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Abstract

China's Belt and Road Initiative (BRI) and promotion of BRI investments in more than 60 countries along the ancient territorial and maritime 'Silk Roads' may give rise to (1) trade disputes and WTO dispute settlement procedures; (2) investment disputes settled through China's more than 130 BITs, ICSID or UNICITRAL arbitration proceedings; (3) financial disputes settled through bilateral negotiations, arbitration courts and other jurisdictions in China rather than through multilateral treaty institutions like the Asian IIB; (4) intellectual property disputes settled through Chinese jurisdictions (like China's Patent office and Chinese courts) or through WTO, WIPO and other multilateral dispute settlement procedures; (5) commercial disputes settled through Chinese courts and commercial arbitration procedures, subject to various limitations of the legal admissibility of ad hoc arbitration inside China; as regards (6) maritime disputes, China refused participating in the UNCLOS arbitration initiated by the Philippines and rejected the UNCLOS arbitration award of 2016 concerning the South China Sea; as regards (7) energy trade and investment disputes, China has not yet ratified the Energy Charter Treaty (ECT) providing for international state-state and investor-state arbitration. Avoidance of multilateral treaties and lack of a multilateral dispute settlement approach distinguish the BRI from past US leadership for multilateral dispute settlement systems in GATT, ICSID, the WTO and regional FTAs. This contribution discusses the increasing 'systemic rivalry' among authoritarian, neo-liberal and ordo-liberal conceptions of international economic law and the resulting legal problems in the settlement of BRI disputes inside EU countries, whose courts may not recognize arbitration awards by Chinese arbitration institutions and may hold Chinese investors accountable for disregard for human and labor rights in their BRI investment inside EU countries.

Keywords

Belt and Road Initiative; China; trade disputes; investment disputes; financial disputes; intellectual property disputes

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Introduction: Multilevel governance of transnational public goods connecting East and West*

All human societies use law as an instrument for social ordering. Yet, even though *homo sapiens* seems to have evolved in Africa, legal civilizations emerged in the villages, cities, kingdoms and empires in Asia, Europe and around the Mediterranean Sea thousands of years ago. Up to the 19th century, the economies of China and India were as important as those of European empires. The scientific revolutions since the 16th century, and the industrial and legal revolutions since the 18th century, enabled the industrialized countries in Western Europe and North America to dominate international economic relations and their legal regulation during the 19th and 20th centuries. Following World War II, almost all Asian trading nations joined the GATT/WTO and the Bretton Woods institutions; they used these multilateral legal and dispute settlement systems for reforming their national and regional economic, trading and legal systems in Asia, thereby lifting more than a billion of poor people in China, India and other Asian countries out of poverty. While Western countries continue to dominate the legal design of worldwide economic organizations like the 1994 World Trade Organization (WTO) and the 1944 Bretton Woods institutions, Asian countries became locomotives driving economic growth not only for their own populations but providing goods and services also for people all over the world. Many Western industrialized countries continue struggling with the economic, social and political adjustment problems resulting from Asia regaining its major share in the world economy, as the shares and political influence of North America and Europe relatively shrink in the 21st century. The hegemonic assault by the US Trump administration on multilateral trade and environmental agreements since 2017 (cf. Petersmann 2018a), the emergence of China as the biggest trading nation with - soon – the world's largest economy, and the Belt and Road Initiative (BRI) launched by President Xi Jinping in 2013 for strengthening trade, investment and infrastructure cooperation with 65 Asian, African and European countries along the ancient territorial and maritime Silk Roads, are historical turning points in designing economic, legal and political cooperation between East and West. While the US Trump administration's *bilateral "trade wars"* (e.g. against China) reflect US attempts at maintaining economic, technological and military US hegemony, Europe emphasizes its different strategic self-interest in maintaining and adjusting *multilateral trade and investment systems* as legal basis for mutually beneficial cooperation with Asia.

During most of its history of more than 5'000 years, China perceived itself as the "Middle Kingdom" maintaining "suzerain-vassal" relationships with several of its neighbouring countries. Law played only a secondary role in Chinese society due to the primary importance given to feudal hierarchies, social stratification, and traditional family and kinship systems. The two intellectual Chinese traditions of *Confucianism* and *legalism* contributed to the imperial administration's increasing use of "rule by administrative decrees"; yet, even though "humane governance" and promotion of social welfare were accepted as moral responsibilities of Chinese rulers and as parts of their "mandate from heaven", little attention was given to individual rights; litigation was discouraged, and "rule of law" in the substantive sense of independent judicial protection of individual rights against abuses of state powers was hardly known (cf. Carty/Nijman 2018). The late Qing government's isolation policy in the 18th century contributed to China's fall under the rule of imperial powers. The communist revolution during *Mao Zedong's* era (1949-1978) led to impoverishing economic policies and 'social dis-embedding' (e.g. due to food crises and the 'cultural revolution'). The reforms and "open door policies" under *Deng Xiaoping's* rule (1979-1989) introduced a "socialist market economy with Chinese characteristics" and economics-driven legal reforms ushering in China's accession to the WTO in 2001. China's government

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used WTO law also for introducing judicial reforms and for embedding its "one state, two systems" policies into international law, for instance by accepting four WTO memberships of China, Hong Kong, Macau and Taiwan (cf. Wu, 2012). The BRI continues to be primarily motivated by domestic policy goals (e.g. to improve access to resources and export markets); it can be viewed as the 'third opening' of China's liberalization policies beginning in 1978 and embedded into multilateral WTO market access commitments since 2001. Yet, whereas democratic and republican city states (e.g. in ancient Greece, Italy, Germany and other northern European states belonging to the "Hanseatic League") and their "constitutional checks and balances" protected decentralized, competitive legal structures promoting free and prosperous societies in many parts of Europe (cf. Scheidel 2019)[1], there are no signs of China's totalitarian "communist party state" accepting constitutionalism and legal decentralization as reasonable self-restraints protecting citizens against abuses of political power. Nor is China transforming its "one state, two systems" agreements into a constitutional confederation protecting human and constitutional rights of citizens in all four Chinese customs territories.

