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**THE BELT AND ROAD INITIATIVE: LAGGING BEHIND IN
ESTABLISHING A COMPREHENSIVE LEGAL FRAMEWORK
FOR THE PROJECT**

Bachelor's thesis

Programme Law, specialization International Relations

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Tallinn 2021

I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is 11985 words from the introduction to the end of conclusion.

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ABSTRACT

The thesis examines whether the current legal framework of the Belt and Road Initiative (BRI) provides an adequate presupposition for the global expansion of the project. The BRI is a highly complex myriad of agreements with governments, businesses, and international organizations. However, these agreements may not be coherent as they are addressing highly diverse subject matters. Furthermore, there is an issue of multiple jurisdictions and the BRI crossing different segments of international law. All these aspects make the notions of transparency, legalization and structural predictability of the BRI having to adopt excessively complicated forms. Additionally, there is a suggestion, debatable though, that China's actions in the framework of the grand project's implementation have already breached multiple international laws, and this factor has speculatively hindered the eagerness of other international actors to become a part of it. The alleged presumption of the BRI in relative negligence in regards of human rights is possibly in severe contradiction with the international legislation protecting human rights. An initiative of such a geo-strategic influence has to be 'friendly' when it comes to complying with the rules of the international framework on human rights. The BRI participants have to give consideration to the economic growth that the global project would entail and, on the other hand, to international laws and standards. Consequently, there is a likelihood that the BRI's lack of providing a harmonized legal framework for the infrastructure project is likely to cause challenges to the enforcement of the grand-initiative as well as the entire international system.

Keywords: The Belt and Road Initiative, legal framework, globalization, dispute settlement, financing, debt sustainability, international investment law, human rights, environmental law

ABBREVIATIONS

AIIB – Asian Infrastructure Investment Bank
BIT – Bilateral investment treaty
BOT – Build-Operate-Transfer
BRI – Belt and Road Initiative
CAI – EU-China Comprehensive Agreement on Investment
CCP – Chinese Communist Party
CICC – China’s International Commercial Court
CIETAC – China International Economic and Trade Arbitration Commission
CJEU – EU Court of Justice
ECHR – European Court of Human Rights
EUCFR – European Charter of Fundamental Rights
FTA – Free trade agreement
GDP – Gross Domestic Product
ICESCR – International Covenant on Economic, Social, and Cultural Rights
ICSID – International Center for the Settlement of Investment Disputes
IIA – International Invest Agreement
ILO – International Labour Organization
IMF – International Monetary Fund
MNC – Western multinational corporation
MOU – Memorandum of Understanding
OBOR – One Belt One Road
OFDI – Outward Foreign Direct Investment
PPP – Public-private partnership
PRC – People’s Republic of China
RCEP – Regional Comprehensive Economic Partnership
SOE – State-Owned Enterprises
TEU – Treaty on European Union
TRIPS – Trade-Related Intellectual Property Rights
TTIP – Transatlantic Trade and Investment Partnership
WIPO – World Intellectual Property Organization

INTRODUCTION

At the end of 2013, Chinese President Xi Jinping announced the Chinese Belt and Road Initiative (BRI), also known as the One Belt One Road (OBOR), which is an inclusive global project of geostrategic significance covering subregions in Europe, Asia, and Africa. The BRI covers, depending on a calculation method, roughly over 70 countries, about 65 per cent of the world's population, and around one-third of the world's Gross Domestic Product (GDP).¹ The BRI's broad scope has a significant influence on economic, strategic, and cultural connections.² The project has already become a policy-shaping factor in various states. The emergence of China as the world's leading trading nation and as the forthcoming world's largest economy, as well as the launch of the BRI aiming to strengthen trade, investment, and infrastructure cooperation, are historical turning points in shaping the legal, economic and political cooperation between East and the West.³

Objectively, if the BRI turns out to be successful, it could generate significant opportunities for a China-designed world economy and develop the current economic system, consequently contributing to world economic growth. However, as Huang illustrates, the management of several risk factors coming along with the initiative will determine the initiative's success or failure.⁴ Martinico and Wu argue that the BRI is primarily motivated by Chinese domestic policy goals, such as improving access to resources and export markets.⁵ According to Martinico and Wu, the BRI governance has arisen substantial critique, among other things, for lack of reciprocity and of respect for competition, transparency, environmental, labour, and human rights standards which the Chinese State-Owned Enterprises (SOEs) represent.⁶ Therefore, it is essential to research whether the BRI's legal foundation is comprehensive enough at a global level to satisfy each party of the extensive project, how the BRI's legal foundation functions or does it function at all, and

¹ OECD. (2018). *China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape*. OECD Business and Finance Outlook, p. 9.

² *Ibid.*, p. 10.

³ Martinico, G., & Wu, X. (2020). *A Legal Analysis of the Belt and Road Initiative*. Switzerland: Springer Nature, p. 46.

⁴ Huang, Y. (2016). Understanding China's Belt & Road Initiative: Motivation, framework and assessment. In *China Economic Review*. Beijing: Elsevier, 314-321, p. 320.

⁵ Martinico & Wu, 2020, *supra* nota 6, p. 47.

⁶ *Ibid.*, p. 53.

whether or not the BRI takes everything crucial into account. In addition, it is relevant to examine how does the BRI comply with prevailing international legislation and treaties. The paper will discuss the BRI's political, social, and economic dimensions affecting the various countries engaging in the project and determine their legal vestige.

Since the BRI passes through numerous countries, the project inevitably confronts some legal disputes between states. The legal traditions in Asia differ significantly from democratic constitutionalism and republican constitutionalism, which are the major national and European legal systems in the EU countries. The various different legal cultures risk provoking conflicts between the parties.⁷ It is relevant to examine how navigating between different legal and regulatory systems is going to function. Additionally, the BRI raises traditional and non-traditional security threats that should be researched from a legal perspective. Labour of the BRI projects is a central concern since it prevails in both field practice and financial institutions established under the initiative. Chinese firms financing and performing the BRI projects have been facing increasing claims of questionable labour practices, possibly not complying with the international human rights law. The states' obligation for the protection of human rights in the context of business activities is controversial.⁸ As human rights are universally protected in various different treaties and are extensive in scope, they influence the BRI countries and should be considered in the infrastructure building. Therefore, it is crucial to determine whether the BRI framework supports the international legal framework on human rights.

The BRI requires significant investments since the extensive infrastructure is prospectively to be built. The massive loans have raised questions since the BRI investments can be seen as a so-called 'debt trap' and furthermore as China's tool to increase its geostrategic power, which consequently promotes low economic efficiency globally. Countries including Sri Lanka, Laos, Pakistan, and Cambodia are already drowning in Chinese debt and fearing Chinese political and military domination. According to Chong and Pham, China's goals of the BRI investments are self-centric. Therefore economic gains may overshadow the welfare and safety of the local population in the host country. If the initiative is not respecting the local community and environment, the long-term implications are likely to be adverse to all participants.⁹

⁷ Martinico & Wu (2020), *supra* nota 6, p. 49.

⁸ Chong, A., & Pham, Q. M. (2020). *Critical Reflections on China's Belt & Road Initiative*. Singapore: Springer Nature, p. 160.

⁹ *Ibid.*, p. 197.

It could be argued that China has not yet visualized a legal framework covering the BRI's implementation and socio-politico-economic risks associated with the project. This argument is to be tested in the paper. For the field of legal studies as well as international relations, it is essential to study if there are, for example, legal deficiencies in China's overseas investment protection, currently depending on the regulatory framework of China for Outward Foreign Direct Investment (OFDI). Moreover, how loans will affect developing countries and whether the project follows international investment treaties and legislation. The legitimacy of economic, financial, and investment cooperation in implementing BRI projects depends on rules-based legal frameworks. The paper ascertains how the local and international legislation complies with global initiatives. Building the economic 'belt' and corridors would promote the movement of goods, people, services, and capital, supporting regional trade and economic development. Consequently, the successful implementation of the BRI requires a suitable legal framework that learns from present institutional frameworks and improves from them.¹⁰

The thesis outlines the political, economic, and social dimensions of the BRI and their legal traces, including analysis of the dispute settlement mechanisms, transparency of the initiative, and infrastructure financing. Following with the evaluation of how the initiative complies with international treaties and legislation. Such as, does the initiative respect principles set in the international human rights law, environmental law, and international investment laws. Methods to conduct the research combine legal discourse analysis to examine the relationship between the BRI and the international legal framework, and to what extent does the BRI comply with it, furthermore, to ascertain whether the BRI must comply with international legislation to some extent in order to succeed. Additionally, legal discourse analysis is enforced to determine the divergence between international and Chinese legislation and how it possibly influences the implementation of the BRI. Statistical analysis is applied in the research to acknowledge the extensive scope of the project, particularly the economic dimension, including investigating the sustainability of the debt and investments necessary to perform the vast infrastructure projects along the BRI. To evaluate the possible risks progressing along the geopolitically significant project, including the possible lacks in the legal framework and particularly BRI's deficient compliance with the international legislation, the research will exploit historical analysis and test how the international actors have responded to China's actions in the past and since the BRI was

¹⁰ Wang, G. (2017). Legal Challenges to the Belt and Road Initiative. *Journal of International and Comparative Law*, 4 (2), 309-330, p. 312.

announced. Process tracing as a qualitative research methodology is established to investigate the causality between the BRI's possible lack in compliance with international legislation as well as the absence of a coherent legal framework with the insufficient enforcement of the project. Utilizing both primary and secondary literature for literature review. Primary literature, as in President Xi's speeches, government documents, as well as international legislation and treaties, will be applied to conduct the research. And secondary literature, including academic books and articles, are utilized in the implementation.

