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## Introduction

WENHUA SHAN, JINYUAN SU AND SHENG ZHANG

For most of its recorded 5,000-year history, China has been a prosperous and influential nation in the Far East. The international order that it shaped in this region is unique in post-Westphalian terms. Despite the fact that it claimed to be the 'Middle Kingdom' and maintained suzerain-vassal relations with neighbouring countries, it was seldom aggressive in its interactions with the outside world, and the peace and order sustained under its predominance was beneficial to the countries in the region. This changed fundamentally due to the late Qing Government's isolation policy of the eighteenth century, which, by way of reaction, brought it under the sway of European powers.

After several decades of war, China became genuinely independent, but remained troubled by civil wars and domestic turbulence. Since 1978, it has experienced rapid economic and social development. In 2011, it became the world's second largest economy, a title Japan had held for over four decades. It is projected to overtake the United States as the global economic leader between 2020 and 2030. Whereas the accuracy of this prediction remains to be tested by time, it is believed by many that the world's economy and politics is undergoing a shift of gravity from the west to the east.

The impact of this shift cannot be underestimated, certainly not in a rise of China's magnitude and a noted change of its approach towards international engagements. In September 2013, as the concept of Silk Road Economic Belt was introduced by Chinese President Xi Jinping during a visit to Kazakhstan, the Chinese government embarked on the 'Belt and Road Initiative' (BRI). In March 2015, the Chinese National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce jointly released an action plan on the principles, framework, and cooperation priorities and mechanisms under the BRI. For the first time, China tabled a grand strategic conception in a bid to enhance international cooperation and global governance, and led its

implementation. Since 2013, the BRI has developed from a concept to a key platform for building a community of a shared future for mankind, and a public good for the world. The concept of the BRI has also been referred to in resolutions adopted by the United Nations (UN) General Assembly and Security Council. In Resolution 2,274 (2016) on the mandate of the UN Assistance Mission in Afghanistan adopted in March 2017, the Security Council called for strengthening regional trade and transit through regional development initiatives, including the BRI.<sup>1</sup> In November 2017, at its 71st session, the General Assembly adopted Document A/71/9, encouraging member states to boost economic development in Afghanistan and the region through the BRI and other initiatives.<sup>2</sup>

But the BRI is not only an economic project; it also has inextricable links to law and order. Cooperation among countries in the context of the BRI cannot succeed without rules and the rule of law. As pointed out by China's State Councillor and Foreign Minister Wang Yi at the Forum on Belt and Road Legal Cooperation in July 2018, 'regulations and the rule of law provide the green light for the BRI to go global, as well as the safety valve to cope with different types of risks and challenges'.<sup>3</sup> Given that the implementation of the BRI involves extensive government-to-government, government-to-enterprise and enterprise-to-enterprise transactions, a sound legal system including an effective and efficient dispute settlement mechanism is an imperative to coordinate the interests of the diverse parties and solve their disputes that arise in such transactions.

Indeed, the role of China in international law particularly in international dispute settlement has become one of the most intriguing topics.

Traditionally, China was very conservative in submitting to the jurisdiction of international tribunals due to its miserable and humiliating experience of foreign oppression and invasion since the Opium War in the 1840s. China has stood firmly in seeking to solve international disputes by way of negotiations on the basis of equality and the Five Principles of Peaceful Coexistence. Such a position has been scrutinized

<sup>1</sup> United Nations Security Council, Resolution 2274(2016), S/RES/2274(2016), [www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2274.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2274.pdf)

<sup>2</sup> United Nations General Assembly, Resolution adopted by the General Assembly on 17 November 2016 on the Situation in Afghanistan, A/RES/71/9, <https://undocs.org/A/RES/71/9>

<sup>3</sup> China Daily, Legal Support to Boost Belt and Road Initiative, 3 July 2018, [www.chinadaily.com.cn/m/chinalic/2018-07/03/content\\_36503057.htm](http://www.chinadaily.com.cn/m/chinalic/2018-07/03/content_36503057.htm)

under a harsh spotlight during the South China Sea arbitration brought by the Philippines.

In sharp contrast with China's conservative approach to dispute settlements under public international law, China has become one of the most active users of the WTO dispute settlement mechanism. Meanwhile, China has adopted a more liberal approach to international investment dispute settlement by embracing a full-scale investor-state arbitration mechanism. As a result, Chinese investors have started to make good use such mechanism provided by the over 130 investment treaties that China has entered into. China and its investors' participation in trade and investment dispute settlement have helped in boosting its confidence in the international dispute settlement system as a whole. Though it remains to be seen how far will China go in engaging international dispute settlement, particularly in public international law fields.

Against these backdrops, the appropriate time has come to consider the unique characteristics of China's engagement in the international dispute settlement. While there have been some examinations of China's participation in the individual fields of international law and dispute settlement, this book distincts itself from existing scholarship by considering international dispute settlement as a whole in the context of the BRI, identifying broad themes including international investment, commercial, WTO and maritime dispute settlements.

