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**China's 'One Belt One Road' – Transnational and Multilevel Rule  
of Law Challenges from a European Perspective**

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# China's 'One Belt One Road' – Transnational and Multilevel Rule of Law Challenges from a European Perspective

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## Abstract:

The article concerns the rule of law challenges associated with the One Belt One Road programme initiated by China. The aim of OBOR is to increase efficient resource allocation and to integrate markets in the more than 60 participating states in Eurasia. Rule of law is essential from a market economy perspective as it provides the market agents with legal certainty about their investments and should be considered as part of the OBOR strategy. The OBOR rule of law challenges are a result of 1) different political and normative approaches to rule of law where the article compares rules of law in a Chinese and European context to highlight such differences as well as finding similarities between them and 2) the multilevel nature of rule of law at national and international level. OBOR will have both a transnational and international dimension where China may influence the rules of laws developments in OBOR's many sectors and levels. However, there are some minimum requirements to rule of law which should be upheld in OBOR in order to protect legal certainty for the participating OBOR parties. Some rule of law challenges have already answers in existing multilateral systems, others need to be handled as OBOR progresses.

## Introduction

In 2013 the President of China, Xi Jinping, initiated the One Belt One Road (OBOR) programme. A Euro-Asian land bridge as well as a 21<sup>st</sup> century Maritime Silk Road will be established. OBOR aims at facilitating trade between Asia, Africa and Europe by reducing trade barriers, improving infrastructure and increase cooperation in numerous sectors between the more than 60 countries which will be involved with China as the main coordinator. One of the core OBOR principles is to let the market have a decisive role in order to achieve efficient allocation of resources.<sup>2</sup>

The paper discusses the transnational and multilevel rule of law challenges of OBOR from a European perspective. The focus will mainly be on issues related to economic law and of relevance for market participants. At its most basic level, rule of law means that law is supreme.<sup>3</sup> Rule of law protects legal certainty and thus provides the agents on the market with expectations that their investments can be protected in accordance with law and that the state

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<sup>2</sup> Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, 2015/03/28, Issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, March (2015), part II: Principles. See more below.

<sup>3</sup> See more below for a discussion of rule of law.

will not overstep its constitutional mandate in its relation with the agents of the market.<sup>4</sup> For all market participants – public and private – which are going to be part of making OBOR into reality, clarification of rule of law will be essential.

The rule of law challenges in the context of OBOR are transnational as ‘rule of law’ can be based in both liberal and socialist systems. Rule of law is often considered to be anchored in Western liberal ideologies, but it is applied in China with a more authoritarian and collective approach. Rule of law is in itself not a clear concept and has no clear authoritative definition. The OBOR cross-border activities between market agents and states can be a clash of different conceptual and normative perceptions of rules of law across the jurisdictions and the question is whether such overlaps between different rules of law will find new ways to overcome potential conflicts and transplant into each other’s respective systems.

The multilevel challenge is reflected by the elevation of rule of law to an international level. Rule of law at international level cannot easily be understood in the context of the traditional state definitions. With state sovereignty as basic assumption of international law, states become both law-makers and subjects of law. Thus one question concerns the relationship between the power of the state to decide law on international level and a commitment to be under law. Into that equation must be considered rule of law developments from international organizations. OBOR goes not only across a number of state jurisdictions but it also crosses into a number of international organizations, including the World Trade Organization (WTO).

The overall aims of OBOR will be outlined in the next part. Thereafter, the concept of rule of law will be elaborated. There will be a comparison between Chinese and European approaches to rule of law highlighting some rule of law similarities and differences. Furthermore, rule of law will be discussed in a global and transnational context. Finally, the OBOR rule of law challenges will be discussed with focus on Chinese soft and hard approaches to OBOR and the transnational and international rule of law challenges in the context of OBOR.

