Book Review

China & WTO Rev. 2020:2; 425-432
http://dx.doi.org/10.14330/cwr.2020.6.2.10
pISSN 2383-8221 • eISSN 2384-4388

CWR
China and WTO Review

A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?

Giuseppe Martinico & Xueyan WU (Eds.)
(London: Palgrave, 2020), 336 pages.
ISBN: 978-3030459994

Jizeng Fan*

No international project supported by the Chinese government is able to compete with the Belt and Road Initiative (BRI). The Chinese government claims that BRI brings prosperity along the ancient Silk Roads, both on land and at sea. Moreover, many undeveloped or developing economies beyond the Silk Road region have got involved in the Initiative. Many Western observers regard the Initiative as a political strategy challenging the established global order on the basis of liberal ideologies. The book "A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?" provides the relevant scholars a chance to rethink the multifaceted role that the Chinese government has played from a perspective of the international rule of law. Having regarded that the book "aims to overcome the divides, taking into consideration the different Eastern (Chinese) and Western perspective,"[1] it would be appropriate to group all the contributors into two camps- Chinese and European Scholars - as both of them may have different concerns relating to BRI.

Qingjiang KONG and Ming DU argue that the "leadership vacuum," caused by President Trump's retreat from actively shaping the global order, coincides with China rising to be the second-largest economy. However, Chinese competitiveness is fragile because the developed economies are still weak in recovery even the emerging ASEAN market poses a potential challenge to the Chinese labor-intensive

* Associate Professor of Sichuan University, China. The reviewer may be contacted at: qqhmxm@gmail.com.

industries. Thus, in the BRI there are fundamental implications for "eas[ing] the entry of Chinese goods and into the regional markets, helping make use of China's enormous industrial overcapacity, thus offsetting the effects of a falling investment rate and rising overcapacity at home" and "sustaining its economy through the access to the Central Asian energy."[2]

However, KONG and DU warn that the marginal benefits to the other BRI participants might put the cooperation into deadlock. One of the effective courses of promoting economic growth has to be the expansion of the amount of outward foreign investment (OFDI) into these countries. Xueyan WU and Wenge ZENG touch on this issue. Wu focuses on the Chinese legal institution concerning the political risk insurance. Despite the fact that the China Export and Credit Insurance Company (SINOSURE) has launched political risk insurance for overseas investment, its lack of legislative support may "cause the problem as loss of stability and predictability." This sort of institutional deficit inhibits the "enthusiasm of investors for purchasing the insurance and restricts the developments of the investment insurance business."[3] Moreover, private enterprises are not granted the equivalent position as those State-owned enterprises in their access to political risk insurance. Regarding these flaws, she even suggests private insurance corporations be licensed and involved in this business by national legislation. On the contrary, ZENG formally examines the Chinese OFDI operations from legal and regulatory perspectives. His chapter articulately show the varieties of Chinese legal and institutional reforms encouraging outward foreign investment. Apart from these achievements, he reminds us many institutional problems hindering the willingness of Chinese enterprise to work with BRI countries.[4]

Yongmei CHEN and Hunchui LIU discuss the rule of law construction influencing on the BRI project. Chen illustrates a dialectic relationship between development of the Maritime Silk Road and implementation of FTA requirements. Providing financial and technical support for infrastructure construction is deemed to be a precondition for those states effectively implementing FTA requirements. Bearing this in mind, he argues the "rule of law construction" is a critical instrument for realizing the purpose of BRI and implementing FTA requirements. Actually, China has devoted time to legislative amendments and policy reforms committed to the freedom of transit, fees and formality connected to importation and exportation, and publication of trade regulations under the FTA

framework. He suggests that the bilateral relationship between China and other BRI participants should be strengthened by economic cooperation combined with China's unilateral extension to its pilot program of free trade zone.[5] LIU seems interested in how the mediation mechanism can flexibly solve the dispute between China and other participants along the BRI. Though LIU acknowledges the mediational institution is rooted in ancient Confucianism, he conducts comparative research on the rules and operation of mediation practice among Italy, India, Singapore and China. However, this comparative research has little influence on his conclusion where he proposes that China should be the designer of the BRI mediation rules.[6]

