights record, and so on. These issues can be roughly grouped into three major categories of interests: economic (i.e., international business), security (e.g., territorial integrity), and world opinion (i.e., naming and shaming). Xi Jinping has called for the growth of international legal studies in China to confront these challenges.<sup>17</sup>

## B. Trends in the Academy

The Chinese academy operates in a certain relationship to the Party-State, one in which the nexus between power and knowledge is regnant. From the 1980s on, there has been increasing intellectual exchange between Chinese scholars and their foreign colleagues. Since roughly 2013 when Xi Jinping assumed leadership of the CCP, there has been a blowback against so-called “Western values,” including such legal principles as judicial independence and liberal rule of law.<sup>18</sup> Whereas there is a plurality of views within the Chinese legal academy, such views are ring-fenced by the lack of academic freedom in the country. The study of international law is no exception; scholarship must be “useful” to the Party-State to garner state patronage, which is a prerequisite for funding, publishing, and policy impact.

At a general level, mainstream Chinese legal scholarship has oscillated between two poles: Marxist legal theory and civil law doctrinalism. Marxist legal

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<sup>15</sup> *Id.* at 101.

<sup>16</sup> Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 PROC. OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.) 267, 272–75 (2000); Jerome A. Cohen, *Law and Power in China's International Relations*, 52 N.Y.U. J. INT'L L. & POL. 124, 125–29 (2019).

<sup>17</sup> Jun Mai, *Xi Jinping Says China Has a Legal Problem: Finding the Lawyers to Defend Its Interests Abroad*, S. CHINA MORNING POST (Mar. 1, 2021), <https://perma.cc/AM6S-T5B3>.

<sup>18</sup> Zhou Qiang (周强), Yao ganyu xiang xifang cuowu sichao lingjian (要敢于向西方错误思潮亮剑) [Dare to Bear a Bright Sword Against the Errant Thoughts of the West], ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS NET] (Jan. 14, 2017), <https://perma.cc/567R-LJE6>.

theory has undergone its own shifts, from extremist strains in the violent 1960s (“all law is bourgeois law”) to more nuanced materialist analyses in the 1980s and 1990s as China began economic liberalization. For Chinese scholars, Marxist theory was a “social scientific” mode of analysis, applying basic principles (i.e., productive “base” as determinative of the “superstructure” law) to build legal institutions. Textbooks and teaching materials in PRC law schools have emphasized such approaches.<sup>19</sup> Starting in the 1990s, Chinese law professors began pushing back on Marxist legal theory and started integrating more civil law positivism into their research and teaching.<sup>20</sup> During this period, more Chinese scholars studied abroad in Europe and turned to statutory analysis akin to what John Henry Merryman and Rogelio Pérez-Perdomo called “legal science.”<sup>21</sup> Chinese legal scholarship shared affinities with Hans Kelsen’s *Pure Theory of Law*—that is, contrary to the Marxist view, law was divorced from such extra-legal forces as politics. The depoliticization of legal scholarship was equally a conscious decision to, as much as possible, sidestep the fraught knowledge-power relationship. Since Xi has been in power, the pendulum has swung back toward Marxist theory.<sup>22</sup>

The above is a generalization only, but these two oscillating points have left little room for other approaches to law, including those of the contemporary social sciences (i.e., sociology, anthropology, political science, non-Marxist economics, etc.). Yet, there have been strands of social scientific thought that have permeated the Chinese legal academy as applied to domestic law, in particular, jurisprudence (*falixue*), criminal procedure, and civil procedure.<sup>23</sup> Professor Bai Jianjun of Peking University was an early outlier, building datasets and using statistical methods to

<sup>19</sup> See, e.g., Falixue Bianxuezu (法理学编学组) [Jurisprudence Editorial Group], *Makesizhuyi lilun yanjiu he jianshe gongcheng zhongdian jiaocai* (马克思主义理论研究何建设工程重点教材) [Key Teaching Materials for Marxist Legal Theory Research and the Construction Project [of Building a Marxist Society]] (2012).

