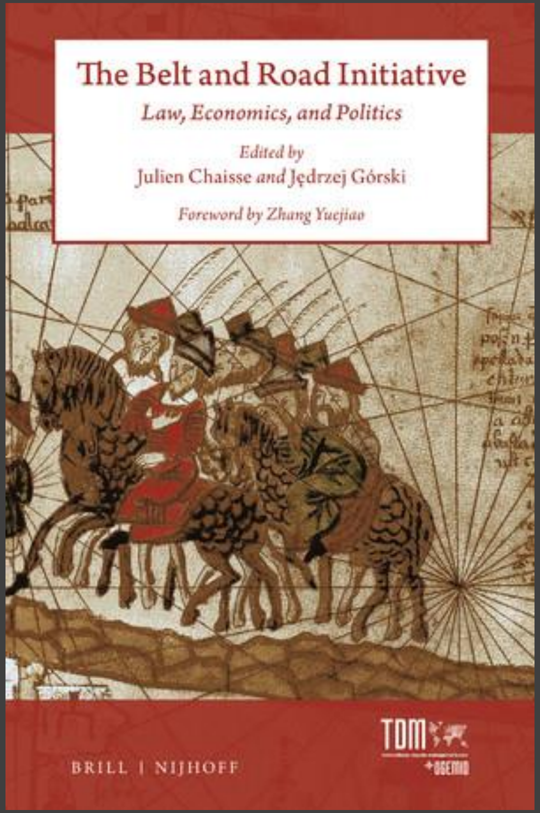

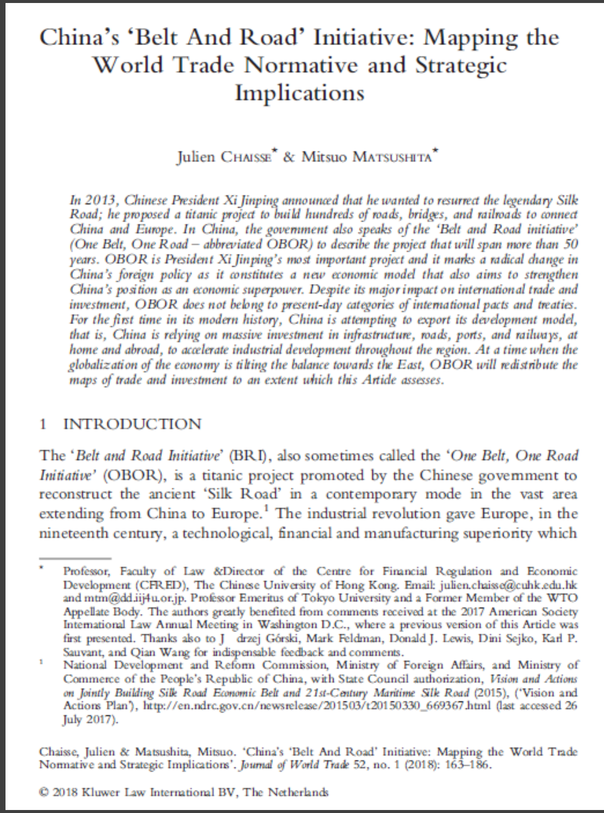

China's 'Belt And Road' Initiative: Mapping the World Trade Normative and Strategic Implications

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

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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).

