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One Belt, One Road, Two Routes Regulation: Regulatory Interactions Between China and Host Countries in the Context of the Belt & Road Initiative*

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In recent years, China's "One Belt, One Road" Initiative (BRI) has become one of the most significant frameworks for foreign capital investment around the world, with around 70 countries hosting BRI projects. In this article, we focus on the regulatory interaction between China and host countries arising from this process. There are two strands. The first focuses on the interaction between Chinese-sponsored BRI projects and the regulatory systems of host countries linked to foreign investment, encompassing both greenfield investment and mergers & acquisitions. The second focuses on the way in which China has adapted its domestic regulatory framework to facilitate outward foreign investment. We conclude by linking these elements with emerging trends in international economic law so as to frame an agenda for further research in a field that has attracted relatively little attention in legal scholarship to date.

Keywords: Belt & Road Initiative, China, foreign investment, mergers & acquisitions, green finance regulation

Introduction

China's "One Belt, One Road" Initiative (BRI) now represents the most significant framework for foreign capital investment around the world. Many scholars have pointed out that the BRI is mainly based on China's economic and geopolitical political strategies (Avgouleas & Trigkas, 2019; Voss, 2011) and therefore, how the BRI policy of the country is changing or will change the traditional financial regulatory pattern of international investment for both China and host countries is an interesting and significant issue for discussion. Since the starting point of the "opening-up policy" of China's economic reform, Chinese enterprises have been keen to develop outward foreign direct investment (OFDI). The rise of BRI policy since 2014, however, is changing the investment strategies of the OFDI activities of the Chinese firms. From a global economic perspective, BRI

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investment activities also deeply impact the regulatory strategies of Chinese OFDI in the host countries and regions along BRI.[1]

In this article, we compare two different routes that are available for outward investment by Chinese enterprises. The first is the acquisition of control of an existing enterprise through mergers or acquisitions (hereafter "M & A").[2] The second is greenfield investment whereby investment is made directly into a new entity established in the host country for that purpose (hereafter "greenfield investment"). While these two techniques share some similarities, they present very different options in terms of the nature and intensity of the interaction with the legal and regulatory systems of host countries. We identify and analyse these differences and the manner in which they influence the choice of route for internationalization. In particular, we focus on whether the more limited interaction with legislation in host countries offered by greenfield investment has driven Chinese outward investment down that route rather than M & A, which could offer better potential in terms of capital cost and integration of Chinese enterprises into global capital markets. In particular, this article aims to explain how the national strategies and international economic policies of China are changing the country's regulatory strategies over financing activities and it will also explore the motivation of host countries' changing regulatory methods over the OFDI of Chinese firms. Last but not least, this article looks at the regulatory interaction in a global context, and therefore we attempt to establish an analytical framework for developing more detailed study on the impact of BRI on international economic law.

China's Role in BRI

When Chinese President Xi Jinping announced the "Silk Road Economic Belt" and the "21st Century Maritime Silk Road" for the first time in 2013, the concept of "BRI" was formed.[3] Since then, BRI has been embedded into China's official politics[4] and plays a critical role in China's investment strategy (He, 2019; Central Compilation & Translation Bureau, 2016). For example, BRI is integrated into China's national economic blueprint as China's 13th Five-Year Plan (2016-2020) has a whole chapter about BRI (Central Compilation & Translation Bureau, 2016).

Outward investment by Chinese enterprises, both state-owned enterprises (hereafter "SOEs") and private enterprises, have made great contributions to BRI. By 2018, more than 90% of BRI projects have involved Chinese companies (HSBC Global Asset Management, 2018). On the one hand, Chinese SOEs are the primary drivers of BRI projects. As of mid-2017, around 1,700 BRI projects undertaken in the three years up until then were being managed by around 50 of China's large SOEs (Baker McKenzie, 2017). And there are good reasons to explain the enthusiasm and active behaviours of Chinese SOEs in connection with BRI. SOEs are always characterized as leading indicators representing China's economic diplomacy (Zhang & Yin, 2019; China Development Bank, 2017; 2018). Endorsed by the Chinese government, SOEs involved in BRI projects could

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[1] For more details on China's OFDI since the 1980s, see Voss (2011, pp. 56-107).

[2] We include "takeovers" within the scope of the EU Takeovers Directive (Directive 2004/25, OJ [2004] L142/12) in this category.

[3] Chinese President Xi Jinping proposed to build the "Silk Road Economic Belt" and the "21st Century Maritime Silk Road" in 2013 at meetings in Kazakhstan and Indonesia respectively, see Mu (2018).

[4] The authority of BRI is the highest executive agency in China that is, the Central Leading Group for Advancing the Development of BRI.

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easily receive financial support from the Chinese government to promote BRI development and achieve the strategic objective of BRI. State owned banks, such as China Development Bank (CDB), the Export-Import Bank of China, account for more than 90% of the significant loans and equity investment in the BRI (Bartholomew, 2019). In particular, CDB, as the largest policy bank for BRI, is willing to provide loans to SOEs if they are engaged in BRI projects. In 2017, CDB supplied $13.4 billion to SOEs in connection with BRI, out of its total BRI loans of $17.6 billion (He, 2019). SOEs have taken advantage of such support to become the dominant players in BRI. At the end of April 2019, there were over eighty central SOEs participating in 3,120 BRI projects which account for more than 60% of total BRI projects by number and close to 80% by value (He, 2019; Yuan, 2019). SOEs are responsible for half of BRI infrastructure projects[5] already under construction or planned and over 70% of the contract value of those projects (Ruta et al., 2019), indicating that Chinese government has supplied strong support in the construction of infrastructure (Zhang & Yin, 2019). On the other hand, the contributions of Chinese private-owned enterprises in BRI investment is increasing (Baker McKenzie, 2017), as they are looking to play a bigger role in promoting BRI (Cheng, 2019). For example, in Africa, more than 10,000 Chinese companies are doing business in BRI projects and 90% are private.[6]

Greenfield investment plays a significant role in outward investment by Chinese enterprises. The cumulative total of China's construction projects from 2005 to 2018, mainly infrastructure, is $480.3 billion for the BRI-participating economies; some 59% of the global total of $814.3 billion (see Figure 1). Since the BRI was initiated in 2013, rapid growth was achieved in construction contracts in terms of numbers of contracts, value of contracts and accomplished turnover (see Figure 2) (He, 2019). These BRI projects have made great achievements in providing jobs, increasing tax revenue as well as improving living conditions (He, 2019) and representing a positive and responsible image of China in BRI countries. Around 85% of the employees under BRI projects invested by Chinese enterprises are local people.[7] According to statistics in 2019, Chinese greenfield investment in BRI has produced about 300,000 jobs (Liu & Fan, 2019), in the manner of establishing industrial parks in partnership with local governments in 82 host countries, and generated $2.28 billion in taxes for local governments (Ilheu, 2020).

[5] According to Jieming Weng who is the deputy head of China's State-owned Assets Supervision and Administration Commission (SASAC), nearly one hundred central SOEs, which include companies, like China National Nuclear Corporation, State Grid Corporation and China Communications Construction Company, had a comparative advantage in building infrastructure such as ports, railways, highways and communication networks, and the central SOEs have carried out more than 60 oil and gas projects in over 20 countries, see Suokas (2018).

