CHINA'S IMPLEMENTATION OF ITS "ONE BELT ONE ROAD" INITIATIVE: LEGAL CHALLENGES AND REGULATION BY LAW

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ABSTRACT

Over the past seven years since its initial proposal in 2013, China's "One Belt One Road" initiative (hereinafter "BRI") has been implemented and drawn dramatic attention. However, it has garnered concerns over China's geographical and economic ambitions in the region. Despite these controversies, this paper will focus on legal challenges embedded into its past seven years of implementation and discuss its legal issues in practice. Part II of this paper provides a roadmap of China's implementation of the BRI in the past seven years. Part III then moves to analyze legal issues in its practice. Part IV will present some suggestions for players to meet challenges and make concluding remarks. This paper concludes that even though the BRI is an ambitious trade and investment initiative for China, practices in the past seven years do reflect a bunch of unresolved legal issues, which will restrict the development of the initiative as a whole per se *in the future, and thereby fewer possibilities for an evaluation of its potential value or its significant influence over world trade and investment. Contrary to its initial objectives and preliminary success announced by China, regulation by law and a rule-oriented structure for the BRI will be more effective*

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instruments to protect the interests of all stakeholders, and will render the global trading system more predictable and fairer.

KEYWORDS: *BRI, implementation, legal challenges, regulation by law, rule-oriented structure*

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I. INTRODUCTION

In 2013, two significant new policies were initiated by the Chinese government to promote its economic reform and accelerate development. One was the establishment of the Experimental Free Trade Zone (hereinafter "EFTZ") in Shanghai in September, and another policy was the one now widely known as the "One Belt One Road" initiative (hereinafter "BRI"), which was firstly delivered as "The Silk Road Economic Belt" by the Chinese President Xi Jinping in speeches during his official visit to Kazakhstan in September and as "21st-Century Maritime Silk Road" during his visit to Indonesia in October. A week later, Chinese Premier Li Keqiang further promoted "21st-Century Maritime Silk Road" at the Association of Southeast Asian Nations (hereinafter "ASEAN")–China summit. These two new policies are commonly recognized as China's new grand economic and foreign policies and will be implemented in the coming years. The EFTZs are inwardly focused and will provide a strong link and support for the back of China to develop the BRI, while the BRI is outwardly focused and will serve as China's trade and investment to the countries along the paths as well as its integration into the world economy.[1] During the past seven years, both new policies have been designed with more details for their implementation. Compared with the EFTZs that are still at the early stage of development, the BRI has been promptly developed and various projects have been constructed along the BRI paths.

The term "One Belt One Road" derives its name from the ancient Silk Road that was a trade network connecting Asia with the Middle East and Europe centuries ago. The ancient Silk Road, beginning in China's Han Dynasty, plays a significant role in the history of China's outbound trade. Nevertheless, in recent decades China has not been the sole country that hopes to revive the Silk Road after its collapse. Prior to China's proposal, other countries and organizations, including Turkey, Saudi Arabia, India, Afghanistan, Kazakhstan and Mongolia, the United Nations Development Programme and the United States (hereinafter "US"), had all proposed similar plans or initiatives to revive.[2] These efforts made by various

[1] Kheng Swe Lim, *Experimental Free Trade Zones and Their Links with One Belt, One Road Initiative*, CHINADAILY.COM.CN (May 26, 2015, 3:33 PM), https://www.chinadaily.com.cn/opinion/2015-05/26/content_20823776.htm.

[2] Jin Chanrong, *Fazhanzhong Guojia He Quanqiu Zhili Duxuyao Yidaiyilu* [*Developing Countries and the Global Governance Need "BRI"*], XINHUA NET (Dec. 26, 2016, 4:41 PM), http://www.xinhuanet.com/world/2016-12/26/c_129420647.htm. The United Nations had launched the "Silk Road Initiative" in February 2008, see Qian Ding, *B&R Key Words (12): Similar Initiatives (Part I)*, CCTV.COM (May 5, 2017), http://english.cctv.com/2017/05/05/ARTI4a3IeMPXIHLuTz3HSOXH170505.shtml; and the US had proposed a "New Silk Road" plan in July 2011, see Joshua Kucera, *Clinton's Dubious Plan to Save Afghanistan with a 'New Silk Road'*, THE ATLANTIC (Nov. 2, 2011), https://www.theatlantic.com/international/archive/2011/11/clintons-dubious-plan-to-save-afghanistan-with-a-new-silk-road/247760/.

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countries and organizations indicate that great opportunities have arisen in the process of a revival of the ancient Silk Road to promote economic development and expand trade.

Despite these efforts, all similar initiatives or plans were not implemented successfully until China delivered its own BRI in 2013. Over the past seven years, China has input billions of dollars into this initiative and numerous projects have been kicked off along the cities of the BRI. Domestically, China has launched an ambitious program to support the BRI and is anxious to shape it as a long-term strategy for China's outbound trade and investment.

It is interesting to find the answer to the question as to why China has been able to kick off a revival of the Silk Road initiative and has implemented it for seven years. Upon a superficial analysis, several factors may contribute to China's capacity for this revival. For example, some existing infrastructure projects along cities of the Silk Road are now able to provide the basic transportation requirement for further trade and investment among the region; various funds that China set up, such as the Asia Infrastructure Investment Bank (AIIB) and the Silk Road Fund, can provide the financial support for the BRI; and finally the existing mechanisms led by China or the relevant regional arrangements can be added or integrated into the BRI, including the Shanghai Cooperation Organization dialogue partnership and the China-ASEAN Free Trade Area.

According to China's proposal, China designed its BRI as various routes. For the "Silk Road Economic Belt" (One Belt) initiative, it has three major routes. The north route runs from China to Central Asia and Russia, and ends at the Baltic of Europe. The middle route starts from China via Central Asia, West Asia, the Persian Gulf, and ends at the Mediterranean Sea. The south route goes from China to the Indian Ocean through Southeast Asia and South Asia. In contrast, the "21st-Century Maritime Silk Road" (One Road) initiative also contains two main routes as designed. One route is from China's coast line to Europe via the South China Sea and the Indian Ocean, and the other route runs from China's coast line to the South Pacific through the South China Sea.

The BRI is an ambitious plan for trade and investment. In light of the proposed routes, at least sixty-five countries around the world have been brought into its scope. These countries include Mongolia and ten countries of ASEAN in East Asia, plus eighteen countries of West Asia and eight countries of South Asia. In addition, five countries of Central Asia, seven countries of the Soviet Union and sixteen countries of Central and East Europe are also included.

After its initial proposal in 2013, the BRI as a concept had been brought up constantly in different occasions and in official government documents for a couple of years. However, it was not until March 2015 that the Chinese

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government formally published a designed action plan in detail.[3] This action plan has been a sole official document in detail published for the BRI that the Chinese government reveals its ambition to develop a trade and investment network centered on China around the world.

Although China has kicked off the BRI, it has garnered concerns over China's geopolitical and economic ambitions in the region. In addition to political controversies, there have been various legal challenges embedded into China's implementation of the BRI during the past seven years. This paper will focus on legal challenges in its practice to discuss China's implementation of the BRI. Part II will provide a roadmap of China's implementation of the BRI. Part III then moves to discuss legal issues in practice. Some suggestions and concluding remarks will be presented in Part IV.

