

The Belt and Road Initiative at the Crossroads

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This special Issue of the *Global Trade and Customs Journal* showcases a wide range of scholarly contributions to one of the most ambitious projects of the twenty-first century.¹ In 2013, the Chinese Government launched the One Belt One Road Initiative (OBOR), now referred to as the Belt and Road Initiative (BRI); a highly ambitious infrastructure project that aims to link China physically and financially to Asia, Europe, Africa, and Oceania. It covers 30% of global gross domestic product (GDP), 62% of the population, and 75% of known energy reserves,² offering a trading route, which has a potential to be the world's largest platform for regional collaboration. It has opened a new market to China and certainly spurs the economy in general. The initiative aims to establish and develop trading partners for the future through connectivity and infrastructure, where trade continues to be a driving force. Many countries have shown interest in joining the initiative because it will strengthen their financial capacity and connections with China and other regions. It is also true that the importance of the initiative is not only from a trade or an investment point of view, but also from the foreign and economic policy perspective: it is of geopolitical interest.

During the first few years after the launch of the BRI, countries, in particular, the United States (US) and the European Union (EU), developed a narrative that the BRI was aimed to diversify China's trading partners to address its production capacity or even to create a

dumping ground for Chinese products. They did not immediately recognize nor respond to the significance of the BRI. Meanwhile, China has quietly built a strategic plan to strengthen ties with countries at the individual level through aid, bilateral cooperation, and offers of friendship to earn collective support for the BRI. The success is evident from the initiative's increasing membership. 2016 saw a watershed moment when largely unexpected events occurred, i.e. Brexit, followed by the change in the US leadership. Apart from these two events, the rise of mega-regional trade and investment agreements, a new outlet for the multilateral trading system have shown the importance of trade diplomacy and the need for international investment. Mega-regional trade will grow through connectivity. Until recently, key international financial institutions (IFI), such as the World Bank³ and the Asian Development Bank, have shown interest in and have provided technical assistance to China⁴ on the BRI.

These cumulative events, along with the rise of China as a global economic power, may have forced the US and EU to respond to the BRI. The US aims to invest in developing countries through recent legislation entitled, 'Better Utilization of Investments Leading to Development Act of 2018' or, the BUILD Act of 2018,⁵ is yet to be signed by the President. The law would establish 'the United States International Development Finance Corporation' (IDFC) to facilitate the participation of private sector capital and skills

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¹ Some considered the BRI as a Chinese Marshall plan of the twenty-first century. However, China has denied BRI to be a Marshall Plan. See 'Beijing insists BRI is no Marshall plan' (*Financial Times* 25 Sept. 2018), <https://www.ft.com/content/48f21df8-9c9b-11e8-88de-49c908b1f264> (accessed 18 Feb. 2019).

² The World Bank Group, *Belt and Road Initiative* (18 Feb. 2019), <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative> (accessed 18 Feb. 2019).

³ See The World Bank, *Belt and Road Initiative*, <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative> (accessed 18 Feb. 2019); Priyanka Kher & Trang Tran, *Investment Protection Along the Belt and Road* (Discussion Paper, MTY Global Practice No 12 Jan. 2019), <http://documents.worldbank.org/curated/en/373561548341008857/Investment-Protection-Along-the-Belt-and-Road> (accessed 18 Feb. 2019); Constantinescu, Ileana Cristina et al. *How Old Is the Belt and Road Initiative?: Long Term Patterns of Chinese Exports to BRI Economies* (MTI Practice Notes Dec. 2018), <http://documents.worldbank.org/curated/en/984921545241288569/How-Old-is-the-Belt-and-Road-Initiative-Long-Term-Patterns-of-Chinese-Exports-to-BRI-Economies> (accessed 18 Feb. 2019); Paul Bastos, *Exposure of Belt and Road Economies to China Trade Shocks* (World Bank Group, Policy Research Working Paper 8503 June 2018).

⁴ See Asian Development Bank, *People's Republic of China: Study of the Belt and Road Initiative* (ADB Technical Assistance Report, Project Number: 50141-001 June 2016), <https://www.adb.org/sites/default/files/project-document/188686/50141-001-tar.pdf> (accessed 18 Feb. 2019).