The hypothesis to be tested in the thesis is as follows: The Belt and Road Initiative lacks a competent legal foundation to be directly interlinked with the project, and there are inconsistencies in the current international legal framework.

1. THE BELT AND ROAD INITIATIVE IN ITS ENTIRETY

China's President Xi Jinping introduced the BRI during his visit to Kazakhstan in September 2013 and, respectively, a month later in Indonesia. President Xi's vision is to establish a new regional cooperation model through the ambitious infrastructure building program.¹¹ The BRI is China's most ambitious international economy and foreign policy initiative and arguably one of the most extensive development plans in modern history.¹² On land Xi's aim is to connect China's underdeveloped hinterland to Europe through Central Asia, which represents the Silk Road Economic Belt. On the 21st Century Maritime Silk Road, Xi aims to connect the Southeast Asian region to China's southern provinces with ports and railways.¹³ China's leaders have framed the main idea of the BRI as to promote regional economic development by creating mutually advantageous cooperation and joint prosperity, increasing trust, understanding, and strengthening communication within countries. The win-win cooperation intends to promote world peace and development.¹⁴ The BRI has four main principles: 1) openness and cooperation; 2) inclusiveness and harmony; 3) market-based operation; 4) mutual benefit.¹⁵ The BRI is an open and inclusive initiative, and, therefore, it does not exclude any parties from it, and there is no pre-defined countries or places. However, to be a part of the BRI, there has to be a commercial sense since China does not just grant international aid.¹⁶

Geographically the "Belt" refers to three general routes. The first one from China to Europe, through Central Asia and Russia using the Baltic Sea. The second route is from China to the Persian Gulf and the Mediterranean through West Asia and Central Asia. The third route is from China to the Indian Ocean through South Asia and Southeast Asia. And the "Road" refers to the maritime dimension of the initiative running from China's coastal ports through the South China Sea to the

¹¹ Xi Jinping, H. E. (2017, May 14). *Work Together to Build the Silk Road Economic Belt and The 21st Century Maritime Silk Road*. Xinhuanet. http://www.xinhuanet.com/english/2017-05/14/c_136282982.htm

¹² Cai, P. (2017). *Understanding China's Belt and Road Initiative*. Lowy Institute, p. 2.

¹³ Huang (2016), supra nota 6, p. 314.

¹⁴ Russel, D. R., & Berger, B. H. (2020). *Weaponizing the Belt and Road Initiative*. New York: The Asia Society Policy Institute, p. 7.

¹⁵ Huang (2016), supra nota 6, p. 318.

¹⁶ Liu, W., Zhang, Y., & Xiong, W. (2020). Financing the Belt and Road Initiative. *Eurasian Geography and Economics*, 61(2), 137-145, p. 138.

Indian Ocean, expanding to Europe and Africa, and from China's coastal ports through the South China Sea to the Pacific Ocean. The BRI infrastructure also includes devoted connections with six economic corridors: the China – Pakistan Economic Corridor; China, Mongolia, Russia Economic Corridor; New Eurasia Land Bridge Economic Corridor, also known as the Second Eurasia Land Bridge; China-Central and West Asia Economic Corridor; China-Indochina Peninsula Economic Corridor; and Bangladesh – China – India – Myanmar Economic Corridor.¹⁷ The BRI projects include a wide range of roads, railways, coal mines, solar power plants, wind farms, hydro dams, integrated space information networks, pipelines, coal-fired powerplants, shipping, aviation facilities, and ports.¹⁸

1.1. Political dimensions and their legal traces

The legal foundations in Asia contradict significantly from other countries which are presumed to participate in the BRI. For example, the European Charter of Fundamental Rights (EUCFR), assuring political, civil, social and economic, human and constitutional rights to EU citizens as multilevel, constitutional restraints on the legislative, executive and judicial powers of the EU institutions, is not by any means parallel to the legal system in the People's Republic of China (PRC). Chinese citizens do not have fundamental individual rights, guaranteeing them to invoke China's national constitution in Chinese courts. As Martinico and Wu illustrate, the Chinese Communist Party (CCP), as the ruling political party of modern China, does not recognize the basic principles of democratic constitutionalism, and therefore conflicts with the UN law and EU constitutional law and their adequate domestic protection within the EU member states. Basic democratic principles are, for example, independent, multilevel judicial protection of human and constitutional rights of citizens against abuses of legislative and executive powers. Conflicts among diverse national legal systems originate from the fact that China has not accepted any essential UN conventions, including civil, political, and labour rights or international dispute settlement jurisdictions ratified by EU member states. Additionally, the EU has given a proposal of creating multilateral investment court systems, which China has neither supported.¹⁹

China implements a non-treaty based approach to the BRI, promoting Chinese and the SOEs preferences, avoiding multilateral treaties and settling disputes by mediation or political

¹⁷ Huang (2016), supra nota 6, p. 318.

¹⁸ Boer, B. (2019). *Greening China's Belt and Road: Challenges for Environmental Law*. Sydney Law School.

¹⁹ Martinico & Wu (2020), supra nota 6, p. 50.

negotiations and arbitration proceedings inside China instead of international proceedings. As a result, there is no established BRI-wide treaty or any constituting treaty within all the BRI countries.²⁰ Moreover, China's standards and dispute settlement provisions in bilateral investment treaties do not follow a consistent pattern. Furthermore, the Chinese characteristics of a market economy differ fundamentally from the multilevel constitutional design existing in the EU. For instance, in China, the totalitarian control by the CCP over state bodies, other public bodies, such as thousands of SOEs, and private bodies pose a risk of domestic market distortions when not effectively limited by multilevel competition laws, policies and judicial remedies comparable to those inside the EU. Additionally, China's low wages strategy differs significantly from the UN's principles set by the International Labour Organization (ILO). China has ratified only 26, of which 20 are in force, of the 177 ILO's Conventions denying labour and trade union rights. For example, China has refused to ratify the ILO Conventions on freedom of association, forced labour, and the right to collective bargaining.²¹

The SOEs operate and finance numerous 'silk road projects' in European states and improve the Chinese 'Silk Road connections' with Europe with numerous other investments. However, BRI cooperation is not based on treaties since China desires to maintain legal flexibility and administrative discretion. Instead, the BRI cooperation within 17 Eastern, Central, and Southern European countries is coordinated through annual '17+1' Ministerial meetings and a secretariat in Beijing.²²

1.1.1. Dispute settlement

China's BRI projects are often based on bilateral, informal and state-centred practices, avoiding multilateral treaties and institutions, including international arbitration institutions. China has complied with the WTO dispute settlement procedures and is a part of the World Bank Agreement establishing the International Center for the Settlement of Investment Disputes (ICSID). Consequently, both dispute settlement procedures can be utilized in disputes linked to the BRI projects; however, China claims that the existing international dispute settlement mechanisms contain numerous defects to be utilized in BRI-related disputes. According to China's view, the

²⁰ Wang, H. (2019). *China's Approach to the Belt And Road Initiative*. *Journal of International Economic Law*, 22(1), p. 7.

²¹ Martinico & Wu (2020), *supra* nota 6, p. 51-52.

²² *Ibid.*, p. 49.