II. SEVEN YEARS OF IMPLEMENTATION IN THE BRI: A ROADMAP

According to the "action plan" published in 2015, the BRI was announced as a systemic project and will be built through consultation and integration to meet all interests concerned and the development strategies.[4] Despite several ambiguous principles provided,[5] the action plan addressed detailed projects to implement the proposal. The main idea is to build economic corridors and economic industrial parks as cooperation platforms along international BRI transport routes and the major cities or sea ports for both inland and waterway.[6]

During the past seven years, China has actively promoted this initiative by selecting some areas and industries as priorities to develop. The infrastructure is the main focus of the BRI, and the industries such as transportation, electricity and renewable energy become the priorities.[7] This policy priority is consistent with a mass demand from the countries along the BRI.[8] As of 2020, some big projects in proposed economic corridors and economic industrial parks as well as cooperation platforms have been constructed or developed.

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[3] *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, MINISTRY FOREIGN AFF. PRC (Mar. 28, 2015), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1249618.shtml.

[4] *Id.* para. 4 (Preface).

[5] *Id.* pt. II (principles mentioned, for example, include consistency with principles of the Charter of the United Nations, openness and cooperation, harmony and inclusiveness, abiding by market rules and international norms, and seeking mutual benefits).

[6] *Id.* pt. III.

[7] *Id.* pt. IV.

[8] For example, some countries such as Vietnam are planning to build power plants in coming years.

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A. The Implementation of Major Projects

In north Asia, in the China-Mongolia-Russia Economic Corridor, most proposed projects, such as the China and Mongolia Erenhot-Zamen Ude Cross-border Economic Cooperation Zone, the Ceke Port Cross-border Railway, and the Moscow-Kazan High Speed Rail Project etc., have all started and are expected to be completed in the next couple of years.[9] In the area of the Eurasian Land Bridge, the transportation of containers along the lines between China and Europe as well as the countries along the BRI with fixed transportation routes and schedules has been put into operation. In addition, two projects with Kazakhstan have also been initiated.[10] In the China-Central Asia-West Asia Economic Corridor, the project of the China-Central Asia natural gas pipeline is the main focus. As of 2018, most lines have been completed and put into use. Only a small part of the line that starts from the Turkmenistan revitalized gas field is still under construction.[11] Moreover, big projects such as the "Angren-Pap" rail tunnel in Uzbekistan and the project of the Dushanbe No. 2 power plant in Tajikistan have all been completed during the past seven years,[12] which signals some significant achievements in China's implementation of the BRI.

In the China-Indochina Peninsula Economic Corridor, the main focus of this Corridor is the construction of high-speed railways. For example, the first high-speed railway is to be built within Indonesia between its capital city Jakarta and one of its largest cities Bandung. This project has been signaled as the first big overseas project that the Chinese high-speed constructor has undertaken using its own technology, equipment, resources and materials.[13] Another railway project is the construction of the China-Laos Railway. It is supposed to be part of the Trans-Asian Railway and has been shaped to be a new channel to go to the Indian Ocean, strengthening the economic and trade cooperation among the China-ASEAN Free Trade Area. Moreover, one Economic Cooperation Zone was also initiated and promoted by China and Laos at the national level.[14]

The China-Pakistan Economic Corridor, which begins from Kashgar in China's Xinjiang Uygur Autonomy region and ends at Pakistan's Gwadar Port, is considered as the flagship project of the BRI. The region is connected

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[9] Ma Xin & Wei Mengchen, *Nianzhong Pandian Yidai Yilu Liuda Jingji Zoulang de Xianzhuang yu Jinzhan* [*Development and Construction Progress of the BRI Six Economic Corridors*], SOHU (Dec. 30, 2016, 5:25 PM), https://www.sohu.com/a/123061287_463913.

[10] *Id.* One is called the "China-Kazakhstan (Lian Yun Port) Logistic Cooperation Platform", and the other is the "China-Kazakhstan Horgos Border Cooperation Center").

[11] *Id.* It is called the "China-Central Asia Natural Gas Pipeline: Line D".

[12] *Id.* pt. III.

[13] *Id.* pt. IV.

[14] *Id.*

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to the "One Road" in the north and "One Belt" in the south. It is a trade corridor that covers infrastructure and resources. As the key hub of the south-north Silk Road, it was regarded as a "sweetheart" of the BRI by several high officials.[15] Starting from May 2013, several big projects have been promoted and some are completed. One of the most significant projects is the Karot Hydropower Project, the first hydropower project financed by the BRI and the first overseas investment that was financed and participated by China's Silk Road Fund. It has also been the largest green field hydropower project invested in by the Chinese companies overseas in recent years.[16] In addition to high-speed railways and hydropower stations, other projects, such as roads and ports construction as well as nuclear power stations, have also been promoted. The most striking project is the construction and operation of the Gwadar Port, including the construction of the Port, the construction of a free trade zone, the construction of highways which connected to the Port and the construction of an international airport. The Gwadar Port project has significant impacts on China in both geopolitical and trade areas. On the one hand, with this Port China can avoid its regular maritime access to Europe, Africa and the Middle East by going through the Straits of Malacca, that is often considered as a contentious area and causes potential risks, notably the regional conflicts with the US, India, and the South China Sea disputes. On the other hand, the western region of China is one of the priorities that China hopes to develop in recent years, and the Gwadar Port thus becomes a junction between the western region of China and Europe, and Africa as well as the Middle East, which will provide a new impetus to China's ambitious western development plan in domestic areas for the coming years.

During the past seven years, the implementation of the Bangladesh-China-India-Myanmar Economic Corridor has not made much progress due to the complicated challenges. One example is the project of the Sino-Myanmar pipelines that has been served as a significant platform for energy cooperation between China and Burma as well as a pilot project for the Bangladesh-China-India-Myanmar Economic Corridor. Despite the completion of the majority of the project, it had experienced some political and social challenges after its initiation.[17] Another example is the project of the so-called Kyaukpyu Special Economic Zone that includes an industrial park and a deep-water port. As this project has unique geographic junctions

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[15] *Id.* pt. V.

[16] *Id. See also* Elizabeth Ingram, *Karot in Pakistan to Be First Hydropower Project Financed by China's Silk Road Fund*, RENEWABLE ENERGY WORLD (Apr. 30, 2015), https://www.renewableenergyworld.com/2015/04/30/karot-in-pakistan-to-be-first-hydropower-project-financed-by-chinas-silk-road-fund/#gref.

[17] For example, the instability of the government of Myanmar, the protest from the society against the constructions of oil and gas pipelines etc.

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to the Indian Ocean, it has triggered criticism and doubts about China's ambition in this region.[18]

In addition to the aforementioned areas and projects that China takes as proprieties to develop according to the action plan, it is also notable that African countries have been introduced into the BRI during the past seven years. It is generally believed that African countries were not initially included in the BRI sixty-five partners when the BRI was proposed in 2013. However, with its implementation, it is apparent that China hopes more partners will join this initiative. Moreover, this also shows that the BRI has a dynamic and flexible structure and that its scopes and focuses can be adjusted at any time, consistent with China's global interests. The cooperation between China and African countries under the framework of the BRI mainly follows the similar mode, i.e., "Railway + Port + Industrial Park" (hereinafter "RPI"). With this RPI mode, Chinese enterprises will firstly help the African countries to build up railways which can be connected with the ports they selected. The selected ports then will be constructed for their future transportation and trade. Finally an industrial park that is usually in a neighboring or the same area will be constructed in order to attract more Chinese enterprises to join. Strikingly, as industrial parks are often served as cooperation platforms between the two governments at either national or local levels, it provides preferential treatments and benefits to Chinese enterprises.[19] Currently, this RPI mode is very popular for Chinese investment and trade in Africa, and is spreading quickly all over the countries that have joined the BRI.