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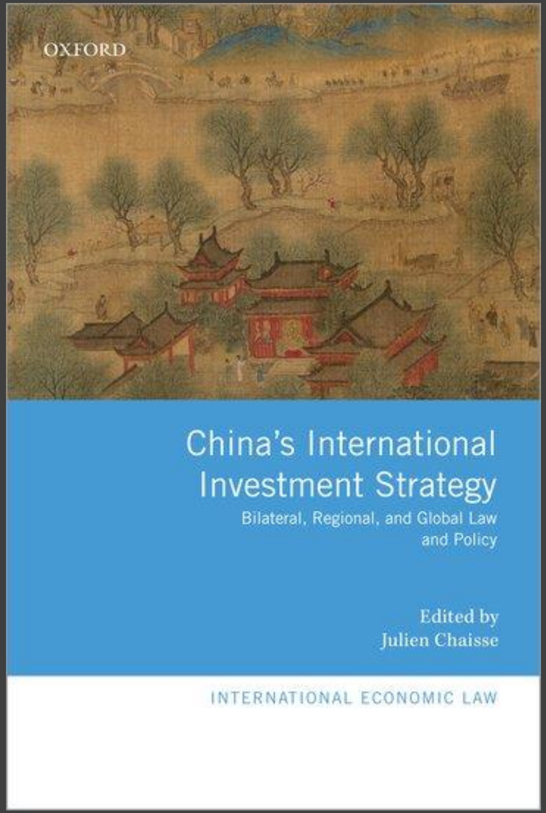

The Belt and Road Initiative in the global trade, investment and finance landscape

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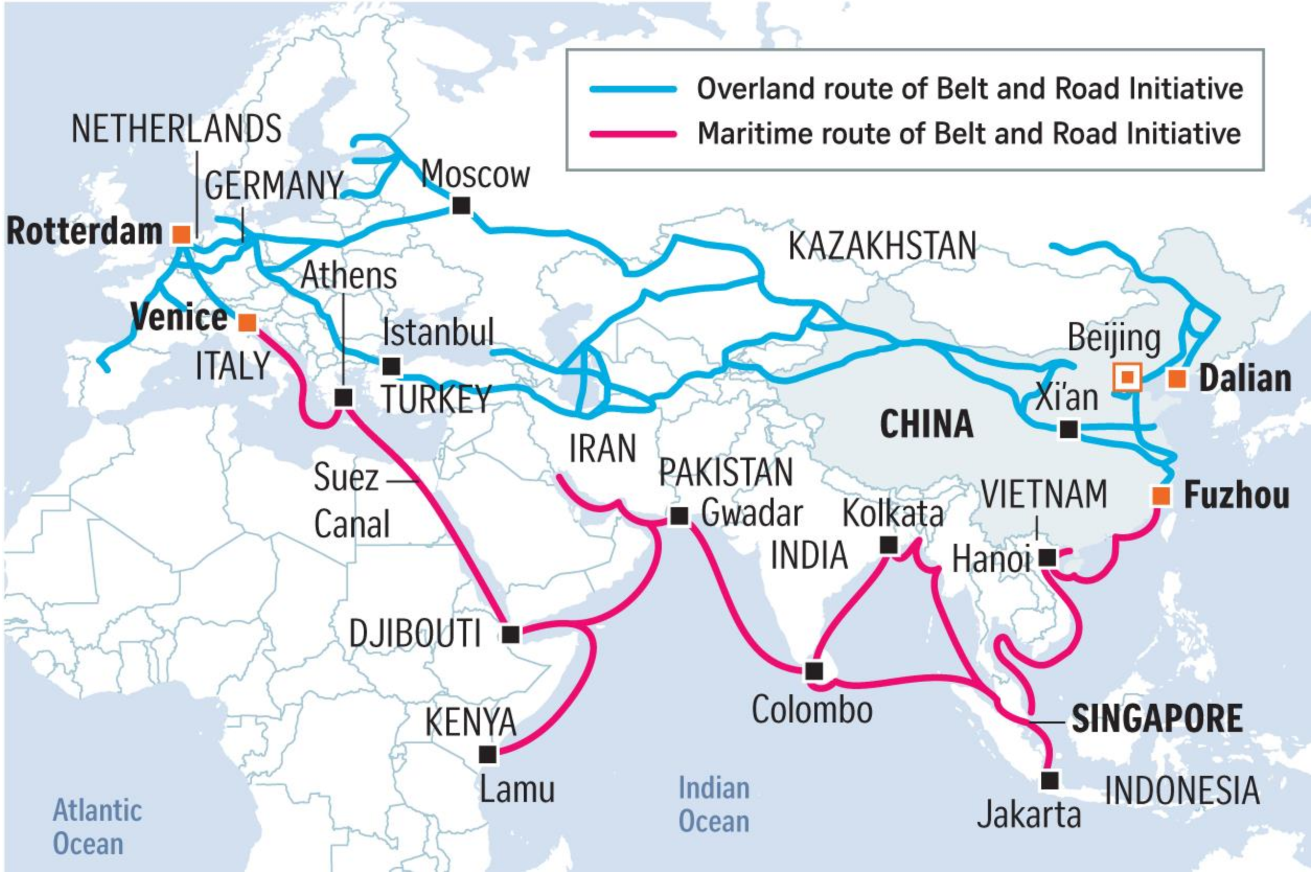
A Brief History