WTO and ICSID have an issue of lack of enforcement and are consequently time consuming and inefficient. From China's perspective, retaliatory measures in the international dispute settlement mechanisms are complicated to apply, even though WTO member states demonstrate favourable successful reports from the appellate bodies and the panels. Additionally, China considers that the ICSID may propose a risk of inconsistencies in treaty interpretation due to its isolated arbitration operations, and therefore, the interests of both home and host states may be altered.²³

The BRI is a significant infrastructure project with a large geopolitical influence; still, China is the predominant country as the source of investment. Therefore, the interests of China maintain fundamental in any dispute settlement mechanism emerging from the BRI. However, since China has a clear difference in interpreting certain concepts and provisions, an issue within other participating countries may emerge, and the counterparties interests may be threatened. For example, any contractual disputes between China and the EU may raise multiple legal issues. Under EU law, contractual disputes and jurisdiction over civil and commercial matters and the enforcement of the decisions of courts and arbitration within EU member states are regulated in the Brussels I Convention and the Lugano Convention. However, when a non-member state of the EU is involved in the dispute, national laws where the defendant is domiciled will govern.²⁴ Article 265 of the 2017 Chinese Civil Procedure Law provides a relatively similar approach.

Article 265 states that: “Where an action is instituted against a defendant without a domicile within the territory of the People's Republic of China concerning a dispute over a contract or rights and interests in property, if the contract was executed or performed within the territory of the People's Republic of China, or the subject matter of the action is located within the territory of the People's Republic of China, or the defendant has seized property within the territory of the People's Republic of China, or the defendant maintains a representative office within the territory of the People's Republic of China, the action may come under the jurisdiction of the people's court of the place where the contract was executed, the place where the contract was performed, the place where the subject matter of action is located, the place where the seized property is located, the place where the tort was committed or the place where the representative office is domiciled.”²⁵

²³ Chong & Pham (2020), *supra* nota 7, p. 166.

²⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art 6.

²⁵ *Civil Procedure Law of China*. (27 June 2017).

Nevertheless, China and the EU can be seen to have contradictory notions of a contract. Chinese enterprises consider a contract as a starting point to the transaction and as an addition to the implementation process. Whereas, in the EU, a contract is considered more as a formal and binding document within the parties. When a dispute occurs, Chinese parties prefer to solve it through negotiation rather than litigation, which the EU promotes.²⁶ To establish an appeal system satisfying China's requirements, China has already taken several bilateral treaties into use with other BRI countries, for example, the China-Australia Free Trade Agreement and the model investment agreement set out in the draft of the Transatlantic Trade and Investment Partnership (TTIP).

In 2015, the Chinese Supreme People's Court declared Opinion 7, aiming to strengthen the initiative's dispute resolution mechanism. The Supreme Court encouraged the use of international commercial and maritime arbitration to settle any disputes arising from the BRI implementation process. Furthermore, to facilitate dispute settlement, the court advocated that the Chinese courts should recognize and utilize the arbitration awards from other states in correspondence to international treaties and practices in addition to Chinese law and increase multilateral legal assistance, particularly between parties of the BRI.²⁷ However, China is eager to maintain the BRI-related commercial arbitration in China's International Commercial Court (CICC), other Chinese arbitration institutions such as the China International Economic and Trade Arbitration Commission (CIETAC), and its Silk Road Arbitration Center.²⁸ CIETAC's arbitration rules entered into force on January 1 2015, aiming to enhance competitiveness through several measures. CIETAC represents an international arbitration institution; however, the number of foreign-related cases accepted by CIETAC has been in an intense decline in recent years, whereas the domestic cases in the arbitral institutions have been increasing.²⁹ This possibly indicates that BRI countries are deterred from choosing arbitral institutions from China due to neutrality concerns. The BRI lacks an inclusive multilateral dispute settlement strategy. Instead, China follows dispute settlement procedures that tend to enhance China's interests and monopolize the settlement measures.³⁰ The procedures are likely to raise abundant issues of applicable law, language, and communication protocols. However, the CIETAC can be considered a breakthrough of the Chinese

²⁶ Chong & Pham (2020), *supra* nota 7, p. 167.

²⁷ *Ibid.*, p. 168.

²⁸ Martinico & Wu (2020), *supra* nota 6, p. 55.

²⁹ Li, A. X. (2020). Challenges and opportunities of Chinese international arbitral institutions and courts in new era of cross-border dispute resolution. *Boston University International Law Journal*, 38(2), 352-394, p. 365.

³⁰ Martinico & Wu (2020), *supra* nota 6, p. 55.

judicial procedure and litigation practices. Along with it, China allows foreign parties and media to participate in the trial process, which is a common factor of the litigation process and increases the transparency of the hearings.³¹

The potential diversity of the BRI disputes may pose problems in creating a single dispute settlement mechanism for settling all the BRI disputes. A single dispute settling mechanism may be even unfeasible and undesirable due to the large variety of disputes possibly arising from the BRI infrastructure. However, the current Chinese approach to dispute settlement may be insufficient, especially for countries that are not WTO members or countries that have not concluded a bilateral investment treaty (BIT) or an FTA with China. Additionally, some countries have an unreliable domestic system to solve economic disputes, for example, when there is a lack of the rule of law, lack of financial law and trade law traditions or any concerns of the enforcement of arbitral awards.

Furthermore, the diversity of different dispute settlement mechanisms in BRI-related disputes may arise an issue of ‘forum shopping’. For example, in a dispute of intellectual property rights, there is the possibility to designate over the World Intellectual Property Organization (WIPO) conventions, the Trade-Related Intellectual Property Rights (TRIPS), and international investment law. Yet, China has not commenced hardly any investment arbitration disputes or WTO disputes related to the BRI projects. Instead, China prefers political dispute settlement and contract re-negotiations if any BRI participant asks for adjustments, as proven in the case of Malaysia, which is in financial difficulties to pay its debt to China.

Currently, there is a Regional Comprehensive Economic Partnership (RCEP) Agreement within China and 14 other Asian countries, which was signed on 15 November 2020. However, it does not provide a regional judicial or dispute settlement system that could offset the possible break down of the international rule of law at the worldwide extent of WTO control. Additionally, the EU has implemented the bilaterally agreed political dispute settlement characteristics in external trade and investment and economic cooperation agreements. The EU has not frequently invoked treaty provisions for international arbitration; instead, disputes tend to be settled in bilateral treaty committees. Politically, there is a vast contradiction of China and the EU's preferences for settling international investment and financial disputes within the BRI and with the judicialization and legislation of trade, financial and investment disputes adopted inside the EU.³²

³¹ Chong & Pham (2020), *supra* nota 7, p. 168.

³² Martinico & Wu (2020), *supra* nota 6, p. 57.

In 2018 the EU Court of Justice (CJEU) interfered on the inconsistency of the BITs among the EU Member States and the EU constitutional law and judicial remedies, announcing the Achmea judgement. The Achmea judgement states that all investor-State arbitration clauses in intra-EU BITs are incompatible with EU law and that any arbitration tribunal established based on such clauses and without a valid arbitration agreement lacks the jurisdiction over the arbitration. As a result of the Declaration, the majority of the EU Member States expressed their willingness to terminate their intra-EU BITs and replace their investor protection mechanisms with equivalents under community acquis. Nonetheless, the EU fundamental rights may be relied upon to ensure sufficient protection for Chinese investors and Chinese workers implementing the BRI projects inside the EU member states.³³ For instance, Article 15(3) EUCFR provides that “Nationals of third countries who are authorized to work in the territories of the Member States are entitled to work conditions equivalent to those of the Union's citizens”.³⁴ As a consequence of the Achmea judgement, the CJEU continues to clarify the protection of third-country investors in member state courts under EU law. The CJEU encourages foreign investors and their workers to seek damages in EU host country courts in situations of failures to comply with the investment protection obligations and fundamental rights provided in the EU law. The EU-China BIT concluded in December 2020 reinforces the legal status of the EU Member States national and European courts to apply European constitutional law and fundamental rights as parts of the applicable law in disputes related to the BRI projects within the EU Member States.³⁵

In particular contexts, the legal and judicial justification and principles may differ in EU-China relations. Such as, the interpretation of property rights developed by national and European courts for foreign investment among the EU Member States among EU citizens does not certainly take the Chinese perspective so actively into account. However, human rights, including the right to own private property and human rights at work, which are provided in Article 6 Lisbon Treaty on European Union (TEU), are fundamental rights that are guaranteed to Chinese citizens within the EU Member States similarly than EU citizens enjoy the rights. There is a significant difference between the well-being and welfare standards between the EU and China. The authoritarian Asian regimes protect welfare and well-being standards on a much lower scale. In contrast, the EU human rights law, social legislation, and constitutional law have a more strict approach to ‘government

³³ Martinico & Wu (2020), supra nota 6, p. 58.