⁵ See Better Utilization of Investments Leading to Development Act of 2018 or the BUILD Act of 2018. <https://www.congress.gov/bill/115th-congress/senate-bill/2463> (accessed 15 Feb. 2019).

in the economic development of countries with low-or-lower middle-income economies, and countries transitioning from nonmarket to market economies to complement US assistance and foreign policy objectives'.⁶ Furthermore, the IDFC would be authorized to issue loans and loan guarantees, provide technical assistance among other measures. By increasing the lending capacity, the US gives the impression that the US is offering an alternative to BRI to address the funding gap for infrastructure development in developing countries. The EU is not far behind. Last year the European Commission initiated the study on EU-Asia Connectivity titled, 'Elements for an EU Strategy on Connecting Europe and Asia'.⁷ The aim of the study is to understand all modes of transport links, as well as digital and energy links in the Euro-Asian area. Moreover, the concept note of the initiative aims to achieve: (i) enhanced governance for Euro-Asia connectivity; (ii) better availability and sustainability of finance; (iii) better market access and economic opportunity for European businesses; (iv) increased people-to-people activities, among others.⁸ In a nutshell, the EU initiative seems to be a vision of Europe to enhance better connectivity with Asia in the wake of the BRI.

One would be hard-pressed to precisely explain the BRI, accounting for its unstated membership, funding, geopolitics, and other aspects. However, the common and most pertinent question which academia, governments, development partners, and stakeholders are aiming to identify is what exactly BRI means to regional and international economic cooperation: is it a new model for regional and international economic cooperation? In addition, there is ongoing speculation of the aim, geopolitics, and ultimately the success of the BRI. Similarly, there are concerns over the funding of the initiative, in particular, the world's newest publicly-financed international financial institution, the Asian Infrastructure Investment Bank (AIIB), and its role in the BRI along with its commitment to the Sustainable Development Goals while implementing BRI related projects.⁹

This special Issue may not address all the concerns, but the authors included here explore many of the contemporary BRI topics, using their expertise, interest, and enthusiasm. Against this backdrop, let me introduce the authors and their contributions:

Kishor Uprety provides a general overview of the BRI and enlightens readers on how BRI architecture combines both a legal and a political framework. Similarly, he itemizes the five goals of the BRI: (i) policy coordination; (ii) facilities connectivity (iii) unimpeded trade (iv) financial connectivity (v) people-to-people bonding. These

goals are further elaborated in detail in the analysis. Despite of the presence of different players, broad goals, and a complex geopolitical setting, Uprety finds that there are primarily two motives behind the BRI. First, China's 'two centenary goals' of turning China into 'a moderately prosperous society' by 2021, requiring a doubling of the 2010 GDP per capita and second, its goal of building 'a prosperous, strong, democratic, culturally advanced, harmonious and modern socialist country' by 2049. Uprety pinpoints some of the legal and technical challenges, including managing the legal risks arising out of cross-border operations, contracting models, choice of law and dispute settlement, fundability, currency, etc. Finally, Uprety briefly touches on the role of IFI such as the World Bank, the Asian Development Bank, and the Asian Infrastructure Investment Bank.

Liao Li's contribution offers the reasons for, and challenges of, the BRI. Li highlights the rise of BRI in the backdrop of anti-globalization, and the rise of China as a global economic power. Moreover, Li describes some of the potential legal challenges which BRI might face, such as the past maritime disputes between China and the Association of Southeast Asian Nations (ASEAN), as well as the overlapping and conflicting issues arising in the bilateral and multilateral treaties to which China is a party, relative to the partners or potential partners of the BRI. As Li reminds us, by 2019, China has already signed 170 cooperation documents with 122 countries and twenty-nine international organizations to build the BRI, and has signed BITs with fifty-six member countries of the BRI. Thus, potential friction may arise, which is highlighted in Li's contribution. Li also discusses the existing international dispute settlement mechanism, and sheds light on the idea of having a new diversified dispute settlement mechanism. In the end, Li describes some important legal safeguards in the BRI, in particular, the use of international law principles, including the principles set out in the UN Charter, and others to ensure that the BRI achieves its goal of economic development while maintaining the rule of law.

Jiangyu Wang's contribution draws Chinese governance approaches to the BRI. He provides an analysis of China's government-to-government approach through examining the Visions and Actions, and Plans insulated in Memorandum of understanding (MOU), which China has signed with BRI partners. In doing so, Wang finds that Chinese approach more informal and less institutional which he refers to as 'partnership-based-relational approach'. He examines and compares the MOU signed with the

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⁶ *Infra*.

⁷ Joint Communication, *Elements for an EU Strategy on connecting Europe and Asia* (European Commission), https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-698599_sv (accessed 20 Feb. 2019).

⁸ *Ibid.*, *Road Map*.

⁹ There is some ongoing research on AIIB and its impacts on infrastructure development. For instance, SciencesPo Law School Clinic is currently working with graduate students on a project titled, 'Assessing the economic and social rights impacts of the Asian Infrastructure Investment Bank (AIIB)'s first investments in urban development.' See Sciences Po Law School Clinic, under the leadership of Professor Jeremy Perelman, <https://www.sciencespo.fr/ecole-de-droit/en/content/clinic> (accessed 19 Feb. 2019).