- The BRI was presented in late 2013 as an ambitious economic project entailing massive investment on the part of China.
- By October 2017, BRI had been added to the Chinese constitution.
- In a few years the BRI had arguably become both China's most significant external move in international economic law, since its World Trade Organization ('WTO') accession, and, perhaps, already one of the most successful global trade initiatives of the 21st century.
- Indeed the BRI has developed so rapidly that Beijing is currently busy identifying steps to limit the projects that might be included in its scope.



In a nutshell

This NPF session represents initial and ongoing efforts to map and plot the major legal and policy dimensions and dynamics of China's Belt and Road Initiative ("BRI").

BRI is now arguably the most important component of China's economic diplomacy and its international trade and investment relations.

Tracing the historic Silk Road trading routes, the BRI has sweeping geopolitical implications.

Outline

1
- Geopolitical shifts' implications

2
- New developments at the domestic level

3
- Characteristics of China's BRI architecture

4
- Dispute resolution

Who are the BRI Jurisdictions?

Vanuatu	Gambia	Ghana	Dominica	Ethiopia	Lebanon	Viet Nam
Tonga	Uganda	Seychelles	Guyana	Sudan	Oman	Singapore
Cook Islands	Cape Verde	South Sudan	Rwanda	New Zealand	Bahrain	Israel
Ecuador	Burundi	Cameroon	Senegal	Bosnia and Herzegovina	Yemen	Azerbaijan
Portugal	Tanzania	Sierra Leone	Tunisia	Montenegro	Egypt	Armenia
Fiji	Zimbabwe	Cote d'Ivoire	Libya	Turkmenistan	Jordan	Czech Republic
Malta	Congo	Algeria	Papua New Guinea	Lithuania	Syria	Bangladesh
El Salvador	Chad	Costa Rica	Bolivia	Latvia	Indonesia	Belarus
Dominican Republic	Nigeria	Djibouti	Antigua and Barbuda	Palestine	Philippines	Cambodia
Chile	Kenya	Mauritania	Trinidad and Tobago	Albania	Myanmar	Georgia
Samoa	Angola	Guinea	Austria	Afghanistan	Brunei	Hungary
Suriname	Namibia	Somalia	Madagascar	Estonia	Timor-Leste	Iraq
Grenada	Gabon	Greece	Panama	Pakistan	Bhutan	Iran
Venezuela	Mozambique	Uruguay	Morocco	Slovenia	United Arab Emirates	Kyrgyzstan
Togo	Zambia	Niue	India	Croatia	Thailand	Laos
Kazakhstan	Maldives	Nepal	Serbia	Russia	Turkey	Moldova
Qatar	Malaysia	Poland	Saudi Arabia	South Africa	Ukraine	Mongolia
Kuwait	Macedonia	Bulgaria	Slovakia	Sri Lanka	Uzbekistan	Romania
Republic of Korea	Tajikistan					

The Rapidly Shifting Geopolitical Landscape

The current international political economy is facing important challenges of increasing intensity.

- Economic and political instability are some of the catalysts likely to lead to change.

The traditional world powers are undergoing transformation into a yet unknown form.

- 2016 was a year when much of the accumulated pressure was expressed through democratic processes.