B. Institutional Building

In addition to the existing institutional framework that China built up prior to the promotion of the BRI, China has attempted to develop some new institutional mechanisms in order to deal with the potential challenges of the implementation of the BRI during the past seven years. Notably, one event is the establishment of the China International Commercial Court (hereinafter "CICC") for the implementation of the BRI.[20] According to the

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[18] *See generally* David Brewster, *Beyond the 'String of Pearls': Is There Really a Sino-Indian Security Dilemma in the Indian Ocean?*, 10(2) J. INDIAN OCEAN REGION 133 (2014).

[19] Rui Huang, *Yidai Yilu Quyu Yanjiu Zhi Feizhou: Zoujin Feizhou Jiyu Chaye Piaoyi de Zhongguo Gushi* [*Regional Studies of the BRI in Africa: Going to Africa, Chinese Stories Based upon Industrial Drift*], OPINION.CHINA.COM.CN (May 14, 2017), http://opinion.china.com.cn/opinion_22_165222.html.

[20] On 27 June 2018, China's Supreme People's Court (SPC) issued "Provisions of Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court". Zuigao Renmin Fayuan Guanyu Sheli Guoji Shangshi Fating Ruogan Wenti de Guiding [Provisions of Supreme People's Court on Several Issues Regarding the Establishment of the International

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official document issued by China's Supreme People's Court (hereinafter "SPC"), the CICC is a permanent adjudication organ that mainly focuses on international commercial disputes. In 2018, two international commercial courts were established respectively, and the SPC appoints its Fourth Civil Division to be the coordinator and guider for these two courts.[21] The CICC purports to protect the interests of parties and provide better legal service for the BRI. According to the SPC, cases will be heard by a panel consisting of three or more Chinese judges. One special mechanism of the CICC is that it uses the "First Instance being Final" which is different from the usual Chinese legal practice of the "Second Instance being Final", i.e., the judgments and rulings made by the CICC are final without the appeal process and will directly bind the disputing parties when they are effective. This design purports to create an effective and convenient legal environment for the BRI disputes. Another special mechanism introduced to the CICC is to establish an expert committee so-called the "International Commercial Expert Committee" (hereinafter "ICEC"), which is employed as a body of consultants and mediators for the CICC. The Committee consists of Chinese and foreign experts invited by the SPC to mediate cases entrusted by the CICC or provide advisory opinions for the CICC.[22]As of May 2019, two international commercial courts under the CICC respectively have held public hearings on the cases.[23]

The second mechanism China has developed is to convene "the Belt and Road Forum for International Cooperation". The BRI summit was supposed to be created as a platform for further cooperation and negotiations in the BRI by inviting senior officers of various countries as well as international organizations to promote collaboration and discussions of disagreements, and China plans to build this summit as a permanent mechanism. At the second BRI summit held in 2019, the Chinese government announced that it will bring the BRI to an updated level and indicated that it has achieved two hundred and eighty-three positive outcomes for the BRI.[24] Notably, on the list of these outcomes, one striking event concerning legal arrangements is that the China Council for the Promotion of International Trade and the

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Commercial Court] (promulgated by Sup. People's Ct., June 27, 2018, effective July 1, 2018), http://www.court.gov.cn/fabu-xiangqing-104602.html.

[21] *A Brief Introduction of China International Commercial Court*, CHINA INT'L COM. CT. [hereinafter "CICC"] (June 28, 2018), http://cicc.court.gov.cn/html/1/219/193/195/index.html.

[22] *The Decision on Appointment of the First Group of Members for the International Commercial Expert Committee*, CICC (Aug. 24, 2018), http://cicc.court.gov.cn/html/1/219/208/210/993.html.

[23] *The China International Commercial Court Hears Its First Case*, CICC (May 30, 2019), http://cicc.court.gov.cn/html/1/219/208/210/1237.html; *The First International Commercial Court of the Supreme People's Court Holds Its First Public Hearing*, CICC (May 31, 2019), http://cicc.court.gov.cn/html/1/219/208/210/1251.html.

[24] *Full Text of Outcome List of 2nd BRF*, BRF (Apr. 28, 2019), http://www.brfmc2019.cn/en/442.shtml.

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China Chamber for International Commerce have jointly established "the International Commercial Dispute Prevention and Settlement Organization" (hereinafter "ICDPSO") with some BRI countries.[25] As the ICDPSO was just established in October 2020, due to a lack of detailed structures and rules of the organization, it is hard to predict the potential role that it will play for the dispute settlement mechanism in the BRI.

C. China's Implementation on MOUs

As of 2019, the statistics provided by China indicates that 123 countries and 29 international organizations have signed 171 official documents or the Memorandum of Understanding (hereinafter "MOU") with China regarding collaboration for the BRI.[26] Most of these partners are developing countries and least developed countries. Although China regards the signature of MOUs as a signal of official acknowledgement and support of the BRI, there are few developed countries that have signed MOUs.[27] Others of China's major trading partners, such as the US, the European Union (hereinafter "EU"), the United Kingdom (hereinafter "UK"), Australia, Canada and Japan, have not agreed to join this initiative. Some of them have expressed their interests, but simultaneously triggered controversies as well as concerns.[28]

Australia and the UK have refused to sign MOUs although China officially made a request. The EU has a similar attitude towards the BRI. On the one hand, the EU considers the BRI is too broad to identify its focus.[29] In addition, China has signed MOUs with sixteen countries from Central and Eastern Europe, among which eleven countries are from the EU. This generates doubts and worries within the EU as to whether China's intention

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[25] On 15 October 2020, the organization has been officially established in Beijing, China. *Guoji Shangshi Zhengduan Yufang yu Jiejue Zuzhi Zhengshi Chengli* [*The International Commercial Dispute Prevention and Settlement Organization Has Been Officially Established*], CHINA COUNCIL FOR PROMOTION INT'L TRADE (Oct. 21, 2020), http://www.ccpit.org/contents/channel_4131/2020/1021/1300612/content_1300612.htm.

[26] *Woguo Yijing Yu 123ge Guojia he 29ge Guoji Zuzhi Qianshule 171fen Yidai Yilu Hezuo Wenjian* [*China Has Signed 171 Official Documents with 123 Countries and 29 International Organizations for the BRI*], BELT & ROAD PORTAL (Mar. 6, 2019, 4:13 PM), https://www.yidaiyilu.gov.cn/xwzx/bwdt/81576.htm.

[27] As of 2020, there are only three countries on the list of developed countries which have already signed the memorandum of understandings [hereinafterMOU] with China for the Belt and Road initiative [hereinafter BRI], including New Zealand, Italy and Luxembourg.

[28] *See, e.g.*, Liu Xuanzun, *Australian State of Victoria Signs MoU with China on Belt & Road*, GLOBAL TIMES (Oct. 28, 2018, 11:13 PM), https://www.globaltimes.cn/content/1124870.shtml.

