Winter January 29, 2018

China's 'Belt And Road' Initiative: Mapping the World Trade Normative and Strategic Implications

Julien Chaisse

China's 'Belt And Road' Initiative: Mapping the World Trade Normative and Strategic Implications

Julien CHAISSE* & Mitsuo MATSUSHITA*

In 2013, Chinese President Xi Jinping announced that he wanted to resurrect the legendary Silk Road; he proposed a titanic project to build hundreds of roads, bridges, and railroads to connect China and Europe. In China, the government also speaks of the 'Belt and Road initiative' (One Belt, One Road – abbreviated OBOR) to describe the project that will span more than 50 years. OBOR is President Xi Jinping's most important project and it marks a radical change in China's foreign policy as it constitutes a new economic model that also aims to strengthen China's position as an economic superpower. Despite its major impact on international trade and investment, OBOR does not belong to present-day categories of international pacts and treaties. For the first time in its modern history, China is attempting to export its development model, that is, China is relying on massive investment in infrastructure, roads, ports, and railways, at home and abroad, to accelerate industrial development throughout the region. At a time when the globalization of the economy is tilting the balance towards the East, OBOR will redistribute the maps of trade and investment to an extent which this Article assesses.

1 INTRODUCTION

The '*Belt and Road Initiative*' (BRI), also sometimes called the '*One Belt, One Road Initiative*' (OBOR), is a titanic project promoted by the Chinese government to reconstruct the ancient 'Silk Road' in a contemporary mode in the vast area extending from China to Europe.[1] The industrial revolution gave Europe, in the nineteenth century, a technological, financial and manufacturing superiority which

* Professor, Faculty of Law &Director of the Centre for Financial Regulation and Economic Development (CFRED), The Chinese University of Hong Kong. Email: julien.chaisse@cuhk.edu.hk and mtm@dd.iij4u.or.jp. Professor Emeritus of Tokyo University and a Former Member of the WTO Appellate Body. The authors greatly benefited from comments received at the 2017 American Society International Law Annual Meeting in Washington D.C., where a previous version of this Article was first presented. Thanks also to J drzej Górski, Mark Feldman, Donald J. Lewis, Dini Sejko, Karl P. Sauvant, and Qian Wang for indispensable feedback and comments.

1 National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* (2015), ('Vision and Actions Plan'), http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html (last accessed 26 July 2017).

Chaisse, Julien & Matsushita, Mitsuo. 'China's 'Belt And Road' Initiative: Mapping the World Trade Normative and Strategic Implications'. *Journal of World Trade* 52, no. 1 (2018): 163–186.

enabled it to dominate the rest of the world. The Silk Road evokes for the Chinese the memory of a rich and glorious past. By giving it a modern rebirth, Xi Jinping is telling the world that the time has come 'to carry this invaluable legacy forward'.[2]

OBOR is a combination of OB ('One Belt', i.e. the Silk Road Economic Belt) and OR ('One Road', i.e. the twenty-first Century Maritime Road). OB is silk roads by land stretching from China to Europe; OR denotes a silk road by sea which includes China, India, Indonesia, parts of Africa, and eventually Europe.[3] OB includes areas between China and Europe connected by railroads, highways, air routes and other means of transport. It goes from China through Central Asia, the Middle East and eventually to Europe. The construction of an economic common market which will comprise the countries along this route is envisaged.

The OBOR has a complex geography that will drive trade and investment flows for many years to come. OB is further subdivided into two major routes, e.g. the North Line, and the Middle Line.[4] The North Line starts from Beijing, goes through Russia, Germany and eventually to the Scandinavian countries. The Middle Line starts from Beijing, goes to Urumqi (in Xinjiang Uyghur Autonomous Region), Afghanistan, Kazakhstan, Hungary and ultimately to Paris, London, Hamburg or Lisbon. In addition, OBOR also consists of two auxiliary routes, bridging some sections of OB and OR. Firstly, China's platform of co-operation with the Baltic, Central European and Balkan countries has been known as the 16+1 Group (it includes Albania, Bosnia, Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, and Slovenia). This platform was initiated with the release of Twelve Measures for Promoting Friendly Cooperation with Central and Eastern European Countries during a summit held in April 2012 in Warsaw.[5] One of its major goals has been to improve the connectivity between China and the port of Piraeus in Greece. OB's hub will potentially be located in

---

2 Permanent Mission of the People's Republic of China to the UN, *The Silk Road – From the Past to the Future*, http://www.china-un.org/eng/gyzg/SilkRoad1/t1134206.htm (last accessed 26 July 2017); *Our Bulldozers, Our Rules*, Economist (*'Silk Road was a conduit for diplomacy and economic expansion…. Mr Xi wants a revival of the Silk Road and the glory that went with it*'.), http://www.economist.com/news/china/21701505-chinas-foreign-policy-could-reshape-good-part-world-economy-our-bulldozers-our-rules (last accessed 26 July 2017).

3 Tian Jinchen, *One Belt and One Road: Connecting China and the World*, Global Infrastrucure Initiative, McKinsey & Company, http://www.globalinfrastructureinitiative.com/article/%E2%80%98one-belt-and-one-road%E2%80%99-connecting-china-and-world (last accessed 26 July 2017); The State Council of the PRC, *Full Text: Action Plan on the Belt and Road Initiative*, http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm (accessed 26 July 2017).

4 There are further routes or corridors for the New Silk Road Economic Belt. Reader may wish to look at the very nicely depicted maps drawn by the HKTDC on their Belt and Road website: http://beltandroad.hktdc.com/ (accessed 18 Nov. 2017).

5 Ministry of Foreign Affairs of the People's Republic of China. *China's Twelve Measures for Promoting Friendly Cooperation with Central and Eastern European Countries*, http://www.fmprc.gov.cn/mfa_eng/topics_665678/wjbispg_665714/t928567.shtml (accessed 26 July 2017).

Poland or the Czech Republic.[6] Its highlight accomplishment has been the modernization of the Belgrade–Budapest railway[7] and the China–Pakistan Economic Corridor (CPEC), which allows the bypassing of the Indian Subcontinent and the Suez Canal on OR's way to East Africa, mostly through the construction of railways, roads and an oil pipeline connecting Kashgar in Shinjang Uyghur Autonom Rayni to the port of Gwadar in Baluchistan.

Beyond politics and international relations, OBOR undeniably has a strong economic dimension, particularly in terms of resource security. The Chinese economy is strongly connected with other economies. China is a major consumer of copper, iron and many other resources produced by African countries. China also relies massively on the production of oil and liquefied gas from the Arabian Peninsula. However, the sea routes in the Strait of Hormuz, the Gulf of Aden, the Strait of Malacca, and the South China Sea are subject to piracy. In addition, China wants to be able to cope with potential friction with the United States (US) and the presence of the US Navy in the Indian and Pacific Oceans which may affect its supplies. The OBOR is, therefore, a way of securing those supplies. Simultaneously, it is an ambition to diversify the export of goods and services to new markets that could represent major alternatives to the rising protectionism in the US or the sluggish growth of the EU. In order to develop new infrastructures that will transform trade, China has started to massively invest in multiple jurisdictions. OBOR is a titanic project. Europe, China and the countries of Central Asia are engaged in the construction of a new major commercial axis.