Although the major changes that have taken place so far are mostly at the domestic level, much of the agenda of the recognised world powers involves a shift in their approach to international affairs.

BRI in the China-US trade context

Under the Obama administration, the US and China maintained a dialogue and emphasised the importance of advancing cooperation in the Asia-Pacific region.

- Against this backdrop, the Free Trade Area of Asia Pacific ("FTAAP") was discussed, together with the US-China Bilateral Investment Treaty ("BIT").

China's focus on BRI had been seen as a reaction to the US-led Trans Pacific Partnership ("TPP").

- Due to its entry criteria, among other factors, TPP excluded China.
- However, BRI is a more open initiative, not expressly limiting the access of any other State.

Implications for inter-State relations and private business

International law is shaped by the dominant actors and has the potential to further influence state behaviour.

From a bipolar world, the current scene is populated by several influential actors.

Thus, the international system is expected to change into a pluralist system with separate subsystems, where power is distributed diffusely and asymmetrically.

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China's trade policy shift

The nature of investment in infrastructure involves not just trade in goods, but also in services, thus operating in line with China's policy to shift its trade and economic focus.

Moreover, outward direct investment ("ODI") means exporting capital, which again is a shift from goods.

The tertiary sector of the Chinese economy (services) is increasing, now accounting for 48.1% of GDP, overtaking the secondary sector (industry and manufacturing) that has declined to 42.7%.

Both trends have been constant and continual, following China's 12th and 13th Five Year Plans.

However, the size of the service sector is still smaller compared to other developed nations.

PPP and private investment

Another pattern that can be observed in Chinese strategy is the preference for setting up joint ventures.

- Many of the BRI projects involve a partnership between a Chinese state-owned enterprise ("SOE") and a local company in the host state – particularly as regards infrastructure projects.
- Consequently, central for developing BRI are PPP contracts.

BRI cannot be sustained exclusively by public capital. Many states along the BRI routes already have significant debts and are not eager to contribute to financing the Initiative.

- China, even though the engine, cannot support the entire undertaking by itself. Also, many of the states are apprehensive of excessive Chinese intervention in their economies.
- In this sense, PPPs can be a way to escape the political issues that can negatively impact BRI.
- As PPP infrastructure projects are concentrated in rail transportation, municipal facilities, ecology and environment protection, clean energy, they fit perfectly with the BRI framework.

PPP and private investment

China is making steps towards aligning with international standards. China's National Development and Reform Commission ("NDRC") signed a MoU with United Nations Economic Commission for Europe ("UNECE") to encourage PPP cooperation, the first China-UN MoU.

The collaboration refers to capital for projects, such as water conservation, transportation and environmental protection.

UNECE also has developed a *Guidebook on Promoting Good Governance in PPPs* and *Guidebook on Promoting Governance for PPPs*, material that can be informative for future investors alongside public entities.

UNCITRAL has issued general recommendations and model legislative provisions as well, and the World Bank has drafted standard documents and guidelines through its PPP in Infrastructure Resource Center.

Since 2014, China has been preparing to create more opportunities for PPPs, building a clear framework in line with international best practices.

This initiative is taken forward by NDRC and China's Ministry of Finance ("MoF").

MoF has announced officially the expansion of pilot projects based on the PPP model.

Foreign direct investment

Another dimension of China's BRI investment strategy is using FDI *in China* to seed and participate in BRI projects.

In this sense, FDI coming from China is viewed positively by the Chinese government as a means to advance the Initiative.

China is currently stressing joint ventures with Chinese SOEs and other companies, but there is also a role for wholly foreign-owned enterprises ("WFOEs").

In turn, the Sino-foreign joint venture, for example, may directly invest in an BRI country with one or more local BRI entities – in what is in effect a "double joint venture".

Under this scenario, China becomes the launch pad or springboard for FDI participation in BRI projects.

FDI in China has been an increasing trend, having overtaken the US as the top destination for foreign investment in 2014, in a context in which global foreign investment fell by 8%.

