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Book Review

China and International Dispute Resolution in the Context of the 'Belt and Road Initiative'

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Even during the COVID-19 pandemic, China's Belt and Road Initiative (BRI) attracted the greatest attention from the leaders at the G-7 summit held in Cornwall, England, in June 2021. The BRI received this attention principally because of its global impact upon political and economic affairs. The G-7 nations had no choice but to propose in their communique an alternative to the BRI for the support of infrastructure investment, which they did to counter and check the Chinese influence on the countries along the BRI.[1] The world has yet to see which will prevail: the BRI spearheaded by a communist country ruled by a single autocratic party or the alternative overseen by democracies that share the values of freedom, human rights, and the rule of law. At least, this is the oversimplified comparison often made. However, what would happen if any of the cross-border projects initiated under the BRI stumbled over a legal dispute? Under these circumstances, is there any room for international law, particularly investment and trade law, in the peaceful resolution of such disputes? What kind of solutions or settlement mechanisms will be available to the parties, governmental or non-governmental, in the dispute and under what regulations?

The book under review, which is part of a recent series on China's BRI in the context of international law,[2] is based on primarily on papers given at an international conference held at the School of Law of Xi'an Jiaotong University in October 2016 to commemorate the tenth anniversary of the Silk Road Institute for International and Comparative Law (SRIICL) (p. 7). This volume offers the reader hints regarding the answers to the questions mentioned above as it covers a broad range of topics and provides in-depth analysis of high-profile issues which concern international dispute resolution

particularly in the fields of trade, investment, and maritime affairs.

Following an introductory chapter, the volume is divided into four parts: Part I offers a general overview of China's BRI in the context of international dispute resolution; Part II discusses some issues concerning international trade dispute resolution in terms of China's BRI; Part III examines some current issues related to investment dispute resolution with special reference to China's BRI; and Part IV addresses maritime dispute resolution in the light of China's BRI.

The two essays in Part I are concerned with, respectively, the implications of China's BRI for international dispute resolution in terms of the mechanisms applied and a global trend in commercial litigation. The first essay (by James Crawford) argues that, without 'specific implementation or governance structure' (p. 14), China's BRI, as 'the external policy of a single state' (p. 15), sees 'no *single* mechanism' (emphasis in original, p. 22) that could settle disputes, particularly because of the diverse types of disputes and the amorphous subject matter covered by its objectives. The second essay examines the current conditions of the enforceability of foreign judgments in both common law and civil law countries in the light of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 2005 Hague Convention on Choice of Court Agreements. The authors (Michael Hwang, David Holloway, and Lim Si Cheng) welcome this global trend and its 'potential to equalise the enforceability of foreign judgments and arbitral awards' (p. 42) in the wake of commercial disputes between private parties in the context of the One Belt and One Road (OBOR) initiative.

Part II consists of two essays focused on trade and investment dispute resolution through a stark contrastive appraisal of current world institutions. The third chapter discusses the legitimacy of China's OBOR initiative and legal methodology as it is applicable to trade and investment adjudication concerning OBOR projects. The author (Ernst-Ulrich Petersmann) suggests that 'republican and cosmopolitan constitutionalism' (p. 77), which are embedded in Western legal frameworks such as those of the European Union (EU), the United Nations (UN), and the World Trade Organization (WTO), may be more appropriate for protecting, through dispute settlement proceedings, the rights and interests of the governmental and non-governmental OBOR participants of the more than sixty-five countries bordering the Silk Road. The fourth chapter (by Guohua Yang) claims that the outcomes of the 2016 G20 Hangzhou Summit even stressed the possibility that China would take the initiative to propose an idea of establishing a new organisation of trade and investment (or World Investment and Trade Organization) under the expansion of regional trade agreements (RTAs), such as the Trans-Pacific Partnership (TPP), in order to update and expand the WTO.

Part III consists of four essays on various aspects of China's involvement in the

OBOR in the context of investment dispute resolution. The fifth chapter (by Meg Kinnear) first provides a historical analysis of the development of the International Centre for Settlement of Investment Disputes (ICSID) in the context of investor-state dispute settlement (ISDS). The author then argues that the ICSID and its facilities are suitable to other agreed institutions in Asia for dispute settlement under the OBOR initiative in terms of the OBOR's 'cross-border character and extensive reach' (p. 108). The sixth chapter (by Wei Shen) scrutinises China's practice of concluding bilateral investment treaties (BITs) in the light of the evolution of the notion of expropriation under international law. The author advocates that China take advantage of the OBOR initiative to build a larger network of BITs, free trade agreements (FTAs), and megaregional investment pacts in the form of a '*minilateral* agreement or arrangement' (emphasis added) in order to, unlike the US-led Marshall Plan during the Cold War, 'achieve the prosperity of the region without a clear political agenda' (p. 148). The seventh chapter (by Peng Wang) considers the hybrid nature of ISDS, proposing a multilateral investment dispute resolution (MIDR) mechanism, the aim of which is to balance public legitimacy management and private efficiency refinement in order to further comprehensive reform of international investment agreements (IIAs), including the harmonisation of substantive investment rules. The eighth chapter (by Anatole Boute) investigates the jurisdictional risk caused by the strategic nature of the BRI (energy infrastructure policy in particular) regarding arbitral tribunals in foreign energy investment disputes. Despite this risk, the author urges China to accede to the Energy Charter Treaty (ECT); its EU-centred nature and interpretation may reduce the ETC's added value for the substantive protection of Chinese energy investors (including its state-owned entities (SOEs)) in disputes against EU Member States along the OBOR.