In September 2013, China's President Xi Jinping announced in his speech[8] at the Nazarbayev University in Kazakhstan, the idea of OB and in the month of October the same year, he spoke about OR in his speech[9] in the Indonesian Parliament.[10] Since that time, Chinese leaders including Xi Jinping have repeatedly

---

6 Cooperation between of China Central and Eastern European Countries. *The Bucharest Guidelines for Cooperation Between China and Central and Eastern European Countries*, point V.ii, http://www.china-ceec.org/151/2014/01/02/41s1569.htm (accessed 26 July 2017).

7 *See ibid.*, at point 1.3, Ministry of Foreign Affairs of the People's Republic of China. *The Suzhou Guidelines for Cooperation Between China and Central and Eastern European Countries*, point 5.3, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1318039.shtml (last accessed 26 July 2017).

8 *Chinese President Delivered Speech at Nazarbayev University*, Xinhuanet, http://news.xinhuanet.com/english/photo/2013-09/08/c_132701546.htm (accessed 26 July 2017).

9 *Speech by Chinese President Xi Jinping to Indonesian Parliament*, ASEAN-China Centre, http://www.asean-china-center.org/english/2013-10/03/c_133062675.htm (accessed 26 July 2017).

10 Obviously, the idea of OBOR did not come out of nowhere in the Chinese leadership during Xi Jinping's first term. For example, Ferdinand on the one hand observes that '*Hu Jintao had earlier evoked the possibility of some kind of new Silk Road initiative, but it had not gone anywhere*' (*see* Peter Ferdinand, *Westward Ho – The China Dream and 'One Belt, One Road': Chinese Foreign Policy Under Xi Jinping*, 92 Int'l Aff. 941, 948 (2016). On the other hand, however, this author also notices that idea of the 'Chinese Dream', closely related to the OBOR project and serving as its ideological foundation, had already sprouted within the communist party during the second half of Hu Jintao's rule, and, subsequently, it was only simply popularized. *See* Peter Ferdinand, above, at 941, 942–944. It is also

spoken about OBOR in international fora such as APEC Summit Meetings and G20 Meetings.[11] The key points of OBOR were also presented in a more orderly manner in March 2015 in the document[12] entitled 'Vision and Actions on jointly building the Silk Road Economic Belt and Twenty-first Century Maritime Silk Road' (2015 Vision). This shows that the Chinese government attaches great importance to OBOR and regards it as a core element of China's foreign policy.[13]

Steps have been taken to get OBOR going and we need to keep our eyes on it to see how it develops in the future. The Asian Infrastructure Investment Bank (AIIB), is reported to have initiated four projects in which it extends loans in cooperation with the World Bank and the Asia Development Bank (ADB).[14] In April 2016, China and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) exchanged a memorandum of understanding for cooperation.[15] In 2015, the EU and China signed a memorandum of understanding and thus there will be a cooperative relationship between Europe and China regarding the OBOR initiative and the EU's connectivity initiatives.[16] The US and Japan, two major economic powers, have not yet expressed interest in joining the OBOR projects.[17] It is true that a measure of uncertainty lingers around OBOR because its future depends on many factors that are currently unknown, and in this respect, it may be like navigating in uncharted seas. Some of the

---

noteworthy that, as mentioned, OBOR-related negotiations within the framework of the 16+1 Group were launched a year ahead official announcement of the OBOR project.

11 At the 22nd APEC Economic Leaders' Meeting in 2014, *Xi Jinping Stressed that It is the Core of the Initiative of 'One Belt One Road' to Carry Out Cooperation for Connectivity*, http://www.fmprc.gov.cn/mfa_eng/topics_665678/ytjhzzdrsrcldrfzshyjxghd/t1210349.shtml (accessed 26 July 2017).

12 Full text *see* http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html (accessed 26 July 2017).

13 People's Republic of China, *13th Five-Year Plan on National Economic and Social Development* (2016), http://www.gov.cn/xinwen/2016-03/17/content_5054992.htm (accessed 18 Nov. 2017); Xinhua. (In the 13th Five-Year Plan, the whole chapter No.51 was devoted to promote the OBOR initiative.)

14 Jane Perlez, *China-Led Development Bank Starts With USD 509 Million in Loans for 4 Projects* N.Y Times (2016), https://www.nytimes.com/2016/06/26/world/asia/china-led-development-bank-starts-with-509-million-in-loans-for-4-projects.html (accessed 8 Mar. 2017). *AIIB, World Bank Planning Closer Project Cooperation*, China Daily, http://www.chinadailyasia.com/business/2015-07/17/content_15291554.html (accessed 18 Nov. 2017).

15 中湊晃「「一帯一路」への視点」世界経済評論、２０１６年９月１０日号 (Nakaminato Akira, *A View on One Belt One Road*, World Econ. Rev. 3 (2016)); Ministry of Foreign Affairs of the PRC, *Foreign Ministry and the UN ESCAP Sign Cooperation Document on the 'Belt and Road' Initiative*, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1355117.shtml (accessed 18 Nov. 2017). (*The Letter of Intent emphasized that both sides will jointly plan the specific actions for advancing connectivity and the 'Belt and Road' initiative and promote policy docking and practical cooperation of all countries along the routes.*)

16 *See* European Commission, press release, *Investment Plan for Europe Goes Global: China Announces Its Contribution to # Invest EU*, http://europa.eu/rapid/press-release_IP-15-5723_en.htm (accessed 26 July 2017).

17 Despite President Trump's rhetoric, there are quiet moves by the US to participate in OBOR – including by possibly joining the AIIB in the near future. *See* Tom Mackenzie & Miao Han, *AIIB's Jin Says Bank's Door Still Open to Trump after Obama Snub*, Bloomberg (9 Jan. 2017).

participants are at odds with China on the political front, e.g. India has signalled its concern about 'the interplay of geopolitics and connectivity'.[18] Although, China gives assistance to Pakistan, Pakistan and India are still in a state of tension.[19] It may be true that China has launched the projects for geopolitical reasons, some of the participants are in a 'friend and foe in the same boat' relationship. However, there is a common ground and tension between the participants and this may raise the question of Japan's involvement in the OBOR.

This Article provides a comprehensive analysis of the OBOR initiative that has emerged since 2013 as a key feature of China's international economic policy. It does so by using a number of sources in Chinese, Japanese and English which have explained the trade-related dimensions of OBOR and with the objective of providing the first roadmap of OBOR trade drivers and trade issues. The importance of this effort is multiple. Firstly, the Article fills a gap in the analysis of China's international policy (which hitherto has been very much centred on WTO membership). Secondly, the Article identifies the fracture lines in the future Asia-Pacific trade policies for the next fifty years. Thirdly, on a more conceptual level, the Article demonstrates that OBOR is not a new type of FTA, and neither is it a competitor to the WTO or the TPP; OBOR is a radically new approach towards international trade and investment in a turbulent (trade) time[20] when many policies developed by Western countries, that we used to believe were firmly established, are being called into question.

In order to develop this analysis, the Article firstly details the policy and institutional foundations of OBOR; also, the conditions of market access in the OBOR area are discussed before analysing the conditions of competition and[21] finally, it draws the

---

18 Brookings, *What India Thinks About China's One Belt, One Road initiative (But Doesn`t Explicitly Say)*, https://www.brookings.edu/blog/order-from-chaos/2016/03/14/what-india-thinks-about-chinas-one-belt-one-road-initiative-but-doesnt-explicitly-say/ (accessed 18 Nov. 2017). ('Connectivity, once *see*n as helping countries transcend geopolitics, was instead identified by the [Indian] foreign secretary [S. Jaishankar] as having 'emerged as a theatre of present day geopolitics''.)