Philippines and New Zealand to identify similarities and differences between MoUs. After comparing these agreements, Wang concludes that China has adopted two models in BRI cooperation. As Wang points out that China-Philippines MOU reflects China's BRI cooperation with a developing country and the China-New Zealand MOA reflects cooperation with a developed country. To illustrate this, he gives an example that China-Philippines MOU is more development oriented offering assistance to the Philippines' development, whereas, China-New Zealand MOA stress the private sector and market economy. In the end, Wang comes to an opinion that the BRI cannot be framed through the lenses of conventional geopolitical strategy.

Shuang Liang presents the public-private partnership (PPP) as a useful model for infrastructure construction in the BRI. Liang shares with us the past success of a PPP project, namely the Cambodian Gan Then Hydropower Station; this supports the view that PPP projects will be able to achieve great success within the BRI platform. Liang suggests us that the Build, Operate, and Transfer (BOT) framework used in PPP model could ensure the sovereignty of the host country, and coordinate the interests of all parties in the BRI. Liang also does not hesitate to provide insights on failed PPP projects under the BRI and provides different legal tools which will enhance legal cooperation under the BRI.

M. Bart Kasteleijn discusses the practical insight of legal and economic aspect of China's related investment into Europe, and in particular through the Netherlands. Kasteleijn examine the trade and investment flow between China and the EU and its Member State through economic data.

Peter K. Yu examines China's growing assertiveness in the international arena and how the BRI will have an impact in the field of intellectual property. In the first part, Yu provides an excellent narrative of China's assertiveness at both regional and global levels. He further elaborates on the change in China's approach from one of so-called 'hide our strength and bide our time,' to one showing its strength in through the Regional Comprehensive Economic Partnership (RCEP), and the establishment of AIIB, and the New Development Bank. Followed by China's growing intellectual property regime and its proactive role could help China take on a role of greater leadership in the intellectual property regime. Yu then explores six areas in which the BRI can play a constructive role in facilitating international and regional cooperation. Finally, Yu addresses three oft-repeated questions regarding the BRI and analyses how the BRI may disrupt existing multilateral and regional institutions, if not alter or supplement them. In addition, answering the sceptics of scholarship, which portrays BRI as a tool of export enhancement or even the use of BRI to transplant China's trade and IP standards to other countries, based on his review of China's approach

on recent trade and investment negotiations, Yu is not convinced.

Bryan Mercurio and Dini Sejko's contribution is timely and relevant to understand the legal risk related to BRI investments. In the first part, Mercurio and Sejko capture the investment climate in BRI countries and identify the legal risks of the different legal systems. Further, the authors analyse different dispute settlement clauses which China has in its investment agreements with BRI member countries and offers lessons for BRI investors through investor-state dispute settlement (ISDS) cases. Finally, the authors provide strategies and solutions China and investors might find helpful to mitigate or eliminate risks.

Tejeswini Nath Bhattarai and I have explored the BRI through the lens of Least Developed Countries (LDCs). We found that around the globe many countries, especially the least developed ones, face significant development funding gaps and a pressing need for infrastructure development. Further, we looked at the funding consideration under the BRI and analysed financial architecture under the BRI, particularly Chinese Policy Banks and New Multilateral Development Banks, among others. We then examine possible implications for LDCs and developing countries and, in particular, we highlight the issue of debt sustainability, geopolitics, among other issues. We took Nepal, which is an LDC and lies in between India and China, two global players, to understand the geopolitics of the BRI. Finally, we argue that LDCs and other developing countries could play a proactive role in building bridges between BRI stakeholders and other multilateral and bilateral development partners by bringing both parties together in infrastructure projects in their countries.

Finally, a few words to people who are behind this amazing project. This special Issue would not have been possible without the confidence, patience, support that Jeffrey L. Snyder, General Editor of the *Global Trade and Customs Journal*, and Kluwer Law International has shown to me. Thank you, Jeff! Also, I am grateful to Professor Régis Bismuth at Sciences Po Law School for his unconditional support and valuable advice and suggestions. And a special mention to Sarah Dahl, who assisted me in the project. Thank you, Sarah!

A final thought, as I read somewhere that 'every great dream begins with a dreamer,' and there is no magic to make it successful. China is working towards the achievement of its dream through the BRI. In pursuit of the objective, there are and will be challenges to the BRI, which may require an inclusive solution. Including, not rejecting, the needs of partners will strengthen the initiative. Therefore, may this special Issue support the view that China should be open-minded, accept the needs of partners, respect their sovereignty, advance the rule of law, promote sustainable development, respect human rights and of course, act in the spirit of global friendship.

Enjoy this special Issue!