2015 saw a global increase in foreign direct investment ("FDI") of 36%, the highest since the 2008 financial crisis.

Globally, flows to developed economies almost doubled, China itself shifting its outbound investment towards developed countries.

Foreign direct investment

In March 2019, China has passed a new foreign investment law (in a move widely seen as an effort to facilitate US trade talks)

- China now grants national treatment for foreign investment at the pre-establishment stage and “negative list” management for foreign capital entering the China market a marked departure from the pre-2013 model of post-establishment national treatment and mixed positive/negative list mode.

The Law abolishes the need for pre-establishment Chinese government approval of foreign investment except for industries on the negative list.

- Under the new law, foreign-funded projects are divided into the categories of encouraged industries and restricted and prohibited industries, the latter constituting the “negative list.”
- It is anticipated that the new law will come into force 2020.

Free Trade Zones (“FTZs”)

The FTZs are designed to give preferential treatment to companies operating inside the zone.

- Foreign investment is encouraged through simplified procedures for investors to establish a company in China.
- Moreover, 37 service industries and 17 manufacturing industries are permitted in the FTZ that are not allowed in the rest of the country.
- Other incentives are unrestricted currency exchange and a 10-year tax-free period for businesses, for instance.
- The dispute resolution mechanism is arbitration, regulated by special rules issued by the Shanghai International Arbitration Center.

Following the Shanghai Free Trade Zone, Guangdong, Fujian and Tianjin Zones were established and issued Statements in support of BRI.

- China is planning to expand the FTZ model across the country.
- In late March 2017, seven additional new FTZs were inaugurated.

The Shanghai Pilot FTZ opened in September 2013 and has focused on implementing pilot policies for systems of governance.

- The FTZ aims to encourage institutional reform and innovation in areas of investment, foreign trade (goods and services), finance, and transformation of government functions.

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Is there a BRI law?

BRI expansive strategy is building a network by conducting bilateral and multilateral negotiations with the States along the route, employing a new concept of “economic corridor”.

This new concept, and potentially new institution, is characterised by a new style of negotiations, designed to create bilateral connections, which are put head to head, and eventually lead to multilateral agreements.

Many of the agreements negotiated by China are MoUs, and therefore not legally binding, showing China’s intention to engage with other partiesvia a less rigid structure.

Put together, they create network effects, thus benefitting all participants.

Investment treaties?

Until now, the extent to which China's BRI investments enjoy investment protection is unclear.

In fact, there is a solution, namely the identification and conceptualization of a BRI multilateral investment treaty.

Despite being invisible, this BRI multilateral investment treaty does exist in the form of a patchwork of bilateral investment treaties concluded by China with BRI countries which are themselves connected to thousands of third-party treaties through an Most Favoured Nation ('MFN') clause.

China’s 145 BITs

China

Bilateral Investment Treaties (BITs) | Treaties with Investment Provisions (TIPs) | Investment Related Instrumen

No.	Partners
1	Albania
2	Algeria
3	Argentina
4	Armenia
5	Australia
6	Austria
7	Azerbaijan
8	Bahamas
9	Bahrain
10	Bangladesh
11	Barbados
12	Belarus
13	Benin
14	BLEU (Belgium-Luxembourg Economic Union)
15	BLEU (Belgium-Luxembourg Economic Union)

16	Bolivia, Plurinational State of	In force
17	Bosnia and Herzegovina	In force
18	Botswana	Signed (not in force)
19	Brunei Darussalam	Signed (not in force)
20	Bulgaria	In force
21	Cambodia	In force
22	Cameroon	In force
23	Canada	In force
24	Cape Verde	In force
25	Chad	Signed (not in force)
26	Chile	In force
27	Colombia	In force
28	Congo, Democratic Republic of the	Signed (not in force)
29	Congo, Democratic Republic of the	Signed (not in force)
30	Congo	In force
31	Costa Rica	Signed (not in force)
32	Côte d'Ivoire	Signed (not in force)