[6] According to Cunhui Nan, as the chairman of Chint Group which is China's leading industrial electrical equipment and new-energy enterprise, BRI is bringing huge opportunities in foreign markets and more than 10,000 Chinese companies are doing business in Africa currently, see Cai (2017).

[7] About 85% of the employees at the central SOEs' overseas branches are local people, see Suokas (2018).

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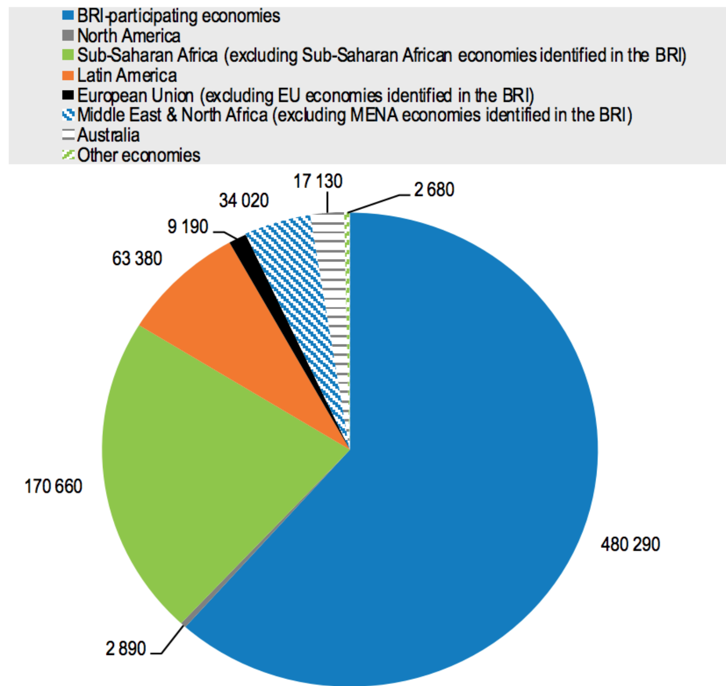

Figure 1. Chinese outward investment in the construction sector, 2005-2018 (Source: He, 2019).

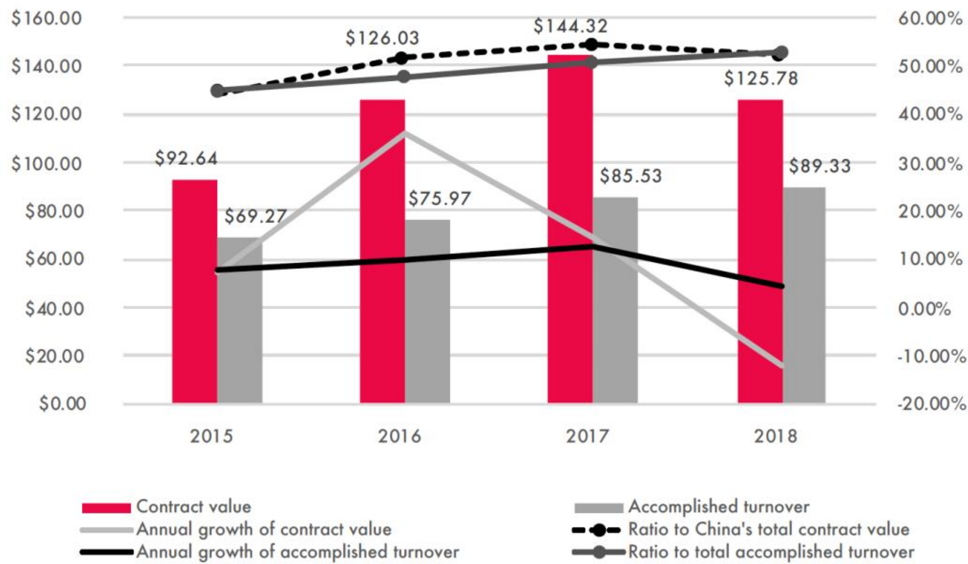

Figure 2. China's construction contracts (US $ billion) (Sources: MOFCOM, 2014; 2015; 2016; 2017; 2018; He, 2019).

In contrast, Chinese M & A activities in BRI face challenges and some of them finally lead to failure. One of the possible reasons is that M & A investment is unlikely to make significant contributions to localities along BRI countries. As we explain later, M & A transactions may not always lead to new investment or the creation of additional employment in the host country. For example, one of China's leading private equity investors-Fosun,[8]

[8] Fosun launched a bid in 2017 to build up a fashion unit to complement its older string of global purchases in the financial, pharmaceutical and entertainment sectors.

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launched a bid in 2017 to build a fashion factory and then entered into negotiations with target company-Scaglia.[9] However, the talks between Fosun and Scaglia stumbled and the transaction was finally completed by another potential purchaser (Sapinda) as it made a promise to keep manufacturing in Italy, thereby protecting local employment.[10] The alternative scenario—under which Scaglia fell under Fosun's control—posed a more direct risk to local employment.

Regulatory Regime in BRI Host Countries

This section compares regulatory mechanisms faced by two modes of Chinese outward investment in BRI, namely, M & A investment and greenfield investment. In order to make a comprehensive evaluation, this section examines regulatory regimes in several major destinations of BRI investment both in Europe and Asia and discusses Chinese investment activities in these countries.

The Increased Relevance of National Security Review for M & A

If investors plan to expand their business in a foreign country, there are two major options. One is M & A, which generally means gaining control over another enterprise by purchasing shares[11]; the other is greenfield investment, which means that investors could directly create a new entity, such as establishing an enterprise or building a factory in the host country. If a foreigner chooses to invest through M & A, the transaction has to go through M & A review, which is normally conducted by the relevant antitrust authority with reference to the competition implications of the transaction. At that stage, national security factors might also be taken into account. Alternatively, some countries, such as the U.S., operate an independent national security review for M & A.[12]

This section analyses the regulatory regimes for M & A in some significant countries for BRI. Although the EU is the most liberalized economic unit in foreign investment, some of its member states have established their own regulatory regime for scrutinizing foreign investment M & A. This sector chooses Italy as an example to analyse regulatory regimes of M & A. Italy was the first member of the EU and even the first member of the Group of Seven major industrialized nations to join BRI in 2019, playing an essential role in BRI. Besides, this section also takes the UK into account, as it is the one of the most important economies in the world with significant influence in Europe as well.

In Italy, according to the Foreign Investment Regulation (FIR) in 2012,[13] foreign investment in certain strategic sectors falls within a comprehensive investment control regime. Based on the FIR, a category of innovative rules and regulations were issued which grants the Italian government extensive power to intervene in

[9] Fosun had entered exclusive talks to buy La Perla with its owner, Pacific Global Management, which was owned by Italian entrepreneur Silvio Scaglia. La Perla was founded in 1953 by corsetry maker Ada Masotti. Scaglia acquired the company through his family holding in 2013.

[10] Fosun and Silvio Scaglia agreed to a 30-day exclusivity period in which Fosun would complete its due diligence. Their negotiations eventually failed and Sapinda, a vehicle co-founded by German entrepreneur Lars Windhorst completed the purchase finally in the end.

[11] The share purchase can be either in the form of a takeover offer for shares in public listed companies or a share purchase agreement in the case of other companies, see further MacNeil (2012).