19 *China Sees Kashmir Dispute as an Obstacle to Silk Road*, Hindu, http://www.thehindu.com/news/international/China-sees-Kashmir-dispute-as-an-obstacle-to-Silk-Road/article14998959.ece (accessed 18 Nov. 2017). (Growing tensions between India and Pakistan is persuading the Chinese … `the Kashmir issue as an impediment to Beijing's OBOR initiative, with the China–Pakistan Economic Corridor at its core.)

20 *See* Arancha Gonzalez Laya & Peter, *From Bad to Worse? The Case for Arresting the Slide in Global Trade Cooperation*, World Econ. F. Draper (Global Future Council on the Future of International Trade and Investment) Strategic Brief for the Annual Meeting of Stewards of International Trade and Investment, Feb. 2017, http://www3.weforum.org/docs/WEF_DAVOS_BRIEF.pdf (accessed 18 Nov. 2017).

21 In this respect, we borrow from Thomas Cottier the distinction between the regulation of the condition of market access and the conditions of competition which 'is an attempt to organise a vast area and to capture the fact that more recent trade policy instruments plainly regulate conditions of markets. Such instruments affect goods upon customs clearance. They affect services, offered and sold within a domestic jurisdiction, to many of which no border measures apply. These regulations fully form part of domestic market regulation. Here, market access is shaped in terms of conditions of competition and the granting of national treatment. This is particularly true for services. While the purpose of the General Agreeemnts on Trade in Services (GATS) is market access, it essentially

regulatory and policy lessons for the future of international trade and cross-border investment.

2 UNDERSTANDING THE OBOR FOUNDATIONS: POLICY AND INSTITUTIONS

The scope of OBOR has not yet been clearly defined, and it may be in the very nature of OBOR that it is not susceptible to a precise definition of its outer boundary. OBOR is a flexible and dynamic process; it involves a development policy for creating a large economic area stretching from China to Europe, and therefore to clearly demarcate the areas that will come under its scope is not appropriate. In this way, OBOR is different from FTAs in the traditional sense. An FTA is a legal framework which sets up a free trade area in which the rights and obligations of participants are clearly defined and the disciplines are enforced through a dispute settlement mechanism. On the other hand, OBOR starts with a series of projects undertaken parallel to each other without the roles of each project being strictly defined.

The Chinese government wishes to initiate a series of large projects to build infrastructures such as railways, highways, pipelines, electric transmission networks, airports and all other related matters in China, the Central Asian countries, and parts of Muslim countries. Eventually, a big common market might be created in which not only China but also the Central Asian countries, India, Pakistan, Myanmar, Nepal, Bhutan, Russia, other European countries, and others are included.[22] Altogether sixty-five countries in Asia, Europe, part of Africa and the Pacific areas will participate, and this shows the diversity of the economic drivers (A), and the considerable diversity of prospects for sectors such as infrastructure, energy, telecommunications, and banking (B).

2.1 Economic drivers

The goal of such projects is to create economically interconnected areas stretching from China to Europe. The Chinese government likes to refer to this series of

operates by shaping conditions of competition for foreign services and service suppliers, ranging from exclusion to equal conditions, commensurate with commitments made. […] Similarly, standards on intellectual property protection define conditions of competition, as do measures affecting investment, subsidies, dumping and government procurement'. *See* Thomas Cottier & Matthias Oesch, *International Trade Regulation. Law and Policy in the WTO, the EU, and Switzerland. Cases, Materials and Comments* 1106 (London, Bern: Stämpfli Verlag AG with Cameron May Ltd).

22 That being said, 'common market' is not a *priority* for the PRC leadership; '*from the Chinese perspective, OBOR characterized by diversified cooperation mechanism does not adopt the building of standard FTAs or higher forms of regional integration (such as customs union, common market, economic integration, and economic and political integration) as its priority target*'. Available at http://ippreview.com/index.php/Home/Blog/single/id/60.html (accessed 18 Nov. 2017).

projects as restoring the ancient Silk Road which connected China with Europe at the time of the Roman Empire. Also, the Chinese government wants to liken such series of projects to the 'Marshall Plan' which the US launched shortly after the Second World War in order to reconstruct Europe that had been devastated by the war.[23]

The motive of China to initiate OBOR is in fourfold: i.e. (1) internationalization of the Chinese currency,[24] the Yuan; (2) the effective use (or re-balancing) of foreign currency reserve; (3) the reduction of excess production capacities in China; and (4) development of China's Western provinces.

In the past decades, China has built production facilities of steel, cement, machines and other capital goods. As the Chinese economy slows down, these facilities have become excessive and the overcapacity in production in China has been a tremendous problem. OBOR may provide opportunities for Chinese industries to reduce the pressure of this excess facility.[25] Meanwhile, guidelines set out in the 2015 Vision and Actions have to be taken into account. For example, it states 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 on the construction' where the industries' burden of excess capacity does not show advantages. The main purpose of OBOR is to construct basic infrastructure in the vast area between China and Europe, and if the projects are successfully launched there will be immense demands for capital goods. Just as an example, the ADB projects that between 2010 and 2020 there will be the need to invest more than USD 800 billion in the construction of infrastructures in the countries composing the ADB. This large effective demand will provide Chinese industries with opportunities for supplying those areas not only with capital goods but also with opportunities for doing business abroad.

---

23 Charles Clover & Lucy Hornby, *China's Great Game: Road to a New Empire*, Fin. Times (2015), https://www.ft.com/content/6e098274-587a-11e5-a28b-50226830d644 (accessed 26 July 2017). However, according to Chinese leadership, China has rejected the analogy of OBOR and the Marshall Plan by Foreign Minister Wang Yi, who dismissed comparisons with the Marshall Plan, stating that 'it is a product of inclusive cooperation, not a tool of geopolitics, and must not be viewed with the outdated Cold War mentality'. Available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1243662.shtml (accessed 18 Nov. 2017); editorial of Global Times, *The 'One Belt and One Road' is Very Different from the Marshall Plan*, http://opinion.huanqiu.com/opinion_world/2014-11/5204124.html (accessed 18 Nov. 2017). (in Chinese）, and Xinhua, *Chinese Marshall Plan Analogy Reveals Ignorance, Ulterior Intentions*, http://news.xinhuanet.com/english/2015-03/11/c_134057346.htm (accessed 18 Nov. 2017).

24 *See* Werner Fasslabend, *The Silk Road: A Political Marketing Concept for World Dominance*, 14 Eur. View 293, 297 (2015).

25 He Yafei, *China's Overcapacity Crisis can Spur Growth Through Overseas Expansion*, South China Morn. Post (7 Jan. 2014) in this opinion, He Yafei, currently Vice Minister of Foreign Affairs, expressed that overcapacity in manufacturing could be taken as an opportunity for Chinese firms to 'go out' for overseas markets. Available at http://www.scmp.com/comment/insight-opinion/article/1399681/chinas-overcapacity-crisis-can-spur-growth-through-overseas (accessed 18 Nov. 2017).