<sup>20</sup> Lei Lei (雷磊), *Fajiaoyixue yu fazhi: fajiaoyixue de falixue yiyi* (法教义学与法治：法教义学的治理意义) [Legal Doctrinalism and Rule of Law: The Governance Significance of Legal Doctrinalism], 40 *FAXUE YANJIU* (法学研究) [JURISPRUDENCE RESEARCH] 58 (2018); Jiao Baoqian (焦宝乾) *Fajiaoyixue zai Zhongguo: Yige xueshu shi de gailan* (法教义学在中国：一个学术史的概览) [Legal Doctrinalism in China: An Academic History Overview], 3 *FAZHI YANJIU* (法治研究) [RULE OF LAW RESEARCH] 48 (2016).

<sup>21</sup> JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 61–67 (4th ed. 2019).

<sup>22</sup> See, e.g., Jiang Shigong (强世功), *Dangzhang yu xianfa: Duoyuan yiti fazhi gongheguo de jiangou* (党章与宪法：多元一体法治共和国的建构) [Party Constitution and State Constitution: Constructing the Republic through Diversity-in-Unity Rule by Law], 4 *WENHUA ZONGHENG* (文化纵横) [CULTURAL TRAVERSE] 18 (2015).

<sup>23</sup> See Sida Liu & Zhihou Wang, *The Fall and Rise of Law and Social Science in China*, 11 *ANN. REV. L. SOC. SCI.* 373 (2015) (providing a history of social scientific approaches to domestic law in China).

test hypotheses since the early 1990s.<sup>24</sup> Today, a number of scholars apply “law and society” approaches, including Professors Zhu Suli, Zhu Jingwen, Ji Weidong, Zhao Xudong, Wang Qiliang, and many others. There has been some institutional support in the form of academic journals, for example, *Law and Social Sciences* (*Falü he Shehuikexue*) and academic research groups like the Law and Social Science Research Center (*Falü yu shehui kexue keyanjiu zhongxin*) at Renmin University, the Interdisciplinary Legal Studies Academy (*Jiaocha faxue xueyuan*) at the China–EU School of Law at CUPL, and the China Institute for Socio-Legal Studies (*Zhongguofa yu shehui yanjiuyuan*) at Shanghai Jiaotong University’s Koguan Law School.

Strikingly, however, these approaches have largely not influenced the study of international law in China. One distinction to note is that, traditionally, scholars who focus on public international law and those who specialize in private international law operate in their own spheres of activity, with limited interaction. So, while it is important to distinguish between the two branches of international law, neither has been particularly receptive to the social sciences, although there has been more engagement with empirical legal studies on the side of private international law scholars as they tend to have more interaction with non-Chinese scholars. A number of Chinese legal scholars have lamented the “theoretical impoverishment” of Chinese international law scholarship.<sup>25</sup> These scholars have bemoaned the traditional focus on normative interpretation and logical reasoning of international law rules without grasping the fundamental nature of international law and its multi-faceted effects in the international system. Of the “methods” identified by Professors Steven Ratner and Anne-Marie Slaughter in their 1999 piece *Appraising the Methods of International Law: A Prospectus for Readers*,<sup>26</sup> only some have taken root in Chinese soil. The New Haven School,<sup>27</sup> critical legal studies,<sup>28</sup>

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<sup>24</sup> Bai Jianjun (白建军), *Cong Zhongguo fazui lü shuju kan zui yin, zuixing yu xingfa de guanxi* (从中国犯罪率数据看罪因、罪行与刑罚的关系) [The Relationship among Criminal Charges, Crime, and Penalties: A Perspective Based on China’s Crime Rate Statistics] 2 *ZHONGGUO SHEHUI KEXUE* (中国社会科学) [SOCIAL SCIENCES IN CHINA] 144 (2010) (using multiple databases, including a longitudinal database of nation-wide crime rates in China from 1988–2007).