[12] Section 721 of the Defence Production Act of 1950 (as amended by the Foreign Investment and National Security Act of 2007), Article 3.

[13] See the Decree Law No. 21 of 15 March 2012.

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foreign investment M & A through vetoing or imposing conditions on transactions, if they are related with strategic activities or pose potential risks to national security, such as transactions investing in the defence sector, communications, energy and transports sectors (Marasa & Picciano, 2019; Goldman QC & Koch, 2019). In 2017, the scope of FIR was expanded by further amendments, which involved foreign investment M & A related to high-tech companies, such as data storage and processing, artificial intelligence, robotics and space, or nuclear technology (Marasa & Picciano, 2019). This category was further revised in 2019 to include broadband electronic communications services based on 5G technology.

Therefore, the Italian government, which is led by the president of the Chamber of Ministries, together with any relevant ministry, such as the Defence Ministry, the Ministry of Transport, the Ministry of Communications, etc., reviews foreign investment M & A in Italian companies by foreign investors that: (i) relates to strategic industries, such as the defence sector or (ii) is linked to strategic fields, such as energy, transport, communication and high-tech sectors (Foscari, Graffi, Immordino, Scapin, & Seganfreddo, 2019). The list of such strategic activities and industries is updated at least once every three years (Foscari et al., 2019). The evolving strategic industries for national security concerns align with technology development and economic growth,[14] and serve the purpose to protect Italian technical and industrial competence (Foscari et al., 2019).

Outside the EU, M & A transactions investing in other countries along BRI also encounter the challenge of national security review. In UK, the Enterprise Act of 2002 was revised in 2018 to extend the scope of M & A review, driven by the concerns of national security, such as military use, quantum technology and computing hardware.[15] It is under this new legal regime that Ligeance Aerospace's acquisition of Northern Aerospace was prohibited. In June 2018, Gardner Aerospace, as a British supplier for Airbus and Boeing, which was completely acquired by Ligeance Aerospace Technology Co., Ltd, a Chinese listed company, in April 2017, officially announced the proposed acquisition of its competitor in the British market, Northern Aerospace. This transaction triggered the UK government's serious concern about the potential threat to national security of the UK, as this transaction would lead to Chinese control of Northern Aerospace which is closely connected with the defence-related technology of the UK. The transaction was then halted by the UK competition authority[16] on the grounds of national security.[17]

Nevertheless, it is possible for many M & A transactions to be approved with conditions under national security review. For example, when considering national security with reference to the Hinkley Point C Nuclear

[14] The legislative changes introduced in 2019 prescribe that any individual or entity entering into 5G-related arrangements with non-EU individuals or entities must by pre-approved by the government when such contracts or arrangements arise, see Foscari et al. (2019).

[15] Relevant Enterprise: (1) the turnover test is met if the Relevant Enterprise's annual UK turnover exceeds £1 m; or (2) the share of supply test will apply even if only the target has a 25% or more share of supply—there is no longer any need for both parties to supply the same category of goods or services, see Competition & Markets Authority (2018).

[16] The authority of antitrust review in UK is Competition and Markets Authority (CMA). See Article 25, Enterprise and Regulatory Reform Act (2013).

[17] The Durham-based Northern Aerospace previously was owned by C Bidco, a subsidiary of the BECAP12 fund of British private equity firm Better Capital, which agreed to sell 100% of the equity of Northern Aerospace to Gardner Aerospace in early June 2018. A public interest intervention notice (PIIN) was then issued by Energy and Industry Strategy (BEIS) on 17 June 2018, calling for the CMA to investigate the sale of Northern Aerospace on national security grounds. CMA issued a preliminary executive order on 18th June 2019 to suspend the deal pending a review under the newly amended Enterprise Act of 2002. On the 20th June, Gardner Aerospace issued a statement acknowledging the delay and saying it was cooperating with the British government.

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Project[18], we note that it was successfully jointly invested by China General Nuclear Co., Ltd. (CGN), and Electricite de France (EDF). This investment agreement was reached in September 2016 and the project is expected to be completed by 2025. According to the investment agreement, CGN and EDF respectively held 33.5% and 66.5% of shares of the joint venture. Although the construction of Hinkley with £18 billion value is able to create 26,000 jobs and apprenticeships and provide seven percent of Britain's electricity needs for 60 years, one of central reasons for its success is that the British government could prevent the sale of EDF's controlling stake prior to the complete of construction, without the prior notification and agreement of ministers, through an additional agreement made in principle with EDF (GOV.UK, 2016). The government is also able to intervene in the sale of EDF's stake once Hinkley is operational (GOV.UK, 2016). This kind of mitigation measure is always adopted by host countries to eliminate national security threats which could also result in the minimum influence on foreign investment activities. After this transaction, the government could take a special share in all future nuclear new build projects under the new legal framework imposed for future foreign investment in Britain's critical infrastructure (GOV.UK, 2016). Since then, the need to constantly enhance the national security review on major infrastructure projects affecting the national economy and energy provision is repeatedly stressed by the British government. In May 2020, new measures to protect British technology have been flagged and Chinese involvement in critical infrastructure and high technology is regarded as a security threat to UK (Tugendhat, 2020), going beyond fields of national security to cover areas, such as military dual-use, computing hardware, quantum technology, and other sectors which have already been covered by a change in the revised Enterprise Act 2002.[19]

Restrictions at the Point of Market Access for Greenfield Investment

We now turn to discuss regulatory regimes for greenfield investment along BRI countries. We take Indonesia as an example of a developing country within the scope of BRI, and the largest economy and top destination for Chinese investment in Southeast Asia, to demonstrate the mainstream trend of pre-access national treatment and negative list for greenfield investment. In order to provide a comprehensive analysis, the regulatory regime in the EU for greenfield investment is also considered as it is one of the most liberalized units in the global economy and comprises the most important partners of BRI development with their high technology and strong financial support. Taking the EU as an example, this section also assesses the potential trajectory of development for screening review for greenfield investment in the future.

In international investment law, the core term of "national treatment" is the obligation to treat foreign investors and their investments no less favourably than national investors.[20] It is normally applied at the point of market access. Thus, regulatory regimes of host countries could be divided into pre-access national treatment and post-access national treatment. Pre-access national treatment shows a much more liberalized attitude towards foreign investment, as it is applied when foreign investors and their investment could receive the same treatment as domestic investors at the phase of making new investments, including establishing enterprises or participating

[18] The first new generation nuclear power project of the UK and one of the biggest energy and infrastructure projects undertaken in the UK in more than a decade, see Ali (2019).

[19] The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018, SI 2018/593.

[20] National treatment is an essential principle in bilateral investment treaties or free trade agreements. It was first stated in NAFTA and then emphasized again in the 2012 U.S. Model Bilateral Investment Treaty. See Article 1102, NAFTA; Article 3, U.S. Model Bilateral Investment Treaty of 2012.