In addition, over the recent decades, China's growth has become unbalanced, and the income gap between regions of China has been growing; in particular, the Western provinces have been falling behind the coastal ones. The 2015 Vision stated that China, in order to cure these disparities, should:

> *make use of the advantages of inland regions, including a vast landmass, rich human resources and a strong industrial foundation, focus on such key regions as the city clusters along the middle reaches of the Yangtze River, around Chengdu and Chongqing, in central Henan Province, around Hohhot, Baotou, Erdos and Yulin, and around Harbin and Changchun to propel regional interaction and cooperation and industrial concentration.*[26]

The economic development of China's interior is also believed to help the appeasement of religious and ethnic tensions between Xinjiang and Tibet and the richer Eastern provinces.[27] About sixty-five countries/economic areas will participate in it in one way or another. The totality of such countries/economic areas occupies about 63% of the world's population and this amounts to four billion people. In terms of GDP, this whole area shares about 30% of the world's GDP.

In order to meet the financial need for carrying out OBOR, the Chinese government established the AIIB.[28] The AIIB is endowed with a capital of USD 100 billion of which half was paid out by China.[29] The AIIB is not only a financial institution for OBOR but it is also a supplier of funds to any Asian useful projects. However, there is no doubt that one of the primary purposes of the AIIB is to be a central institution in promoting OBOR. Many countries have joined the AIIB. In 2014, twenty-one countries, including China, India, and Singapore, signed the agreement to establish the AIIB and later the UK, France, Germany, and Italy joined. In 2015, the original fifty-seven countries participated as the founding members; this list included twenty-one countries in Asia-Pacific, seven from the former Soviet group, nine from the Middle East, seventeen from Europe, one from America and two from Africa.

In addition to the AIIB, other financial institutions are established. These institutions are the Silk Road Fund to which China contributed USD 40 billion, the SCO Development Bank (Shanghai Cooperative Organization Development Bank) established by the contribution of China to the amount of USD 80 billion,

---

26 *See*: 2015 Vision, point 6.

27 *See*: Michael Clarke, *Beijing's March West: Opportunities and Challenges for China's Eurasian Pivot*, 60 ORBIS 296, 297 (2016); David Babayan, *New Silk Roads in the Southern Caucasus: Chinese Geopolitics in a Strategic Region*, 10 Yale J. Int'l Aff. 39, 40 (2015).

28 On the Asia Infrastructure Investment Bank, *see* W http://en.wikipedia.org/wiki/Asia_Infr (accessed 18 Nov. 2017).

29 'The authorized capital stock of the Bank shall be one hundred billion United States dollars (USD 100,000,000,000), divided into one million (1,000,000) shares having a par value of 100,000 dollars (USD 100,000) each, which shall be available for subscription only by members in accordance with the provisions of Article 5'. *See* AIIB Article of Agreement, at Art. 4.1.

the New Development Bank (initially known as the BRICS Bank) whose initial capital amounted to USD 100 billion contributed by the BRICS countries (China contributing USD 41 billion, Russia, Brazil and India each contributing USD 18 billion, and South Africa contributing USD 5 billion).

The totality of the above is probably not sufficient to finance the very large financial requirement to carry out OBOR. Plus, this totality will not be readily available. For example, in the case of the AIIB, five years are needed to fully pay up the authorized capital because AIIB members are obliged to cover their shares in five installments, i.e. pay in USD 20 billion (all members in total) each year.

In this perspective, joint financing between such international financial organizations as the World Bank and the ADB will make sense. As will be mentioned later, the introduction of private money is essential to make OBOR successful, and in this respect, the PPP (Private/Public Partnership) approach will be useful.

2.2 Prospects: infrastructures, transport, and energy

Much is left to future decisions regarding what exactly OBOR will do and it may be too premature to describe exactly what this will be. However, the following categories of projects seem to present tentative plans.

There will be a wide range of projects for building infrastructure in Central Asia, the Middle East and some part of Southeast Asia.[30] This will involve such items as city planning, building infrastructures in relation to water supply systems, sewerage systems, housing, factories, stores and other buildings, and all other related items necessary for city planning. This creates huge demands for the construction industry, civil engineering, the iron and steel industry, cement and other related aspects of building cities.

Another potential area of importance is transportation. China intends to build networks of transport throughout the participating countries. This involves preparation and construction of ports, airports, highways, railways, pipelines, electric transmission networks, and various related facilities. This should be a big market for Chinese industries including transport, construction, and all related areas.

The third promising area is energy.[31] This involves not only the exploration and exploitation of energy resources in those areas, such as natural gas, petroleum,

---

30 *See* William T. Wilson, *China's Huge 'One Belt, One Road' Initiative Is Sweeping Central Asia*, The Heritage Found., http://www.heritage.org/asia/commentary/chinas-huge-one-belt-one-road-initiative-sweeping-central-asia; (accessed 18 Nov. 2017). Enoch Yiu, *'One Belt, One Road' Infrastructure seen as Catalyst for New Trade Growth*, http://www.scmp.com/business/global-economy/article/2051138/one-belt-one-road-infrastructure-seen-catalyst-new-trade (accessed 18 Nov. 2017).

31 Erica Downs, *Mission Mostly Accompolished: China's Energy Trade and Investment Along the Silk Road*, Jamestown Found., https://jamestown.org/program/mission-mostly-accomplished-chinas-energy-trade-and-investment-along-the-silk-road-economic-belt/ (accessed 18 Nov. 2017).

uranium, coal, forestry, agricultural products, and fisheries, but also the construction of power plants, refineries, electric transmission stations, electric wire networks, and pipelines. Demands for the construction of stations and facilities related to those areas will be very large.

When the construction of infrastructures, as described above progresses, there will be a greater movement of people, and eventually, tourist industries will be promoted because the areas along the ancient Silk Road abound in historic heritage.[32]

As stated earlier, Chinese industries have excess production capacity and it is imperative for them to find new markets abroad. In this perspective, the Chinese government has established a 'special zone' which is the creation of the Chinese government and the respective foreign government; thereafter, Chinese and foreign enterprises engage in large-scale construction works for building infrastructure in that country. Developing countries in Central Asia and Southeast Asia need infrastructure and therefore a 'special zone' for the investment and construction of infrastructure is like 'killing two birds with one stone' for Chinese enterprises in need of finding a foreign market and the country which needs the infrastructure. China has established 118 special zones in fifty countries, and in these fifty countries, twenty-three countries and seventy-seven zones are within the OBOR countries.

Among the special zones established to date, the Sihanoukville Special Economy Zone[33] in Cambodia is well known. This is a joint venture between five enterprises from China and Cambodia in which 80,000 to 100,000 employees are expected to work and in which seventy-nine foreign companies will participate.

2.3 Dispute settlement mechanism

OBOR is composed of diverse activities such as trade, investment, engineering and many other business activities. Therefore, a dispute settlement mechanism in OBOR should not be specialized in a narrow area of disputes such as just trade or investment. It should be able to handle overall issues. It will include informal procedures as well as formal procedures, e.g. mediation, arbitration, and adjudication by a semi-judicial body. A careful study is necessary to determine the proper relationship between laws and regulations of the participating countries and the

---

32 Tim Winter, *One Belt, One Road, One Heritage: Cultural Diplomacy and the Silk Road*, Diplomat (2016), http://thediplomat.com/2016/03/one-belt-one-road-one-heritage-cultural-diplomacy-and-the-silk-road/ (accessed 18 Nov. 2017).