<sup>25</sup> Jun Zhao (俊赵), *Xueke jiaocha shijiao xia guojifa yanjiu* (学科交叉视角下的国际法研究) [International Law Research from the Interdisciplinary Perspective], *GUANGMING RIBAO* (光明日报) [BRIGHT DAILY] (July 9, 2017), <https://perma.cc/53VA-SJBL> (bemoaning Chinese international law scholarship’s *lilun pinkunhua* (theoretical impoverishment)); see also Li Ming (李鸣), *Guojifa de xingzhi ji zuoyong: Pipan guojifa de fansi* (国际法的形式及作用：批判国际法的反思) [The Form and Function of International Law: A Reappraisal of Critical International Law], 3 *ZHONGWAI FAXUE* (中外法学) [SINO-FOREIGN LEGAL STUDIES] 801, 817 (2020).

<sup>26</sup> See Abebe et al., *The Social Science Approach to International Law*, 22 *CHI. J. INT’L L.* 1, 3 (citing Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 *AM. J. INT’L L.* 291 (1999)).

<sup>27</sup> Wang Guiguo, *The New Haven School of Legal Theory from the Perspective of Traditional Chinese Culture*, 20 *ASIA PAC. L. REV.* 211, 212 (2012).

<sup>28</sup> See, e.g., Li, *supra* note 25.

and Third World Approaches to International Law<sup>29</sup> have their adherents in China but have mainly not entered the academic mainstream. Law and economics, however, has gained much more traction.<sup>30</sup> The determining factor in the relative success of such “methods”<sup>31</sup> seems to be the ability of the pioneers of these approaches to steer the scholarship toward the developmental aims of the Party-State.

Social scientific approaches have gained some measure of currency in the policy areas identified above: economic, security, and world opinion interests.<sup>32</sup> There are a number of notable examples. Perhaps the most amount of empirical work has been done on issues that touch on China’s economic interests; for instance, research has been conducted on investment law, including the legal risks in Chinese enterprises’ outbound investment strategies,<sup>33</sup> and the enforcement of foreign judgments in PRC courts.<sup>34</sup> In the category of security interests, there have been a number of studies on arbitration under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>35</sup> As to world opinion, Chinese scholars have made particular efforts in the area of human rights law.<sup>36</sup> So while there have been some advancements made in introducing social scientific approaches to international law, compared to the English-language literature, the methodological

<sup>29</sup> See, e.g., Li Hongfeng (李洪峰), *Lun guojifa disanshijie fangfa de pipanxing* (论国际法第三世界方法的批判性) [Discussion of TWAAIL], 65 SHEHUI KEXUEJIA (社会科学家) [SOCIAL SCIENTIST] 88 (2011).

<sup>30</sup> See, e.g., CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW, SCHOOL OF LAW AND ECONOMICS (Fa yu jingji yanjiuyuan), <https://perma.cc/BD2F-9QA8>.

<sup>31</sup> See Abebe et al., *supra* note 26, at 3 (citing Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 3 (2012) (noting that the “methods” are really mainly theoretical and analytical projects and not methods in the social scientific sense)).

<sup>32</sup> See *supra* Section II.A.

<sup>33</sup> See, e.g., Wang Xiaofeng (王晓峰) & Wang Linbin (王林彬), *Zhongguo zai zhongya zhijie touzi suo mianlin de falü jiqi fengxian tantao – yi Hasakesitan gongheguo wei li* (中国在中亚直接投资所面临的法律及其风险探讨—以哈萨克斯坦共和国为例) [Discussion of the Laws and Risks Faced by Chinese Direct Investment in Central Asia: Taking the Republic of Kazakhstan as an Example], 85 JIANGXI CAIJING DAXUE XUEBAO (江西财经大学学报) [JOURNAL OF JIANGXI UNIVERSITY OF FINANCE & ECONOMICS] 113 (2013).

<sup>34</sup> See, e.g., He Qisheng (何其生), *Guoji shangshi zhongcai sifa shencha zhong de gonggong zhengce* (国际商事仲裁司法审查中的公共政策) [Public Policy in Judicial Review of International Commercial Arbitration], 7 ZHONGGUO SHEHUI KEXUE (中国社会科学) [CHINA SOCIAL SCIENCE] 143 (2014).