[29] Andreas Grimmel & Susanne My Giang, *Why China's 'One Belt, One Road' Initiative Should Be Taken More Seriously by the EU and How It Can Be an Interregional Success*, LSE (Apr. 11, 2017), https://blogs.lse.ac.uk/europpblog/2017/04/11/why-chinas-one-belt-one-road-initiative-should-be-taken-more-seriously-by-the-eu/.

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is to split the EU. Moreover, the EU also worries about China's market strategy, arguing the Chinese enterprises may obtain more orders in the market via the BRI and simultaneously the initiative may push China's trading partners into a trap of debts.[30] The EU further criticized China for not following the international custom to sign multilateral treaties with its partners for the BRI. On the other hand, the US is unwilling to support the BRI, thereby rendering the EU and its alliance to doubt the feasibility of implementing the BRI.[31]

The attitude of the US towards the BRI is similar to the EU's. When China initially proposed the BRI, the US generally considered it as "China's Marshall Plan" or "debt diplomacy", which is mainly for fighting with the US Asia-Pacific rebalancing strategy.[32] The US further argued that China would rely on the BRI to seek a westward strategy and thus attempt to reshape the geopolitical landscape of Eurasia that has been dominated and led by the US during the past century.[33] Moreover, the US, cooperating with Australia, Japan and India, did research to seek a substitute proposal to counter the BRI. With the new tough policies against China recently adopted by the US administration, the US officials have been more critical of China's implementation of the BRI.[34] However, contrary to the US politicians, the US businesses have expressed their interest and are anxious to join the projects of China's BRI.[35]

In addition, some emerging economies also have concerns over the implementation of the BRI. India views the China-Pakistan Economic Corridor as a violation of India's sovereignty and argues that intensive investment in India's neighboring countries is a threat to India's security and interests.[36] Finally, India has traditional border issues with China, and this

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[30] *See, e.g.*, Col DJS Chahal, *Belt and Road Initiative (BRI)—A 'Debt Trap' for Recipients and Retarder for China's Economy*, OLIVE GREENS INST. (Apr. 26, 2019), https://www.olivegreens.co.in/easyblog/belt-and-road-initiative-bri-a-debt-trap-for.

[31] Eszterhai Viktor, *The One Belt One Road from Germany's Perspective*, PAGEO (Aug. 15, 2017), http://www.geopolitika.hu/en/2017/08/15/the-one-belt-one-road-from-germanys-perspective/.

[32] Simon Shen, *How China's 'Belt and Road' Compares to the Marshall Plan: Should We Think of "One Belt, One Road" as China's Marshall Plan?*, THE DIPLOMAT (Feb. 6, 2016), https://thediplomat.com/2016/02/how-chinas-belt-and-road-compares-to-the-marshall-plan/.

[33] *See generally* Serafettin Yilmaz & Liu Changming, *China's 'Belt and Road' Strategy in Eurasia and Euro-Atlanticism*, 70(2) EUR.-ASIA STUD. 252 (2018).

[34] Brian Cloughley, *Belt and Road Harmony—and Hostility*, STRATEGIC CULTURE FOUND. (June 11, 2019), https://www.strategic-culture.org/news/2019/06/11/belt-and-road-harmony-and-hostility/.

[35] Evelyn Cheng, *Honeywell, Other US Companies Look to Benefit from China's Gigantic 'Belt and Road' Initiative*, CNBC (Mar. 12, 2018, 12:06 PM), https://www.cnbc.com/2018/03/12/honeywell-other-us-companies-look-to-benefit-from-chinas-gigantic-belt-and-road-initiative.html.

[36] Rajasimman Sundaram, *Disambiguation of OBOR in Sino-Indian Relations: Is It a Strategic Checkmate—Part-1*, IDR (May 14, 2017), http://www.indiandefencereview.com/spotlights/disambiguation-of-obor-in-sino-indian-relations-is-it-a-strategic-checkmate-part-1/.

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unresolved controversy further drives India to question China's motivation for the BRI.[37]As a result, on the one hand, India has clearly refused to attend the activities of the BRI, and on the other hand, it has cooperated with other countries to propose a new regional project to counter the impact imposed by China's implementation of the BRI.

III. SEVEN YEARS OF IMPLEMENTATION IN THE BRI: LEGAL ISSUES VS. REGULATION BY LAW

The BRI has been progressively implemented for seven years since it was first proposed in 2013. During the past seven years, despite initial success announced by China, there are various challenges embedded into the practice that may lead to the failure of the whole initiative. Among them, legal issues will be singled out in order to discuss and indicate that the existing framework of China's implementation has been absent from regulation by law. The irregularity of law has rendered China's implementation of the BRI less predictable, not transparent and at risk.

A. Institutional Issues

Generally, China relies on the existing bilateral investment or trade agreements to implement the BRI. However, most of the so-called "agreements" are either bilateral agreements that China signed with its partners many years ago or MOUs that loosely express the intention to cooperate with China in the BRI. According to a chart published by China's Ministry of Commerce (hereinafter "MOFCOM"), as of 12 December 2016, China has signed bilateral investment agreements with one hundred and four countries and regions.[38] Among these partners, most are included in the BRI. Nevertheless, the chart indicates that no agreement has been signed since 2013 and further implies that all bilateral agreements China has currently employed do not target its implementation of the BRI. Currently, the real "agreements" for the BRI China signed with its BRI partners are MOUs. However, as a MOU is a framework for both parties to express their intention to cooperate and thus is often not strictly drafted by providing detailed provisions for implementation, it is hard to legally and strictly bind the

[37] A more recent border conflict between China and India was in June 2020, which may cast a long shadow on the relationship between the two countries, from which both will not recover completely for many years.

[38] *Woguo Duiwai Qianding Shuangbian Touzi Xieding Yilanbiao* [*Bilateral Investment Treaty*], DEP'T TREATY & L. MINISTRY COM.PRC (Dec. 12, 2016, 10:09 AM), http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml. (Since 12 December 2016, MOFCOM has not updated the statistics.)

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signing parties. As a result, MOUs have triggered criticism and doubts about China's intention to propose and implement the BRI,[39] and are further argued as evidence to prove that the BRI is not transparent and not feasible for its future implementation, but rather is merely a development strategy that China pushes in the specific regions for its ambition in politics.[40]

The absence of details and legal binding provisions in the MOUs has some negative impacts on the implementation of the BRI. Firstly, it renders the projects invested in the BRI countries uncertain. Most of the current projects are proposed and pushed by the leaders of the parties. Their implementation is generally contingent upon the willingness and intention of the leaders. Once the proposed project has any difficulties during its implementation, considering the relationship of the BRI, the leaders often choose to resolve the problem through individual efforts rather than the dispute-settlement resort. By employing this power-oriented mechanism, the implementation of the BRI looks more like a temporary policy than a long-term strategy. As most projects of the BRI are time, energy and capital intensive, changes of both parties' leaders and/or governments may also add to the difficulties of the implementation of the projects in a long period. The new leaders or government may not continue to support the projects. Even on the Chinese side, whether the next generation of the Chinese leaders will continue to take the BRI as a long-term national strategy and lend consistent support to the projects is also questionable.