33 On Shianoukville Special Economic Zone, *see* http://www.ssez.com/en/company.asp?lon (accessed 18 Nov. 2017).

body of rules that will evolve in the framework of OBOR. It is the recommendation of the authors that this process should not be made excessively formal, and that a measure of flexibility and soft law will be useful.

Although many dispute settlement venues are appealing to the parties involved in contracts related to commercial disputes along the OBOR, the Chinese Central Government and the Government of the Hong Kong SAR are pushing for the further establishment of Hong Kong as a centre for the settlement of disputes related to the OBOR initiative and for The Hong Kong International Arbitration Centre to have a leading role in this.

The Chinese international investment regime covers more than 140 countries but the majority of the treaties belong to the so-called first and second generation of Chinese bilateral investment treaties which have a narrow dispute settlement clause that provides access to investment arbitration only with respect to the amount of compensation in the case of expropriation.[34] The state-owned enterprises' (SOEs) and the SWFs' access to arbitration is discussed, but it is not yet clear in the literature,[35] and the problems raised by the scholarship with respect to access to investment arbitration are even more relevant in relation to the Chinese international investment agreements (IIAs). There is no comprehensive treaty which regulates trade and investment between the OBOR countries. In fact, some of the OBOR countries do not have a bilateral investment agreement with China. The expansion of Chinese outbound FDI in recent years places Chinese investors at the front of high political and legal risks and hence amplifies the call for the renegotiation of the old Chinese investment agreements in order to address the problems which Chinese private and state-owned investors are facing and will face in the OBOR countries and elsewhere.

3 THE CONDITIONS OF MARKET ACCESS STANDARDS

If OBOR aims at creating some sort of common market, the standardization of institutions is one of the essential principles. This includes such items as the standardization of roads and highways, railways, buildings and other infrastructures, uniform standards of safety features of machines and other tools, testing methods, and representation of products and goods.

[34] Manjiao Chi & Xi Wang, *The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications: The Admissibility of Disputes for Investor-State Arbitration*, 16 J. World Inv. & Trade 869 (2015).

[35] *See* Claudia Annacker, *Protection and Admission of Sovereign Investment Under Investment Treaties*', 10 Chinese J. Int'l L. 531 (2011); Mark Feldman, *The Standing of State-Owned Entities Under Investment Treaties*, in *Yearbook on International Investment Law and Policy 2010/2011* (K. Sauvant ed., OUP 2011); Julien Chaisse & Dini Sejko *Investor-State Distorted – When the Claimant is a State*, in *Judging the State in International Trade and Investment Law: Modern Sovereignty, the Law and the Economics* (Choukroune ed., Springer 2016).

In this area, there are several models that OBOR should take into account in setting its standards, i.e. international agreements; these include WTO: TBT Agreement (Agreement on Technical Barriers of Trade); WTO: SPS Agreement (Agreement on Sanitary and Phytosanitary Measures); relevant chapters in TPP; and other FTAs. OBOR can adopt some principles from those sources and modify them to fit them into the unique features of OBOR.

3.1 Risk management

OBOR requires a very large amount of investment and the prospect of profitability is not so certain. Even if the projects are profitable, they may be profitable only in the long run. In the short run, there may be a risk of failure and delay. Such business risk is probably even greater than it is in the regular investment activities in the markets of developed countries. Therefore, in order to attract and promote the participation of various private enterprises, it is essential to prepare a legal framework for risk hedge. Such a risk management system primarily involves export and investment insurance. Such insurance to cover the risks involved in export and investment caused by country-risk, e.g. war, insurgency, undue expropriation of private properties, revocation of business licences, etc. by the host country. However, not only country-risk but also business risk (credit risk) needs to be covered. Often public insurance agencies (such as NEXI (Nippon Export Investment Insurance), which will be mentioned later) undertake such insurance because the risks involved are so great and so unpredictable that private insurance companies may be reluctant to underwrite them.

However, insurance business operated by public insurance agencies sometimes tends to be stiff and bound by rules and regulations. In this respect, it may be a good idea to let private insurance companies undertake such risk-hedge operations, and, in order to cover the losses that may be incurred by them, public insurance agencies provide re-insurance to private insurance companies to cover their losses.

Often international financial institutions offer such guarantees such as the investment guarantees provided by the World Bank and similar guarantees given by the ADB. Guarantees offered by such international financial institutions may not be sufficiently large against the large demand required in carrying out OBOR projects. However, guarantees provided by such international financial institutions enhance the credibility of the projects that are the beneficiaries of such guarantees. Such guarantees can act as a prime pump to call in private money.

Closely related to the risk management or risk hedge is the dispute settlement mechanism in international trade and investment. In respect of dispute settlement in trade and investment between exporters, importers, investors, host governments and other parties of interests, some sort of arrangement is necessary for the resolution of disputes, as in the dispute settlement procedures in FTAs and Investor-state Dispute Settlement (ISDS). Dispute settlement procedure will be touched upon later. Here it is important to note that the agencies which offer guarantees, such as those described above, can subrogate the claims of insured parties against malefactors whether they are private or public bodies, and this provides a more stable financial basis for operations.

3.2 Investment

There is no doubt that OBOR entails a direct investment of many kinds for building infrastructures and it is essential for it to have some rules on direct investment. There are many bilateral international investment agreements and all of the FTAs have investment chapters. In general, they provide for the non-discriminatory treatment of foreign investment, national treatment, most-favoured nation treatment, fair and equitable treatment, and no unreasonable expropriation of properties without compensation. Those are the necessary principles for any international economic agreement designed for co-existence and co-prosperity.

3.3 Financing and subsidy

Financing by public and semi-public financial institutions is important because such institutions can extend loans and credits even in situations where the possibility of default is relatively high. Financing by the AIIB in China, the Japan Bank for International Cooperation and the US Exim Bank are examples of financing by such public or semi-public financial institutions. Such financial institutions can finance projects by loan at an interest rate below the market rate. Also, another issue in relation to financing is the term of the loan. Some of the OBOR projects require a long time before any profit is expected, and in this situation, a long-term loan is necessary which makes the role of public and semi-public financial institutions important.

In the case of financial institutions entirely controlled by China, the extension of concessional loans for projects in third-party countries have been mostly vested in the Export-Import Bank of China (China EXIM Bank) since 1995.[36] Plus, a number of other quasi-commercial state-owned institutions have been in operation, for example, the China-Africa Development Fund, founded by the China Development Bank in 2007 and various forms of quasi-commercial financing such

---

36 China EXIM Bank was founded in 1994 as a 100% state-owned entity directly controlled by China's State Council. *See* Export-Import Bank of China. *Profile/ About the Bank/ Introduction*, http://english.eximbank.gov.cn/tm/en-TCN/index_618.html (accessed 26 July 2017).

as packages combining loans at commercial and concessional rates. One might also mention the pervasive use of buyers' credits extended by the CDB – which has improved the price competitiveness of many Chinese products exported by Chinese national champions, such as Huawei.[37] The terms and size of loans granted by such institutions have generally lacked transparency,[38] because China has been paying its concessional loans; which means that some portion of the aid is required to be spent on goods, services or contractors originating from China.[39]

In this connection, finance provided by international financial institutions is very important. Examples of such international financial institutions are the AIIB in China, the ADB, and the World Bank. Such international financial institutions, either alone or in cooperation with national and international financial institutions, can supply sufficient funding to big projects. As already mentioned, the participation of the ADB and the World Bank is important to increase the prestige and credibility of OBOR, without which the introduction of private money to projects will be difficult. In the case of the AIIB, its president gave an early assurance that: '*there will be no nationality restriction on the procurement of goods and services for AIIB-financed operations*'[40]and provision was included in the AIIB's Articles of Agreement.[41] Direct subsidy by governments and other public bodies can be given to projects where the profitability is uncertain and the risk is relatively high. Such subsidy can take many different forms, including the direct payment to enterprises undertaking the projects and including other benefits such as finance at a preferential rate, provision of goods, transport, and other services. Also, the provision of infrastructure (such as free access to highways, railways, port facilities, warehouses, pipelines, electric transmission facility, etc.) is still another form of subsidy.