This book presents contributions from eminent judges, legal scholars and practitioners from Europe, the United Kingdom, the United States of America, Australia and China in a variety of areas of international law with close relevance to China.

H. E. Judge James Crawford (Chapter 1) considers that an effective dispute resolution system is important to the success of the BRI. It could help to offset the fears that may otherwise turn trade and investment away. With predictable legal protections underwriting their participation in the scheme, trade and investment might more readily be encouraged to flow the full length of the BRI. The BRI will operate through, rather than aiming to replace, existing legal frameworks of cooperation and economic integration. Given that the types of disputes that might arise in the context of the BRI are notably diverse, no single mechanism of dispute settlement is possible.

Michael Hwang SC, David Holloway and Lim Si Cheng (Chapter 2) examine the dispute solution options the contracting parties have when their cross-border transaction turn sour. The traditional answer is that international arbitration is the best option to govern cross border

disputes. Yet recent trends have improved the enforceability of foreign judgments. They argue that the foreign judgment is catching up with the foreign arbitral award in terms of enforceability. After introducing the consistent enforceability of foreign judgments in common law countries, they highlight a number of contemporary trends that are gradually improving the enforceability of foreign judgments in civil law countries. In the end, they discuss the fledgling potential of the 2005 Hague Convention on Choice of Court Agreements to standardize the law and practice of enforcement of judgments made by designated courts in exclusive choice of court agreements.

Ernst-Ulrich Petersmann (Chapter 3) discusses legal methodology problems of multilevel trade and investment regulation and explores related problems of adjudication involving investment projects in the context of BRI involving more than 65 countries. The very limited number of investor–state arbitration proceedings initiated so far by foreign companies against China – or by Chinese companies against foreign host states – suggests that alternative dispute resolution may become one of the important ‘legal innovations’ of BRI. Yet, the involvement of third parties as ‘mediators’ or ‘conciliators’ in dispute settlement proceedings also raises questions of ‘justice’ and of legal methodology that are easier to resolve by embedding BRI regulations into multilateral trade, investment and UN law.

Guohua Yang (Chapter 4) analyses the trade outcomes of the G20 Hangzhou Summit by revealing its position on strengthening the multilateral trading system, advancing negotiations on Doha issues, ratifying the Trade Facilitation Agreement, opposing protectionism on trade and its support for plurilateral trade agreements like the Environmental Goods Agreement. He points out that the G20 Hangzhou Summit will be beneficial to the development of both the WTO and G20. He also discusses specifically the importance of including issues in regional trade arrangements, the possibility of establishing a World Investment and Trade Organization (WITO) and the role of China in this aspect.

Meg Kinnear (Chapter 5) examines the role of the International Centre for the Settlement of Investment Disputes (ICSID) in investor–state dispute settlement. After briefly introducing the creation of the ICSID, she argues that ICSID dispute settlement is one of the mechanisms available should disputes arise under the BRI, and that the ICSID’s special attributes will make it a particularly effective vehicle in this context. Further, she introduces the ICSID’s efforts to modernize its rules.

Wei Shen (Chapter 6) explores the BRI and China's bilateral investment treaty (BIT) regime in the context of expropriation. He focuses on the notion of expropriation and the related compensation standard by examining expropriation clauses in China's existing BITs. China's BITs have been experiencing a generational evolution. Since 2006, when China signed a BIT with India, China has included the concept of indirect expropriation in its BITs. Yet most of the BITs between China and BRI counterparties were signed before 2006, which suggests that the expropriation and compensation standards in these existing BITs were not up to higher standards for protecting China's outbound investment into BRI counterparties. A sensible approach to fill in the gap is to have a BIT network covering China and BRI countries and applying the doctrines of indirect expropriation and the 'Hull Formula' to compensate expropriated investment.

Peng Wang (Chapter 7) looks at the reform of investor–state dispute settlement from the perspective of fast resolution, party autonomy and cost management. He proposes a Chinese perspective on a Multilateral Investment Dispute Resolution (MIDR) system of balance between public legitimacy management and private efficiency refinement. The institutional structure of the MIDR should be of internal balance, moderating three tensions between state and arbitrator, between investor and host state, and between state and arbitral tribunal during *ex ante* and *ex post* process of dispute resolution. The process of establishment of the MIDR should be one of external balance, moderating tensions between the procedure and substance of the MIDR, between the MIDR and existing institutions, and between the legal rights of MIDR stakeholders and the political will of leading states.

Anatole Boute (Chapter 8) discusses the added value that the Energy Charter Treaty (ECT) can potentially offer to Chinese external energy security by protecting Chinese outbound investments in countries along the Belt and Road. The geographical scope of the ECT to a large extent covers China's main energy partners along the 'Silk Road Economic Belt'. In addition, participating in the modernization of the ECT could help China shape the treaty to reflect the special characteristics of its foreign energy investments and adjust this mechanism to the benefit of China's increasing energy activities in the large number of BRI counterparties.