According to K.Mahbubani, Singapore's long-time ambassador to the United Nations (UN), the "biggest gift the West gave the Rest was the power of reasoning", which "seeped into Asian minds gradually, through the adoption of Western science and technology and the application of the scientific method to solving social problems" (Mahbubani 2018:11ff):

> "East Asian societies, especially Japan and the 'Four Tigers' (South Korea, Taiwan, Hong Kong and Singapore) were the first to absorb these ideas and practices, such as free market economics and empirical scientific research"…. "This spread of Western reasoning … triggered three silent revolutions that explain the extraordinary success of many non-Western societies in recent decades"…. "The first revolution is political. For *millenia*, Asian societies were deeply feudal. The people were accountable to their rulers, not rulers to their people. 'Oriental despotism' was a fair description of the political environments in all corners of Asia"… "The rebellion against all kinds of feudal mind-sets which gained momentum in the second half of the twentieth century was hugely liberating for all Asian societies"… "in a big shift from previous 'despotic' assumptions, most Asian leaders now recognized that they are accountable to their people"…. "The second revolution is psychological: the Rest are going from believing that they were helpless voyagers in a life determined by 'fate' to believing that they can take control of their lives and rationally produce better outcomes"… "In the last thirty years, we have carried more people over the threshold of university education than we have in the previous 3'000 years"… "The third revolution is in the field of governance"... "Fifty years ago, few Asian governments believed that good rational governance could transform their societies. Now most do"…. "In China, India and Indonesia, more than 90 per cent of young people named technology as the factor that made them most hopeful for the future".

Decolonization, universal recognition of human rights, and multilevel governance of public goods (PGs) through national and international organizations are among the biggest political achievements during the second half of the 20th century. The shift of power to Asia has, however, failed to effectively protect human rights and multilevel, *democratic* governance of PGs in many Asian countries. Globalization continues to transform most *national* into *transnational PGs* like rule of law, rules-based trading systems, protection of the environment, mitigation of climate change, and protection of many of the 17 "sustainable development goals" (SDGs) adopted by all UN member states. Yet, the collective action problems require limitations of intergovernmental power politics through "constitutionalization" of discretionary foreign policies aimed at transforming *national* into *multilevel governance of transnational PGs* for the benefit of citizens. Such multilevel constitutionalism continues being resisted by many governments (cf. Petersmann, 2020a), often due to feudal, religious and other power-oriented - rather than humanist and democratic - world views neglecting the close interrelationships between

[1] Scheidel (2019) explains the widening economic gap between Europe after the fall of the Roman empire and other parts of the Old World in terms of (1) Europe's legal decentralization (unleashing "competitive fragmentation of power", economic rivalries, growth and "renaissance modernity" in many parts of Europe) and (2) the later industrial revolutions as the two "great divergences" differentiating Europe from the "agrarian paternalism" in China.

transnational economic and non-economic "overlapping PGs" (e.g. between a rules-based world trading system, climate change mitigation, and the 17 SDGs). The US Trump administration's assault on the WTO legal and dispute settlement system risks undermining protection also of many *non-economic PGs*. Will China's BRI and bilateral agreements with more than 60 countries participating in trade, investment and infrastructure cooperation along the territorial and maritime Silk Roads offer Asian leadership for rules-based protection of transnational PGs and peaceful settlement of related trade and investment disputes? This contribution discusses some of the related legal questions by using the example of disputes over "silk road projects" financed and operated by Chinese state-owned enterprises (SOEs) in European states, where Chinese SOEs bought and administer parts of the Piraeus harbour in Athens (Greece), construct a railway linking Belgrade (Serbia) to Budapest in Hungary, and improve China's "Silk Road connections" with Europe through numerous other investments. This BRI cooperation with 17 central, eastern and southern European countries is coordinated through annual "17+1" Ministerial meetings and a secretariat in Beijing (with "national coordinators" in each of the 17 partner countries). Yet, also this BRI cooperation is not treaty-based due to China's preference for legal flexibility and administrative discretion.

Can China's bilateralism be reconciled with the EU's multilateral approaches to international law?