Tax cuts and tax reductions are other forms of subsidy. For example, tax legislation can provide that enterprises engaged in OBOR projects set aside a certain amount of annual income as a reservation for covering future losses and that such an amount is deductible from corporate income. Likewise, the amount of expenses spent in purchasing capital goods for OBOR can be deducted from corporate income on an accelerated basis as depreciation allowances. These

37 *See* Deborah Bräutigam, *Aid 'With Chinese Characteristics': Chinese Foreign Aid and Development Finance Meet the OECD-DAC Aid Regime*, 23 J. Int'l Dev. 752, 757 (2011). *See also* Mikael Mattlin & Matti Nojonen, *Conditionality in Chinese Bilateral Lending*, 14 BOFIT Discussion Papers 3, 13–14 (2011).

38 *See* generally, Paul Hubbard, *Aiding Transparency: What We Can Learn About China ExIm Bank's Concessional Loans*, The Centre for Global Development Working Paper No. 126 (2007); Deborah Bräutigam, *China, Africa and the International Aid Architecture*, African Development Bank Group Working Paper Series No. 107 (2010).

39 *See* Bräutigam, *ibid*., at 30; Felix Zimmermann & Kimberly Smith, *More Actors, More Money, More Ideas for International Development Co-operation*, 23 J. Int'l Dev. 722, 728 (2011).

40 *See* Liqun Jin, *AIIB to Benefit Asia and Beyond*, China Daily, 12 (New York, 2015).

41 *See* AIIB Articles of Agreement, at Art. 13.8.

measures could have the effect of tax reduction and could be helpful to enterprises engaged in OBOR projects.

Providers of such benefits need to be aware that subsidies are under the disciplines of the WTO and FTAs. As long as providers of such benefits belong to the WTO or other FTAs, unlimited provision of subsidy either by direct transfer of funds or the forgiveness of tax obligations can lead to infringement of obligations contained in such international agreements.

3.4 Environment

Any contemporary big projects for development must take into consideration, their impacts on the environment. Such consideration is necessary to keep up sustainable development and the projects' political and the social acceptability.[42] There is a great depository of laws and regulations relevant to environmental policies. However, they are too many to be enumerated here, and in the following passages, only two items are mentioned.

The Kyoto Protocol, which is the protocol to the United Nations Convention on Climate Change, provides for the reduction of GHG (greenhouse gasses), and, as a means to achieve it, CDM (Clean Development Mechanism) is mentioned. In the CDM, the enterprises of developed countries undertake some projects designed to reduce GHG in developing countries under the permission and supervision of the United Nations, and the margin of reduction of GHG accomplished through this margin of reduction is credited to the enterprise which conducted the project. This credit is tradable to sell to the government of its home country, and then either the government can credit it against the obligation to reduce GHG or the enterprise can sell the credit in the emissions market.

Likewise, in JCM (Joint Credit Mechanism) authorized in the Paris Convention of 2015, two governments (usually the government of the developed country and the developing country, respectively) enter into a bilateral agreement and establish a joint committee composed of representatives of both governments. An enterprise of the developed country party applies for a certificate to operate a program for the reduction of GHG in the territory of the developing country party. When the certificate is given, the enterprise engages in the operation, and then the reduction which is accomplished by this operation is given to the enterprise as a credit. The enterprise can sell it to the government of the developed

[42] The Chatham House, *Navigating the New Normal: China and Global Resource Governance* (2016). The report suggested that 'China's approach to resource security and sustainability will help define its reputation, and whether it is perceived as a responsible actor on the world stage and as a development partner'. Available at https://www.chathamhouse.org/publication/navigating-new-normal-china-and-global-resource-governance#sthash.3ZabLcwQ.dpuf (accessed 18 Nov. 2017).

country. Thereafter, it can credit it against the obligation to reduce GHG. Otherwise, the enterprise can sell it for profit in the emissions market.[43]

In both instances, operations engaged in by enterprises involve the transfer of technology and direct investment. This is a measure taken for the promotion of environmental policy but, at the same time, this is a type of foreign direct investment and transfer of technology. The authors propose that OBOR can consider adopting measures such as those.

4 THE CONDITIONS OF COMPETITION

In building this vast infrastructure network, Beijing faces the difficulty of the funding and the institutional coordination of its imperial project.

On the one hand, China promotes its major public enterprises, notably the Chinese Railway Group, but it is also aware of the need to share the benefits of these investments with local companies in order to obtain the assent and confidence of the states concerned. Delegating to interested countries is also a way for Beijing to limit the bill because the scope of its ambitions entails a bill of expenses that could exceed its financial capacities. This is so because of the economic and financial crisis that China is experiencing; the immense monetary reserves of the country have melted, going from 4,000 billion dollars in June 2014 to 3,200 billion in April 2016. It is in this perspective of rationalization and sharing of participations in the OBOR, that it is necessary to understand the launch in 2014 of the AIIB, composed of fifty-seven founding members but largely dominated by Beijing. This international structure, with a starting capital of USD 100 billion, allows Beijing to compete with the ADB or even the World Bank, both of which are largely dominated by the US (and Japan).

So what are Beijing's means of financing its new trading empire? The exact amount is not known precisely because it is less a single set than the coordination of a multitude of different projects. It is certain that the sum involved is large, and the sources of financing it are numerous. But in 2015, China launched a USD 40 billion 'Silk Road Fund' With USD 100 billion capital that could grow rapidly over time. The AIIB will be able to raise significant sums to participate in specific projects included in OBOR. This is also the case for the BRICS 'New Development Bank' (Brazil, Russia, India, China, and South Africa), also launched in 2014, with a capital of USD 100 billion in China. This is without counting, the investments of the big companies and the Chinese banks that, if they do not officially enter the global project 'One Road, One Belt', they will participate

[43] On JCM, *see* Mitsuo Matsushita, *Law and Policy in Combating Greenhouse Gases in Japan*, in *Legal Issues on Climate Change and International Trade Law* 993–108 (Deok-Young Park ed., Springer 2016).

indirectly in it and the Chinese imperial project. This is the peculiarity of this project: it is not only the result of the unilateral and vertical will of a state, but it also resembles a gigantic network, which includes its funding.