Xiaoling TAN and Shisong JIANG contribute towards the protection of intellectual property rights and the role of cities in the global governance. TAN has noted that recent global and regional agreement intensified the protection of the IP rights, while China's authority has been concerned with this issue far more than before. However, TAN casts doubt on the effective protection of IP rights among these BRI countries as more than 20 are not WTO members. Even if some countries have the relevant legal protection, few of the IP owners or professional enterprises have engaged in this field in those countries. Taking the fact that many developing countries' voices have not been heard by the IP law-makers from the developed countries, Tan suggests that China can strategically apply the relatively loose measure for IP rights protection, because this strategy would be able to maintain Chinese interest in innovative enterprise, alongside attempts to make those less developed countries' voices heard.[7] JIANG's essay tells a story of a past, present and future relationship between China and international law. He argues that China's role has transferred from a "humiliated" international lawtaker to an international lawmaker in the US led-regime. However, China is not able to be a new powerhouse unless it could propose a highly-impact innovative legal discourse in compliance with the contemporary Chinese ideology. Therefore, he proposes that the idea of transnational cities' alliance and network might be used in combatting the old state-centered fashion, as a new way of providing opportunities and diminishing the inequality and unrepresentativeness generated by international politics.[8]

In contrast, European scholars place high interest on the prospect of whether the Chinese government would sincerely respect the rule of law and human rights

in its engagement in transnational governance. Lorenzo Zucca compares the two conceptual models of global orders. The orthodox one is founded by the liberal constitutionalism, whereas the alternative one is shaped by China's terms of "non-moralizing" but "economic collaboration centric." The current Sino-American trade war lies in the inevitable clash of two models. Being a member of the WTO does not change China into a democratic state.

The progress of the totalitarian regime in the economy correspondingly undermines the controlling American power in both national and international affairs. Zucca proposes three solutions to break the ice. The first two seem too negative to be accepted in the sense that neither terminating cooperation nor abandoning international commitments satisfy the interests of the US. Thus, reforms of existing situations might unlock the deadlock. Considering the remote possibility of China or the US curbing their ambitions in competing for global hegemony, Zucca suggests that "the only option… is to involve all the participants to maintain and possibly reform the existing institutions."[9]

Ernst-Ulrich Petersmann and Henrik Andersen discuss the factors of rule of law and fundamental rights protection in the BRI cooperation. Regarding the fact that "there are no signs of 'communist state party state"' accepting constitutionalism and legal decentralization as reasonable self-restraint protection citizens against abuse of political power" and many important multilateral treaties concerning human rights protection and dispute settlement jurisdiction "have not been accepted by China," Petersmann concludes that China-initiated BRI is nothing more than a project exclusively driven by the Chinese government's interests. Rather than a complete refusal to engage in the BRI cooperation with China, Petersmann suggests that rivalry between China's state capitalism and European ordo-liberalism could be resolved at best through a multilateral, rules-based legal and dispute settlement system.[10] Andersen anatomizes the elements and contents of the rule of law. In contrast with the Chinese instrumentalist notion presented in CHEN's essay above, Andersen extracts the minimum consensus from the Hayek, Rawls and Raz theories, concluding that legal certainty, transparency, predictability, access to justice and equality are necessities for the definition of the rule of law. He borrows Hayek's argument on the promotion of the rule of law having a positive relationship on economic development, particularly in the aspect of reducing transaction costs and enhancing the predictability of economic

activities. Moreover, it is one of the basic principles commonly embedded in the international legal order. On these grounds, Andersen asserts China and other participant states have enormous benefits in promoting the rule of law and human rights. Thus, he maintains the BRI disputes should be resolved under the established international courts at best.[11]