National legal traditions in Asian countries differ from democratic constitutionalism (e.g. in ancient Athens) and republican constitutionalism (e.g.in ancient Rome), which continue to shape the national and European legal systems in the 27 constitutional democracies of the European Union (EU). The ancient constitutional theories of justice (as expressed in the publications of Greek and Roman philosophers like Plato, Aristotle and Cicero) justifying law, republican governance, rules-based self-regulation in "private law societies", constitutional "checks and balances" and judicial remedies by procedural, constitutional, distributive, corrective, commutative justice principles and equity have no equivalent in Chinese legal traditions. Nor does the transformation of agreed principles of justice in national and European constitutional law systems – such as the European Charter of Fundamental Rights (EUCFR) recognizing civil, political, economic and social, human and constitutional rights of EU citizens as multilevel, constitutional restraints on the legislative, executive and judicial powers of EU institutions – have a parallel in the legal system of the People's Republic of China (PRC). Citizens are not allowed to invoke China's national Constitution in Chinese courts as a basis for individual rights. The basic principles of democratic constitutionalism – like free democratic elections of representative national and European parliaments, and independent, multilevel judicial protection of human and constitutional rights of citizens against abuses of executive and legislative powers – remain alien to the totalitarian claim of China's communist party (CCP) to unlimited political powers over state institutions and private citizens (cf. Li & Jiang 2018; Petersmann 2018b). The recognition of "inalienable" and "indivisible" civil, political, economic, social and cultural human rights in UN law and EU constitutional law, and their effective domestic protection inside the national legal systems of EU member states, reflect regulatory approaches to the complex interactions between civil societies and their interdependent legal, political, economic, social and cultural systems, which are fundamentally different from the PRC's regulatory approaches (e.g. vis-à-vis minoritarian Tibetan and Uighur cultures, political dissidents, human rights advocates, economic competition, political, social and labour rights). The different legal cultures risk provoking conflicts if, for example, Chinese SOEs implementing "Silk Road projects" inside the EU (like construction of transport links) fail to respect human, labour, environmental or judicial rights protecting workers and citizens inside EU member states; or when foreign direct investors from the EU are denied "access to justice" in Chinese jurisdictions and are forced to accept the formation of "CCP committees" also inside foreign firms operating in China.

Such risks of conflicts among diverse national legal systems are amplified by the fact that important UN conventions (e.g. on civil, political and labour rights) and international dispute settlement jurisdictions (e.g. by the International Tribunal for the Law of the Sea) ratified by EU member states have not been

accepted by China. The EU proposals for creating multilateral investment court systems have, so far, also not been supported by China; yet, at an informal meeting of WTO trade ministers on 24 January 2020 at the World Economic Forum in Davos, China was among 43 WTO members committing themselves to using Article 25 of the WTO Dispute Settlement Understanding (DSU) for an *interim* appellate arbitration review pending the resolution of the WTO Appellate Body (AB) crisis triggered by the US blocking of AB nominations. The implementation of the BRI reflects preferences of Chinese authorities and SOEs for informal bilateralism (e.g. based on "memoranda of understandings"), avoidance of multilateral treaties, and settlement of disputes by political negotiations or mediation and arbitration proceedings inside China rather than by international adjudication.[2] The protection standards and dispute settlement provisions in China's bilateral investment treaties do not follow a uniform pattern; they have, so far, rarely been invoked by Chinese or foreign companies (cf. Shan 2015 and 2020; Chaisse 2019). China's "socialist market economy with Chinese characteristics" differs fundamentally from the multilevel constitutional design of the EU's "competitive social market economy" (Article 3 Lisbon Treaty). For example:

- The risks of domestic market distortions resulting from the totalitarian control by the CCP of state bodies, other public bodies (like thousands of SOEs) and private bodies (including also thousands of private companies) are not effectively limited by multilevel competition laws, policies and judicial remedies similar to those inside the EU.[3]
- The risks of public and private distortions of WTO market access commitments aimed at non-discriminatory conditions of trade, undistorted price competition, reciprocity and transnational rule of law are not effectively limited by "common market law" (e.g. similar to EU common market rights, judicial remedies, and constitutional "checks and balances") and reciprocal opening of market access (e.g. to government procurement).
- The gigantic size of China's domestic market (18% of the world population), its totalitarian control and direction (e.g. through direct and indirect subsidization of SOEs), and inadequate protection of intellectual property have entailed structural over-production (e.g. of steel, cement, aluminium, solar panels) and counterfeiting, with exportation of surplus products and of counterfeited goods causing major disruptions in third countries (e.g. more than 80% of all counterfeit and pirated products seized in 2013 in seven EU countries originated in China). Chinese restrictions of internet governance, distortions of the digital economy, and political uses of digital control technologies prompt technological rivalries and conflicts between Chinese and foreign interests (e.g. over technology transfers imposed on foreign companies, 5G network technologies).
- China's export-oriented trade mercantilism has entailed "one-way traffic" on the railways connecting China with Europe, with many trains returning empty to China.
- China's claims to unilateral appropriation of more than 80% of the South China Sea – in violation of its multilateral legal obligations under the UN Convention on the Law of the Sea (UNCLOS), as formally established through legally binding arbitration awards[4] - reveal hegemonic ambitions in China's maritime "Silk Roads" policies.

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[2] On the dispute resolution culture in East Asia, its preferred use of arbitration and mediation, and the advantages of using commercial arbitration for the settlement of disputes over BRI investments rather than the Chinese ordinary, judicial system, see: Yuhong Chai (2018). Many of the 51 WTO members along the Belt and Road are less developed countries with comparatively less developed judicial systems and hardly any effective, regional court systems outside Europe.

[3] Cf. "China grants immunity to executives to bolster private sector" (*Financial Times* of 15 December 2019, reporting that "Chinese prosecutors are dropping criminal charges against business owners in a desperate effort to rescue the country's ailing private sector" so as to "help companies grappling with one of the country's worst debt crises", thereby "putting the economy above the strict implementation of the law").

[4] See China's rejection of the arbitration award of 12 July 2016 under UNCLOS Annex VII concerning the Chinese claims to control more than 80 per cent of the South China Sea without regard to UNCLOS obligations: Permanent Court of Arbitration Case No 2013-19 in the matter of the South China Sea Arbitration (*The*

- China's strategy of low wages and of denial of labour and trade union rights has prompted China to ratify only 26 of the 177 International Labour Organization (ILO) Conventions (e.g. refusing to ratify the ILO Conventions on forced labour, freedom of association, and the right to collective bargaining, and disregarding recommendations made by ILO monitoring committees).