127	Tanzania, United Republic of	In force	24/03/2013	17/04/2014
128	Thailand	In force	12/03/1985	13/12/1985
129	Trinidad and Tobago	In force	22/07/2002	07/12/2004
130	Tunisia	In force	21/06/2004	01/07/2006
131	Turkey	In force	13/11/1990	20/08/1994
132	Turkey	Signed (not in force)	29/07/2015	
133	Turkmenistan	In force	21/11/1992	04/06/1994
134	Uganda	Signed (not in force)	27/05/2004	
135	Ukraine	In force	31/10/1992	29/05/1993
136	United Arab Emirates	In force	01/07/1993	28/09/1994
137	United Kingdom	In force	15/05/1986	15/05/1986
138	Uruguay	In force	02/12/1993	01/12/1997
139	Uzbekistan	Terminated	13/03/1992	12/04/1994
140	Uzbekistan	In force	19/04/2011	01/09/2011
141	Vanuatu	Signed (not in force)	07/04/2006	
142	Viet Nam	In force	02/12/1992	01/09/1993
143	Yemen	In force	16/02/1998	10/04/2002
144	Zambia	Signed (not in force)	21/06/1996	
145	Zimbabwe	In force	21/05/1996	01/03/1998

WTO?

The WTO Trade Facilitation Agreement ("TFA") entered into force on 22 February 2017 and provides new disciplines in *connection* with GATT Articles V, VIII, and X.

These disciplines include electronic Single Windows, streamlined and harmonized cross-border customs procedures, simplified border and port formalities, pre-arrival clearance, advance rulings, trusted trader arrangements, and more detailed provisions on goods in transit.

Most of the 65 countries along the New Silk Roads are also WTO Members and a large percentage of these countries, including China, have already acceded to the WTO TFA.

China was the 16th WTO Member to formally ratify the TFA on 4 September 2015.

At the same time, China's FTAs typically include provisions concerning trade facilitation as do the mega-regionals associated with BRI, such as RCEP, the EAEU, the SCO, and TFTA/CFTA.

One of the hallmarks of BRI is its emphasis on "Connectivity" which is greatly assisted by liberalized TF measures.

In addition, a significant proportion of the infrastructure being constructed under BRI auspices is related to the rapid movement of goods along trade and transport corridors, including transnational railways, roads, and river transport as well as major port developments, such as the port of Gwadar in Pakistan

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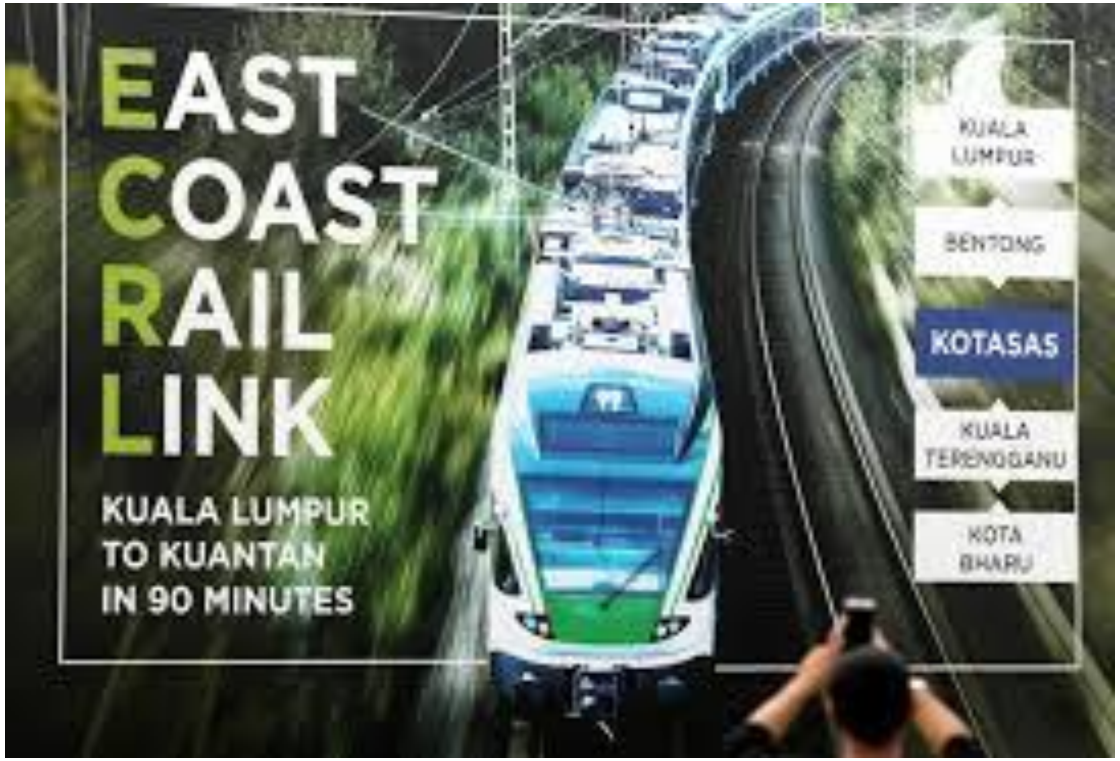
What is a BRI Investment Dispute?