## OBOR and Its Aims

In March 2015, the Chinese National Development and Reform Commission, the Ministry of Foreign Affairs, and the Ministry of Commerce of the People’s Republic of China (PRC) released a joint paper concerning the “Vision and Actions on Jointly Building Silk Road Economic Belt and 21<sup>st</sup> Century Maritime Silk Road” outlining the overall aims and visions of OBOR. According to the joint paper, OBOR is a result of slow growth in the World economy, uneven global development, and financial crises. It takes into account economic globalization and the multi-polar world, cultural diversity and the higher level of IT application.

OBOR will involve countries in Asia, Africa, and Europe. The aims are to promote orderly and free flow of economic factors, a highly efficient allocation of resources and deep integration of markets. It aims at encouraging the implied countries to “achieve economic policy coordination and carry out broader and more in-depth regional cooperation of higher standards; and jointly

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<sup>4</sup> See for example Karla Hoff and Joseph Stiglitz, After the Big Bang? – Obstacles to the Emergence of the Rule of Law in Post-Communist Societies, *The American Economic Review*, June (2004) 753; Samuel Bufford, International Rule of Law and The Market Economy - An Outline, *Southwestern Journal of Law & Trade in the Americas*, 12 (2006) 303

creating an open, inclusive and balanced regional economic cooperation architecture that benefits all.”<sup>5</sup>

The core principles of OBOR are:

- Be in line with the purposes and principles of the UN Charter.
- Upholding the Five Principles of Peaceful Coexistence.
- Openness for cooperation for countries and international and regional organizations.
- Inclusiveness and harmony with tolerance among civilizations and respect of respective countries’ development.
- Supporting dialogue between different civilizations where common ground is to be sought in order to be in peace for common prosperity.
- Abiding market rules and international norms where market will have a decisive role in allocation of resources with a primary role of enterprises and where governments “perform their due functions”.
- Seeking mutual benefits for all parties involved.<sup>6</sup>

The cooperation priorities are policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bonds. *Policy coordination* aims to promote intergovernmental cooperation between China and the implied states. *Facilities connectivity* concerns the transport and energy infrastructure taking into account state sovereignty and security policies. *Unimpeded Trade* concerns improvement of investment and trade facilitation, including ensuring that the WTO Trade Facilitation Agreement takes effect and lowering non-tariff barriers and enhance trade liberalization. *Financial Integration* concerns financial cooperation and currency stability. That will involve the Asian Infrastructure Investment Bank (AIIB) and BRICS Development Bank – and will involve cooperation on multilateral and bilateral level in order to strengthen the risk response, the risk warning systems, and the financial crisis management. *People-to-people bond* concerns the public support for OBOR including exchange students, exchange culture, increase tourism between participating states, increase joint research activities, and focus on employment.<sup>7</sup>

Since 2008, the European Union (EU) and China have negotiated to establish a bilateral investment agreement. The European need for Chinese investments is a result of the Eurozone crisis and OBOR can serve as a short-term solution before the bilateral investment agreement will take effect.<sup>8</sup> In a joint statement between the European Economic and Social Committee and China Economic and Social Council from May 2016, they emphasised the importance of

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<sup>5</sup> Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, 2015/03/28, Issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, March (2015), part I: Background

<sup>6</sup> Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, 2015/03/28, Issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, March (2015), part II: Principles

<sup>7</sup> Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, 2015/03/28, Issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, March (2015), part III: Framework

<sup>8</sup> Insa Ewert, The EU-China Bilateral Investment Agreement: Between High Hopes and Real Challenges, *Security Policy Brief*, 68, February (2016).

reciprocity by being stakeholders in each other's financial institutions; A number of EU Member states are Members of the AIIB,<sup>9</sup> and China is involved with the European Fund for Strategic Investment. They also highlighted principles of internationally agreed standards in respect of public procurement, environmental protection, human rights, and labour and social protection.<sup>10</sup> OBOR is also of interest for European enterprises. For example, the China-Britain Business Council and the UK Foreign & Commonwealth Office have stressed that European Companies can form partnerships with Chinese companies, like joint partnerships, technology transfer, investment funding, public-private partnerships in areas related to infrastructure, financial and professional services, advanced manufacturing, and transport and logistics.<sup>11</sup>