<sup>35</sup> See, e.g., GAO JIANJUN (高健军), *Lianheguo haiyangfa gongyue xiang xia zhongcai chengxu guize yanjiu* (联合国海洋法公约：向下仲裁程序规则研究) [RESEARCH ON ARBITRATION PROCEDURAL RULES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA] (2020).

<sup>36</sup> See, e.g., Zhao Shukun (赵树坤) & Mao Kui (毛奎), *Zhongguo renquan yanjiu de zhutixing juexing yu xingsi: 1978–2018* (中国人权研究的主体性觉醒与省思: 1978–2018) [The Realization of the Centrality of Chinese Human Rights Research: 1978–2018], 1 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [EAST NORMAL POLITICS AND LAW UNIVERSITY JOURNAL] 103, 103 (2019) (calling for greater use of social scientific approaches to studying human rights).

rigor of Chinese empirical studies of international law may be less widespread and more diluted.

Abebe, Chilton, and Ginsburg juxtapose social scientific approaches to international law with critical ones. While this distinction may be less clear in practice, Chinese scholarship on international law has certainly gravitated toward the critical. A number of scholars and jurists have produced works that assume a strongly normative position regarding the origins, framework, and operation of international law.<sup>37</sup> While it is difficult to generalize about this diverse body of scholarship, the authors share, to varying degrees, the view that aspects of international law are created by Western liberal states and are hegemonic. Many of these works seek to counter such Western-led (and primarily U.S.-driven) hegemony by greater influence from China. These works may dovetail with Marxism, critical legal studies, or TWAIL schools, but they more often rely on certain culturalist assumptions about “China” (the Chinese state, Chinese culture, “the Chinese people,” and/or Chinese civilization). “China” stands for a presence in international law that promotes non-intervention, is consensual and harmonious, is friendly to the interests of developing countries, and prefers such methods of dispute resolution as mediation over litigation. The critical approach does not, for the most part, employ empirical methods, and so there is a divergence between the critical and social scientific views in the Chinese scholarship.

### III. PROBING THE DOUBLE FIREWALL

One way to understand this divergence is with reference to the notion of what could be called the “double firewall” that exists in Chinese legal scholarship. The double firewall refers to, on the one hand, the barrier between the English-language and Chinese-language literature (the “external firewall”) and, on the other hand, that between the domestic law scholars and international law scholars within China (the “internal firewall”), which itself could be further complicated by the partial siloing between private international law and public international law scholars. The double firewall operates to filter out certain approaches to law and to allow in others that are legitimate in the eyes of the academic censors. The

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<sup>37</sup> See, e.g., WANG TIEYE (王铁崖), *Guojifa Yinlun (国际法引论)* [INTRODUCTION TO INTERNATIONAL LAW] 272–73 (1998); XUE HANQIN, *CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW* 147–58 (2012); Bing Bing Jia, *A Preliminary Study of the Title to Huangyan Island (Scarborough Reef/Shoal)*, 45 OCEAN DEV. & INT’L L. 360 (2014); GUIGUO WANG, *INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE* (2015); Liu Jingdong (刘敬东) & Wang Lulu (王路路), “Yidaiyilu” *changyi chuangzhi guojifa de lujing yanjiu* (“一带一路”倡议创制国际法的路径研究) [Research on the Route for the Belt and Road Initiative’s Creation of International Law], 6 XUESHU LUNTAN (学术论坛) [ACADEMIC DISCUSSION] 13 (2018).

double firewall can best be explained through a kind of sociology of knowledge in regard to academic institutions and practices in China.

Starting with the internal firewall, there are pedagogical, political, and institutional factors that have militated against the growth of international law studies in the PRC. Pedagogically, compared to domestic legal studies, it is clear that the study of international law is relatively embryonic in China. Given that academic knowledge production in China is, generally, rather conservative in terms of its analytical, methodological, and canonical reference points, it is not surprising that there is some path dependency in the thinking of Chinese legal scholars, and that this traditionalism may be more pronounced in a field that has not had time to experiment, diverge, and debate.