- Is there such a thing?

Typical BRI Project Dispute Example (ECRL Malaysia) - PENDING

- Nov 2016, a USD13.1 billion framework loan and construction agreement, was signed between the Malaysian Government and China Communications Construction Company Ltd
- July 2018 – project suspended
- January 2009 – project cancelled



SOURCE : https://www.nst.com.my/news/nation/2019/01/454624/updated-malaysia-cancelling-ecrl-project-cccc-azmin

Both Malaysia and China are considering claims

- The Dispute Procedure (DP) that is considered most advantageous to the Party claiming will be sought to be used:

- China & Malaysia BIT (1990)
- China & ASEAN ACFTA (2010)
- ECRL Contract (if any DP mentioned)
- Domestic Law (i.e. Malaysian Law)
- Chinese Law

China & Malaysia BIT (1990) session 7 Settlement of Investment Disputes

- DP is to file a complaint with the competent authority or competent court locally (i.e. in Malaysia)
- CHINA could wish to pursue international arbitration, but there is no automatic right to arbitration

(2) Disputes or differences between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, if possible, be settled amicably.

(3) If such disputes or differences cannot be settled according to the provisions of paragraph 2 of this Article within a period of 6 months from the date either party requested amicable settlement and the parties have not agreed to any other dispute settlement procedures, the investor concerned may choose one or both of the following means of resolutions:

① File complaint with and seek relief from the competent administrative authority or agency of the Contracting Party in whose territory the investment was made.

② File suit with the competent court of law of the Contracting Party in whose Territory the investment was made.

(4) The dispute relating to the amount of compensation and any other disputes agreed upon by both parties may be submitted to an International Arbitral Tribunal.

Concluding remarks

BRI produces an immersive effect, more complex than simply trade, looking to create deeper bonds.

The Belt and Road Initiative is a complex project that includes infrastructure construction ("*including railways, highways, air routes, telecommunications, oil and natural gas pipelines and ports*") in a framework of trade and investment liberalisation.

At the same time, the Initiative extends to energy related projects and social connections and integration. Its five main goals are "*policy co-ordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bonds*".

Many of the characteristics of such new economic corridors stem from ancestors of the Initiative.

The historical Silk Road was a network of commercial routes, formally established during the Han dynasty, but operating for many centuries predating the Han, which had a major influence on the world economy and cultural connections.

Among the first segments was the Persian Royal Road, established during the Achaemenid Empire in 500-330 BCE, which served as one of the main conduits of the Silk Road.

The Persian Road ran from northern Persia to the Mediterranean Sea in Asia Minor and provided facilities for quick and effective communication, as described by Herodotus in *Histories*.