Secondly, a lack of detailed substantive and procedural rules of the dispute settlement in the MOUs forces stakeholders to have to seek other dispute resolutions at national or international levels, which reduce confidence in and the potential attraction of the BRI. On the one hand, most projects in the BRI, as indicated earlier in this paper, are long-term ones and thus are subject to the complicated and various political, legal and cultural contexts. They are readily trapped in various disputes. As a result, efficient and effective provisions for the dispute settlement are necessities for the implementation of the BRI, not only among the BRI countries but also among the various other individual participants in the BRI. And on the other hand, as bilateral investment agreements do not target the implementation of the BRI, the binding provisions of the dispute settlement mechanism in these agreements even if they have, will not fit into the category of the BRI. As indicated in the following Table,[41] some BRI countries are not members of certain important conventions regarding the dispute settlement mechanism at the multilateral level, which will further reduce the potential possibility

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[39] For details about BRI's MOUs, see generally Sebastian Ibold, *Cooperation Agreements and MoUs Under the Belt and Road Initiative*, BRI (Nov. 18, 2018), https://www.beltroad-initiative.com/memorundum-of-understanding-belt-and-road-initiative/.

[40] Shen, *supra* note 32.

[41] For details, see *infra* Part III: D.

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for seeking other dispute resolutions to resolve the BRI disputes. Moreover, few international disputing parties are willing to opt for domestic tribunals of either party to resolve the disputes between them. Consequently, enacting legal binding provisions of dispute resolutions in the MOUs that are called formal "agreements" of the BRI is crucial to the implementation of the BRI. This is because certain disputes, in this regard, de facto are not able to be resolved without relevant provisions in the MOUs.

Finally, the advocacy of signing MOUs may also triggers doubts as to why China is unwilling to join the regional agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP") or other formal bilateral agreements to deal with the similar trade and investment issues. This will further render China in a worse position when promoting the BRI because the intention behind the initiative may be more easily interpreted as China's ambitions for politics in the region. Therefore, an absence of legal binding provisions in the MOUs of the BRI may become the deadlock for China's future implementation of the BRI and will finally destroy the projects.

Another institutional issue is embedded into the relationship between the BRI and other regional trade or investment agreements. As unimpeded trade and financial integration are two ultimate goals for the BRI, however, these goals may overlap in other similar regional trade and investment agreements, such as the CPTPP and the Regional Comprehensive Economic Partnership (hereinafter "RCEP"). As China has not decided to step into the CPTPP but has joined the RCEP,[42] and simultaneously launched the BRI, this will leave doubts as to whether China intends to dominate the regional trade and investment by employing the BRI as an instrument. Apparently, contrary to the BRI, the CPTPP and the RCEP are highly transparent and rule-oriented, and their processes of negotiations are largely in compliance with the international customs for reaching multilateral trade and investment agreements rather than a domestic scheme promoting one party's government through signing bilateral MOUs. Moreover, in the future, even if China has formal bilateral or multilateral agreements with its BRI partners on trade and investment rules, they cannot avoid rules intertwined with many other regional trade and investment agreements, a phenomenon so-called the "spaghetti bowl",[43] because the BRI partners are involved with at least sixty-five countries around the world and many of them have already engaged in various regional and multilateral trade and investment agreements. Therefore, the issue of application of rules and agreements will be essential and extremely complicated for the implementation.

[42] On 15 November 2020, fifteen countries formally signed Regional Comprehensive Economic Partnership (RCEP) and are currently waiting for their congress for approval respectively.

[43] *See* Jagdish Bhagwati, *US Trade Policy: The Infatuation with FTAs* 4-9 (Columbia Univ., Discussion Paper Series No. 726, 1995).

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In addition, the current BRI summit that China created for cooperation is much like a political forum for announcement of achievements by politicians rather than a platform for problem-solving discussions and negotiations by government representatives. However, a real platform for resolving the disagreements and disputes among the BRI partners is essential to the whole initiative. The current legal framework and structure of the BRI, including the existing bilateral investment agreements, MOUs, and other dispute settlement mechanisms, such as the BRI summit and the ICDPSO, are not able to provide sufficient legal instruments for the implementation of the BRI. For a long-term existence, the BRI thus should find a new resolution or reshape its current mechanism to resolve the institutional issues.

B. The CICC Issues

In addition to a lack of provisions for the dispute settlement mechanism in the MOUs, the issue of the CICC is also controversial. To date, the BRI does not have a uniform dispute settlement mechanism and various researches have advocated that the establishment of a specific dispute settlement mechanism for the BRI is a must.[44] To respond to this proposal, the establishment of the CICC demonstrates part of China's latest efforts. However, the current CICC mechanism has its inherent insufficiency that should be improved in the future. First, countries that joined the BRI have varying legal systems, and this variety may lead to various understandings and interpretations of rules and laws for the disputes that occur in these systems. However, in the CICC, most judges are merely familiar with the Chinese legal system and thus are not able to deal with all disputes of the BRI effectively. Despite the establishment of the ICEC as a body of consultants and mediators for the disputes, it is not clear whether and how the ICEC will work for the disputes, and to what extent the advice it provided will be accepted by the CICC. The role and working procedures for the ICEC as consultants and mediators are thus yet questionable. Since there is no practical case that can be referred to evaluate these questions, it will have to wait and see how the dispute settlement mechanism of the BRI will be reshaped to overcome.

Furthermore, as the judgments and rulings made by the CICC are final without appeal process, the system is more like an arbitration procedure than a court proceeding. However, judgments and rulings made by the CICC are not real arbitral awards and are not able to be applied to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for implementation. As a result, on the one hand,

[44] *See generally* Jiaxiang Hu & Jie (Jeanne) Huang, *Dispute Resolution Mechanisms and Organizations in the Implementation of 'One Belt One Road' Initiative: Whence and Whither*, 52(5) J. WORLD TRADE 815 (2018).

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an absence of the appeal process prevents the parties from seeking further remedies in the domestic legal system. And on the other hand, judgments and rulings will be very difficult to implement outside China due to the difficulties of recognition and implementation of judgments around the world. The implementation of the judgments and rulings made by the CICC can merely rely on the domestic legal system, i.e., the Chinese judicial system. This double insufficiency may hurt the stakeholders' interests, a foreign partner of the BRI in particular.

Last but not least, the biggest insufficiency of the CICC is that it is merely a domestic judicial system based upon the domestic law and thus not an ideal dispute-settlement resolution for resolving the BRI disputes. It is not a real international commercial court or arbitration committee established by the bilateral or multilateral agreements. Generally, there are three different types of disputes in the BRI, including trade and investment disputes between countries, investment disputes between host countries and investors, and commercial disputes between enterprises located in different BRI countries. The SPC has expressly identified that the scope of cases the CICC will take is "the international commercial cases [that] are civil and commercial disputes between equal entities" and has excluded the first two types of BRI disputes from the scope.[45]

According to the SPC, the first two types of the BRI disputes are able to be settled by the "existing international dispute settlement rules".[46] As a result, the jurisdiction of the CICC merely extends over the cases that meet any of the following five conditions:[47]

1. First instance international commercial cases in which the parties have chosen the jurisdiction of the [SPC] according to Article 34 of the Civil Procedure Law [of China], with an amount in dispute of at least 300,000,000 Chinese yuan;
2. First instance international commercial cases which are subject to the jurisdiction of the higher people's courts who nonetheless consider that the cases should be tried by the [SPC] for which permission has been obtained;
3. First instance international commercial cases that have a nationwide significant impact;

[45] *The State Council Information Office Held a Press Conference on the "Opinion on the Establishment of 'the Belt and Road' International Commercial Dispute Settlement Mechanism and Institutions"*, CICC (June 28, 2018), http://cicc.court.gov.cn/html/1/219/208/210/769.html.
[46] *Id.*
[47] Provisions of Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, *supra* note 20, art. 2.