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in existing enterprises. Post-access national treatment is applied at the operation phase, such as the conditions for managing foreign-invested enterprises in the host country.[21] In the past decades, China had adopted post-access national treatment for foreign investment. It meant that foreign investors had to get approvals from governmental authorities before establishment of their greenfield investment. However, this long-lasting post-access national treatment in China was replaced by pre-access national treatment when China's newly adopted Foreign Investment Law came into effect in January 2020. Besides China, this mainstream principle of non-discrimination and same treatment for investors (both domestic and foreign) at the point of market access has already been adopted in a large number of countries along the BRI.[22] Taking Indonesia as an example, which has a significant impact on Chinese investment in BRI projects as it is the major destination of Chinese BRI investment in the Southeast Asia and the largest economy in ASEAN, pre-access national treatment has already been adopted in the whole country as early as 2007, when Indonesia's new Foreign Investment Law was published.[23]

Against the background of pre-access national treatment, most industrial fields are open to both domestic and foreign investors. In this regard, negative list through characterizing business sectors with certain requirements is a necessary approach for host countries to scrutinize foreign investment. For example, in Indonesia, a negative list was issued to clarify industrial sectors which are closed or open with requirements.[24] According to the Indonesian negative list, several business activities, such as production of weapons, ammunition, explosive equipment and warfare equipment (ChinaGoAbroad.com, 2011), are strictly closed for foreign investment. Some business fields are open with certain conditions. Ownership requirements are a key issue. In some restricted sectors, local ownership is a necessary element, and the restriction of foreign ownership is also required.[25] For example, if foreign investors wish to participate in mining operations, they have to sell their stocks by the 15th year of production, and the local ownership in this industrial sector should be increased to 51% at that time (Carabine & Courtice, 2018). This kind of regulatory design on local participation is to protect natural resources and the small and medium enterprises against competition with foreign investors (Bunawan, 2017), as the domestic market and natural resources could be easily dominated by large multinational companies with strong competitiveness. According to the latest revision of the negative list in Indonesia issued in November 2019, more business fields were exempted from the previous negative list for foreigners to invest, in order to further encourage foreign investment inflows into the country (Yap & Tan, 2019).

Greenfield investments in a large number of business sectors could be directly carried out under the trend of pre-access national treatment if they were not specifically stated in negative list. However, inspired by other

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[21] Organization for Economic Co-operation and Development, Negotiating Group on the Multilateral Agreement on Investment: Treatment of Investors and Investments (Pre/post-establishment) (11 October 1995).

[22] Pre-access national treatment has had far-reaching influence since it was first adopted in NAFTA, followed by a large number of countries. In 2009, there were already 26 free trade agreement applying pre-access national treatment. The countries include the U.S., Canada, Australia, New Zealand, Japan and other developed countries, as well as Thailand, Malaysia, Indonesia, the Philippines, Vietnam and other developing countries, see Li and Qiao (2013).

[23] Indonesia has recognized the important role of foreign capital investment since 1967 and published Number 1 of Foreign Investment Law in 1967 which is replaced by Number 25 of Foreign Investment Law in 2007, see Bunawan (2017).

[24] In Indonesia, the President Regulation No. 39 of 2010 on List of Business Fields which are Closed for Investments and Business fields that are Conditionally Open for Investments, was the so-called negative list when the Foreign Investment Law No. 25 of 2007 came into effect, see ChinaGoAbroad.com (2011).

[25] See the Indonesia Negative List.

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major economies and in line with the rise of protectionist policies globally, such as the Foreign Investment Risk Review Modernization Act adopted by the U.S.,[26] stricter screening mechanisms form part of a broader trend, even in the EU which is the most liberalized unit for foreign investment in the world. The European Council adopted the EU FDI Screening Regulation (Regulation) in 2019,[27] which provides for an enabling framework for member states to review FDI on grounds of security and public policy and to increase co-operation among member states (Immerzeel & van den Berg, 2020). That is to say, a screening mechanism which would cover a wide range of investment was established in the EU (The European Parliament and the Council of the European Union, 2019). It is worth noting that greenfield investment is involved and non-EU investors establishing or maintaining long-term and direct contracts would also be subject to this review (The European Parliament and the Council of the European Union, 2019). The Regulation enables EU member states to consider: (i) Whether the investor is directly or indirectly controlled by the government of a third country; (ii) whether it has previously participated in business influencing public interest or security; and (iii) whether it is considered to be at serious risks of engaging in illegal activities (The European Parliament and the Council of the European Union, 2019; Fountoukakos, Katrana, & Hall, 2019). Before the Regulation was published in 2019, there were 14 member states in the EU that had already conducted screening mechanism on the grounds of public interests or security considerations under relevant EU treaty provisions (The European Parliament and the Council of the European Union, 2019). The TFEU allows EU member states to take measures if they consider it is necessary to protect essential interest of their security, military security in particular, such as investment related to arms, munitions or war material.[28] The creation of this screening review is a response to pressures from a number of EU Member States (primarily Italy, Germany, and France) (The European Parliament and the Council of the European Union, 2019) which are worried about Chinese investment in particular.[29]

Even though the 2019 Regulation neither establishes a screening mechanism at the level of the EU, nor does it require member states to set up such a regulatory regime in their domestic legislation, some member states intend to introduce such screening reviews on foreign investment. For example, the Netherlands which has for decades advocated the importance of free trade and its open market economy and did not have any FDI review policies in place, is opting for stricter investment review to protect national security and public interests (Immerzeel & van den Berg, 2020). In late 2019, the Dutch government stated that a draft bill aimed at introducing a broader national security screening process would be issued in 2020 (Immerzeel & van den Berg, 2020). Such legal initiatives could be regarded as a response to the EU's Regulation.

Through demonstrating common criteria and standards (The European Parliament and the Council of the European Union, 2019), such a mechanism is recommended to those member countries which have not yet created this kind of instrument,[30] as it is beneficial to strike a balance of regulatory competencies between EU

[26] Foreign Investment Risk Review Modernization Act (2018).
[27] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investment into the Union.
[28] Article 346 (1)(b) of the Treaty on the Functioning of the European Union (TFEU), see Goldman QC and Koch (2019).
[29] One of the reasons for this kind of screening review at the EU level is that other countries, specifically the United States, China and Japan have established similar systems to protect their national security, see Herbert Smith Freehills (2019).
[30] The review mechanism must be transparent and clearly define the reasons for review and the time limit for issuing review decisions. At the same time, the review process should not discriminate against investors from different non-EU countries and allow judicial review of decisions, see The European Parliament and the Council of the European Union (2019).

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and member states, as well as to facilitate cooperative behaviours among EU member states (The European Parliament and the Council of the European Union, 2019). It is likely that amendments to current foreign investment regimes in EU members states will be carried out as a response. As a process for cooperation and communication between the EU and member states is set out in this Regulation, some mechanisms on exchanging and sharing information are to be expected (The European Parliament and the Council of the European Union, 2019). The Regulation is aimed at preserving public order or security, including in certain sectors connected to critical infrastructure,[31] critical technologies,[32] critical inputs,[33] sensitive information or the freedom and pluralism of the media. [34] Thus, public interest and security considerations become key criteria and not only for M & A transactions as the recommended screening mechanism but also covers greenfield investment. Chinese investors who plan to invest into the EU under the context of BRI policies have to consider the effects on the grounds of public interest and national security which might be assessed in the screening process.[35]

China's Regulatory Reform Supporting BRI Investment

Generally speaking, the above analysis indicates that host countries' regulatory strategies toward BRI-related investments are likely to be increasingly tougher than before. For Chinese enterprises, this is likely to mean increased uncertainty and higher compliance costs. In response and in order to facilitate BRI investment and enhance the economic impact of China in developing countries, Beijing has implemented three key initiatives: (1) loosening banking loan regulation for BRI-related overseas M & A; (2) improving the national image by strengthening regulatory scrutiny on Chinese firms' cross-border transactions; and (3) high-profile pilot reform in green finance and corporate social responsibility. We now turn to discussing these initiatives and their implications.