OBOR differs from the traditional international law framework where rules and directions are set in treaties. OBOR is more network oriented. The overall aims do not have a clearly defined pathway yet. The road to OBOR will be established as the project develops. However, OBOR will cross into already established regional and international legal, economic and political regimes. For example, the AIIB takes some of the same functions as the World Bank.<sup>12</sup> However, it is believed that OBOR do not seek to replace already established international trading systems.<sup>13</sup> OBOR must here comply with WTO law concerning custom duty reductions,<sup>14</sup> the antidumping battles between China and the EU,<sup>15</sup> establishments of public-private partnerships and government procurement,<sup>16</sup> and the WTO Trade Facilitation Agreement.<sup>17</sup>

The ambitious OBOR project, with its dialogue based approach, will meet a more rule oriented Europe and it will cross into already established multilateral frameworks. It will be necessary to establish a number of bilateral and multilateral agreements between China and European states and the EU. The project is to a large extent market-based with participation of private and public institutions to carry out the projects following market principles.<sup>18</sup> In a market

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<sup>9</sup> Austria, Denmark, Finland, France, Germany, Italy, Luxembourg, Netherlands, Poland, Spain, Sweden and the UK. In addition, Non-EU states like Iceland, Norway, and Switzerland are Members.

<sup>10</sup> European Economic and Social Committee and China Economic and Social Council, Joint Statement – 14<sup>th</sup> Meeting of the EU-China Round Table, Brussels, 18 and 19 May 2016, paras 6-10

<sup>11</sup> China-Britain Business Council and UK Foreign & Commonwealth Office, One Belt One Road – A role for UK companies in developing China's new initiative – New opportunities in China and beyond, 2016, at 5

<sup>12</sup> M. Wan, *The Asian Infrastructure Investment Bank: The Construction of Power and the Struggle for the East Asian International Order*, (New York, Basingstoke: Palgrave Macmillian, 2016), 58

<sup>13</sup> See David Cohen, China's "second opening": Grand ambitions but a long road ahead, in "One Belt, One Road": China's Great Leap Outward, *European Council on Foreign Relations*, June 2015, at 3

<sup>14</sup> Reduction of custom duties for the implied states can be a violation of the Most Favoured Nations principles, for example, GATT 1994 Art. I but can be accepted if it complies with Art. XXIV concerning Free Trade Agreements and Custom Unions.

<sup>15</sup> See for example Art. VI of GATT 1994 and the Antidumping Agreement and the special antidumping rules towards China as – from an EU perspective – a non-market economy in the Chinese Accession Protocol, Art. 15. There have been a number of disputes between China and the EU concerning antidumping duties imposed by both parties.

<sup>16</sup> Government procurement and public-private partnerships might be covered by the Plurilateral Government Procurement Agreement in the WTO which China has not signed but keeps an observer status. However, other of the implied states are bound by the Government Procurement Agreement.

<sup>17</sup> WTO Agreement of Trade Facilitation, WT/L/931 of 15 July 2014. The Trade Facilitation Agreement will become part of the WTO Agreement and take effect once 2/3 of the WTO Members have ratified it.

<sup>18</sup> See above; Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, 2015/03/28, Issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, March (2015), part II: Principles

economy, it is a prerequisite that rule of law applies for those agents who invest in order to create value whereas rule of law is less important – or even problematic - for asset strippers and agents involved in money laundering.<sup>19</sup> In theory, rule of law protects the agents of the market as it provides stability and certainty. For example, an investor cannot expect the market to act in a specific way but the investor can have legal expectations that the investment is safe through law. For example, company law will often provide the shareholders tools to act against directors if they act beyond the interest of the company or if they have conflict of interests,<sup>20</sup> or competition law will provide the legal tools to keep companies with dominant market positions from abusing such positions, like predatory pricing.<sup>21</sup> This is not to say that law itself is sufficient or without problems. For example, the global financial crisis was partly due to weak regulation of the financial sector,<sup>22</sup> and where rule of law has more limited power if those accountable for the crisis only to a limited extent can be held liable under law.<sup>23</sup>

In addition, with the expected bilateral and multilateral agreements between states participating in OBOR, it must be assumed that those states will comply with their obligations and put law above arbitrary decisions.<sup>24</sup> However, different understanding of *rules* of law – and conceptual and legitimate questions by elevating rule of law to an international level – can be a challenge to OBOR. To highlight some different conceptual understandings of rule of law, the next part will address some differences between European and Chinese rules of law as well as the challenge with a global rule of law, before the following part will address in more detail the rule of law challenges in OBOR.