Mutually beneficial trade and investment cooperation for creating transnational infrastructures of (rail)road, maritime and internet connectivity among countries along the Silk Roads meets the criteria of 'aggregate PGs'.[5] Whereas informal bilateralism may entail abuses of power asymmetries imposing superior interests of the stronger partner, rules-based and transparent multilateralism protects weaker countries against abuses of power. US governments have taken an antagonistic view of the BRI in view of their strategic rivalries with China. The EU's multilateralism pursues no hegemonic foreign policies. At a 2017 BRI Forum in China, EU delegates surprised their Chinese hosts by turning down an offer to sign a declaration supporting the BRI by financing infrastructure investments inside the EU. Even though the EU describes China as a "systemic rival promoting alternative models of governance", it has not opposed the participation of EU member states in various BRI projects financed by Chinese SOEs, notably in Southern, Central and Eastern European states. Europeans criticize BRI governance, *inter alia*, for lack of transparency, reciprocity, and of respect for competition, environmental, labor and human rights standards by Chinese SOEs. At another BRI Forum in April 2019, President Xi Jinping pledged a more open approach and – in response to problems of over-indebtedness of some borrowing countries - respect for financial sustainability. The more the US Trump administration rejects multilateral agreements in favor of unilateral power politics and 'bilateral deals' undermining the WTO and the 2015 Paris Agreement on climate change prevention, the more obvious become the increasing conflicts between three different, geopolitical policy paradigms:

- US leadership for *multilateral, neo-liberal trade liberalization*, deregulation and privatization of economic activities since World War II continues to be driven by domestic interest group politics, resulting in increasing social inequalities inside the USA and in US non-participation in important worldwide agreements (like UNCLOS, many multilateral human rights treaties, criminal law treaties, and environmental treaties). The underlying economics is based more on utilitarian "Chicago school" reasoning (e.g. market-driven maximization of "Pareto-" and "Kaldor-Hicks-efficiencies") than on "constitutional economics" (e.g. increasing economic and social welfare through democratic regulation of "market failures" and related "governance failures" in order to better satisfy general preferences of consumers and citizens). Neo-liberal US leadership has ended with President Trump's mercantilist power politics shunning legal constraints in both domestic and foreign policies. The Trump administration's external mercantilism and domestic neo-liberalism disdain 'judicialization' of dispute settlements in worldwide agreements (like the WTO), notably in view of their judicial limitations of US abuses of trade remedy laws.
- China's totalitarian *state capitalism* denies effective legal constraints on the CCP's political monopoly and economic dirigisme; notwithstanding China's continuing support for multilateral WTO negotiations and WTO dispute settlement procedures, China prefers administrative

Republic of the Philippines v The Peoples Republic of China). The award is published on the PCA website at www.pcacases.com/web/view/7.

[5] On the defining characteristics and different kinds of "pure PGs" (whose use is 'non-rival' and 'non-excludable' like human rights) and "impure PGs" (like 'club goods' excluding free-riders, common pool resources with rival uses), the related "collective action problems", and their limitation through "multilevel constitutionalism" and multilevel governance institutions see Petersmann (2017) ch 2; Shi (2018). As "market failures" (like free-riding) impede the decentralized provision of PGs, and the "aggregation" and transformation of national PGs into transnational PGs (like transnational rule of law, climate change mitigation) is made difficult by collective action problems among self-interested state actors with different preferences and interests, there is no universal solution or strategy for "republican governance", i.e. the "building blocks" and production processes for transnational PGs may differ depending on the particular regulatory challenges.

discretion and legal flexibility in bilateral BRI cooperation, thereby enabling China to use power asymmetries to its advantage (e.g. in the South China Sea).

- *European ordo-liberalism* rejects neo-liberal "market fundamentalism" advocating for a minimal state; it emphasizes the need for "strong states" legally limiting "market failures", "governance failures" and "constitutional failures" (cf. Petersmann 1983; Slobodian 2018). The EU's ordo-liberal "*economic constitutionalism*" uses multilateral treaty disciplines for limiting market failures and governance failures also in multilevel governance of transnational PGs and international dispute settlement through rules-based trade and investment liberalization, adjudication, protection of the environment and of human and constitutional rights as foundations of the EU's "competitive social market economy". Reconciling European multilateralism with Chinese bilateralism will require multilateral, rules-based approaches to protecting transnational rule of law and respect for human rights, as prescribed in the EU's foreign policy constitution (cf. Petersmann 2020a).

Trade and investment disputes between China and the EU

BRI projects financed and carried out by Chinese companies continue to be based on flexible legal instruments (like memoranda of understandings) that tend to avoid multilateral BRI treaties and institutions.[6] China's BRI projects are often based on informal, bilateral and state-centered practices compared with the US post-war leadership for the multilateral Bretton-Woods Agreements, GATT, the WTO and multilateral trade adjudication. China has been a party to the World Bank Agreement establishing the International Center for the Settlement of Investment Disputes (ICSID) for more than 25 years; it has also complied with most adverse WTO dispute settlement rulings (cf. Zhou 2019). These ICSID and WTO dispute settlement procedures are also available for the settlement of trade and investment disputes linked to BRI projects. Yet, China's BRI dispute settlement strategy has prioritized commercial arbitration in China's International Commercial Court (CICC) of the Supreme People's Court (cf. Jiang 2020), other Chinese arbitration institutions like the China International Economic and Trade Arbitration Commission (CIETAC) and its Silk Road Arbitration Center in Xi'an, and cooperation with other arbitration centers in Asia (e.g. in Hong Kong, Singapore), Africa and Europe (cf. Gu 2020). The lack of a multilateral dispute settlement strategy distinguishes the BRI from the past US leadership for multilateral dispute settlement systems in GATT, ICSID, the WTO and regional free trade agreements (FTAs). Instead, China follows diverse, complementary dispute settlement methods and emphasizes the advantages of political dispute settlement methods over third party adjudication.