Natalie Klein (Chapter 9) investigates dispute settlement relating to the maritime dimensions of the BRI, and explores the potential use of the dispute settlement mechanism of the United Nations Convention on the Law of the Sea (UNCLOS) in relation to possible disputes relating

to three subjects that may arise pursuant to the BRI: ports, navigation and military activities. She observes that there is undoubtedly an important role for judges or arbitrators to play in ensuring that the implementation of the BRI remains consistent with the rights and obligations agreed under UNCLOS. How successfully this role will be played will ultimately depend on the precise details of any dispute and the final decisions of a particular court or tribunal, including the enforcement of those decisions. Courts or tribunals will likely see themselves as having a critical position in ensuring that the balance of interests agreed in the UNCLOS is not jeopardized by the national strategies or priorities of any one state party.

Keyuan Zou (Chapter 10) analyses the legal issues arising from state practice in the implementation of the UNCLOS, particularly relating to the practice in east Asia concerning maritime dispute settlement. He discusses the general legal framework including the UNCLOS, and how states in East Asia solve their disputes in a peaceful manner. Unlike Europe or America, the Asian cultures are quite divergent. Such divergence has different impacts on the attitudes and policies of Asian countries towards the settlement of disputes. It may also be an obstacle to the regional integration of effective control of disputes as well as to the general acceptance of the international judicial bodies whose foundation was based essentially on western legal systems. The questions about 'the efficacy of future global initiatives that are perceived to be Western in origin and orientation, and how they can be amenable incorporated into the legal systems and cultures of non-Western countries'<sup>4</sup> should be timely and properly answered.

Bingbing Jia (Chapter 11) examines an issue of treaty interpretation arising from a moment's reflection on the dispute settlement mechanisms established in the UNCLOS. Those mechanisms, with primarily the International Tribunal for the Law of the Sea and Arbitral Tribunals established under Annex VII of the Convention making waves in recent times, are designed solely to deal with disputes concerning the interpretation or application of the Convention. Any dispute that may eventually seize those mechanisms for solution will be primarily related to treaty interpretation. Besides, while hugely important, the UNCLOS does not provide for all matters in the oceans. Professor Jia tries to investigate

<sup>4</sup> See Douglas M. Johnston, 'Environmental Law as "Sacred Text": Western Values and Southeast Asian Prospects', in Douglas M. Johnston and Gerry Ferguson (eds.), *Asia-Pacific Legal Development* (Vancouver: UBC Press, 1998), at 416.

what should be done in interpreting the UNCLOS, if it is silent on matters indispensable for proper interpretation of some of its rules.

Jiangyu Wang (Chapter 12) takes up the South China Sea arbitration case between China and the Philippines concerning maritime entitlements in the South China Sea. The relevant arbitral tribunal ruled in favor of the Philippines, first on jurisdiction and admissibility issues in October 2015, and finally on the merits in July 2016. China has not only refused to accept the tribunal's jurisdiction but also vigorously attacked the validity and legality of the final award. China's handling of this case has several implications for its approach to international dispute settlement. The South China Sea Arbitration may have given China two takeaways: the appreciation of the importance of using international law and the understanding that foreign countries – led by the United States – again are using international law as a disguise to violate China's sovereignty. A combination of these two factors will strengthen the prevailing attitude of treating international law as a tool to protect China's national interest, rather than a serious belief in international rule of law.

This edited volume is an outcome of an international conference held in October 2016 to commemorate the 10th anniversary of the Silk Road Institute for International and Comparative Law (SRIICL) at the School of Law of Xi'an Jiaotong University. As can be seen from the preceding chapters, it might well be the case that no 'one size fits all' dispute settlement mechanism may be found for all transactions under the BRI, as rightly pointed out by Crawford. However, this does not prevent states along the BRI countries to consider creating new or adapting old mechanisms to better fit their needs of dispute settlement. As this book goes to press, China has already set up two new courts (in Xi'an and Shenzhen respectively) devoted to commercial disputes arising out of international transactions particularly along the BRI countries. The courts, which intend to provide an 'integrated dispute resolution (IDR) mechanism by closely cooperating with arbitration and conciliation institutions,<sup>5</sup> have already settled a number of cases.<sup>6</sup> Clearly law is playing an increasingly important role in the BRI implementation, and it is natural to start with procedural rules and mechanisms. This book is certainly not the end but the beginning of the discussions on BRI dispute settlement.

<sup>5</sup> Wenhua Shan, IDR – The Chinese Solution for International Commercial Dispute Settlement (in Chinese), *Legal Daily*, 13 November 2018.

<sup>6</sup> Qiao Wenxin, The First International Commercial Court of the Supreme People's Court effectively concluded the first five cases, *People's Court Daily*, 30 December 2019.

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