

蓟门法苑

古代中国国际法研究

孙玉荣 著

中国政法大学出版社

古代中国国际法研究

孙玉荣 著

中国政法大学出版社

图书在版编目(CIP)数据

古代中国国际法研究/孙玉荣著. - 北京:中国政法大学出版社,1999.1

ISBN 7-5620-1737-9

I. 古… II. 孙… III. 国际法-研究-中国-古代
IV. D9.29.2

中国版本图书馆 CIP 数据核字(98)第 32062 号

责任编辑 张 越

出版发行 中国政法大学出版社

经 销 全国各地新华书店

承 印 国家统计局印刷厂

850×1168 32 开 7.75 印张 字数 124 千字

1999 年 1 月第 1 版 1999 年 1 月第 1 次印刷

ISBN 7-5620-1737-9/D·1696

印数:0001-3000 册 定价:12.50 元

社 址:北京市海淀区西土城路 25 号

邮 编:100088 电话:62229803 或 62229563

声 明:1. 版权所有,侵权必究。

2. 如有缺页、倒装,由本社发行科负责退换。

常年法律顾问:北京地平线律师事务所律师 夏卫民

序

1993年冬，我应邀去意大利讲授中国法律制度史。使我感叹的是，意大利学者不仅尊重自己的历史，而且重视相关民族的历史。与我接触的学者，无论是著名的汉学家白佐良教授还是罗马法学家斯奇巴尼教授，都对中国古代法律文化充满兴趣，并且备加称道。作为中国的法史工作者，应当为弘扬民族的法律文化精华做出更多的贡献。我们当时议定，向意大利国家科研委员会申请立项，资助整理、研究、翻译、出版古代中国国际法资料。项目得到批准之后，我招收了第一位博士研究生孙玉荣。起初她协助我整理史料，后来逐渐萌发了在此基础上深入研究并撰写中国法制史博士学位论文的念头。经过她三年的努力钻研，最终摆在我们面前的就是这本《古代中国国际法研究》。当然，那部文字艰深的古代中国国际法史料也早已交给罗马的汉学家去翻译成意大利文。

孙玉荣同学曾是我指导的法律思想史硕士研究生，在中国政法大学研究生院的6年法律史研读过程中称

1/1/2011

得上刻苦勤奋并且多有成果。从意大利学者推崇并翻译介绍古代中国国际法的举动中，我们便可以推知研究古代中国国际法的理论价值和现实意义。我深信有兴趣读完这本书的人，对此会有更深的认识。

怀效锋

1998年9月18日

内 容 提 要

国际法，是现代国际社会通用的一个名词，通常是指调整国家之间的关系的有法律拘束力的原则、规则和制度的总体。在古代，调整国家之间关系的法律并没有使用“国际法”一词来表达。由于各国学者对国际法的定义没有取得一致意见，所以引起了学界对古代有无国际法这一问题的争论。本书对古代中国国际法这一课题进行了探讨，提出自己的见解。

全书共分十一章

第一章 导论。本章批评了认为古代没有国际法的观点，指出古代有国际法，并用东方和西方古代国家的实例加以证明。古代中国国际法作为古代东方国际法的重要组成部分，其存在是断无疑义的。但古代中国国际法有它自己的独特的定义，特指用于调整中国版图内各分立时期国家之间的关系的有法律拘束力的原则、规则和制度的总体。古代中国国际法的渊源主要有国际习惯、国际条约、礼、义和经。

第二章 古代中国国际法的基本原则，包括国家主权平等原则、国家领土神圣不可侵犯原则、不干涉

别国内政原则、和平解决国际争端原则、条约必须遵守原则。

第三章 古代中国国际法的主体。国家是古代中国国际法的唯一主体。国家的构成有四要素：定居的居民、确定的领土、一定的政权组织和主权。按行使主权的状况，古代中国的国家可分为独立国和附属国两种。古代中国国家的基本权利有独立权、平等权、自保权、管辖权，同时古代中国国家负有守约义务、司法义务、道德义务，权利和义务统一不可分。古代中国国际法的承认主要包括国家承认和政府承认。古代中国国际法的继承包括国家的继承和政府的继承。

第四章 国家领土。古代中国虽然没有国家领土及领土主权的概念，但却存在领土主权不可侵犯的原则及对领土主权的限制。古代中国国家领土的取得方式主要有先占、添附、征服、割让、时效和归还。边界和领土不可分，古代中国对于边界争端非常重视，边界的划定多以河流、山脉为界。