## Rule of Law and Its Definitions

It is not the aim here to go into a lengthy debate on the various definitions of rule of law.<sup>25</sup> It is a hazy concept but can vaguely be defined as the political and moral maxim where law is

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<sup>19</sup> See for example Karla Hoff and Joseph Stiglitz, After the Big Bang? – Obstacles to the Emergence of the Rule of Law in Post-Communist Societies, *The American Economic Review*, June (2004) 753; Samuel Bufford, International Rule of Law and The Market Economy - An Outline, *Southwestern Journal of Law & Trade in The Americas* 12 (2006) 303

<sup>20</sup> See for example ss. 170-187 of the UK Companies Act 2006.

<sup>21</sup> Predatory pricing is generally prohibited in various competition laws. See for example Art. 102 of the Treaty on the Functioning of the EU and related case law, like *Akzo v Commission*, Case C-62/86, Judgment of the Court (Fifth Chamber) of 3 July 1991, ECR. 1991 I-3359, and see Art. 17 of Anti-Monopoly Law of the People's Republic of China, NPC 30 August 2007.

<sup>22</sup> *Final Report of the National Commission On the Causes of the Financial and Economic Crisis in The United States – The Financial Crisis Inquiry Report* – by the US Financial Crisis Inquiry Commission, January 2011, p. xviii.

<sup>23</sup> It is an essential rule of law requirement that a person cannot be held liable retrospectively.

<sup>24</sup> The principle of *pacta sunt servanda* is fundamental in international law. It is codified in the Vienna Convention on the Law of Treaties, Art. 26.

<sup>25</sup> See for an overview of different definitions; Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' *Public Law*, Autumn (1997) 467. See also more elaborated; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (reprint by Liberty Fund, Indianapolis, 1915); Joseph Raz, The Rule of Law and its Virtue, in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009) 210; R. Peerenboom, 'Varieties of Rule of Law' in R. Peerenboom (ed), *Asian Discourses of Rule of Law – Theories and implementation of rule of law in twelve Asian countries, France and the US*, (London, New York: RoutledgeCurzon, 2004) 1; F. Hayek, *The Road to Serfdom*, The Definitive Edition, B. Caldwell (ed) (Chicago: The University of Chicago Press, 2007); J. Rawls, *A Theory of Justice*, Revised ed. (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999);

supreme and everyone, including the Government, must comply with law. A violation of rule of law can lead to *uncertainty* as future cannot be planned and from a business perspective the investment can carry a higher risk, or a violation of rule of law can lead to *frustrations* as legal expectations are not fulfilled either by a lack of enforcement of law or due to retrospective law.<sup>26</sup>

The problem with defining rule of law lies in its different perceptions as either formal or substantive. A formal rule of law does not judge on the content on law but merely provides the necessary tools to keep law supreme. From the formal approach, Raz has suggested in a non-exhaustive list some of the most important rule of law elements: 1) All laws should be prospective, open, and clear, 2) laws should be relatively stable, 3) the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules, 4) the independence of the judiciary must be guaranteed, 5) the principles of natural justice must be observed, 6) the courts should have review powers over the implementation of the other principles, 7) the courts should be easily accessible, and 8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.<sup>27</sup> Even though this version of rule of law is claimed to be value-neutral, it still provides a value-oriented framework where it is taken for granted that courts – or other independent third party institution – provide the best solution to uphold law, to observe natural justice, and that the courts can be easily accessed.