Politically, Chinese legal scholars have sought to align their research with the goals of the Party-State and have done so mainly through doctrinal analyses. Despite some vague nods to the value of interdisciplinary research, the social sciences have, for the most part, largely not (yet) been validated by the authorities.<sup>38</sup> It may seem surprising, then, that scholars of domestic law have been more successful in integrating economic, sociological, and anthropological perspectives into their legal research. However, the U.S. legal academy, too, shows greater openness toward social scientific interdisciplinarity on domestic issues than on international ones, which could perhaps be explained by the incentives for international law scholars to publish research that conforms to the way in which international law organizations—organizations the scholars may want to join—conceive of legal problems and research.<sup>39</sup> Of course, in the PRC, the stakes are much higher for Chinese legal scholars to conform. The U.S. government does not silence scholars for their political views, an occurrence which is not uncommon in the PRC.<sup>40</sup>

There are also institutional factors that may hamper the development of diverse approaches to international law in China. The promotion and performance review system for Chinese legal scholars may encourage certain types of scholarship over others. There are opportunity costs associated with spending years to pursue a postgraduate degree in a social science discipline and to collect and analyze data. The job market, university administrative processes, and the broader discipline may not value such labors, especially in the field of international law where the field is so much smaller than domestic law.

Turning to the external firewall, there are, again, linguistic, institutional, and political reasons that prevent diverse approaches to international law from entering the Chinese legal academy, whereas the Party-State patronage may result

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<sup>38</sup> See Zhao, *supra* note 25.

<sup>39</sup> I thank Professor Eric Posner for this suggestion.

<sup>40</sup> SCHOLARS AT RISK, OBSTACLES TO EXCELLENCE: ACADEMIC FREEDOM & CHINA'S QUEST FOR WORLD-CLASS UNIVERSITIES 16 (2019).

in encouraging critical approaches to represent Chinese views. Under Xi's leadership, the Chinese academy has taken a nativist turn that has strained intellectual exchange across the external firewall. So, for example, whereas previously Chinese legal scholars could publish in English language journals and law reviews, recently the Ministry of Education has disfavored such publication outlets. This has emboldened PRC university administrators to double down on Chinese language publications, thus strengthening the external firewall.<sup>41</sup> Conversely, the nativist Trump administration spread anti-Chinese sentiment in the U.S. in the wake of the Covid-19 pandemic; consequently, there has been a decline in interest in as well as funding for intellectual exchanges with China in US universities.<sup>42</sup> For these reasons, the small spaces afforded to certain approaches to international law (e.g., social scientific ones) have seemingly shrunk, whereas critical approaches are experiencing a kind of surge.

#### IV. CONCLUSION

Extending the insights of the comparative international law literature, it seems that contemporary trends toward nationalism and protectionism in the international system also shape the study of international law by scholars differently situated within that system. Despite the grim picture afforded by the Chinese double firewall, and the various hurdles it poses, there is cause for hope. A new generation of Chinese students are studying abroad and obtaining post-graduate degrees in social sciences and the law. Against conformist tides and various forms of pressure, these scholars are bringing these methods and theories back to China and combining them with insights from the Chinese legal scholarship to create new epistemic communities, some of which will thrive and create transnational links. As China increasingly looks to shape international law, the emergent field of social scientific approaches to international law in China will be one touchstone for understanding what those forms may look like.

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<sup>41</sup> Zhonghua renmin gongheguo jiaoyubu (中华人民共和国教育部) [Ministry of Education of the PRC], "Guanyu pochu gaoxiao zhexue shehui kexue yanjiu pingjia zhong 'wei lunwen' buliang daoxiang de ruogan yijian" de tongzhi (《关于破除高校哲学社会科学研究评价中'唯论文'不良导向的若干意见》的通知) [Notice on "Several Opinions on Eliminating the Bad 'Thesis-Only' Trend in the Evaluation of Philosophy and Social Science Research in Universities"] (Dec. 10, 2020) (stating, "In the pursuit of international publication, we must not deliberately minimize and vilify China and undermine national sovereignty, security, and development interests.").

<sup>42</sup> Frank Wu, *Attacking Chinese on Our Campuses Only Hurts America*, INSIDEHIGHERED (July 15, 2019), <https://perma.cc/BAY2-VFDN>.