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> 4. Cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards . . . ;
> 5. Other international commercial cases that the [SPC] considers appropriate to be tried by the [CICC].

In addition, the SPC also identifies the international commercial cases as:[48]

> 1. One or both parties are foreigners, stateless persons, foreign enterprises or other organizations;
> 2. One or both parties have their habitual residence outside the territory of [the People's Republic of China (P.R.C)];
> 3. The object in dispute is outside the territory of the [P.R.C];
> 4. Legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the [P.R.C].

According to the foregoing provisions and interpretation, the CICC is not able to accept cases between the BRI countries and cases between host countries and investors. However, as indicated earlier, the majority of the current BRI projects are involved with infrastructure and investment, and thereby more disputes of the first two types. Simultaneously, although the SPC considers the first two types of disputes are able to be subject to the existing dispute settlement mechanism, it should be noted that not all BRI countries and all BRI disputes are able to be resolved by the existing mechanism, such as the World Trade Organization (hereinafter "WTO") dispute settlement mechanism and the International Center for Settlement of Investment Disputes (hereinafter "ICSID") Convention. This is because certain BRI countries have not joined the existing dispute settlement mechanism, or certain BRI disputes are not resolved due to a lack of binding agreements.[49] Furthermore, a lack of provisions for the dispute settlement mechanism in the MOUs and bilateral agreements renders the situation even worse. Consequently, certain disputes between the BRI countries and certain investment disputes between host countries and investors are not able to be subject to any existing dispute settlement mechanism and cannot be resolved by a rule-oriented approach.

For the third type of the BRI disputes that are currently the main target of the CICC, the CICC needs to consider whether both parties, in specific

[48] *Id.* art. 3.
[49] *See infra* Table.

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cases of one foreign party outside China, are willing to choose it as their jurisdiction. Parties may not have confidence in the Chinese legal system, or the amount of the disputes cannot reach the benchmark of jurisdiction,[50] and parties are thus unwilling to accept the jurisdiction of the CICC. On the other hand, in the disputes where both parties are enterprises located in different BRI countries, most disputing parties often intend to choose the commercial arbitration under their contracts. However, according to the foregoing criteria that the SPC set for the CICC to accept the cases, merely when the two parties choose the CICC and an amount in a dispute reaches the benchmark of 300,000,000 RMB, it can trigger the jurisdiction of the CICC. Therefore, even though the jurisdiction of the CICC may compete with various commercial arbitration committees over the BRI disputes of 300,000,000 RMB or above, the role of the CICC in resolving other BRI disputes may be limited in practice. It can be applied to resolve some disputes, in particular when two Chinese enterprises have domestic disputes for the BRI. However, for the majority of the BRI disputes, it won't work. The BRI thus needs to create a real international dispute settlement mechanism that can apply to all legal systems and disputes along the BRI in order to ensure the long-term implementation of the initiative.[51]

C. The State-owned Enterprises and State Capitalism

In the BRI, China's state-owned enterprises (hereinafter "SOEs") have played an important role in the majority of the projects. According to the statistics, as of April 2019, "SOEs that controlled by the China's central government"[52] have implemented 3,120 projects along the BRI routes, which accounts for more than 60% of infrastructure projects of the BRI that have kicked off or intend to start. And the contract amount that these projects involved even accounts for almost 80% of the total contract amount that China has signed for the infrastructure projects in the BRI.[53]

Currently, the BRI primarily focuses on development of infrastructures, which renders China's SOEs in a better position in competing in the market

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[50] Provisions of Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, *supra* note 20, art. 2 (see the criteria (1) on the benchmark of 300,000,000 Chinese Yuan (RMB)).

[51] *The International Commercial Dispute Prevention and Settlement Organization Has Been Officially Established*, *supra* note 25. China has just launched another organization called ICDPSO as a part of its latest efforts to resolve the BRI disputes.

[52] In China, the term refers to state-owned enterprises [hereinafter SOEs] administered solely by the State Council or the entrusted institution that supervises or administers the state-owned assets. These enterprises are normally wholly SOEs or state-owned holding enterprises.

[53] Ma Changyan & Zhang Yi, *Yangqi he Minqi zai Yidai Yilu Jianshe zhong Liliang You Duoda Shuju Gaosu Ni* [*How Is the Strength of Central Enterprises and Private-owned Enterprises in the Construction of the BRI? The Statistics Will Tell You*], WWW.CE.CN (Apr. 25, 2019), http://www.ce.cn/xwzx/gnsz/gdxw/201904/25/t20190425_31936040.shtml.

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than private enterprises. In infrastructure projects that are often time, energy and capital intensive, SOEs have stronger competition advantages. Although China's private enterprises have improved their status in recent years, in domestic circumstances they are not able to gain the same resources and support as SOEs. For example, it is much easier for SOEs to obtain financial loans from banks or get other support from the central or local governments at various levels than private enterprises when facing challenges. Despite this, most large-scale enterprises in China are SOEs. For example, the majority of Chinese companies that are on the Fortune 500 are SOEs, in contrast to the rest of the list from other countries of which the majority are privately-owned ones. Consequently, China's SOEs will have more competition advantages and stronger capacities to invest in and operate projects abroad than private enterprises. To some extent, SOEs are representatives of the Chinese government abroad. This closer relationship with governments is particularly important in the context of the existing framework of the BRI. This is because the BRI mainly employs the relationship of the two governments to discuss the frictions when it is absent from regulation by law to resolve disagreements and disputes. In this sense, the factor of obtaining the standing support from the government is essential for enterprises to be involved with the BRI.

However, the past seven years of implementation in the BRI have demonstrated that it is necessary to consider the issue of SOEs in the BRI if a rule-oriented structure that is acceptable by all stakeholders in the BRI is able to be created. It should be noted that the full involvement of SOEs in the BRI does not provide benefit for a fairer rules structure of the BRI. In fact, extensive participation of SOEs in the BRI may cause severe challenges to the projects. One notable challenge is the intention and strategies of SOEs that are involved with the projects. Because SOEs are somewhat quasi representatives of the government, any action undertaken by SOEs thus is more readily misunderstood and confused with actions of governments. Moreover, the strong support from the government and its close relationship to the government also renders the involvement of SOEs to be labeled as "state capitalism".[54]

In addition, the intention and strategies of the involvement of SOEs in the BRI are not clear. For SOEs, making profits might not be the priority in the projects. Other considerations, such as national interests and diplomatic relationships, may also play an important part if paying much attention to the intention of the government. Unlike private enterprises, SOEs represent certain interests of states and thus it is inevitable to consider various factors to invest or trade with specific partners rather than merely profits. However,

[54] Erebus Wong et al., *One Belt, One Road: China's Strategy for a New Global Financial Order*, MONTHLY REV. (Jan. 1, 2017), https://monthlyreview.org/2017/01/01/one-belt-one-road/.

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in the BRI, considering an absence of regulation by law and the instability of the policy and leadership, it is hard to maintain a long-term involvement if there is not a profit-driven intention. Finally, the fact that the majority of the BRI projects are undertaken by SOEs adds more possibilities to the label of "state capitalism", which further triggers the suspicions and concerns about China's intention and strategy for the BRI.