4.1 Consortium

Here the term 'consortium law' denotes a group of laws relating to the cooperative relationship between enterprises to carry out projects. OBOR undoubtedly entails large projects for the construction and development of infrastructure in the vast areas concerned. In order to develop infrastructure in areas which remain relatively undeveloped, it is essential that enterprises engaged in projects join together in some form of business combinations. There are a great variety of business forms or combinations between enterprises. For example, a simple contractual relationship between enterprises is a type of combination. Trade associations play an important role in pulling together; human, economic, and technological and other resources, making large projects possible. Such a cooperative relationship may take the form of incorporation. Two or more companies may decide to establish a joint venture company to carry out big projects. Consortia technology development is very important in carrying out OBOR, and, in this respect, such devices as R&D joint ventures are useful.

Largely classified business combinations that are involved in OBOR can be divided into incorporated entities and unincorporated entities. The former include joint stock companies and other forms of incorporated entities.

Companies which engage in different areas of related or unrelated business can be organized under the umbrella of a holding company and the companies in the group can act together under the directives of the holding company. One of the uses of the holding company system is that, it can save the risk involved in a project in a specific area engaged in by one of its subsidiaries under its umbrella, when such subsidiary incurs a heavy loss.

Unincorporated entities include cooperatives and associations. Depending on the jurisdiction, laws governing procurement might also create consortia allowing unrelated business to jointly compete for public contracts, bear responsibility for contract performance, or settle payments with government agencies. This type of combination is easier to establish and more flexibly to operate than incorporated entities. Such combinations operate as joint export and import, joint marketing, joint investment, joint R&D, joint financing, and a great variety of other activities.

One of the features of OBOR is PPP, e.g. private public partnership, which means that there will be cooperative relationships between governments and other public bodies on the one hand and private enterprises on the other as well as intergovernmental cooperation and cooperation between private enterprises. In this perspective, one can envisage that there will be forms of cooperation such as B-B relationship (business and business cooperation), B-G relationship (business and government cooperation), and G-G relationship (government and government relationship).

4.2 State-owned enterprises

The SOEs are playing an important role during the Go Global Strategy[44] and their role may be reinforced through the OBOR initiative. The important role of SOEs in OBOR is one of its characteristics that distinguish it from other ventures. It should be remembered that OBOR is a project initiated by the Chinese government, and, although projects involved in OBOR may be multi-state or multi-SOEs, mixed public/private ventures, there is no doubt that the Chinese government and the Chinese SOEs play a key role in it. There are many SOEs in China which have very important roles to play in OBOR As they are especially suited to engage in projects involved in OBOR.[45] They are relatively immunized from the risk of business failures concomitant to development projects in undeveloped areas because SOEs are supported by the government; they operate under directives of the government, and they engage in activities in accordance with governmental policy.

Therefore, private enterprises, both domestic and foreign, which intend to engage in OBOR, must be prepared to work with the Chinese SOEs. SOEs often operate on a principle different from that of private enterprises, i.e. SOEs do not necessarily operate on a profit motive but also on policy considerations.[46] When private enterprises cooperate with SOEs in joint undertakings, private enterprises may be puzzled by this difference in governance. Another difference is in terms of accountability, e.g. whereas private enterprises are primarily accountable to shareholders and sensitive to financial loss, SOEs are generally accountable to the government agencies which supervise them. However, many SOEs today are actually SIEs (state-invested enterprises) or SICs (state-invested companies) with the +State (through SASAC among others) assuming a diminishing role – more as

---

44 *See* generally, Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm* 103 (2015).

45 *See* generally Qinhua Xu & William Chung, *China's Energy Policy from National and International Perspectives – The Energy Revolution and One Belt One Road Initiative* (CityU HK Press 2016); John P. Tuman & Majid Shirali, *The Political Economy of Chinese Foreign Direct Investment in Developing Areas* 1 (2016); Xiaofei Li, *China's Outward Foreign Investment: A Political Perspective* (University Press of America 2010).

46 *See* Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-Owned Enterprises*, 47 Cornell Int'l L. J. 631, 648 (2014), for an in-depth analysis of the governance structure of Chinese SOEs. *See also* Law of the People's Republic of China on the State-Owned Assets of Enterprises (中华人民共和国企业国有资产法 [现行有效], 05 Jan. 2009, at Art. 4.

a shareholder and not even a controlling one at that. This is particularly true for listed SICs – which often have significant private Mainland, Hong Kong, OFII, and other foreign investment. In order to deal with this difference in corporate cultures, it may be necessary to establish a coordinating agency charged with adjusting the relationship between private enterprises and the SOEs involved in the ventures.

There is a significant concern among critics in the US, Western countries and Japan that, due to their overcapacity, easy access to the financing by state-owned banking institutions and the overall state support, Chinese SOEs may act in a way different from private enterprises in the West. Because a number of OBOR projects pursue goals that go beyond the mere economic dimension, such as access to resources and energy security, geopolitical stability, security, and fighting terrorism, the SOEs and SWFs that are involved in the project may engage in anticompetitive behaviours such as predatory pricing to win bids in big projects abroad by offering exceptionally low prices in order to have political returns.[47] It is necessary to establish the rules of conduct for SOEs either through informal guidelines[48] issued by the governments or through an international agreement between the relevant governments that their behaviours will not overstep the boundaries.

The Trans Pacific Partnership (TPP),[49] negotiated and signed during the Obama administration but yet not in force, is one of the first international attempts to provide a comprehensive regulation to the participation of SOEs in international trade and investment flows. The deal declares a number of principles which insist that the contracting parties must ensure that the SOEs under their jurisdictions do not engage in predatory practices.[50] This kind of guidance is useful in establishing a set of rules for conducting SOEs. This seems to be essential if the OBOR projects wish to solicit foreign enterprises (especially Western, US. and Japanese ones) to engage in and cooperate with the Chinese SOEs in various projects.

---

47 *See* Xiaolei Sun et al., *China's Sovereign Wealth Fund Investments in Overseas Energy: The Energy Security Perspective*, Energy Pol'y 654–661 (2014).

48 OECD guidelines for SOEs, a number of Chinese SOEs already declare to comply with corporate social responsibility guidelines.

49 *See* below s. 2.1

50 *See* generally, Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, 19 J. Int'l Econ. L., 657 (2016); *see also* Julien Chaisse, *Untangling the Triangle – Issues for State-Controlled Entities in Trade, Investment and Competition Law*, in *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Julien Chaisse & Tsai-yu Lin eds, OUP 2016).

4.3 Public procurement

Much procurement by the governments and public bodies will be involved in projects under OBOR. The interest of domestic suppliers and contractors seeking protection from international competitions will here intersect with the interests of multinational corporations. Suppliers and contractors from countries granting development aid or concessional loans will also encourage their governments to give aid. Moreover, as mentioned earlier, some projects in OBOR are long-range and their profitability at least in the initial period is not certain. Therefore, PPP-style projects are carried out and governments will take initiative in undertaking them. In this context, government or public procurement plays an essential part. In order to keep the cost within a reasonable range and to maintain fairness and equitability in projects, appropriate rules of public procurement is needed..