第五章、外交关系法，是古代中国国际法中较发达的部分。古代中国国家外交关系机关可以分为中央外交关系机关和外交代表机关。其中中央外交关系包括君主和外交部门；外交代表机关即外交使节。古代中国早在春秋时期，就已有关于使节的种类、等级、特权、任命、接受使节的礼仪和使节的终止等问题的明确规定，经过三国、南北朝、五代十国及宋辽夏金

时期的发展，不断趋于完善与规范化。

第六章 条约。古代中国的条约法也很发达，条约实践内容丰富。古代中国条约的缔结过程包含着相当大的宗教成份。其中包括礼仪的成份。古代中国，缔结条约的仪式主要有会坛、杀牲、执耳、歃血、载书、告神。条约订立之后，将其副本藏在盟府。条约是由国家缔结的，只要一个条约是合法的，缔约各方就必须善意履行，此即条约必须遵守原则。但是，违反国际法基本原则的条约自签订之时无效。条约可以因战争而终止，也可因单方面废约而终止。

第七章 国际组织。古代中国的国际组织称作“盟会”或“盟”。上古时期的国际组织主要有北盟会、南盟会和总盟会，其职能主要有政治、经济、军事、司法等方面。中古时期的国际组织主要指三国时期的吴蜀联盟。近古时期的国际组织主要指宋金联盟。中古和近古国际组织的产生宗旨相同：三国之间连年攻伐，元气损耗殆尽，任何一国都不能消灭其他两国而独立存在。在这种情况下，弱小的两国为了自保，除了加强武器装备和防守外，不得不为了共同的利益而联合起来，组成国际组织。

第八章 古代国际经济法。古代中国国际经济法定义不同于现代国际经济法，仅指国际贸易法而言。关于贸易管制和对进出境货物的限制，早在春秋时期就已开始，以后的三国、东晋十六国、南北朝、五代

十国、宋辽夏金时期都有所规定。

第九章 国际争端的解决。古代中国国际争端的解决方法有强制解决方法和非强制解决方法两大类。强制解决国际争端的方法有反报、报复和干涉。非强制解决方法指和平解决国际争端的政治方法和法律方法。和平解决国际争端的方法有谈判与协商、斡旋与调停。和平解决国际争端的法律方法指仲裁和司法解决。

第十章 古代中国战争法。古代中国战争与武装冲突的开始和结束都使各交战国或武装冲突各方之间的法律关系发生重大的变化，并由此产生一系列的法律后果。古代中国战争法有其特有的基本原则，如旗鼓而战、不伐丧国、禁灭同姓国家等。此外，古代中国战争法对于交战国的人民、间谍、中立等问题也都有所规定。

第十一章 结论。本书在考察大量历史事实的基础上，雄辩地说明了古代中国国际法的存在。但古代中国国际法毕竟不同于近现代国际法。它有自己的特点，尽管古代中国国际法与近现代国际法有着质的特殊性，但它的历史地位及其对现代国际法的借鉴意义却是不容抹煞的。

Studies on International Law in Ancient China

—Summary—

International Law is the name for the body of Customary and treaty rules which are considered legally binding by states in their intercourse with each other. It is a current term in modern times. It was not used in ancient time. The views of scholars are divergent on the exist of international Law in Ancient China, because each sticks to his own stand of the definition of International Law. The book approached to international Law in Ancient China.

The book consists of eleven chapters.

Chapter I. Introduction. The introduction criticized mistakes of objection and persisted in the existence of international Law in Ancient China. The history had proved both in ancient East and in Ancient West that the international law was exist. International Law in Ancient China Was an impor-

tant part of International Law in Ancient East. International Law in Ancient China was the name for the body of general principles and rules of conduct between divided Kingdoms in the Chjinese territory. The sources of International Law in Ancient China included international custom, international conventions, ceremony, justice and classics.

Chapter II . The foundmental principles of International Law in Ancient China include the principle of equality, the principle of mutual non - invasion, the principle of non - intervention, the principle of peaceful resolution to an international disputes, and the principle of abidance by the treaty.

Chapter III . The subject of International Law in Ancient China. The state was the only subject of International Law in Ancient China. The state should possess the following qualification: a permanent population, a defined territory, a government and the sovereignty. The states in Ancient China could be divided into independent staes and vassal states. The fundamental rights of the state in Ancient included: the right of independence, the right of equality, the right of self - preservation, and jurisdiction. On the other hand, the main duties of the state in Ancient China included: the duty of abidance by the rteaty, the duty of judicature, and the imperfect obligation. The right and the duty were unitary. The recognition of International Law in Ancient China could be divided into

the recognition of state and the recognition of government. The succession of international Law in Ancient China also could be divided into the succession of state and the succession of government.