³⁴ *Charter of Fundamental Rights of the European Union*. (18 December 2000).

³⁵ Martinico & Wu (2020), supra nota 6, p. 59.

failures' and 'market failures', such as private and public abuses of power on forced labour, child labour, or discrimination on a workplace. Therefore, Chinese SOEs investing in the EU Member States may have difficulties respecting political, social, economic, civil, and cultural rights and social laws in social market economies and ordoliberal competition that the EU promotes. The difficulties may consequently give rise to legal conflicts, for example, regarding the distinction in values of Chinese employers and their employees working within the EU Member States that promote liberal values and equal individual freedoms. The settlement of conflicts inside the EU may require more resilient dispute settlement procedures than Investor-State Dispute Settlement, conciliation and mediation. The favourable outcome of strengthening the public law dimensions of investor-state disputes with common arbitration procedures, such as ICSID and UNCITRAL and the EU proposals on a multilateral investment court system depends a lot whether China also accepts them or not. Additionally, there is a possibility that the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) will strengthen the legal disciplines of protecting workers rights for the third country investors inside the EU.³⁶

1.1.2. Transparency

By January 2021, 143 countries have signed the Memorandum of Understanding (MOU) with China and accordingly joined the Belt and Road Initiative.³⁷ The details of the initiative are still insufficient, and China will have to clarify significant implementation challenges. The BRI should be implemented through procedures that are as open and transparent as possible when assuming that the initiative aims are not just a propaganda platform for China and assuming that the participant countries of the BRI are the principal beneficiaries rather than the Chinese economy itself. Implementation through a vast number of bilateral and multilateral arrangements and domestic institutions is likely to cause inefficiency, conflict, and corruption.³⁸ However, China retains rigorous control over the project, and a comprehensive picture of how the BRI projects will be implemented, what will be done, and who will participate in the BRI summits is left for others to guess from available dispersed information. Instead of publicly available material, China promotes the public-private partnership (PPP) model, supporting China's concept of strict transparency conditions. For example, the OECD has principles requiring the establishment of a

³⁶ Martinico & Wu (2020), supra nota 6, p. 60.

³⁷ The Green Belt and Road Initiative Center. (2021). *Green Belt and Road Initiative Center*. Retrieved March 2021, from Countries of the Belt and Road Initiative: <https://green-bri.org/countries-of-the-belt-and-road-initiative-bri/?cookie-state-change=1615988335352>

³⁸ Djankov, S., & Miner, S. (2016). *China's Belt and Road Initiative - Motives, Scope, and Challenges*. Peterson Institute for International Economics, p. 15.

transparent and predictable legitimate framework providing the grounds of value for money and using budgetary process transparency, which minimizes fiscal risks. As the OECD Secretary-General outlines, "Openness and transparency are key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economies".³⁹ Additionally, the G20 issues Guidelines for PPP contracts underlining the need for conducting social and environmental impact assessments to be included in the implementing process of a PPP contract. Presently, due to uncertainties stemming from state subsidies, state control, and private companies acting as proxies for the Chinese government, it is very complex to analyze the risks that the Chinese investments pose.

Furthermore, security concerns are perceived as a fundamental impact of the project, even though China highlights that the BRI has only pure economic goals. China has gained control over many countries utilizing the BRI infrastructure and investing. For example, Sri Lanka's Hambantota Port, wherefrom the Chinese perspective, China made a successful deal, gaining overall control of the port as a part of the Maritime Silk Road. The arrangement aroused intense fears that the port will be exploited for Chinese naval vessels. Additionally, there is an expressed concern of China interfering with the BRI states' domestic affairs since it expands its influence due to the broad infrastructure and gains control over regions due to their debt distress. Significant investments that China is granting increases the feasibility of China to alter domestic legislation, including laws governing foreign investment, trade, contracts, taxation, labour, intellectual property, environmental protection, physical property, and so on.

Some Chinese scholars suggest that the public welfare in the BRI regions will develop by reducing the role of politics in international relations and limiting sovereign rights of the countries, and focusing on economic growth; however, the particular propensity possibly reveals the more ambitious plan of China to create new systems and standards governing international trade and consolidate the status of China in the international order. Consequently, to build strong international standards for the BRI project, the countries involved must apply proactive practice involvement to increase and guarantee the BRI infrastructure project's transparency.⁴⁰

³⁹ Gurría, A. *Openness and Transparency - Pillars for Democracy, Trust and Progress*. OECD.

⁴⁰ Chong & Pham (2020), *supra* nota 7, p. 170-171.

1.2. Economic dimensions and their legal traces

1.2.1. Financing of the BRI

Chinese state-owned banks provide 87 per cent of the total BRI funding. The remaining 13 per cent of the BRI funding is provided by multilateral financial institutions, the Silk Road Fund, and equity financing of enterprises in Chinese capital markets.⁴¹ Accordingly, the majority of the BRI funding originates from China.

Currently, China has already signed at least 200 cooperation documents with hundreds of countries, including developing and developed countries and numerous international organizations. Additionally, a considerable number of financial institutions and companies from developed countries participate in the establishment of third-party market cooperation.⁴² Third-party market cooperation represents a relatively new international cooperation model: the cooperation between Western multinational corporations (MNCs) and Chinese firms, where MNCs are encouraged to participate in the BRI. To some extent, third-party market cooperation projects have already been implemented, and different kind of cooperation mechanisms established, consolidated with the support of the Chinese government and developed countries.⁴³ By 2019, the BRI became the second-largest trade zone globally, after the EU, with China's total trade exceeding 7.5 trillion dollars with BRI participant countries. The foreign direct investment of China in BRI countries exceed 110 billion dollars. Moreover, the BRI construction projects account for 52% of the total amount of Chinese overseas construction contracts between 2013 and 2018. Outright, the BRI has a significant contribution to global development; however, there are several challenges in financing the BRI.

Firstly, the so-called 'debt traps' present an issue to the BRI. There has been a harsh critique of the BRI financing system. Developing countries face the risk of owing large amounts of debts to China since Chinese banks have been providing loans to the BRI countries with interest rates between 4% to 4.5%. Additionally, many projects have been funded in the long term without certainty of profitability. China cannot guarantee the effectiveness and success of all projects; consequently, if

⁴¹ He, A. (2020). The Belt and Road Initiative: Motivations, financing, expansion and challenges of Xi's ever-expanding strategy. *Journal of Infrastructure, Policy and Development*, 4(1), 139-169, p. 153.

⁴² Martinico & Wu (2020), *supra* nota 6, p. 199.

⁴³ Zhang, Y. (2019). Third-party market cooperation under the Belt and Road Initiative: progress, challenges, and recommendations. In *China International Strategy Review*. Beijing: Springer, 310-329, p. 311.

a project is suspended or revoked for some reason, the countries still have to pay their loans to China, which leads the countries into 'debt-traps'.⁴⁴

China's President Xi Jinping delivered a speech at the United Nations (UN) in 2015, utilizing a chance to clarify his country's motivation on the BRI. Speaking about global development work, he underlined that facing the future; China will continue to give due consideration to both self-interests and justice, noting that "Big countries should treat small countries as equals, and take a right approach to justice and interests by putting justice before interests".⁴⁵ However, it is questionable whether the investment and trade are based on only economic ambitions and how is the implementation of such a broad principle managed. Under which conditions is the Chinese government going to adopt policies with more significant societal benefits rather than focusing on economic advantages? Moreover, who is going to finance the societal aspects of the development projects? So far, there is no indication of China promoting the social benefits of BRI countries, simultaneously in the presence of preferential government policies such as tax concessions and subsidies, rent-seeking practices are likely to increase. There is a concern that the initiative may become an ATM for Chinese SOEs due to priority investment and development projects.⁴⁶

Many of the BRI infrastructure projects require significant investments and capital demands, yet with relatively high risks. The investment patterns and funding mechanisms of the BRI expose the host states to financial risks. The funding mechanism tends to utilize China much more than the host states. Chinese bank loans are redirected to Chinese contractors implementing the infrastructure development projects that China later benefits from once the projects are completed. Furthermore, most BRI participant countries are developing low-income countries that have a relatively great extent to potential economic, social, political and environmental risks. The risks for developing countries include the risk of recession, foreign exchange volatility, regulatory and non-regulatory issues, price instability, excessive private sector investment, lack of transparency and corruption.⁴⁷ The infrastructure loans concerning the BRI projects are principally negotiated

⁴⁴ Chong & Pham (2020), supra nota 7, p. 196.