In this connection, principles developed in public procurement under the WTO's Government Procurement (GPA) and commonly repeated in the majority of recently concluded or modified FTAs (including TPP) will be helpful. In essence, the GPA model of procurement markets' liberalization is based on a few basic premises such as that the selection of suppliers or contractors shall be based solely on commercial factors.[51] An open competitive bid system (a system under which all interested suppliers may submit a tender)[52] shall be preferred over a limited bid system and individually negotiated procurement and a limited bid system (a system under which procurers reach out to suppliers of their choice[53]) should be allowed only under exceptional conditions.[54] This model also precisely regulates largely procedural matters such as the transparency, publicity, and integrity of the procurement process,[55] valuation of contracts,[56] neutrality of information technology applied in the course of the procurement process,[57] and the rules of origin.[58] It imposes numerous transparency-related requirements like, for example, notices on specific planned/intended procurement,[59] generally planned procurement,[60] and on contract awards.[61] It regulates the ways in which the

51 GPA, at Arts XV.5 and VIII.
52 *See ibid.*, at Art. I(m).
53 *See ibid.*, at Art. I(h).
54 *See ibid.*, at Art. XIII.1.
55 'Conduct of Procurement procuring entity shall conduct covered procurement in a transparent and impartial manner that: (a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; (b) avoids conflicts of interest; and (c) prevents corrupt practices'. *See ibid.,* at Art.IV.4.
56 *See ibid.,* at Art. II.6.
57 *See ibid.*, at Art. IV.3.a.
58 *See ibid.*, at Art. IV.5.
59 *See ibid.*, at Art. VII.1–3.
60 *See ibid.,* at Art. VII.4–5.
61 *See ibid.*, at Art. XVI.2.

technical specifications will be sketched by procurers,[62] the timing of the procurement process,[63] and the review procedures available for bidders before domestic courts or quasi-courts.[64] China has been considering joining the WTO GPA for some time now and the US has continued to press the Chinese on this. It may be worth noting what have been the Chinese positions on these issues – bearing in mind that China has its own GP Law.

However, multilateral development banks, including the AIIB, have their own procurement guidelines for procurement related to the projects which they finance. These guidelines have been largely harmonized over recent decades under the leadership of the World Bank in cooperation with the OECD DAC's committee since 1999; these activities came under the aegis of the DAC in 1999.[65] Also, such rules will encroach upon domestic procurement rules, whether harmonized with the GPA or not.

Recently, the AIIB took a further step towards reinforcing the internal policy in anti-corruption practices[66] and joined other MDB in the Agreement on Mutual Enforcement of Debarment Decisions.[67] Through the voluntary agreement, the AIIB joined the other MDBs in cross-debarring entities that have been involved in 'fraudulent', 'corrupt', 'collusive' and 'coercive' practices.[68]

4.4 Fair trade, competition and trade remedies

In any business system, fair trade and competition are always important to maintain its effectiveness and OBOR is no exception. Therefore, some form of legal framework is necessary to maintain fair trade and competition. This includes the prohibition of cartels, undue monopoly and unfair methods of competition such as

---

62 GPA, at Arts I.u, and X.2.

63 *Ibid.*, at Art. XI.

64 *Ibid.*, at Art. XVIII.1.

65 *See*: World Bank. *Procurement Harmonization*, http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:22989220~menuPK:8118597~pagePK:8271521~piPK:8271523~theSitePK:84266,00.html (accessed 26 July 2017).

66 *See* AIIB Policy on Prohibited Practices, Arts 1.1, 3, and 12, https://goo.gl/pjO1Pf (accessed 26 July 2017). In addition, for an analysis for Chinese regulation on anti-corruption and their implications on the OBOR Initiative *see* Michelle Miao, *Audacity and Dilemma, China's One Belt One Road Initiative and Xi Jinping's Anti-Corruption Campaign*, in *Legal Dimensions of China's Belt and Road Initiative* (Lutz-Christian Wolff and Chao Xi eds, Wolters Kluwer 2016).

67 *AIIB Says No to Doing Business with Corrupt Bidders*, AIIB News (2017), https://goo.gl/1cahkR (accessed 26 July 2017). The AIIB joined the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group in signing the Agreement for Mutual Enforcement of Debarment Decision, available at https://goo.gl/RQBCkn (accessed 26 July 2017).

68 Agreement for Mutual Enforcement of Debarment Decisions, Cross Debarred Entities, https://goo.gl/ekr4jM (accessed 26 July 2017).

false and misleading advertisements and the abuse of superior bargaining position exercised against subcontractors and dealers whereby they are subjected to undue disadvantages. This should provide against unfair trade practices in international trade such as antidumping and international predatory pricing practices.

5 CONCLUSION

China has long stood on the model of an economy exporting countless industrial goods albeit ones of poor quality. President Xi Jinping has begun a decisive shift towards a new model of organic growth based primarily on the consumer power of the new Chinese middle classes. But China's current economic difficulties illustrate the challenge of such a paradigm shift. It is precisely here that the imperial project finds its economic explanation. Beijing knows that these innumerable investments in the infrastructure of the interested countries will produce a strong economic growth for the latter. These countries, notably the BRICS, Iran, and Pakistan, see their respective middle classes and their propensity to consume, rapidly developing. China is beginning to see its own Chinese strategy: by launching a massive power policy towards the OBOR, Beijing hopes to exert enough influence to capture a large share of the consumption of these countries and to reduce its dependence on Western countries in terms of export. This is especially so since the levels of development of the latter are reaching a threshold of stagnation which weighs negatively on Chinese growth. Through the OBOR, Beijing thus wishes to extend to a large part of the world its model of development both political and economic.

China absolutely needs no customs barriers because it has not completed its transfer and therefore has to save time. The Chinese are struggling to move from a mercantilist export-oriented economic model to a model where domestic consumption takes over. In fact, OBOR also may well illustrate the possible end of a neo-liberal cycle already illustrated by Brexit and the election of Trump.

In an opinion issued in 2015, China's State Council has foreseen that the goal of OBOR is to establish OBOR/FTA or Silk Road FTA.[69] OBOR at this stage is not an FTA within the meaning of the above definition, although OBOR may develop into an FTA in the future. In an FTA, rule-making comes first, and after the rule is established development follows. In OBOR, development and rule-making proceed in parallel with each other. In an FTA, the activities of private initiative are emphasized, and in OBOR both role of government and public

[69] State Council, *Opinions on Speeding Up the Implementation of Free Trade Zones Strategy* (2015), it points out that '*the long-term goal is to forge a global FTA network that further covers countries along the route of the Belt and Road Initiative and other important countries*', available at http://english.gov.cn/policies/latest_releases/2015/12/17/content_281475255618346.htm (accessed 18 Nov. 2017).

initiatives are the key factors. An FTA is based on a free market and free enterprise philosophy and OBOR is a mixture of government and private initiatives. In the long run, OBOR may develop into a sort of FTA. However, it will be a long time before this happens. As it stands today, OBOR is a series of projects in which government initiative rather than private initiative plays the central role. Unlike a traditional FTA, which starts from establishing a legal framework, OBOR does not start from a set legal framework. It is not an exclusive club such as FTAs in which only the insiders gain benefit. Its feature lies in that it is an open-ended framework or forum in which participation is open to everyone wishing to participate. It starts with projects backed up by government and public authorities. The goal of OBOR may be to establish a large economic area in which participants will cooperate for co-prosperity. Therefore, OBOR may eventually grow into a legal framework. As to what type of legal framework it will create, it is at present too premature to contemplate and predict. It may be a legal framework like FTAs which constitute an exclusive zone in which the parties cooperate. On the other hand, it may remain an open framework or forum, and therefore it may be a different creature from today's FTAs. Eventually some sort of rules of conduct for the participants will emerge and this may be a new type of FTA.