Banking Loan Regulation for Cross-border M & A

The China Banking Regulatory Commission (now the CIBRC) issued the first edition of the "Guidelines for the Risk Management of buyout loans of Commercial Banks" (Guidelines), which explicitly allowed qualified commercial banks to get involved in buyout loan business. Through this mechanism, Chinese enterprises have obtained a new and legal financing path for overseas M & A transactions. According to the latest edition of the Guidelines which was re-issued in 2015, buyout loans refer to loans issued by commercial banks to the acquirer or its subsidiaries to pay the consideration (purchase price) and fees of M & A transactions.[36] As these loans are

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[31] It refers to such infrastructure construction, such as energy, transport, water or investments in land and real estate, see The European Parliament and the Council of the European Union (2019).

[32] It includes key enabling technologies, such as Al, robotics, semiconductors, nuclear technologies, or biotechnologies, see The European Parliament and the Council of the European Union (2019).

[33] The critical inputs are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a member state or in the union. For example, energy or raw materials, as well as food security might be involved in certain situations, see The European Parliament and the Council of the European Union (2019).

[34] It refers to personal data, or the ability to control such information, see Herbert Smith Freehills (2019).

[35] In determining whether FDI affects public security or public order, Member States and the Commission may also take into account whether: (1) The foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces of a third country; (2) The foreign investor has already been involved in activities affecting security or public order of a Member State; or (3) Whether there is a serious risk that the foreign investor engages in illegal or criminal activities, see The European Parliament and the Council of the European Union (2019).

[36] Article 4, Guidelines for the Risk Management of Buyout Loans of Commercial Banks (2015 Revision).

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different from other types of bank loans, the regulation imposes special requirements on buyout loan providers in terms of the identity of the principal who obtained the loan, the purpose of the loan, and guarantees for repayment.

First of all, the main entities receiving such loans include not only the acquirer, but also the subsidiaries of the acquirer. The subsidiary referred to shall be a special purpose vehicle (SPV) established by the acquirer for the purpose of completing M & A deals.[37] Secondly, the purpose of buyout loans can be equity investment, whereas other types of banking loans in China cannot be used for that purpose. According to the Guidelines, the permissible use of buyout loan includes direct payment of transaction considerations (including overseas M & A) and other transaction costs.[38]

The new version of the Guidelines on buyout loans has expanded the maximum duration of buyouts loan from five years to seven years[39]. This aims to ensure that the acquirer has abundant time to complete the integration work after the acquisition is completed, which is especially complicated and uncertain in overseas M & A. Moreover, the new version of the buyout loan regulation of the CIBRC allows the borrower to use its acquired equity in the target enterprise as collateral for guaranteeing the repayment.[40] In the old version of the Guideline, the acquirer was not permitted to do so.[41] In addition to affirming that the buyout loan is secured against the equity in the target enterprise, it also specifies other guarantee methods for the borrower, so long as it can adequately cover the risk of the buyout loan.[42]

To sum up, although in the recent years, China's regulators tend to strengthen the regulatory approval process for international M & A activities of Chinese enterprises, the opening-up policy and BRI nevertheless pushed the CIBRC to loosen its regulation on buyout loans, which directly facilitates the development of cross-border M & A transactions.

Stricter Supervision on the Utilization of Domestic Enterprises' Funds in Cross-border Investment: Sanction on Anbang Insurance Corporation as an Example (2018-2020)

In order to understand the Chinese regulatory response to the BRI policy and international regulatory development against the Chinese OFDI more comprehensively, we also explore how China specifically strengthens scrutiny and sanctions on speculative foreign investment transactions of Chinese enterprises.

In 2017, the State-owned Assets Supervision and Administration Commission (SASAC)[43] issued the "Measures on Supervision and Administration of Overseas Investment by Central Government Enterprises",

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[37] See *Ibid.*, Article 3, Article 41, *Ibid.*

[38] See *Ibid.*, Article 4.

[39] See *Ibid.*, Article 22.

[40] See *Ibid.*, Article 29.

[41] This approach has much in common with the prohibition on a public company giving financial assistance for the purchase of its own shares found in section 678 of the Companies Act 2006 in the UK. A similar prohibition can be found in the EU second Company Law Directive 77/91/EEC, OJ 1976 L26/1 (as amended). It follows that a target company in the EU or the UK could only pledge its assets to support a loan taken by a bidder to fund a takeover subject to these rules. But these rules do not apply to the bidder pledging shares it already owns in the target in connection with a loan to fund a takeover.

[42] Article 29 of the Guidelines for the Risk Management of Buyout Loans of Commercial Banks (2015 Revision).

[43] SASAC is a special commission of the People's Republic of China, directly under the State Council. It was founded in 2003 through the consolidation of various other industry-specific ministries. As part of economic reform, nearly half of state-owned enterprises were sold off in the form of stocks. SASAC is responsible for managing the remaining SOEs, including appointing top executives and approving any mergers or sales of stock or assets, as well as drafting laws related to state-owned enterprises, see the official website of SASAC.

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stipulating that overseas investment by the SOEs that are owned by the central government of China must conform to the enterprise development strategy and international business planning, stick to focus on the core business, and shall not engage in non-main business investment abroad in principle.[44]

If it is really necessary to carry out non-core business investment, a SOE shall apply to the SASAC for approval and adopt the way of cooperation with the central enterprise with relevant core business advantages. This requirement is mainly to guide central enterprises to give full play to their comparative advantages based on their core businesses, improve their core competitiveness through internationalisation, and prevent enterprises from getting involved in overseas investment and operation risks brought by non-core businesses.

Also, in 2017, the State Administration of Foreign Exchange (SAFE)[45] issued the Notice on Further Promoting the Reform of Foreign Exchange Administration and Improving the Verification of Authenticity and Compliance, to strengthen the verification of the authenticity and compliance of overseas direct investment. According to this regulation, when applicants go through the registration and remittance procedures of overseas direct investment, a domestic institution shall, in addition to submitting relevant audit materials as required, explain to the bank the source and purpose (use plan) of the investment funds, and provide the board resolution (or partner resolution), contract or other authenticity certification materials.[46]

Upon this new supervisory regime, the PRC SOEs' irrational foreign investment has been effectively suppressed, which in fact is aimed at improving the national image of China in international economic affairs especially within BRI countries. In terms of regulatory practice, the Chinese regulators also enforce the law in a stricter way on speculative overseas takeovers, which can be well illustrated by the Anbang case as below.[47]

Anbang Insurance Group is one of the largest Chinese financial holding corporations whose subsidiaries mainly deal with insurance, banking, and financial services, based in Beijing. Although the Chinese regulator has severely criticized speculative cross-sector takeovers by such large group enterprises, Anbang has held a geographically diversified portfolio of assets in financial services real estate and lodging since 2014. In the North American markets, Anbang bought real estate from Blackstone Group L.P. in 2015 for $414 million Another major purchase by Anbang Group in the North American markets was a portfolio of luxury hotels in the U.S. including New York's Waldorf Astoria hotel and the J W Marriott Essex House in Manhattan and the Westin St. Francis in San Francisco (Karmin & Putzier, 2019). But these transactions pre-dated the more recent intensification of regulatory scrutiny.