Another concern is over the relationship between SOEs and rules construction of the BRI. During the past seven years, SOEs have been challenged by various domestic rules and regulation set by the BRI countries when implementing the BRI projects. For example, SOEs are readily under the doubts about the issues, such as national security and social responsibility,[55] or trigger discussions of the principle of competitive neutrality.[56] Apparently, it is not beneficial to the implementation of the BRI projects. On the one hand, most of China's SOEs do not familiarize themselves with international conventions and customary laws, and often intend to employ the domestic political instruments to resolve the problems. Usually, they do not resort to an international dispute settlement mechanism even if the disputes have already arisen. Although China joined the ICSID Convention in 1993, Chinese enterprises had never filed claims by employing the ICSID mechanism until 2010.[57] Most SOEs often ignore various risks but rely on assistance from the government. A recent settled case brought by China's SOE Beijing Urban Construction against the Government of Yemen[58] in the ICSID has indicated that SOEs did not evaluate potential legal risks before implementing the BRI projects. On the other hand, the appointment of their leaders is contingent upon whether SOEs have completed the political tasks in the terms, and the board of management of SOEs is thus not often anxious to shape rules in the BRI. Consequently, it is almost impossible to shape or create systematic rules for the BRI if the rules construction of the BRI intends to rely on the practices of participants and developments of projects, in particular in the case of participation of SOEs. In this regard, the role of SOEs in the rules construction for the BRI is very limited.

Therefore, the current scheme should be shifted to encourage more private enterprises to participate in the BRI and to provide a fairer competition field and environment for all participants. Measures should include taxes reduction and financing policy etc. to help more private

[55] For example, the hydropower project of Myitsone Dam along the Ayeyarwady River in Myanmar triggered harsh criticism from the public.

[56] The principle is a recent hot issue in processes of negotiations of multilateral and regional agreements

[57] The earliest claimant from China as enterprises in the ICSID is the case of Beijing Shougang and others against Mongolia in 2010.

[58] Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction (May 31, 2017).

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enterprises to be involved with the BRI. Extensive participation of private enterprises in the BRI may not be able to resolve all the issues that SOEs have caused in the BRI. However, it ensures help to create rules of a level playing field for all participants in the BRI, and will be good to reduce the suspicions and criticism of "state capitalism" and will benefit rules construction in the BRI as a whole.

D. The General Legal Issues of the Implementation

In addition to the systematic and specific legal challenges aforementioned, there are other legal issues when implementing the BRI. Most of these issues can be included in the scope that the WTO have discussed and regulated. They are issues such as trade and investment barriers, market access, transparency and facilitation etc. For example, in Lebanon, the invoices of all imports need to be certified by the Consulate General of Lebanon located in the exporting country. However, as Lebanon merely has an Embassy located in China's Capital City, it provides that all enterprises located in that city have to go to the Lebanese Embassy to apply for certification and all other enterprises located outside have to make a note on the invoice that there is no Lebanese Consulate General in their locations.[59] Like Lebanon, all imports of the Syria Arab Republic also need licenses that can only be obtained from Syria's Economy and Trade Ministry and its associates.[60]

However, the crucial question for the foregoing examples that is relevant to the legal challenges of the BRI implementation is that neither Lebanon nor Syria is a member of the WTO. Although they are WTO observers, they are not subject to the WTO rules. This does imply the challenge of irregularity in the BRI implementation. Among the BRI countries, as the Table indicates below, some are not WTO member states, some are countries with which China has never signed any bilateral investment agreement, and some are countries that have not joined the New York Convention or the ICSID Convention. Consequently, an absence of regulation of both bilateral investment agreements and various multilateral trade agreements or dispute-

[59] CHINESE ACAD. OF INT'L TRADE & ECON. COOPERATION [hereinafter CAITEC], ECON. & COMMERCIAL COUNSELLOR'S OFFICE OF THE EMBASSY OF CHINA IN THE REPUBLIC OF LEB. & MINISTRY OF COMMERCE, DUIWAI TOUZI HEZUO GUOBIE (DIQU) ZHINAN: LIBANEN (2019NIANBAN) [COUNTRY (REGION) GUIDE FOR FOREIGN INVESTMENT AND COOPERATION—LEBANON (VERSION 2019)] 87, http://images.sh-itc.net/202001/20200113135742394.pdf.

[60] CAITEC, ECON. & COMMERCIAL COUNSELLOR'S OFFICE OF THE EMBASSY OF CHINA IN THE SYRIAN ARAB REPUBLIC & MINISTRY OF COMMERCE, DUIWAI TOUZI HEZUO GUOBIE (DIQU) ZHINAN: XULIYA (2019NIANBAN) [COUNTRY (REGION) GUIDE FOR FOREIGN INVESTMENT AND COOPERATION—SYRIAN ARAB REPUBLIC (VERSION 2019)] 31, http://images.sh-itc.net/202001/20200113140432750.pdf.

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settlement arrangements, will render all stakeholders in a high-risk position for implementing the BRI.

TABLE: BRI Countries (Regions) That Have Not Entered into Certain International Conventions (As of February 2020)

Country/Region	**WTO Membership**	**New York Convention Membership**	**ICSID Convention Membership**	**Bilateral Investment Agreement with China**
Myanmar	Yes	Yes	**No**	Yes
Thailand	Yes	Yes	Yes (sign only)	Yes
Laos	Yes	Yes	**No**	Yes
Vietnam	Yes	Yes	**No**	Yes
Brunei Darussalam	Yes	Yes	Yes	**No**
Iran	**No** (observer)	Yes	**No**	Yes
Iraq	**No** (observer)	**No**	Yes	**No**
Syrian Arab Republic	**No** (observer)	Yes	Yes	Yes
Jordan	Yes	Yes	Yes	**No**
Lebanese Republic	**No** (observer)	Yes	Yes	Yes
Palestine	**No**	**No**	**No**	**No**
Yemen	Yes	**No**	Yes	Yes
Bangladesh	Yes	Yes	Yes	**No**
Afghanistan	Yes	Yes	Yes	**No**
Maldives	Yes	Yes	**No**	**No**
Nepal	Yes	Yes	Yes	**No**
Bhutan	**No** (Observer)	Yes	**No**	**No**
Uzbekistan	**No** (Observer)	Yes	Yes	Yes
Turkmenistan	**No**	**No**	Yes	Yes
Tajikistan	Yes	Yes	**No**	Yes
Russia	Yes	Yes	Yes (sign only)	Yes
Belarus	**No**	Yes	Yes	Yes

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	(Observer)			
Azerbaijan	**No** (Observer)	Yes	Yes	Yes
Moldova	Yes	**No**	Yes	Yes
Poland	Yes	Yes	**No**	Yes
Latvia	Yes	Yes	Yes	**No**
Bosnia and Herzegovina	**No** (Observer)	Yes	Yes	**No**
Montenegro	Yes	Yes	Yes	**No**
Serbia	**No** (Observer)	Yes	Yes	Yes
North Macedonia	**No**	Yes	Yes	Yes

SOURCES: (1) Members and Observers, WTO website; (2) List of Contracting States, New York Convention website; (3) Databases of ICSID Member States, ICSID; (4) MOFCOM's official website, Department of Treaty and Law, MOFCOM, China, "Table of China's Bilateral Investment Treaty" (Bilateral Investment Treaty), Dec. 12, 2016, http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml.