Giuseppe Martinico focuses on the role international soft law plays in the BRI. Relying on a pragmatic view, he explains that China's preference for international soft law, for example, MoU as a specific BRI bilateral agreement, may attribute to the voluntary, less formal and flexible nature of the BRI project. Although both normative and institutional flexibility might "provide BRI with adaptiveness and pragmatism," Martinico points out that transparency and unambiguity are two crucial requirements of safeguarding for the BRI.[12] Last but not least, Imad Antoine Ibrahim presents her empirical study on the subject of transnational freshwater disputes settlement among China and Central Asia. Because of the vague provisions and insufficient enforcing mechanism embodied in the international water law, combined with China's refusal to accede to the relevant international treaties, diplomatic negotiation would be an appropriate way to solve the water disputes. Regarding the successful negotiation between China and Kazakhstan and the complex situation of freshwater resource allocation in Central Asia, Ibrahim advocates China's active and responsible involvement in the fair management of shared resource.[13]

Because of the absence of a conclusive chapter in this book, I would like to briefly present my critical views. Honestly, BRI fits well with China's political goal of pushing its illiberal governance model towards those underdeveloped and semi or undemocratic economies and with the economic goals of exporting Chinese goods and labor force towards BRI participants. Even the huge Chinese investments are not gifts but loans. However, these basic facts have been ignored by almost all Chinese scholars. Most of their essays are no more than a formal descriptions of the Chinese legal developments adapting to the international standard and the current legal deficiencies that we need to overcome; some may even provide their suggestions in order to perfect the BRI. They are actually too much concerned with the Chinese interest in the BRI cooperation. Moreover, some Chinese propose a "top-design" method in a BRI legal institution where China is the designer of the institutions or the leader of those undeveloped countries

fighting against the developed economies. In this context, other BRI participants are destined to be powerless followers. I am sure many western observers are confused as to whether a "China on top" ideology is equal to neo-imperialism where all the participatory states must follow Chinese rules, rather than those having equal rights on the BRI cooperation.

Nearly all European scholars focus on the issues of the rule of law and human rights protection. Petersmann and Zucca correctly show that a state regime whose constitution is not embedded in the principles of check-and-balance or liberal democracy would strive for an alternative global order stabilizing those with undemocratic rule. The liberal notions of the rule of law and human rights protection are definitely excluded from the alternative global order in accordance with Chinese political goals. Neither would they like to be subjected to a transnational court jurisdiction as China is less able to take advantage of its political power than it could do in the bilateral negotiation. Thus, Andersen's proposal on the dispute resolution between China and other BRI participants before the established international tribunals or Petersmann's hopes for resolving the dispute under a rule-based multilevel fundamental rights system, would be wishful thinking.

References

1. Giuseppe Martinico & Xueyan Wu, *The Belt and Road Initiative: A Legal Analysis-An Introduction*, *in* A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road? 2 (G. Martinico & X. WU eds., 2020).
2. Qingjiang KONG and Ming DU, *Is the 'Belt and Road' Initiative the Chinese Vision of Global Governance*, *id*. at 18.
3. Xueyan WU, *China's Political Risk Insurance for Outward FDI within the Content of Belt and Road Initiative*, *id*. at 191.
4. Wenge ZENG, *An Analysis of the Legal Issues of China's Overseas Investment in the Context of the 'Belt and Road' Initiative*, *id*. at 212-7.
5. Yong Mei CHEN, *The Construction of the Rule of Law of OBOR through Implementation of TFA*, *id*. at 97-100.
6. Huichun LIU, *Construction of the International Commercial Mediation Mechanism under BRI: A Comparative Study Perspective*, *id*. at 272-7.

7. Xiaoling TAN, *On China's Strategy in Belt and Road International Intellectual Property Cooperation*, *id*. at 181-2.
8. Shisong Jiang, *Marching to an International Law Powerhouse through Cities: An Ideational Reflection on China's 'Belt and Road' Initiative*, *id*. at 243.
9. L. Zucca, *Two Conceptions of Global Order*, *id*. at 38.
10. E.-U. Petersmann, *International Settlement of Trade and Investment Disputes over Chinese 'Silk Road Projects' inside the European Union*, *id*. at 66.
11. H. Andersen, *Rule of Law Gaps and the Chinese Belt and Road Initiative: Legal Certainty for International Business*, *id*. at 126-7.
12. G. Martinico, *Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative*, *id*. at 142.
13. I. Ibrahim, *The Importance of International Water Law to the Successful Implementation of the Belt and Road Initiative: Evidence from Central Asia*, *id*. at 163.