As a regulatory response to speculative foreign transactions, Mr. Xiaohui Wu, the CEO of Anbang Group, was detained in Beijing by the Chinese authorities in June 2017 as part of an investigation of Anbang's activities (Karmin & Putzier, 2019). Due to the abovementioned very aggressive speculative M & A transactions in global markets during the recent decade, Anbang Group was at risk of failing to pay policy-holders. Then, according to the law and regulation on insurance industry in China, the CBIRC decided to take control of Anbang Group from

[44] Article 3, Measures on Supervision and administration of Overseas Investment by Central Government Enterprises (2017).

[45] SAFE is an administrative agency under the State Council tasked with drafting rules and regulations governing foreign exchange market activities, and managing the state foreign-exchange for the People's Bank of China. See official website of the SAFE.

[46] Article 8, Notice on Further Promoting the Reform of Foreign Exchange Administration and Improving the Verification of Authenticity and Compliance (2017).

[47] See the detailed reports online: On cross-border insurance corporations: A story of Anbang Insurance (12 September 2019); & Bradsher (2018).

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February 2018 until 22 February 2020 (Li, 2020; Weinland, 2019). Simultaneously, Wu was sentenced to 18 years of imprisonment after he was found guilty of embezzlement and fraud in May 2018 (Shen, 2018).

In a nutshell, Anbang-style speculative overseas investment has been severely criticized or even strictly sanctioned by the Chinese government in recent years, because BRI policy has been regarded as a global and diplomatic strategy mitigating the economic pressure caused by domestic economic depression. Speculative investment may seriously damage the national imagine of China and its leading commercial entities who are playing a leading role in BRI projects.

Green Bond Regulatory Reform for BRI-Related Finance

As the Anbang case shows, Chinese firms' overseas investment is not regarded by the authorities as a pure form of economic and commercial activity. Instead, overseas investment has been closely connected with the national image of China. In particular, considering the severe downturn of the domestic markets, China is eager to accelerate the development of international investment. In terms of the BRI-related investments, most of those projects are organized by large Chinese SOEs in developing regions of the world. Therefore, China has a very strong motivation to optimize its national image by encouraging environment-friendly investment in a high-profile way. In particular, most BRI-projects involve infrastructure construction and are very likely to generate high externalities, such as environmental contamination or employee protection problems. High standards of corporate social responsibility in relation to the Chinese corporations' financing activities in BRI countries will not only benefit the society of host countries but also facilitate long-term commercial opportunities for Chinese SOEs. In the following section, we demonstrate how this perspective has been mobilized by green finance regulation in China.

General regulatory reform on green bonds in domestic financial market of China. Compared with developed countries, the history of China's green bond market is very short. In 2014, CGN Wind Power Co., Ltd. issued a one-billion-yuan five-year carbon supplement medium-term note in the interbank market, which is considered to be the earliest green bond issuance activity in China. Marked by the Announcement on Issues Concerning the Issuance of Green Financial Bonds in the Interbank Bond Market issued by the PBOC, the official regulation of the green bond market in China was initiated in late 2015. However, in 2016, the scale of green bond issuance in China's financial market soon reached $ 36.2 billion, accounting for 39% of the total global green bond issuance ($ 81 billion), thus becoming the largest green bond market in the world. In 2017, despite the overall weakness of China's bond market, the amount of green bonds issued still increased, and the number of bonds issued doubled (Lu and Fang, 2018).

In recent years, the regulatory reform over China's green bond market has been jointly advanced and by the financial regulators at a highest level. For example, the Guidelines for Issuing Green Bonds (2015) issued by the National Development and Reform Commission (NDRC)[48] attempts to simplify and accelerate the approval procedure of green bonds in the Chinese bond markets.[49]. Moreover, according to the "NDRC Guidelines for Green Bonds", companies applying for the issuance of green bonds can relax the application of certain existing

[48] NDRC, formerly State Planning Commission and State Development Planning Commission, is a macroeconomic management agency under the State Council, which has broad administrative and planning control over the economy of mainland China, see the official website of the NDRC.
[49] Article 2.1, NDRC Guidelines for Issuing Green Bonds (2015).

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regulatory rules, such as "relaxation of funds raised by bonds to the total investment of the project to 80%"[50] and "enterprises issuing green bonds are not subject to restrictions on debt issuance".[51]

Similarly, the National Association of Financial Market Institutional Investors (NAFMII)[52], affiliated with the People's Bank of China, stated in the Guidelines for the Business of Green Debt Financing Instruments for Non-financial Enterprises (2017) that

> the NAFMII will simplify the approval and registration procedures for green debt financing instruments, and improve registration service for green debt financing instruments in a more efficient way, and will unify the communication procedures for the issuers of green debt financing instruments.[53]

The CSRC also stated the following in its Guiding Opinions on Supporting the Development of Green Bonds (2017): The application acceptance and review of green corporate bonds will be subject to the "special super-efficient approval" procedure[54].

Besides the abovementioned, in terms of the green finance development in the domestic securities system in China, both the Shanghai Stock Exchange and the Shenzhen Stock Exchange have clearly listed the "privileged measures" for green bond issuance in the legal documents issued by them. For instance, the Shanghai Stock Exchange's Notice on the Pilot of Green Corporate Bonds (2016) and the Shenzhen Stock Exchange's Notice on the Pilot of Green Corporate Bonds Pilot (2016) both commit that the stock exchanges will establish a more efficient and costless approval and supervisory system on green bond issuance of the A-share listed firms.[55] Moreover, the Notice on the Pilot of Green Bonds which was issued by the China Securities Regulatory Institution Quotation System Co., Ltd. in 2016 promised that the quotation system will establish a green channel for the green bond transactions, and the company will improve the efficiency of the issuance and transfer of green bonds.

Based on the above on-going regulatory reform in relation to the green bond markets in China, transaction and compliance costs in relation to the issuance and dealing of bonds in the Chinese domestic financial markets has been significantly reduced. The supervision of green bonds has been particularly prominent in this regard. Issuers benefit from the specific green finance policies of various regulatory agencies. Those "preferential measures", to a certain extent, can explain the sudden emergence of China's green bond market in the recent decade. These efforts, linked to the development of green finance, laid a solid foundation for supporting BRI-related projects through debt financing in the global capital markets. That is particularly the case for the

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[50] *Ibid.*, Article 2.2.1; For other bonds the limit is 60%. See The NDRC Notice on Developing the Market for Enterprise Bonds and Simplifying Approval Procedure for Issuance of Enterprise Bonds (2008).

[51] Article 2.2.2, NDRC Guidelines for Issuing Green Bonds (2015).

[52] The NAFMII was founded on September 3, 2007, under the approval of the State Council of China. NAFMII aims to propel the development of China OTC financial market, which is composed of interbank bond market, inter-bank lending market, foreign exchange market, commercial paper market and gold market. See the official website of NDFMII.

[53] Article 10, NAFMII Guidelines for the Business of Green Debt Financing Instruments for Non-financial Enterprises (2017).

[54] Article 4, CSRC Guiding Opinions on Supporting the Development of Green Bonds (2017).