In contrast to a formal rule of law, a substantive rule of law will provide judgement over the content of law as not all law can be accepted. That will often be a rule of law requiring democratic principles are complied with and/or human rights are protected and with a liberal fundament.<sup>28</sup> See for example Rawls, who stated that “[O]ne legal order is more justly administered than another if it more perfectly fulfils the precepts of the rule of law. It will provide a more secure basis for liberty and a more effective means for organizing cooperative schemes.”<sup>29</sup> Rawls’ rule of law must be understood as implying that various political systems, even those without a liberal basis, can have a rule of law but the strength of it is measured by its ability to protect liberty.<sup>30</sup>

There is not a clear authoritative definition of rule of law but there is reference to ‘rule of law’ in a number of various legal and political instruments. For example, in the preamble to the UN Universal Declaration of Human Rights it reads:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

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Kaarlo Tuori, *Ratio and Voluntas – The Tension between Reason and Will in Law*, (Farnham, Burlington: Ashgate, 2011), pp. 207-239

<sup>26</sup> Joseph Raz, The Rule of Law and its Virtue, in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009) 210 at 222

<sup>27</sup> Joseph Raz, The Rule of Law and its Virtue, in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009) 210 at 214-218

<sup>28</sup> See for a general discussion Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ *Public Law*, Autumn (1997) 467

<sup>29</sup> J. Rawls, *A Theory of Justice*, Revised ed. (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), at 53. See also M. Radin, ‘Reconsidering the Rule of Law’, *Boston University Law Review* 69 (4) (1989) 781 at 787–790.

<sup>30</sup> *Ibid.*

It seems here that there is a distinction between ‘rule of law’ and ‘human rights’ where rule of law is instrumental in protecting human rights.

The Charter of the UN also has a clear link to rule of law. The preamble provides that the UN is determined;

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained

However, in 2004, the UN Secretary-General stated about the rule of law:

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to 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 the 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.<sup>31</sup>

This version of rule of law has a more substantial touch as it seems to require conformity with human rights. The question is how to define human rights. Regardless of a formal or substantive definition of rule of law, it must be expected that states comply with their international obligations. Human rights have an abstract level in the Charter of the UN and they are more specifically formulated in the International Covenant on Civil and Political Rights (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, those conventions are not directly binding on states which have not given their consent. For example, China has not ratified the ICCPR. It does not rule out an indirect commitment through other means than the covenant itself. For example, in the interpretation of treaties, the Vienna Convention on the Law of Treaties opens up for human rights principles can serve as interpretative context.<sup>32</sup>

As I have written elsewhere, rule of law must be understood as a transnational concept with specific traits for the respective jurisdictions. However, in order to be a *rule* of law it has some categorical features and cannot be considered as value-neutral as it must contain;

“some degree [of protection of] the *individual’s right to access justice* (...); a *degree of equality* between the subjects of law (...); *predictability* in the sense that the individual and the public can rely on law. In the same line, law-making must go through a clear and transparent procedure and constitutional basic principles must be reflected in law (...); Such constitutional and legal bases must be observed by the law-making and law-enforcing institutions but must also be protected by an impartial institution, like a constitutional court, although other types of political institutions can

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<sup>31</sup> Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, United Nations Security Council, S/2004/616, 23 August 2004, para. 6, at 4.

<sup>32</sup> See for example the preamble of the VCLT which explicitly refers to human rights and Art. 31(3)(c).

provide such functions, which ensures the *functionality of the particular legal system and law*”<sup>33</sup>