At least 7 different kinds of BRI disputes should be distinguished; their often "overlapping jurisdictions" may lead to "strategic forum shopping":

- International *trade disputes* tend to be settled by China through multilateral WTO dispute settlement procedures or through bilateral and regional negotiations. The 2010 ASEAN-China FTA (as amended in 2018) provides for settlement of disputes through consultations, mediation, conciliation or arbitration.
- *Investment disputes* tend to be settled through bilateral negotiations in the context of China's more than 130 bilateral investment treaties (BITs) rather than through the very small number, so far, of ICSID or UNICITRAL arbitration proceedings involving the PRC or companies from the PRC.
- *Financial disputes* seem to be settled through bilateral negotiations, arbitration and other jurisdictions in China rather than through multilateral treaty institutions like the AIIB, which provides for settlement of disputes concerning loans from this bank through UNCITRAL arbitration.

[6] The 2015 Agreement establishing the Asian Infrastructure and Investment Bank (AIIB) and the 2001 Shanghai Cooperation Organization – even though initiated by China and having their headquarters at Beijing – have mandates far beyond BRI cooperation.

- *Intellectual property disputes* may be settled through Chinese jurisdictions (like China's Patent Office and Chinese courts) or through WTO, WIPO and other multilateral dispute settlement procedures.
- *Commercial disputes* are settled through Chinese courts and commercial arbitration procedures, subject to various limitations of the legal admissibility of ad hoc arbitration inside China (e.g. private ad hoc arbitration may be allowed inside China only inside Free Trade Zones and certain arbitration centers).
- As regards *maritime disputes*, China refused participating in the UNCLOS dispute settlement procedures initiated by the Philippines and rejected the UNCLOS arbitration award of 2016 concerning the South China Sea.
- As regards *energy trade and investment disputes***,** China is not among the more than 75 members of the 1998 Energy Charter Treaty, which provides for international state-state and investor-state arbitration (ISA) of energy disputes and related investments.

This potential diversity of BRI disputes seems to confirm that creating a single dispute settlement mechanism for settling all potential BRI disputes would be neither feasible nor desirable. Yet, the pragmatic 'trial and error' approach of China vis-à-vis dispute settlement of BRI projects may be insufficient, for instance regarding countries that are not WTO members, with which China has not concluded a BIT or an FTA, or whose domestic judicial systems for the settlement of economic disputes are not reliable (e.g. due to lack of rule of law, of judicial independence, lack of trade law and financial law traditions, or concerns about the enforcement of arbitral awards).[7] The diversity of dispute settlement fora for BRI related disputes invites "forum shopping", for instance in case of disputes over intellectual property rights protected by WIPO conventions, the WTO Agreement on trade-related intellectual property rights (TRIPS), and international investment law. So far, China seems to have initiated hardly any WTO disputes and investment arbitration disputes related to Silk Road projects. If borrowing and host countries asked for adjustments to Silk Road Projects (like Malaysia due to its financial difficulties to pay its debts vis-à-vis China), political dispute settlements and contract re-negotiations were the preferred methods of agreed dispute settlement. Like China, also many other Asian countries often prefer political rather than judicial dispute settlement methods (as illustrated by the rejection of ICSID by India, Thailand and Vietnam). The disregard for the WTO legal obligation (under Article IX:1 WTO Agreement) to appoint vacant WTO AB positions by majority votes, if necessary, illustrates that some WTO members may not be unhappy about the US initiative to destroy the WTO AB review system, which – as of 11 December 2019 – is no longer capable of accepting new appeals or completing all the 13 pending appellate review procedures. The draft Regional Comprehensive Economic Partnership (RCEP) Agreement between China and 14 other Asian countries, which is scheduled to be finalized in 2020, does not provide for a regional judicial and appellate review system that could compensate for the likely breakdown of the international rule of law at the worldwide level of WTO governance.

The prioritization of bilaterally agreed, political dispute settlements has also become characteristic for the EU's external trade, investment and economic cooperation agreements. In EU treaty practices, disputes tend to be settled in bilateral treaty committees; treaty provisions for international arbitration have, so far, been rarely invoked by the EU (e.g. recently for the settlement of disputes over Korea's compliance with rules on worker rights in the EU-Korea FTA). This preference of both China and the EU for settling international financial and investment disputes politically stands in sharp contrast to the legalization and judicialization of trade, investment and financial disputes inside the EU. The Achmea

[7] On the risks of non-enforcement of arbitral awards in Asian BRI countries (e.g. due to invocation of the "public policy exception" in Article V:2,b of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards), and on the advantages of harmonizing the "public policy concept" in the cross-border enforcement of arbitral awards among Asian countries, see: Weixia Gu (2018).