⁴⁵ Xi Jinping, H. E. (2015, September 29). *Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind*. Ministry of Foreign Affairs of the People's Republic of China. https://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpdmgjxgsfwbcxlhgcl70znxlfh/t1305051.shtml

⁴⁶ Cheng, L. K. (2016). *Three questions on China's "Belt and Road Initiative"*. Hong Kong: Elsevier, p. 3-4.

⁴⁷ Chong & Pham (2020), supra nota 7, p. 196.

government-to-government, which enforces a bilateral lending behaviour, consequently increasing the lack of transparency and enhancing questions of regional debt sustainability.⁴⁸

The risks attached to BRI financing are further advanced by the Chinese investors and SOEs lack of knowledge and engagement with local stakeholders. Countries like Vietnam are an example of a poorly functioning framework. In Vietnam, the BRI infrastructure projects, financed by Chinese loans and performed by the Chinese labour force, have suffered from various issues such as cost overruns, construction delays, poor quality of the construction, and high maintenance costs after the completion of the project.⁴⁹

Another risk the developing countries may face due to China's immense grants and loans is becoming an 'economic vassal' of China. China underlines that its motives behind the BRI are only economic; however, in addition to the growth of the Chinese economy and enhancement of international trade and cooperation, China has strong domestic ambitions based on the political and strategic advantages of the BRI. Consequently, developing countries receiving loans from China are at risk of the possible weakening of their national sovereignty.⁵⁰ For example, the way China deals with debt claims has proven to increase national sovereignty concerns. In particular, in Sri Lanka 2017, the country could not anymore deal with its public debt due to participation in the BRI, and as a consequence, the government of Sri Lanka handed over a crucial port to China as a gesture of a debt-for-equity swap and 99-year lease. In the lease contract, the lessee government, China, represents a more powerful country than the lessor government, in this case, Sri Lanka. As a result, China has taken control of the port, and Sri Lanka cannot implement its eviction rights if China refuses to leave.⁵¹ A similar situation has been perceived in Djibouti, where China and Djibouti agreed of building a railway, a parallel water pipeline, and a new seaport to Djibouti with Chinese investment as a part of the new Maritime Silk Road. The construction of the port was not yet ready when the PRC Foreign Ministry announced in 2016 that a Chinese naval facility would be built next to the new port. Djibouti accepted the offer as an exchange of bank credit for naval access. After 2012 China has become the largest inward investor in Djibouti, primarily due to the railway link project to Addis Ababa, which is part-planned and financed by China, and now occupied by the Chinese. The railroad is built with Chinese standards and

⁴⁸ Dinwiddie, A. (2020). China's belt and road initiative: An examination of project financing issues and alternatives. *Brooklyn Journal of International Law*, 45(2), 745-776, p. 757.

⁴⁹ Chong & Pham (2020), *supra* nota 7, p. 196.

⁵⁰ *Ibid.*, p. 197.

⁵¹ Dinwiddie (2020), *supra* nota 20, p. 757-758.

technology aiming to enhance regional economic integration. When the expenses of the new railway exceeded \$505 million, debate, whether the Djiboutian or Chinese government was responsible for the costs emerged. The debate was resolved by China taking an equity stake over the rail operating company in Djibouti.⁵² Furthermore, the BRI does not fully utilize the international financial market since China maintains most of its financial burden, which is both inefficient and unsustainable. However, the MNCs have not gained sufficient opportunities to engage in the BRI, and the competition between MNCs and Chinese firms is not driving the interests of both parties as actively than collaborating would.⁵³

To encounter the global challenges posed in BRI financing, it is necessary that the BRI would be further internationalized and encourage global investors to participate in the financing. Particularly, MNCs may pose an important actor in facilitating the burden of BRI financing since MNCs maintain sufficient capital in the form of direct investment and therefore decreases the debt burden of BRI countries. Also, the MNCs vast local knowledge, prolonged international experience and previous successful operations in developing countries support Chinese firms to enter and flourish in BRI-bound markets. Additionally, when the financial burden would be shared with more actors, the financing gap and the possibility of ‘debt traps’ would be reduced. Therefore, it is essential to develop closer cooperation between China and the BRI participant countries and Chinese firms and MNCs along the BRI to ensure sustainable and high-quality development of the BRI.⁵⁴

The existing economic system, established in 1944, includes three essential features. First, the United States is a dominant leader in the international economic system, designing and enforcing international rules. Secondly, the international monetary system is led by the US dollar. Moreover, finally, three international organizations are primarily controlling and maintaining international economic order, the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO). The system has contributed to steady economic growth; however, a reform of the international economic system has been recently in growing demand. The current international economic system relies a lot on the economic systems of developed countries, especially in the US; the system promotes free investment, free trade, free market and strict market

⁵² Styan, D. (2019). *China's Maritime Silk Road and Small States: Lessons from the Case of Djibouti*. Journal of Contemporary China, p. 5-6.

⁵³ Zhang (2019), *supra* nota 18, p. 313.

⁵⁴ *Ibid.*, p. 312-313.

disciplines. However, the subprime crisis in the US has raised serious questions about the US system and its role in the future.⁵⁵ Therefore, the growth of China along the BRI project could overtake the US as the largest economy in the world and develop the current economic system. However, as Huang outlines, the domestic legal framework of the Chinese overseas investment is flawed, and the legislative system of the BRI lags behind in this regard. Moreover, the form of financing the BRI follows have raised serious concerns about debt sustainability. The International Monetary Fund (IMF) has indicated its concerns of the BRI viability being threatened due to the high levels of lending to developing countries with already heavy debt burdens.⁵⁶

The PPPs China encourages to use between other BRI countries often pursue the Build-Operate-Transfer (BOT) model. When the BOT model is used in developing PPP projects, the public authority will grant the private sector entity a concession to develop an infrastructure facility; the private actor is also responsible for financing, building and operating the planned facility for a specific period. After the specific period, the facility should have produced enough profit to cover the project costs, repayment of the debt, and promised return of investor equity, meaning that the facility should be transferred to the public authority free of charge. On the other hand, the particular model enables the developing countries to gain important infrastructure asset with minimal government spending. China has even encouraged the use of PPPs to help with the debt sustainability of the BRI. However, in 2018 the BRI projects begun to suffer from delays in project performance or complete cancellation, intensifying the Chinese debt management and sovereignty concerns.

Moreover, the fear of Chinese lending practices has intensified due to the fact that China manages debt claims rather on a case-by-case basis than adopting a multilateral approach. In the Belt and Road Forum in 2019, China attempted to assure that its lending practices concerning the BRI do not pose a threat to debt sustainability. However, the BRI debt sustainability concerns are not likely to fade away before China alters its debt management approach.⁵⁷ Furthermore, the effects of debt instability have far more reaching consequences than just the success or failure of the BRI. Developing countries rely upon that infrastructure development will lift them out of poverty, and to finance such projects, public borrowing is necessary. However, if the infrastructure projects do

⁵⁵ Huang (2016), *supra* nota 6, p. 317.

⁵⁶ Dinwiddie (2020), *supra* nota 20, p. 757

⁵⁷ *Ibid.*, p. 748.

not generate economic growth or revenue to supply the debts, it will lead to a decline in domestic spending.⁵⁸

1.2.2. EU-China Comprehensive Agreement on Investment

As discussed in the previous chapter, the international investment regime is experiencing complicated, and thorough changes and the new practices and emerging issues must be determined. It is necessary to balance the conflicting interests between the states right to regulate and investment protection and between national security and investment liberalization. The EU and China can play an essential role in developing investment, and economic cooperation since the EU ensures access to the Chinese markets for European companies and the European market is a significant destination for Chinese investment.