Thus rule of law cannot escape its liberal fundament as the individual is protected against arbitrary decisions from the public authorities and it can to some extent provide judgment of law. However, rule of law does not end with protection of the individual against the public. It has another dimension; the public is also protected against the ‘individual’. The ‘individual’ can take many shapes and the individual may be a strong political and/or economic power. For example, under the European Convention on Human Rights (ECHR), multinational companies have achieved some human rights protection.<sup>34</sup> The political and economic role of multinational enterprises should not be underestimated in the global economy. In a global economy with multinational enterprises as some of the leading actors,<sup>35</sup> it is important to keep in mind that the public also must be protected by law. For example, predatory pricing, which can cause damage to market participants and the economy, is prohibited in traditional competition laws,<sup>36</sup> or in some jurisdictions there is liability for corporate manslaughter or homicide.<sup>37</sup> It must therefore be expected that multinational enterprises can be prosecuted and be held liable for violations of law and that governmental institutions, with authority to impose fines or other types of sanctions, can expect law to be upheld in courts or other third party institution, which should be independent from the government and from the multinational enterprises. Rule of law can be problematic to uphold in places with high level of corruption if, for example, the judges are open to accept bribery.<sup>38</sup> Thus rule of law must be understood as law protecting both the individual against the public and the public against the individual. To put differently; rule of law protects the minor against the major power within the constitutional and legal boundaries.

The next two sub-parts will outline different approaches to rule of law. The focus will be on Europe and China as they will play major parts in the establishment of OBOR and relevant institutions. Thereafter, the rule of law challenges on global level will be discussed.

## **European Approaches to Rule of Law**

It is important to distinguish between different rule of law models in Europe. For example, continental European constitutional supremacy models where the individual will have constitutional protection of fundamental rights against legislation of law-maker compared to

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<sup>33</sup> Henrik Andersen, China and the WTO Appellate Body’s Rule of Law, *Global Journal of Comparative Law* 5 (2016) 146 at 150-151

<sup>34</sup> See for example the case law from the European Court of Human Rights concerning fair trial, *Dombo Beheer B.V. v Netherlands*, ECHR (1993), Series A, 274; EHRR (1994) 213; or right to privacy, *Société Colas Est and others v France*, Case No. 37971/97 ECHR 2002-III.

<sup>35</sup> See for example about the lobbying power of financial institutions with claims of self-regulation which was one cause behind the global financial crisis. See Deniz Igan, Prachi Mishra and Thierry Tresselt, A Fistful Of Dollars: Lobbying And The Financial Crisis, *NBER Macroeconomics Annual*, 26 (1) (2012), 195

<sup>36</sup> The powerful multinational enterprises have only limited obligations under public international law due to its statist assumptions. However, multinational enterprises can indirectly bind themselves, for example through the UN Global Compact and its commitments to human rights, labour standards, environment and anti-corruption. See more at; <https://www.unglobalcompact.org/>

<sup>37</sup> See for example from the UK the Corporate Manslaughter and Corporate Homicide Act 2007.

<sup>38</sup> See Transparency International, *Global Corruption Report 2007*, (Cambridge, New York: Cambridge University Press, 2007).

the UK Parliamentary Supremacy without a codified constitution and where the courts are bound to follow acts of Parliament regardless of their content.<sup>39</sup> In the UK, the courts only have authority to declare acts from Parliament ‘incompatible’ with the ECHR and cannot declare them invalid, cf. section 3 and 4 of the Human Rights Act 1998. Thus rule of law must be understood in light of the constitutional and political differences between European states.<sup>40</sup> Nevertheless, the Western European systems have formal liberal-oriented structures in common where the outset is the individual but the degree of authority of courts to declare law invalid will differ.

The ECHR has consolidated rule of law in Europe by requiring fair trials,<sup>41</sup> prohibition against retrospective law,<sup>42</sup> prohibition against discrimination<sup>43</sup> etc. It provides standing before the European Court of Human Rights (ECtHR) to individuals against their states concerning violations of the ECHR. Even though the ECHR has an inter-governmental basis, which is also reflected in the approaches to it by its Members, it has transplanted common rule of law principles in the Member States.