[55] Article 8, Shanghai Stock Exchange's Notice on the Pilot of Green Corporate Bonds (2016); Article 8, Shenzhen Stock Exchange's Notice on the Pilot of Green Corporate Bonds Pilot (2016). China A-shares are the stock shares of mainland China-based companies that trade on the two Chinese stock exchanges, the Shanghai Stock Exchange (SSE) and the Shenzhen Stock Exchange (SZSE). Historically, the shares were only available for purchase by mainland citizens due to China's restrictions on foreign investment. However, since 2003, select foreign institutions have been able to purchase these shares through the Qualified Foreign Institutional Investor (QFII) system. Established in 2002, the QFII program allows specified licensed international investors to buy and sell on mainland China's stock exchanges, see further Huang (2014).

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greenfield mode of foreign investment, where project values can be very high, and funding has traditionally been sourced directly from banks rather than capital markets. M & A transactions offer the potential to be funded in different ways (especially in the case of so-called "share for share" offers [MacNeil, 2012]), where no cash payment is made in connection with a change of control), but to date those types of transaction have not featured prominently in BRI projects.

The establishment of "green investment principles for BRI". In order to ensure that the new investment projects of the BRI have the attributes of environmental friendliness, climate adaptation and social tolerance, the Green Finance Leadership Program of China and the Green Finance Institute of the City of London jointly launched the Green Investment Principles for BRI (GIP) in November 2018. The GIP aims to promote and realize the United Nations 2030 Sustainable Development Goals, implement the commitments of the Paris Agreement in the entire investment process of BRI projects. The GIP currently advises and encourages all the infrastructure construction and investment projects should comply with the principles set out below.[56]

First of all, the participants of the BRI investment projects should embed sustainability into corporate governance. They commit to embed sustainability into their corporate strategy and organizational culture. The boards and senior management of the investors and operators commit to exercise oversight of sustainability-related risks and opportunities, set up robust systems, designate competent personnel, and maintain acute awareness of potential impacts of the investments and operations on climate, environment and society in the BRI region.

Secondly, the participants in the BRI investment projects are obliged to understand environmental, social and governance risks. They will strive to better understand the environmental laws, regulations, and standards of the business sectors in which the participants operate as well as the cultural and social norms of the host countries. Moreover, participants will incorporate environmental, social and governance (ESG) risk factors into their decision-making processes, conduct in-depth environmental and social due diligence, and develop risk mitigation and management plans, with the help of independent third-party service providers, when appropriate.

Moreover, all the BRI investors will conduct analysis of the environmental impact of their investments and operations, which should cover energy consumption, greenhouse gas (GHG) emissions, pollutants discharge, water use and deforestation, and explore ways to conduct environmental stress tests of investment decisions. BRI investors and operators agree to institute stakeholder information sharing mechanisms to improve communication with stakeholders, such as government departments, environmental protection organizations, the media, affected communities and civil society organizations, and set up conflict resolution mechanism to resolve disputes with communities, suppliers and clients in a timely and appropriate manner.

In addition, all the participants of BRI projects are strongly encouraged to utilize green financial instruments. Both the BRI investors and operators will more actively utilize green financial instruments, such as green bonds, green asset backed securities (ABS), Yield Co.[57], emission rights-based financing, and green investment funds, in financing green projects. And BRI investors and operators agree to adopt green supply chain management and

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[56] Green Investment Principles for the Belt and Road (Green Finance Leadership Program, 1 December 2018).

[57] A "yield co" is a company that is formed to own operating assets that produce a predictable cash flow, primarily through long term contracts. Separating volatile activities (such as development, R & D, construction) from stable activities of operating assets can lower the cost of capital. Yield cos are commonly used in the energy industry, particularly in renewable energy to protect investors against regulatory changes, see Wills (2014).

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will integrate ESG factors into supply chain management and utilize international best practices such as life cycle accounting on GHG emissions and water use, supplier whitelists, performance indices, information disclosure and data sharing, in their investment, procurement and operations.

Finally, all the BRI investors and other participants agree to allocate funds and designate personnel to proactively work with multilateral organizations, research institutions, and think tanks to develop their organizational capacity in policy implementation, system design, instruments development and other areas covered in these principles.

In a practical sense, the "greening" of BRI construction and investment projects has reached a consensus among many governments and financial institutions. As of the end of March 2019, nearly 20 financial institutions from countries and regions along the "Belt and Road", such as China, the UK, Pakistan, and the UAE have signed the GIP for BRI investment (China Development Bank and United Nation Development Programme, 2019).

Potential Implications for International Economic Law: A Research Agenda

In the light of our observations in this article, we realise that the legal and regulatory practice of BRI investment in the international community will also produce significant influence on the development of international economic law, in particular, its impact on environmental, social and governance issues and dispute resolution. Therefore, to conclude this article, we attempt to establish an analytical framework for collaboration with international law scholars to collaborate on further research related to BRI.

The Necessity of Green BRI and Interplay With ESG

China's Belt and Road Initiative (BRI) presents a challenge to global efforts to tackle climate change and move toward a carbon neutral pathway. With $900 billion in potential foreign infrastructure spending under the BRI framework, foreign investment along BRI might hurt the environment along BRI countries (Hu & Montero, 2019). For example, most carbon dioxide emissions will come from infrastructure projects taking place in BRI countries. In particular, most of the BRI countries have vulnerable conditions of climate and environment. The land areas covered by the BRI are mainly Central Asian countries. They are mostly covered by desert with very few green vegetation and water resources, thus having weak environmental carrying capacity. Southeast Asian countries are suffering from shrinking rainforests and increasing pollution due to unrestricted commercial development and rapid industrialization. Coastal factories pouring pollutants into the sea, which have severely damaged the local marine resources, have weakened the ecological environment of countries and regions along the Maritime Silk Road, including West Asia, North Africa, the Association of Southeast Asian (ASEAN) countries and Sri Lanka in South Asia (Shi, Bao, & Ren, 2019).

Therefore, implementing the concept of Environmental, Social and Governance (ESG) into practice and taking into account environmental and climate influence can help achieve sustainability in host BRI countries. The concept of "Green BRI" is one of China's key commitments for sustainable development and environmental protection. In 2015, the Chinese government claimed that efforts should be made to promote green and low-carbon infrastructure construction and operation management, taking into full account the impact of climate change. Later China issued related policies including the Guiding Opinions on Promoting a Green BRI. China has promoted some clean energy projects through the BRI. For example, in Argentina, China Development Bank and China Export-Import Bank provided 85% of the financing for the 500-megawatt Cauchari solar power plant, the

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largest in Latin America. In addition, nearly 50 bilateral and multilateral eco-environmental cooperation documents have been signed with the co-construction countries and international organizations.

The EU has strong awareness of environmental protection against climate change, and has developed relatively mature laws and regulations, including a taxonomy and disclosure standards to benchmark ESG investments.[58] For example, the Green Paper of the European Union on Advancing the European Environment for Corporate Responsibility (European Commission, 2001) sets clear environmental, social and economic requirements for enterprises, which also results in strong ESG consciousness of European investors in BRI investments. However, China, as the main driver of BRI, has not yet issued official documents on encouraging BRI ESG investment. Moreover, developing countries along BRI lack the legal frameworks and operational guidelines for ESG investment (European Commission, 2001). To embrace the highest international standards, it may be wise for China and BRI countries to comprehensively integrate the ESG considerations into investment treaties and practices.