The EU-China Comprehensive Agreement on Investment (CAI) can be seen as an essential part of developing the regional investment cooperation since the existing BITs between China and the EU member states are not comprehensive enough to acknowledge the demands of both sides and consolidate the latest practices.⁵⁹ The CAI was ratified in December 2020, after seven years-long negotiations. The agreement aims to create balanced cooperation between the EU and China, replace the existing BITs, and harmonize the ratio of investments between EU countries and China. The CAI is intended to create improved balanced cooperation and increase trade cooperation among the participants. The negotiations began in 2013 and proceeded slowly since there was a fear that the agreement would benefit some parties more than others or China alone. The agreement has a massive effect on the future course of the EU-China bilateral cooperation, and it creates a cooperative relationship between them that is increasingly interdependent. The increasing interdependence between the countries can be seen as liberalization of the Chinese markets for EU investors and expanding investment areas between them, resulting from the deepening trade and cooperation that is adjusting the EU and China investment policy.⁶⁰ The CAI aims to establish a uniform legal framework for investments between the EU and China, modern protection standards, and dispute settlement arrangements by replacing the 25 outdated BITs that the EU member states and China had concluded before the EU gained competence for FDI under the Lisbon Treaty

⁵⁸ Dinwiddie (2020), *supra* nota 20, p. 758.

⁵⁹ Yin, W. (2019). *Challenges, issues in China-EU investment agreement and the implication on China's domestic reform*. Asia Pacific Law Review.

⁶⁰ Amal, M. (2021). *EU-China Comprehensive Agreement on Investment (CAI): Looking through the European Union's perspective*. Department of International Realitions, Airlangga University, p. 2.

2009.⁶¹ Practically, the CAI enables European countries to enlarge access to China's market and improve European investors' treatment in China. The core contents of the CAI includes market access, issues regarding reciprocity, national treatment, clarifying the dispute resolution, and environmental and labour protections, including sustainable development.⁶² However, an issue related to the CAI from the EU's perspective is that the agreement will possibly legitimize China's problematic actions related to human rights violations and environmental issues.⁶³

1.3. Social dimensions and their legal traces

Countries along the BRI preserve significant global resources, Extending to 75 per cent of the proven energy reserves⁶⁴ such as over 50% of global gas, over 15% of global oil, 25% of coal, and considerable iron ore resources, zinc, copper, bauxite, and nickel. China is already a dominant primary resource importer for countries like Turkmenistan, Sudan, Mongolia, Iran and Laos. Conceivably, China is trying to strengthen its dominant international status by expanding throughout the BRI and gaining control over the resources. The major infrastructure project of pipelines, ports, railways and international connectivity would definitely promote global economic development; however, it may pose a setback to eco-social development and therefore risk the foundations of human security. For the BRI to succeed, the project requires considerable attention to balance global human development. The human security issue lays on one particular question: how are small communities with a single source of livelihood going to survive the grand visions of belts, roads and corridors?⁶⁵

The BRI raises both traditional and non-traditional security threats along with the vast territory of the infrastructure. Traditional security threats emerging from the initiative include, for instance, territorial and island disputes, which have already been seen, for example, in the so-called Sino-Vietnamese Paracel islands sovereignty dispute in 2014. Additionally, traditional security threats

⁶¹ Grieger, G. (2020). *EU-China Comprehensive Agreement on Investment: Levelling the playing field with China*. European Parliamentary Research Service, p. 3.

⁶² Yin (2019), supra nota 23, p. 6.

⁶³ Amal (2021), supra nota 23, p. 5.

⁶⁴ Demiryol, T. (2019). Political Economy of Connectivity: China's Belt and Road Initiative. In *Proceedings of the 13th International RAIS Conference on Social Sciences and Humanities*. Scientia Moralitas Research Institute, 168-180, p. 150.

⁶⁵ Dellios, R., & Ferguson, R. (2017). The Human Security Dimension of China's Belt and Road Initiative. *Journal of Management and Sustainability*, 7(3), 48-62, p. 52.

may appear as regional political turmoil in individual countries, especially in developing countries where the political situation and the governments are vulnerable and uncertain.⁶⁶

The Xinjiang Uyghur Autonomous Region is a crucial region to China. It has been considered as a strategic pivot point connecting essential industrial centres of eastern China with western Europe. Its regional capital, Urumqi, is the starting point of three economic corridors of the BRI: the China – Central Asia – West Asia corridor, the New Eurasian Land Bridge, and the China Pakistan Economic corridor. From the Chinese point of view, the region is under the influence of extremism, terrorism, and separatism, and the country demands stability to develop. Therefore, China has tightened its grip over the region due to geostrategic and economic reasons. China characterizes the security concerns as the lack of economic development. As China's President Xi asserts, economic and social development are the essential foundation for lasting stability and peace in Xinjiang. However, China's actions towards the province of Xinjiang has enhanced international concerns. The UN reports that the ethnic-religious minorities in Xinjiang are systematically detained and re-educated in re-education camps by China.⁶⁷

The alleged genocide practised by China, for example, in Xinjiang, is said to be partly motivated by the expansion of the BRI.⁶⁸ China has breached every single article of the UN genocide convention in its treatment of Uighurs in Xinjiang. The exceptional human rights violations occurring in Xinjiang cannot be ignored as they are in conflict with the international and, specifically, the UN principles. Chinese policies in Xinjiang have exacerbated the fear of Chinese growth, including the fear of Chinese mass migration and the fact that Chinese workers are significantly better paid than locals and the lack of cultural knowledge and sensitivity of the Chinese migrants. The local irritation of the Chinese projects has created hostility towards some aspects of the BRI in addition to the lack of satisfaction with national governments.⁶⁹ However, the allegations mentioned are consistently denied by China as the Chinese consider that the issues

⁶⁶ Haiquan, L. (2017). The Security Challenges of the “One Belt, One Road” Initiative and China's Choices. *Croatian International Relations Review*, 23 (78), 129-147, p. 137.

⁶⁷ Wolf, S. O. (2020). *The China-Pakistan Economic Corridor of the Belt and Road Initiative - Concept, Context and Assessment*. Switzerland: Springer, Wolf, S. O. (2020). *The China-Pakistan Economic Corridor of the Belt and Road Initiative - Concept, Context and Assessment*. Switzerland: Springer. p. 219.

⁶⁸ Finley, J. S. (2020). *Why Scholars and Activists Increasingly Fear an Uyghur Genocide in Xinjiang*. *Journal of Genocide Research*.

⁶⁹ Wolf (2020), *supra* nota 26, p. 59.

are “internal matter”. Furthermore, China has denied access to representatives of the UN, desiring to conduct an independent evaluation of the situation.⁷⁰

The other main actors, such as the United States and the EU, have a critical approach towards China’s actions. There prevails a concern that the BRI would displace the US-led institutions and allows China to become the predominant power of the subregion, undermining the prevailing liberal economic order and spreading authoritarianism and economic coercion. The countries anticipate that the Chinese-led approach will neglect issues of good governance, social, and environmental impacts and encourage precarious lending practices, consequently provoking unsustainable debt. According to the 2016 Council Conclusions on the EU strategy towards China, the EU is eager to cooperate with China to reinforce rule-based governance, regional security and sustainable development. Nonetheless, the visions of the EU and China of international rule-based order and connectivity are in contradiction which is constantly increasing as the EU takes a tougher stance towards the human rights violations China practices, in addition to the lack of transparency of the infrastructure project, which undermines the coherent principles of the EU.⁷¹

⁷⁰ Waller, J., & Albornoz, M. S. (2021). Crime and No Punishment? China’s Abuses Against the Uyghurs. *Georgetown Journal of International Affairs*, 22(1), 110-111, p. 110.

⁷¹ Wolff, S. (2021). *China’s Belt and Road Initiative: Implications for the OSCE*. OSCE Network - OSCE Network of Think Tanks and Academic Institutions, p. 31.

2. LOCAL AND/OR INTERNATIONAL LEGISLATION COMPLYING WITH GLOBAL INITIATIVES

2.1. The BRI and International Human Rights Law

Human rights are diverse in content, and there are numerous human rights treaties. However, human rights concerns are seldomly addressed in IIA negotiations, and IIAs rarely accommodate human rights provisions. Taking China's social and political situation into account, and the especially poor human right situation, it is not surprising to see China's reluctant attitude towards labour rights provisions. Consequently, none of the Chinese IIAs consolidates core labour standards.⁷² Under international human rights law, states are obliged to respect, protect, and fulfil human rights, meaning that states have the obligation not to interfere in the enjoyment of human rights and proactively guarantee and facilitate those rights. The PRC accepted the UN Charter of Universal Declaration of Human Rights not until 1971 when it was admitted into the UN. Subsequently, China has ratified 8 out of 18 of the UN-sponsored Human Rights Treaties.⁷³

The Guiding Principles on Business and Human Rights of the UN provides that states have the duty to “protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.” However, the debate whether states are responsible for ensuring human rights in the context of businesses within their territories has been comprehensive.⁷⁴ Indeed, it is often stated that international investment law and human rights law are two totally distinct tracks due to their different regulatory approaches and focuses. Therefore, IIAs typically focus on investment-related human right concerns insufficiently.⁷⁵ The foreign investors and their business and investment interests are at risk when host states respect their human rights obligations and enforce measures or policies to protect, respect, and fulfil human rights. Tense about such risks to their business actions, investors may initiate investor-state

⁷² Chaisse, J. (2019). *China's International Investment Strategy*. Oxford: Oxford University Press, p. 110.