Part IV consists of four contrasting assessments of China's attitude towards maritime dispute resolution, including the 2016 *South China Sea* Arbitration: a critical Western viewpoint and three sympathetic Eastern ones. The ninth chapter (by Natalie Klein) explores the potential use of the dispute settlement regime contained in the United Nations Convention on the Law of the Sea (UNCLOS) with respect to disputes related to ports, navigation, and military activities. Regardless of China's reaction to the 2016 *South China Sea* arbitral award, the UNCLOS dispute settlement procedures are 'one of many tools to be used to moderate state behaviour' (p. 232), even as the BRI progresses. The tenth chapter (by Keyuan Zou), is an examination of various Asian experiences in the field of maritime dispute settlement in the light of dispute settlement mechanisms, including the International Tribunal for the Law of the Sea (ITLOS), part of the UNCLOS; the author describes Asian cultures and legal traditions that diverge from those of Europe and America and regards the use of law courts for dispute settlement 'as unfriendly and

confrontational, and a loss of face' (p. 246). The author maintains that this is reflected in China's attitude towards international adjudication bodies whose foundations are 'essentially based on western legal systems' (p. 250). The eleventh chapter (by Bingbing Jia) explores the silence — the unspoken/unwritten rules — of the UNCLOS in the light of *travaux préparatoires* (draft records), state practice, and relevant jurisprudence concerning territorial disputes and the regime of islands. The author severely denounces the *South China Sea* arbitration for its erroneous interpretation of Article 298 (1)(a)(i) regarding the term 'historic title' in relation to China's claim over the archipelago in question (the Nansha Islands or the Spratly Islands) and of Article 121 (3) regarding the term 'human habitation' with respect to Taiping Island. The twelfth chapter (by Jiangyu Wang) also stresses China's 'prevailing attitude of treating international law as a tool to protect [its] national interest' (p. 316), critically assessing a wide range of legal issues in the *South China Sea* awards (both on jurisdiction and on merits) with special reference to (1) the illegitimacy of the Arbitral Tribunal, (2) its lack of jurisdiction, and (3) its erroneous interpretation of the relevant UNCLOS provisions.

Unlike other books whose theme is the BRI and international law,[3] the book under review has a direct bearing on the analysis of legal issues surrounding trade and investment, particularly along OBOR regions. Moreover, the analytical depth of each essay is considerable, and the resources of data concerning state practice related to treaty-making are abundant. The four-year gap between the original conference and its publication is not so long that the reader should worry about obtaining relevant and timely information regarding the current and hastily changing field of trade and investment, though this period could have been shorter considering the popularity of the theme addressed by the book.[4] In addition, some of the essays in the volume aptly point out that the cultural and traditional roots of China's reluctant attitude towards international adjudication may yield opposing responses from pro-Western and pro-Eastern readers in the highly globalised and diverse society of today. This contrastive posture of the essays in the book under review is also reflected in each of the authors: the Chinese authors support their own government's policies and behaviour, whereas the non-Chinese writers present a critical look at the same.

The reader will still find it necessary to cautiously judge whether, even in the context of BRI projects, China's traditional distrust of third-party dispute resolution when its core interests are concerned — such as territorial sovereignty — will largely remain the same, though China may become flexible regarding the use of commercial arbitration or adjudication, which normally involve its economic interests and do not affect its sovereign authority or impair its dignity under a specific ideology.[5] As described above, this perceptual divide between the West (i.e., European and American countries) and the East

(i.e., Asian countries) concerning international adjudication may, for the time being, loom over the use or non-use of international law in dispute resolutions concerning territorial sovereignty, even after China's BRI develops regional economic and social life along the OBOR. In this sense, the book under review may give the reader a message of both hope and disappointment respecting the future of the BRI and international law during the return of the *pax sinica*.

Endnote

1 See Rhyannon Bartlett-Imadegawa, 'G-7's infrastructure investment plan vies to rival Belt and Road', *NIKKEI Asia*, 20 June 2021, at <https://asia.nikkei.com/Economy/G-7-s-infrastructure-investment-plan-vies-to-rival-Belt-and-Road> (accessed 25 June 2021).

2 See, for example, *International Governance and the Rule of Law in China under the Belt and Road Initiative*, edited by Yun Zhao, Cambridge University Press, 2018; *The 21st Century Maritime Silk Road: Challenges and Opportunities for Asia and Europe*, edited by Keyuan Zou, Shicun Wu and Qiang Ye, Routledge, 2020.

3 See my viewpoints in 'Book Review: *The Belt and Road Initiative and the Law of the Sea*', *Transcommunication*, Vol. 8-1, 2021, pp. 51-55; 'Book Review: *Normative Readings of the Belt and Road Initiative: Road to New Paradigms*', *Waseda Global Forum*, No. 16, 2019, pp. 133-137.

4 See *supra* n. 2: *International Governance and the Rule of Law in China under the Belt and Road Initiative*, which was published in 2018, derives from an international conference held in June 2016 (p. 6); *The 21st Century Maritime Silk Road*, which was published in 2020, generates from two international symposia, one in May 2017 and another in May 2018 (p. xvii).

5 It is of our interest to note that '[i]t would be wise for China to build the BRI as an IPG [International Public Good] while enhancing its capacity-building in the area of international rule-making' because, in doing so, 'the country may gradually transform itself from a rule-taker or rule-follower into a *rule-shaker* or even *rule-maker* in the international economic and trade arena' (emphasis added). See Jingxia Shi, 'The Belt and Road Initiative and International Law: An International Public Goods Perspective', in *International Governance and the Rule of Law in China under the Belt and Road Initiative*, *supra* n. 2, p. 31.