Chapter IV. The territory of state. The concept of territorial sovereignty could not be found in Ancient China, but the territorial sovereignty was non - invasion. The modes of acquisition of territory were occupation, accretion, conquest, cession, prescription, and reversion. The state boundary were unitary with the territory. The territorial organization was taken the matter seriously.

Chapter V. Law of consular relations in Ancient China. The organ of diplomatic relations in Ancient China could be divided into the central organ and diplomatic agents. The central organ included the head of state and ministry of foreign affairs. The diplomatic agents were the diplomatic envoys. The rules such as the kind, the grade, the privilege, and the appointments of the envoy had been found in the Spring and Autumn Period. And after the, the rules were developed.

Chapter VI. The treaty of International Law in Ancient China. The practices of the treaty in Ancient China were varied and colourful. Treaties in Ancient China invariably surrounded by religious symbols. The process of concluding a treaty was following: (a) build an earthen platform for

meeting; (b) kill animal sacrifices; (c) hold the plate on which the ears of a sacrifice lie; (d) smear the blood of a sacrifice on the mouth; (e) state in the treaty; (f) swear an oath by deities. Treaties were concluded by a state. If a treaty was legal, the parties of concluding a treaty should abide by the treaty. But the treaty violating of the fundamental principles of International Law in Ancient China were void before the fact.

Chapter VII. The International Organization. In Ancient China, the international organization was called "alliance". There were the North Alliance, the South Alliance, and the Whole Alliance in remote ages. These alliances performed an function in the respect of politics, economy, military affairs and judicature. In the middle ancient times, the international organization mainly meant the Wu - shu Alliance. The Song - Jin Alliance was an international Alliance too. The aim of building both the Wu - shu Alliance and the Song Jin Alliance was alike. The war among three Kingdoms continued. Any of them could not annex the other kingdoms, besides enhancing combat preparedness. The two small and weak Kingdoms were united as an international organization for the common benefits.

Chapter VIII. International Economic Law in Ancient China. The definition of International Economic Law in Ancient

China differed from in modern times. International Economic Law in Ancient China only meant International Trade Law. In Ancient China, the foreign trade should be restrictive. The import and export of goods also could be restrictive.

Chapter IX. Resolution to international disputes. In Ancient China, the means of resolution to international disputes were divided into forcible means and peaceful means. The forcible means included retortion, reprisal and intervention. The peaceful means included negotiation and consultation, good office, and mediation, arbitration, and judicial settlement.

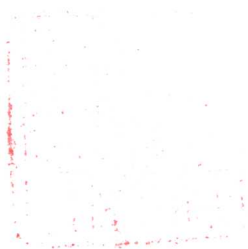
Chapter X. The war in Ancient China. The law of the war in Ancient China was abundant. The relation of the belligerent parties had changed when the war broke out. A series of results of the Law had happened after the war was over. In Ancient China, the law of war possessed unique principles such as forbidden to destroy the members of the same clan. The rules about the neutrality and the spy also could be found in the law of the war in Ancient China.

Chapter XI. conclusion. The book made an on - the - spot investigation about historical events and drew a conclusion that the exist of International Law in Ancient China was different from Contemporary International Law in Ancient China. International Law and possessed unique characteristics. Al-

though there was a qualitative characteristic between International Law in Ancient China and Contemporary International Law, We should pay attention to the historical position and the practical significance of International Law in Ancient China.

作者简介

孙玉荣: 1969 年生于黑龙江, 1997 年毕业于中国政法大学研究生院, 获法学博士学位。现任教于北京工业大学经管学院法律系。已发表法学学术论文 20 余篇, 主篇法学著作 2 部, 与他人合著法学著作 8 部, 公开发表法学科研成果 100 余万字。



目 录

序	怀效锋 (1)
内容提要	(1)
第一章 导论	(1)
第一节 古代国际法的存在	(1)
第二节 古代东方国际法	(11)
第三节 古代西方国际法	(21)
第四节 古代中国国际法释义	(33)
第五节 古代中国国际法的渊源	(47)
第二章 古代中国国际法的基本原则	(54)
第三章 古代中国国际法的主体	(60)
第一节 国家的要素	(60)
第二节 国家的种类	(62)
第三节 国家的基本权利与义务	(63)
第四节 国际法上的承认	(72)
第五节 国际法上的继承	(75)
第四章 古代中国国家领土	(78)
第一节 国家领土的取得和变更	(78)