judgment of the EU Court of Justice (CJEU) of March 2018[8] on the inconsistency of BITs among EU member states with EU constitutional law and its judicial remedies entails that - according to the EU Commission – "all investor-State arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement".[9] In a Declaration of 15 January 2018 on the legal consequences of the Achmea judgment and on investment protection, 22 EU member states committed to terminate their – altogether more about 80 - intra-EU BITs by December 2019, if possible; they will no longer interpret the Energy Charter Treaty as including ISA clauses applicable in relations among EU member states.[10] Some of the EU's constitutional guarantees of fundamental rights and economic freedoms also protect Chinese investors and workers inside the EU. For instance, according to Article 15:3 EUCFR, "(n)ationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union". Article 17:1 EUCFR provides:

> "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

Hence, EU fundamental rights may be relied upon to ensure adequate protection also of Chinese investors and of their workers carrying out Silk Road projects inside EU member states. Past infringement actions by the EU Commission underscore its willingness to act on its own to protect foreign investors inside EU member states from measures taken by their host states, rather than leave it only to those investors to seek judicial remedies.[11] The jurisprudence of the CJEU continues clarifying investor protection under EU law by member state courts in the wake of the *Achmea* Judgment. This may incentivize also foreign investors, or their workers, to seek damages in host country courts for failures to comply with investment protection obligations and fundamental rights under EU law. In such disputes related to Silk Road investment projects inside EU member states, national and European courts – and, if the aim of concluding an EU-China BIT by the end of 2020 should be realized, possibly also ISA composed of professional judges – will be legally bound to apply European fundamental rights and constitutional law as parts of the applicable law. As the demands of justice, and of legal and judicial justification, may differ according to the particular contexts, the principles of justice applicable to market and business transactions, labor contracts, "justice at the workplace", and "just compensation" for direct or indirect expropriation of property rights in EU-China relations may differ from those developed by national and European courts for foreign investments by EU citizens among EU member states. Yet, human rights (including human rights at work and to own private property) – as a type of fundamental rights focusing on respect for everyone's dignity and humanity – are recognized as "general principles of the Union's law" (cf. Article 6 Lisbon TEU) that protect Chinese workers and investors inside the EU no less than workers and investors with EU passports. EU human rights law, constitutional law and social legislation tend to limit "market failures" and "governance failures" (e.g. public and private abuses of power like gender, racial and other discrimination, forced labor, child labor, other abuses of power in the workplace) much more strictly than in authoritarian Asian countries, which protect much

[8] Case C-284/16, *The Slovak Republic* v. *Achmea BV*, ECLI:EU:C:2018:158, 6 March 2018.

[9] Cf. *Protection of Intra-EU Investment, Communication from the Commission to the European Parliament and the Council*, COM (2018) 547 (19/7/2018), at p. 26.

[10] See: https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

[11] Cf. the judgment in Commission v Hungary, Case C 235/17 (May 21, 2019). See also COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Protection of intra-EU investment, COM/2018/547 final (Brussels: European Commission, 2018) (providing "guidance to help EU investors to invoke their rights before national administrations and courts and to help Member States to protect the public interest in compliance with EU law.")

lower minimum standards of welfare and well-being (e.g. in terms of legal prohibition of gender and racial discrimination and other abuses of power). As Chinese SOEs may not be used to respecting civil, political, economic, social and cultural rights and the ordo-liberal competition and social laws in social market economies, their implementation of Silk Road projects inside EU member states may give rise to legal conflicts (e.g. about "justice at work" in the power relationships between Chinese employers and their employees inside EU member states if liberal values like equal individual freedoms, privacy and co-determination of workers are disregarded); the settlement of such conflicts inside the EU may entail judicial dispute settlement procedures different from ISA, mediation and conciliation. It remains to be seen whether the ongoing negotiations on reforms of ICSID and UNCITRAL arbitration procedures, and the EU proposals for a multilateral investment court system, will strengthen the public law dimensions of investor-state disputes in ways that will also be accepted by China; or whether the jurisprudence of the CJEU and of the European Court of Human Rights (ECtHR) on protecting human rights as worker rights (e.g. based on EU anti-discrimination law, Articles 8, 11 and 14 European Convention on Human Rights) will strengthen the legal disciplines for foreign investors inside the EU and the protection of their workers (e.g. against being treated like commodities or robots), for instance by limiting the terms of labor contracts through mandatory principles of constitutional law and human rights law aimed at guaranteeing "justice at work for all" (cf. Collins 2019).

Conclusion: Multilevel protection of rule of law in silk road investment projects?

International trade, competition, investment, social and environmental laws need new rules in order to better take into account the risks of market failures and governance failures (including climate change) in relations between neo-liberal economies (e.g. in Africa, the Americas and Asia), state-capitalist economies (e.g. in China and many of its Asian BRI partner countries), and ordo-liberal economies (e.g. in Europe). The more globalization transforms *national* into *transnational PGs* (like transnational connectivity among BRI countries, climate stability) which no state can unilaterally protect without international law and cooperation, the more multilevel governance of transnational PGs requires multilevel protection of transnational rule of law; also the legitimacy of economic, financial and investment cooperation in the implementation of BRI projects depends on rules-based legal frameworks, impartial dispute settlement procedures, predictability and compliance of governance with the "rule of law" as "a principle of governance in which all persons, institutions and entities, … including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" that have become part of universally recognized human rights principles.[12]