⁷³ Office of the United Nations High Commissioner for Human Rights (OHCHR). *Status of Ratification Interactive Dashboard*. Retrieved May 2021, from <https://indicators.ohchr.org>

⁷⁴ Chong & Pham (2020), *supra* nota 7, p. 161.

⁷⁵ Chaisse (2019), *supra* nota 23, p. 109.

arbitration as investor treaties provided a powerful ground for doing so. However, investor-state arbitration may undermine the human rights in the host state, and the investors may dispute the legitimacy of human rights-related measures and policies. Moreover, the investment-arbitration procedures prevent states from fully complying with their obligations under human rights law and unjustly restrains their rights to regulate.⁷⁶

In 2017 the UN Committee on Economic, Social and Cultural Rights specified the UN Guiding Principles adapting the General Comment on State Obligations under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in the Context of Business Activities. The document provides a non-exhaustive list of specific acts of states, in context to business activities, that violates the obligation to protect and fulfil human rights. For instance, the failure of the state to adopt and enforce legislation that requires businesses to practice human rights due diligence, the failure of providing the victims of human rights abuses means of effective remedy and failing to take actions to intervene in such situations, and states failing to monitor the activities of business entities and their influence on the enjoyment of social, economic, and cultural rights. Furthermore, the General Comment implements that states are not only directly responsible for human rights violations caused by the actions of private entities but also for the failure of taking equivalent actions to prevent such circumstances. Therefore, the obligations to protect and fulfil human rights do not only bind the states within their territory but also within their jurisdiction.⁷⁷

Under the obligation Framework of the ICESCR, states have the responsibility to protect, respect and fulfil human rights treaties. When talking about business or investment activities, the obligation to “respect” human rights requires that states cannot prioritize any investment interests of foreign investors that breach human rights without justifiable justification or conduct policies that directly contravene with human rights. Host states have the responsibility to ascertain any inconsistencies between the human rights conventions they are obliged with and investment treaties they are entering to; if such inconsistencies exist, the host country shall refrain from concluding the treaty. The obligation to “protect” obligates both the host states and the foreign investors home countries to provide a legal framework that requires the investors to impose and minimize the risk of possible human rights violations. Finally, the obligation to “fulfil” requires

⁷⁶ Lo, M.-w. (2020). *The evolution of Chinese international investment agreements and their potential impacts on human rights protections for the "belt and road initiative" countries*. Asian Journal of WTO and International Health Law and Policy, 15(2), 399-460, p. 406.

⁷⁷ Chong & Pham (2020), *supra* nota 7, p. 161-162.

directing the enterprises towards the fulfilment of human rights.⁷⁸ The national governments maintain primarily responsible for enforcing international human rights standards; however, the emerging concept of corporate social responsibility declares that corporations and foreign investors have some degree of responsibility likewise to implement social and environmental standards in addition to human rights obligations. The concept of corporate social responsibility is steadily toughening in soft law instruments, such as the UN Guiding Principles on Business and Human Rights. Consequently, it may possibly become a binding treaty eventually.⁷⁹ The advancement in human rights law may pose a challenge for some states along the BRI as some Asian governments are already lagging behind the required human rights framework. For example, due to the extraterritorial applicability of the human rights law, to some extent, the Chinese government can be considered to be responsible for human rights abuses committed by its national companies, and especially Chinese SOEs, even though they are not occurring on the Chinese territory.⁸⁰

Nevertheless, the BRI does not obtain a complete deficiency of human rights dimensions as the Asian Infrastructure Investment Bank (AIIB) provides requirements of social development and inclusion. The AIIB Environmental and Social Framework emphasizes the promotion of equity and non-discrimination and the AIIBs support towards human rights encouragement to respect them. Still, the AIIB does not make it clear how these requirements will be carried out and implemented. Thus the AIIB must provide a wider extent of transparency in how it determines and monitors that projects how they are adopted according to human rights standards.⁸¹

2.2. The BRI and International Environmental Law

The major infrastructure projects of the BRI are likely to have a massive impact on the environment. Therefore, the environmental aspect of the investment projects is crucial to take into consideration. The risks in Chinese firms taking control of infrastructure projects and construction in ecologically fragile areas are increasing due to China's flagrant negative environmental records. For instance, projects such as the dam and copper mine in Myanmar and a port in Sri Lanka were suspended due to environmental interests. Furthermore, a hydropower plant construction in Laos

⁷⁸ Lo (2020), *supra* nota 29, p. 404.

⁷⁹ *Ibid.*, p. 405

⁸⁰ Chong & Pham (2020), *supra* nota 7, p. 161-162.

⁸¹ Martinico & Wu (2020), *supra* nota 6, p. 120-121.

on the Mekong River led to temperature rise in the area and destruction of nature.⁸² The official Chinese stance on investment and development initiatives is that they should confront the national requirements of the laws of the host countries, including environmental laws. Nonetheless, as anticipated, the legal standards of environmental laws differ vastly in the host countries, and therefore, the BRI does not have harmonized environmental law guidelines to adopt.⁸³

The basic framework of international environmental law is provided by the 1972 Stockholm Declaration of the UN Conference on Human Environment and the 1992 Rio Declaration on Environment and Development. The basic framework is constantly developing and modernizing to correspond with the contemporary world. Throughout the modernization of the framework, two important legal principles have emerged concerning preserving and protecting the environment: the preventive principle and the precautionary principle.⁸⁴ The preventive principle obligates states to take “all appropriate measures to prevent significant transboundary harm or any event to minimize the risk thereof”.⁸⁵ Furthermore, the preventative principle obligates states to implement an environmental impact assessment for all planned activities that are likely to have an environmental impact. Furthermore, the precautionary principle determines that states shall take measures to protect the environment even when the risk is uncertain or when there is an absence of evidence about a particular risk.⁸⁶ Principle 15 of the 1992 Rio Declaration states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.⁸⁷ The precautionary principle extends over national borders and control, and states must actively ensure that the actions practised within their authority or jurisdiction respects environmental laws. Therefore, by virtue of due diligence obligations, states may be responsible for environmental damages caused by acts of non-state actors or if states benefit from actions taken by transnational corporations under the jurisdiction or effective control of the state.⁸⁸

Furthermore, the Chinese Environmental Risk Management Initiative issued in 2017 states that “financial institutions and enterprises engaged in overseas investment should fully understand the

⁸² Chong & Pham (2020), supra nota 7, p. 163.

⁸³ Boer (2019), supra nota 10, p. 4

⁸⁴ Chong & Pham (2020), supra nota 7, p. 163.

⁸⁵ United Nations. (2005). *Prevention of Transboundary Harm from Hazardous Activities*, §3.

⁸⁶ Chong & Pham (2020), supra nota 7, p. 164.

⁸⁷ *Rio Declaration on Environment and Development*. (1992). The United Nations Conference on Environment and Development, Principle 15.

⁸⁸ Chong & Pham (2020), supra nota 7, p. 164.

environmental laws, regulations and standards of the host countries, as well as the key environmental risks for their projects”.⁸⁹ Consequently, Chinese foreign investor enterprises are obliged to consolidate principles of environmental protection into their production and operational plans and development strategies as well as establishing environmental protection rules and regulations. As a result, the financial institutions and enterprises in China are able to advance the progress towards crucial sustainability goals, for instance, the ‘greening’ of the BRI, the fulfilment of the Paris Agreement on climate change, and the 2030 Agenda for Sustainable Development, and strengthen the implementation of the Guidelines for Establishing the Green Financial System. To achieve the sustainability goals, it is necessary to adopt responsible investment principles and improve its foreign investment risk management.⁹⁰ However, China has an immense lack of regulations and policies in environmental issues, which will presumably hinder the reinforcement of sustainability goals and preventive and precautionary principles.⁹¹

⁸⁹ *Environmental Risk Management Initiative for China’s Overseas Investment*. (5 September 2017).

⁹⁰ Boer (2019), *supra* nota 10, p. 6.

⁹¹ Chong & Pham (2020), *supra* nota 7, p. 164.