In addition, the latest development for implementing the BRI is that China adopts a new RPI mode in some BRI regions. However, a recent case in Kenya has demonstrated that the RPI mode that is quite popular in the BRI carries high legal risks and may be illegal under different legal systems.[61] A lack of provisions in formal legal documents/treaties to ensure its legality and implementation may leave the projects with an awkward and pending future. Therefore, it is necessary to clarify and regulate this mode in formal bilateral legal documents/agreements.

IV. SUGGESTIONS AND EPILOGUE: OLD WINE IN A NEW BOTTLE OR A NEW MODEL FOR TRADE & INVESTMENT

As discussed earlier in this paper, there are two primary motivations that led China to propose the BRI although they were not indicated in official documents. One motivation is to deal with the excess manufacturing capacity of China's domestic industries. The other is to fight with the US for its regional alliance in the Asia-Pacific, in particular identifying the CPTPP as one where the predecessor TPP was allegedly targeted by China's trade

[61] Pritesh Kamath, *Kenyan Appellate Court Rules $3.2 Billion Chinese Contract with Kenyan Railways 'Illegal'*, REPUBLIC WORLD (June 25, 2020, 1:05 PM), https://www.republicworld.com/world-news/africa/kenya-railways-china-railway-contract-chinese-debt-trap-diplomacy.html.

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impacts and the political ambition in the region. Consequently, the proposal of the BRI is an emerging response to these economic and political pressures. The BRI is thus much like a policy-oriented product to meet politicians' demand for domestic policies and diplomacy. Early developments of the BRI have not implied a clear and consistent landscape for its long-term existence and implementation.

Since the BRI was proposed, scholars and observers have offered various analyses and discussions on its development from different perspectives.[62] However, although the opinion has been offered that the ambiguity of the BRI and a non-treaty-based network is the strength that China pursues,[63] to date nothing has demonstrated that China intends to establish a non-binding-mechanism for the BRI as it declared that this initiative is a long-term national policy for China's future outbound trade and investment. On the contrary, the current structure of the BRI has implied an increasing instability and misunderstanding about its implementation and its initial purpose. At the domestic level, China's various domestic stakeholders have their individual understanding and interests regarding the implementation of the BRI, and thereby various local policies to promote this initiative, which may be inconsistent with China's national interests and international commitments.[64] At the international level, severe challenges, such as the doubts about an instrument for "debt diplomacy" and the doubts about China's continuous responsibilities and financial support for this initiative, have prevented further developments and the implementation of the BRI.

As discussed earlier, the historical background of the BRI's proposal and its implementation during the past seven years have demonstrated that the current framework will not work for the sustainable development of this initiative but will bring a bunch of severe legal challenges unresolved for the future, including the institutional issues, the CICC model for disputes, the issue of SOEs and other issues of irregularities. These challenges may

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[62] *See generally* Julien Chaisse & Mitsuo Matsushita, *China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications*, 52(1) J. WORLD TRADE 163 (2018); Jonathan E. Hillman, *China's Belt and Road Initiative: Five Years Later*, CSIS (Jan. 25, 2018), https://www.csis.org/analysis/chinas-belt-and-road-initiative-five-years-later-0; Guiguo Wang, *Legal Challenges to the Belt and Road Initiative*, 4(2) JICL 309 (2017); Julien Chaisse & Jamieson Kirkwood, *Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty*, 23(1) J. INT'L. ECON. L. 245 (2020); Heng Wang, *China's Approach to the Belt and Road Initiative*, 22(1) J. INT'L. ECON. L. 29 (2019).

[63] Heng Wang, *supra* note 62, at 39-43. *See also generally* Alice Ekman, *China's New Silk Roads: A Flexible Implementation Process*, *in* THREE YEARS OF CHINA'S NEW SILK ROADS: FROM WORDS TO (RE)ACTION? 9 (2017).

[64] For example, some local governments have given various subsidies to enterprises that will participate in projects of the BRI in order to encourage them to invest and trade overseas. These subsidies may be inconsistent with China's WTO commitments.

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ultimately hurt the interests of all stakeholders in this initiative, which will further restrict the development of the BRI as a whole *per se*.

It has been seven years since the BRI's initial proposal, and the initiative has been extremely large and complicated. After seven years of implementation, the BRI is not an emerging response to pressures at its early stage any more. However, the current framework of the BRI remains the same irregularity and continues to be absent from regulation by law. It has a policy-oriented network rather than a rule-oriented structure. Consequently, without a rule-oriented structure, the BRI is not predicable, not transparent and readily open to cause disputes. As Professor John Jackson has noted, a rule-oriented structure would have been "creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions".[65] Therefore, the current policy-oriented framework of the BRI is much like a political declaration for an economic strategy, which was merely rooted in politicians' visions. Rules construction is thus essential to its future implementation. A transfer to a rule-oriented structure will not only add confidence for trading partners on this long-term initiative but also reduce frictions and disputes, and thereby ultimately strengthen the implementation and contribute to the continuous growth of the BRI. However, currently it is hard to evaluate its potential value or its significant influence over world trade and investment due to these legal challenges. The existing framework of the BRI is thus not a new model for trade and investment, but is much like an old wine in a new bottle.

In light of this, China was urged to reappraise these challenges posed by the existing framework of the BRI. Further efforts should be made both at national and international levels to ensure the policy-oriented framework will be shifted to a rule-oriented model. Potential measures undertaken may include re-clarifying China's objective, methods, rights and obligations of this long-term initiative; rendering the initiative with less political meaning but more legal content according to the international rules and customary laws; the reconstruction of its treaty network; and redesigning a unique dispute settlement resolution for the BRI disputes. More specific measures include adding some contents to the BRI in its existing negotiations on the regional or multilateral investment or trade agreements; or upgrading its existing trade or investment agreements/ treaties with the BRI countries; and negotiating or signing a specific new trade or investment agreement for the BRI. In order to avoid misunderstandings of the BRI as an ambitious strategy and a government-controlled instrument for specific purposes, China should also give the BRI a less political image but more international and legal characteristics. It should encourage more private enterprises to join in this

[65] JOHN JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 340 (2d ed. 1997).

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initiative and gradually reduce the support given to SOEs for their participation. Simultaneously, Chinese enterprises should be given more options to make their individual decisions on participation in the BRI based upon a profit-driven motivation rather than political considerations. Private enterprises should become the majority of the participants in the BRI.

At the time of writing, global trade and investment are in the deepest contraction because of the lockdowns to mitigate the spread of COVID-19. Many projects of the BRI under construction have been suspended or cancelled.[66] This emergency has reaffirmed that a predictable and legally-binding rules system is a must for the future survival and sustainable development of the BRI. To ensure this, contrary to the BRI's initial objectives and the preliminary success announced, China has a long march to go. The legal regulation of regional or multilateral trade and investment schemes are not easy tasks in an international trading regime. Large schemes, like the BRI, are particularly difficult. However, regulation by law will be an effective instrument to protect the interests of all stakeholders, which will render the global trading system more predictable and fairer.

[66] *See generally* Alfred Wu et al., *The Impact of COVID-19 on Belt and Road Initiative Infrastructure and Construction Projects*, MONDAQ (June 25, 2020), https://www.mondaq.com/canada/litigation-contracts-and-force-majeure/958096/the-impact-of-covid-19-on-belt-and-road-initiative-infrastructure-and-construction-projects.

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