The trade wars between China and the USA since 2018 were caused by (1) geopolitical rivalries and mercantilist zero-sum-conceptions of international trade advocated by the US Trump administration; (2) American neo-liberal interest-group politics (e.g. increasing recourse to illegal "trade remedies" and US disruption of the WTO dispute settlement system); and (3) systemic conflicts between China's totalitarian state-capitalism and liberal interpretations of WTO law (Petersmann 2020b). The "phase-one economic and trade agreement between China and the USA", signed on 15 January 2020, reflects these systemic conflicts: while the Preamble acknowledges that it is "in the interest of both countries that trade grow", the agreement leaves – arguably WTO-inconsistent, illegal – discriminatory US tariffs on imports from China worth up to $360bn in place; it includes discriminatory commitments of China to increase its purchases of US goods and services up to a total amount of $200 bn during 2020/2021, thereby strengthening China's state-capitalist quantitative trade management; other agreed provisions (e.g. on "forced" technology transfer, currency manipulation) aim at rules-based market-opening and at legal disciplines limiting market distortions in China, without mentioning discriminatory US restrictions on Chinese technology firms like Huawei; the bilateral dispute settlement procedure provides for the possibility of unilateral, discriminatory trade sanctions inconsistent with WTO rules and WTO dispute

[12] UN General Assembly Resolution A/RES/67/97 (2012) on "The Rule of Law at National and International Levels".

settlement procedures. The incoherent character of this partial "trade truce" is also illustrated by the absence of rules on many of the systemic US complaints of Chinese trade distortions (e.g. by industrial subsidies, SOEs, China's technology policies and cyber theft); the hegemonic, geopolitical rivalries underlying this "phase-one truce" suggest that the US trade war risks continuing indefinitely. Similarly, the agreement announced by the USA, the EU and Japan in January 2020 on tougher subsidy disciplines aimed at Chinese SOEs remains unenforceable due to the simultaneous US disruption of the WTO legal and dispute settlement system.[13] Continuing trade conflicts appear unavoidable not only between China's totalitarian state capitalism (e.g. denying constitutional "checks and balances" limiting the CCP's powers and state-interventions) and the interest-group-driven, American neo-liberalism, where economic and environmental law-making are dominated by rent-seeking interest groups and by their financial support for congressmen and trade politicians; as illustrated by the US sanctions against Chinese technology companies, the US trade war against China and the increasing use by the USA of trade sanctions as a foreign policy instrument also affect third countries and the future of the WTO.

Following the 2016 "Brexit referendum" and the US election of President Trump, the executive trade policies of both the British and US governments increasingly avoided multilateral legal disciplines, parliamentary and judicial control also in relations with European trading partners (cf. Petersmann 2020b); this increasing recourse to intergovernmentalism and power-related conflicts (e.g. between EU law and Anglo-Saxon deregulation of product, production, tax, competition and environmental standards) is likely to further undermine multilateral trade rules and adjudication. Other WTO member countries increasingly emulate the US tactics of preventing judicial clarifications of WTO rules. For example, a draft WTO panel report of spring 2019 on China's complaint against EU anti-dumping measures found that Section 15 of China's WTO Accession Protocol does not prevent other WTO members from applying non-discriminatory "distortion of competition principles" in their application of anti-dumping laws to imports from China; China's suspension of this WTO complaint after the interim review of the panel findings ushered in the non-publication and non-adoption of this panel report and of its important clarification of WTO legal disciplines. As China refused to accept the OECD principles on artificial intelligence, and its "Made in China 2025" program aims at import substitution and technological independence (e.g. replacing foreign by domestic computers in all government offices), EU countries have introduced stricter surveillance of foreign direct investments from China (notably in information and communication technology sectors). Many WTO members continue to criticize China for not adequately meeting its transparency requirements under WTO law (e.g. regarding subsidies, sub-central government measures, China's obligation to translate its regulations into English). The more the US assault on the WTO legal and dispute settlement system limits political and judicial clarifications of the often contested meaning of WTO rights and obligations, the more China may find it preferable to prioritize its bilateral BRI and RCEP projects for constructing a China-centered "Eurasian trading system", which could replace the USA as China's main export market and enable state-capitalist economies to become "rule-makers" defending their authoritarian control of economies and polities also in transnational cooperation.

Since China's first BIT concluded in 1982, China accepted full ICSID jurisdiction since 1998 and pre-establishment national treatment commitments since 2013 (subject to exceptions). China concluded more than 50 BITs with BRI partner countries; but the number of FTAs concluded by China remains much smaller (cf. Jingxia 2018). China's new foreign investment legislation approved in 2019 reflects

[13] Due to the illegal "blockage" by the USA of the appointment of AB members since 2017, there was only one single AB member left as of 11 December 2019; this rendered the AB uncapable of admitting new appeals, and prompted both the USA and other WTO members to prevent adoption of adverse panel reports by "appealing into the void"; cf. E.U.Petersmann (2020c). At an informal WTO ministerial meeting during the Davos World Economic Forum in January 2020, the EU and 16 other WTO members (including China) agreed to using voluntary arbitration pursuant to Article 25 DSU as a temporary substitute for appellate review until the WTO AB would become operational again. In the meeting of the WTO Dispute Settlement Body on 27 January 2020, the USA blocked, once again, Mexico's request – on behalf of 120 WTO members – to initiate the procedure for appointing the six vacant AB positions.