Green BRI is a promising channel for China and EU cooperation. To date, the EU is the most developed region in green development and has held the lead position in terms of regulatory framework. In the future, Frans Timmermans, executive vice president of the environmental committee of the European Parliament, said that "the European Green agreement" is the "lifeline" for the EU to get out of the shadow of the COVID-19 pandemic (Good New Energy, 2020). The scale and scope of BRI may mean that it is one of the most realistic options to implement this objective on a widespread basis in a short timescale.

ESG Practice of the Chinese Enterprises in BRI Countries

In this article, we have preliminarily examined the latest policy development in relation to the Chinese commitment to ESG principles, which means that the Chinese government currently intends to play a very positive role in ESG practice, at least at a policy-making level. In fact, however, it is still quite questionable whether the Chinese corporations will effectively fulfil their ESG commitments to the BRI countries and the international community (Shepherd, 2020). Therefore, a detailed assessment and analysis on the ESG practice of BRI investment will be desirable for both international economic law and commercial law scholars.

In particular, apart from the green finance issues which have been discussed above, environmental protection is an essential aspect of the BRI. Chinese enterprises need to pay close attention to their environmental responsibilities arising from their FDI in other BRI countries. The determination of environmental responsibility is required to consider the sources of environmental obligations and operational logic of different dispute settlement mechanisms. Chinese enterprises face environmental obligations from four dimensions, that is, the Chinese government, host countries, international law, and other informal environmental obligations (D. S. Hu, Ou, & X. Y. Hu, 2017).

Moreover, we also expect specific political and economic analysis on the ESG practice of the Chinese firms in BRI regions[59], which aims to explain:

1. Whether the BRI has been reshaping the ESG practice at an international level;

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[58] See Technical expert group on sustainable finance (TEG) (2020); for a broader perspective on global governance of climate change, see Sampford (2010).

[59] For instance, such interdisciplinary research can be carried out by examining the available BITs between China and host countries under BRI; also, this can be done by investigating leading legal cases in BRI investment.

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2. Whether the Chinese SOEs and authorities strictly keep their promise to ESG practice;

3. Whether the political economy of China's party-state and state capitalism can reshape the ESG practice.

BRI Practice, Global Administrative Law and Cross-border Regulatory Cooperation

With its increased recognition and implementation, BRI has become a new paradigm of global governance that China contributes to the international society in the new era. Global administrative law is an attempt to introduce the procedural principles of administrative law into the field of global governance. By creating such distinctive concepts as "global administration" and "global administrative space", it provides a new perspective and tool for examining and promoting global governance. As a technical perspective and solution, however, global administrative law itself does not focus on the political process or deal with political divergence. The focus of global administrative law does not lie in the specific content of substantive rules, but on existing or potential principles, procedural rules, review mechanisms and other mechanisms related to transparency, participation, and rational decision-making to ensure the legitimacy of global governance. The reasonable implications and inherent limitations of global administrative law as both an idea and an approach could shed much light on the building of the cooperation mechanism of Green BRI between parties such as China and the EU.

BRI and Potential New Dispute Resolution Mechanisms?

Most of the BRI investments are large-scale and long-term transnational deals, therefore China and host countries will be motivated to enhance their collaboration on establishing effective and efficient dispute resolution mechanism. There is no doubt that the interaction between the BRI and the development of international commercial dispute resolution mechanism will be a significant task for international researchers. For instance, relevant issues may include: (a) Whether the existing dispute resolution mechanisms in international law are effective for dealing with BRI-related disputes in transnational investment?; and (b) how the Singapore Convention on Mediation (2019) [60] may impact the dispute resolution in relation to BRI projects.

Moreover, in order to enhance the national ability in dealing with transnational investment disputes, China established its first international commercial court, namely China International Commercial Court (CICC) [61] in 2018.The CICC is a mini-circuit court, which is subordinate to the Supreme People's Court (SPC). With the mission of handling international commercial and investment disputes and especially BRI disputes. How the CICC interacts with other international law mechanisms is an area of interest for BRI. Therefore, it will be an interesting topic to explore whether, and if so how, the CICC and Singapore Convention on Mediation will make any change to the legal practice of transactional dispute resolution in relation to the Chinese OFDI.

[60] With more than 7,500 Chinese companies having now set up operations in Singapore, Singapore companies are well positioned to either partner with them to invest in BRI projects or offer their advisory services. But while there are significant business and financial benefits from taking part in the BRI, there are also sizeable risks that need to be evaluated carefully, hence Singapore is motivated to actively play a leading role in BRI matters. Based on its rich experience in international commercial arbitration, Singapore is ambitious in developing a new dispute resolution mechanism which will bring benefit to China and Singapore mutually. On 7th August 2019, The Singapore Convention on Mediation was signed by 52 countries including China and Singapore, in particular, this will be beneficial to facilitate dispute resolution in relation to maritime disputes in BRI investment, see Chan (2019); & Xu (2019).

[61] The CICC is established by the Supreme People's Court of China (SPC) to adjudicate international commercial cases. CICC's objective is to try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, and create a stable, fair, transparent, and convenient rule of law international business environment. The First International Commercial Court is situated in Shenzhen, Guangdong Province, and the Second International Commercial Court in Xi'an, Shaanxi Province. The Fourth Civil Division of SPC is responsible for coordinating and guiding the two international commercial courts, see Zuo (2019).

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Conclusion

This paper compares two major modes of Chinese foreign investment, namely, M & A and greenfield investment, to examine the recent development of regulatory strategies of host countries along BRI and the counterpart policies of China. It concludes that the changing regulatory attitudes of these host countries are largely driven by concern over national, industrial and social security problems which may be caused by Chinese firms under the ambitious BRI policy. The rapid emergence of Chinese power in high-tech areas like artificial intelligence and the state capitalistic power in exporting infrastructure construction exacerbate the intensive relationship between China and developed host countries.

While the BRI policy of Beijing justifies the outbound investment by the Chinese firms at a national level, it has made the developed regions feel uncomfortable, because the BRI projects will inevitably intensify the economic competition between Chinese and local firms. Correspondingly, China's regulatory reform aims not only to promote BRI-related projects financially, but also to create a cooperative, mutually beneficial, unhostile and responsible national image to mitigate potential distrust, misunderstandings and conflicts from host countries, both economically and diplomatically.

The above interaction between China and host countries also gives rise to a consequence that, increasingly, Chinese firms carry out foreign investment via the formats—in essence greenfield investment—that avoid triggering host counties' national security review or other approval procedures. This is a pragmatic investment strategy for the Chinese enterprises which can reduce uncertainty and costs in political and compliance matters. Moreover, the constructive and responsible image created by greenfield investments are also favoured by the Chinese authorities, which simplifies the process and brings economic benefits to the Chinese enterprises.

To date, the BRI initiative has attracted less attention from legal scholarship than its economic significance would suggest. Part of the reason may well be that the formal BRI legal framework at the level of international law may not be the most important aspect for understanding the operation of BRI. As we demonstrate in this article, there are important regulatory interactions between BRI projects and the domestic laws of host countries. Nevertheless, a better understanding of BRI will require these issues to be integrated more fully into research focused on international economic law. We hope that our article can act as a catalyst in that direction.

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