3. DISCUSSION

The BRI highlights the necessity to strengthen connectivity and deepen cooperation between the participant countries to benefit the people among the countries and to promote cooperation. Provided by the rule of law, the political process of the BRI must reinforce transparency and predictability in laws, governmental administration of laws, and the procedures adopted by the courts to ensure that citizens, public institutions, and enterprises know their rights and obligations in advance. In theory, the BRI should provide enterprises with legal certainty to calculate the risks of their investments and form expectations of their returns. Furthermore, the BRI must implement access to justice to ensure enterprises rights and protection of legitimate expectations and provide equality under the law. Additionally, to ensure legal certainty, the BRI must secure that the enterprises or the governmental institutions are not above citizens in front of the law.

The state-driven investment and arbitration model that China represents and utilizes is the main reason causing the lack of transparency in the financing, adequate dispute settlement, and infrastructure projects. The lack of transparency is likely to be an obstacle hindering the BRI as it will, without doubt, cause resistance and local dissatisfaction since it reinforces criticism on the negligence of environmental sustainability, corruption, lack of local participation and consideration, and the lack of coordinated social projects for an inclusive development goal. For example, the cases of Sri Lanka and Djibouti proved that both the receiving countries and China could have benefited from a transparent process of Chinese investment. A transparent investment process could prevent debt distress and ‘debt-traps’, especially in countries that are already heavily indebted. By promoting transparency, the receiving countries may evaluate the profitability of the investment and avoid over-lending and consequently evade debt crisis, and Chinese banks and foreign investors could avoid risky investments and take a more cautious approach which could strengthen the financial sustainability of the BRI.⁹²

The BRI is a highly complex network of agreements consisting mainly of MOUs between China and other countries governments and international organizations. The MOUs are non-binding instruments and address highly diverse subject matters; for instance, MOUs have been used to address both specific and general issues. Furthermore, China has concluded multiple IIAs, including primarily BITs, which may be directly or indirectly government-to-government,

⁹² He (2020), *supra* nota 19, p. 163.

business-to-business, or business-to-government. The agreements are complex and may involve multiple jurisdictions; additionally, they may cross different scopes of international law, including finance, trade, investment, labour, and the environment. However, multiple BRI agreements are minimally legalized, meaning that they are aspirational, with weak institutionalization, not precise, and non-binding, also the agreements have weak obligatory enforcement. For instance, the Italy-China MOU illustrates that there is no legal or financial obligation to perform within the parties since it states that it “does not constitute an international agreement which may lead to rights and obligations under international law”. Additionally, the agreements do not usually delegate legal authority, and instead of adhering to treaties, China favours less formal and flexible arrangements.⁹³

The absence of a coherent treaty-based framework, formal protocols, or founding charters makes the implementation of the BRI insufficient and sensitive for problems when disputes occur. The vast amount of agreements China and Chinese SOEs have with individual governments and enterprises form a tremendous variation between the parties involved since the agreements differ substantially; therefore, there is a considerable lack of consistency, making it challenging to ensure that the provisions are related to each other. Additionally, as discussed, the IIAs do not incorporate, for example, labour, human rights, and environmental issues, which affects the relationship with civil societies and local communities. The BRI legal issues often fall outside the scope of WTO rules, BITs and IIAs, and they often lack systematic rules on fundamental issues. Consequently, the demand for coherent international rules for the BRI is immense. The minimal legalization and the lack of a coherent legal framework are likely to impose challenges in the enforcement of the BRI.

⁹³ Wang, H. (2020). *The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges*. World Trade Review, 1(24), p. 7-8.

CONCLUSION

International flows of capital, technology, goods, and people can provide a strong incentive and comprehensive foundation for global economic growth. The BRI could provide a mutually beneficial cooperative political, economic, and cultural exchange model and accelerate globalization. However, the BRI still includes major flaws in contradiction with international principles and laws. Addressing all the legal challenges will certainly affect the viability of the initiative. Evidently, the grand-initiative, despite its high-level aims, still does not have a consistent institutional framework supported by treaties, no formal membership protocols, no overreaching institutionalization, and no founding charters. Instead, the BRI-bound framework is largely based on ‘soft law’ such as plenty of MOUs, agreements, and declarations, which promote the flexibility and, to an extent, inclusiveness of the idea. However, the highly complex network of agreements addressing diverse matters involve multiple jurisdictions and may cross different scopes of international law; therefore, the initiative is likely to boost challenges of coherence, predictability, consistency, transparency, and risk management.

To a visible extent, the legal system in China is in contradiction with the international legislations and regulations. For instance, the Chinese legislation does not provide similar fundamental rights to, for example, the EUCFR, ensuring political, civil, social and economic, human and constitutional rights. Furthermore, China has not accepted UN conventions on civil and political rights or ILO conventions on forced labour or freedom of association. The issue emerges when disputes occur between the parties since the BRI does not obtain a consistent dispute settlement structure. Regarding dispute settlement, the BRI lacks an inclusive multilateral dispute settlement mechanism. Nevertheless, the Chinese Supreme Peoples Court encouraged to increase the use of international arbitration proceedings respecting international treaties; China maintains utilizing Chinese arbitration institutions in BRI disputes and promotes dispute settlement measures that enhance China’s interests, which undermines transparency and the interests of both the home and host states. Furthermore, as the Chinese legislation does not ensure globally protected fundamental rights, such as human rights, fundamental rights are likely to be threatened under the Chinese arbitral institutions. With an initiative as broad as the BRI, covering approximately 65% of the

global population, it is necessary to have an efficient and universally enforceable dispute settlement mechanism, which China has not yet been able to propose.

The BRI-associated projects must comply with existing legal systems as it crosses into them, and comply with the principles set in the UN charter and core principles of the ILO as they cover a broad scope of the international regime and majority of the BRI countries; furthermore, the BRI concerns a wide range of workers in the international field that has to be protected by promoting social justice, decent work, and human-centred future work. The European countries and businesses are not likely to engage in BRI projects that do not guarantee the same human rights protection as their national laws, as it would cause an indirect devaluation of labour and human rights standards in the European markets. Furthermore, the lack of transparency is a major barrier for companies to seek involvement in the BRI. The lack of transparency in Chinese investments has increased concerns of national sovereignty. The large number of BITs and the absence of a consistent framework make the predictability of Chinese investments complex, which intensifies the risk of debt distress. To create a sustainable globally functioning market economy, China needs to increase transparency and predictability within the BRI.

The BRI infrastructure projects require extensive investments, particularly in developing countries, and China and Chinese SOEs finance the majority of the projects. However, foreign investments do not have a coherent legal protection mechanism, and China's foreign investment protection laws incorporate an immense gap. Moreover, China's current foreign investment mechanism is more subject to policy constraints rather than legal regulation, which is ineffective and immensely sensitive to problems when disputes occur. Therefore, to prevent 'debt traps' and to protect particularly developing countries that are already indebted, it is crucial to develop the legal protection mechanism of foreign investment from international law to domestic law; the legislative system for foreign investment should be integrated and developed into a transparent legal mechanism.

Objectively, the BRI is in egregious conflict with the international human rights treaties. China's actions within the BRI's framework neglected the rights of ethnic minorities and, therefore, 'produced' an exponentially growing number of the international allegation on genocide. Furthermore, since China is a permanent member of the UN Security Council and unless the BRI's unimite aim is not to 'tackle' the UN-based international system off the way, it is necessary for it to implement the BRI projects in accordance to the UN principles and regulations to promote

human rights, sovereign equality, sustainability, and peaceful means of the economic expansion and development throughout the project. The international actors are concerned that China's actions are neglecting principles of good governance and social and environmental impacts and spreading authoritarianism and economic coercion. The Chinese legislation is lagging behind in the ICESCR framework providing that investors must respect human rights, also in host countries, and impose and minimize the risk of possible human rights violations.

Likewise, the BRI does not have harmonized environmental law guidelines, and there is a lack of regulations and policies to ensure the environmental sustainability of the BRI. Still, under the international environmental law, China may be seen as responsible for environmental damage caused by the BRI infrastructure projects. This is because the environmental laws extend over national borders and include preventative actions, such as formulating an environmental impact assessment for planned projects that may have an environmental impact. The lack of a coherent legal framework on a global level is likely to cause enforcement issues of the BRI. Therefore we can state that the current legal framework is not comprehensive enough to cover the Belt and Road Initiative as a whole and address all the legal issues of the comprehensive project. To promote the project's efficiency and minimize regulatory differences, it is relatively necessary to accomplish a certain level of legal harmonization.

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