the changing investment policies; yet, it is widely criticized as "a missed opportunity" to stop the downward trend, since 2015, of foreign direct investment in China.[14] The number of ICSID arbitration procedures for settling disputes involving China as a respondent (three cases only by July 2017), or introduced by Chinese investors abroad as complainants (five ISAs by July 2017), remains exceptionally low (cf. Un Hong & Yoen Lee 2018). China has played a leading role in the adoption of the 2017 'Guiding Principles for Global Investment Policymaking' by the G20. Yet, EU officials criticize China for the "snail pace progress" in the many years of negotiations on a China-EU investment agreement and for making access of European companies to the Chinese market often conditional on joint ventures and technology transfers. The recent EU proposal for a Regulation reviewing FDI by Chinese companies (e.g. screening Chinese take-overs of strategic European industries and of critical information technologies and infrastructures) reflects the EU's cautious attitude vis-à-vis Chinese SOEs and Chinese geopolitical influence. The advisory opinion by the CJEU of 30 April 2019 on the consistency with EU law of the investment court system of the Comprehensive Economic and Trade Agreement (CETA) of the EU with Canada sets out clear constitutional limits for future ISA in a China-EU investment agreement.[15] In view of China's non-participation in the UNCLOS arbitral proceeding initiated by the Philippines against China in 2013 and China's non-recognition of the arbitral award of 2016 rejecting China's claims to more than 80% of the South China Sea, it remains doubtful whether China will support the EU proposals for a multilateral investment court. It remains to be seen how China – in case the US assault on the WTO dispute settlement system should adversely affect also other WTO governance functions (like the WTO negotiations on electronic commerce, where China's insistence on protection of "cyber sovereignty" and national data storing requirements conflicts with US positions) – will respond to the dismantling of the WTO provisions for horizontal and vertical separation of legislative, administrative and judicial WTO governance powers and mutual 'checks and balances'. The US trade war against China risks undermining the important role which international law has so far played in furthering economic and legal reforms inside China.

The systemic conflicts between Chinese state-capitalism, Anglo-Saxon neo-liberalism and European ordo-liberalism embedded into rights-based, multilevel constitutionalism suggest increasing bilateral and regional challenges to the WTO legal and dispute settlement system. BRI projects are driven by Chinese economic, political and legal interests, for instance in Chinese top-down governance (e.g. prioritizing bilateral contractual arrangements exploiting power asymmetries), China's preference for maintaining legal flexibility, and China's self-interest in becoming a "rule-maker" in new policy fields like the cyberspace and patent registration. The EU is currently designing a multilateral counter-strategy, for instance insisting on China's compliance with EU law in carrying out BRI projects inside the EU (e.g. respect for EU regulations for public procurement procedures in case of large infra-structure projects like the new high speed train connections between Belgrade and Budapest). From the EU perspective, BRI related trade and investment disputes may be better settled through WTO and investment arbitration than through Chinese court and arbitration proceedings applying Chinese law, whose consistency with EU constitutional law guarantees (like individual rights to effective remedies and to a fair trial, cf. Article 47 EUCFR) appears doubtful. Currently, 17 EU member states are members of the China-led AIIB, and 11 participate in BRI projects, which are discussed in a 17+1 institutional framework. Agreement on common EU positions on China's BRI initiative would be facilitated by conclusion of the proposed EU-China investment agreement and by China's accession to the WTO Government Procurement Agreement so as to protect reciprocal market access rights, investor rights and other fundamental rights and judicial remedies. The breakdown of the WTO dispute settlement system risks adversely affecting the impact of WTO law on China's continuing "rule by law

[14] See: "China's new foreign investment law is a missed opportunity", *Financial Times* 24 December 2019.

[15] Opinion 1/2017 CJEU of 30 April 2019, ECLI:EU:C:2019:341. In Opinion 1/2017, the ISA procedures in the CETA were found to be consistent with EU law in view of the legal limitations of the potential reach of ISA by CETA guarantees of, *inter alia*, the legal autonomy of EU law, the EU judicial system, the democratic 'regulatory freedom' to protect non-economic PGs, and of fundamental rights (e.g. of access to judicial remedies, equal treatment) as protected in the EUCFR.

construction". The constitutional requirement of the EU under Article 3 of its Lisbon Treaty to contribute – also in its external relations – to "the sustainable development of the Earth", "free and fair trade", "the protection of human rights" and "to the strict observance … of international law" will be closely watched by European civil societies and democratic institutions in future EU cooperation with China. Notably in the implementation of the EU's "new green deal" for climate change mitigation through reduction of greenhouse gas emission, the EU's introduction of taxes on carbon-emissions and related "border carbon adjustments" are likely to give rise to increasing conflicts with other WTO members (like China, India and the USA as the countries with the largest carbon emissions). China's use of WTO law for promoting "rule by law" in China's multilevel governance of transnational trade reflects a "thin", formal conception of rule of law that does not meet all the formal criteria (like publicity, prospective application, generality, clarity, consistency, performability, stability over time, congruity between the positively enacted and actually practiced law) and institutional criteria (like an independent judicial system) of what L.Fuller called the "internal morality of law" (cf. Fuller 1977, 46 ff). China's legal system and "rule by law" are even less consistent with substantive conceptions of rule of law, notably with the human and constitutional rights protected by EU law, by UN human rights and labor rights conventions, or by the definition of "rule of law" in UN reports.[16] This systemic rivalry between China's totalitarian state-capitalism (e.g. using extremely low labor costs and state subsidies for its export-led growth model) and Europe's rights-based "social market economy" (based on multilevel human rights and democratic constitutionalism) is likely to remain a source for regular economic conflicts in the cooperation among China and Europe, which would be resolved best through multilateral, rules-based legal and dispute settlement systems. It remains paradoxical that – even though the WTO remains the only worldwide organization capable of negotiating multilateral competition and legal disciplines for SOEs, state subsidies and other market distortions – the US Trump administration has given up Western leadership for using WTO law and dispute settlement procedures as constraints on systemic, competitive distortions and abuses of power inside China.

[16] Cf. Report by the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (UN Security Council, 23 August 2004), which defines the rule of law as a "principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well measures to ensure adherence to the principles of supremacy of law, equality before law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".

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