A more complex picture is the multilevel rule of law nature of the EU. As suggested by Kochenov, a rule of law in the context of the EU must be understood separately from the Member states.<sup>44</sup> The EU is not a state but it has sovereignty to law creation in specified areas, like the EU single market, and a court system with indirect access of EU citizens through the national courts’ rights and obligations to forward questions on interpretation of EU law to the EU Court of Justice (ECJ),<sup>45</sup> and direct access to challenge EU acts from the EU institutions if the individual is the addressee of the decision, like the EU Commission’s decisions in competition law cases; or if the act is of direct and individual concern to the natural or legal person who is not a direct addressee of the act, like EU and foreign companies which are

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<sup>39</sup> That view can be contested. For example, the courts have accepted the primacy of EU law when it conflicts with UK law; see for example the Factortame cases; *R v Secretary of State for Transport ex p Factortame Ltd* (No. 1) [1990] 2 AC 85 and *R v Secretary of State for Transport ex p Factortame Ltd* (No. 2)(C-213/89) [1991] 1 AC 603. See also the comment from former Lord Chief Justice of England and Wales, Lord Woolf:

“However, if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might chose to do so by saying that it was an un rebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.” Lord Woolf, *Droit public - English style, Public Law* (Spring, 1995) 57 at 69.

<sup>40</sup> See for a discussion about different types of constitutional systems and their different effect on rule of law as a result of their underlying ‘ratio’ and ‘voluntas’ in Kaarlo Tuori, *Ratio and Voluntas – The Tension between Reason and Will in Law*, (Farnham, Burlington: Ashgate, 2011), pp. 207-239.

<sup>41</sup> Art. 6 of the ECHR.

<sup>42</sup> Art. 7 of the ECHR.

<sup>43</sup> Art. 14 of the ECHR.

<sup>44</sup> Dimitry Kochenov, *The EU Rule of Law: Cutting Paths Through Confusion*, *Erasmus Law Review* 2 (1) 5 at 18.

<sup>45</sup> Art. 267 of the TFEU.

affected by EU antidumping measures;<sup>46</sup> or the final category, concerning regulatory measures of direct concern which do not entail implementation into the domestic systems.<sup>47</sup>

The rule of law is codified into the EU treaties. For example, it follows from the preamble of the Treaty on the European Union (TEU):

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, (...) CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

Art. 2 of the TEU provides:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail

The Charter of the EU provides in its preamble:

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice

Rule of law is also reflected in EU case law. For example, in *Les Verts v Parliament*, the Court of Justice of the EU (ECJ) stated:

The European Economic Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, [which] established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.<sup>48</sup>

Thus the EU follows European rule of law traditions which, as mentioned above, can be difficult to clearly define but which have a liberal basis. It is notable that the EU seems to distinguish between ‘rule of law’ and ‘democracy’ and ‘human rights’ in a Razian fashion. It

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<sup>46</sup> See for example Chinese companies’ access to the EU Courts concerning non-market treatment of Chinese companies in EU antidumping determinations; *Changzhou/Zhejiang v Council*, Case T-255/01, judgment of the Court of First Instance, 23 October 2003, ECR 2003, p. II-4741; and concerning the fundamental principle of respect for the right of a defence, *Foshan Shunde Yongjian Housewares & Hardware v Council*, Case C-141/08 P, judgment of the ECJ, 1 October 2009, ECR 2009, p. I-9147.

<sup>47</sup> See Art. 263(4) of the TFEU

<sup>48</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23. See also *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 281

is also notable that the EU texts distinguish between universal values ‘human dignity, freedom, equality and solidarity’ which leave out ‘rule of law’. However, the ECJ will go far to protect fundamental rights. In *Kadi and Al Barakaat International Foundation v Council and Commission* (hereafter; *Kadi*), the EU institutions had adopted a regulation in line with a UN Security Council Resolution which would freeze Kadi’s finances as Kadi appeared on a list of suspected terrorists by the UN Security Council. The EU institutions wanted to comply with the Resolution from the UN Security Council. In the case, the ECJ found that fundamental rights had been breached by the EU institutions as Kadi was prevented from the use of his property and that he had not had a fair hearing. Thus the ECJ upholds rule of law by reviewing the acts of the EU institutions and by stressing natural justice. *Kadi* has also a multilevel rule of law dimension which will be discussed below.

The concept of rule of law in a European context can be seen in light of liberal approaches to law: rights and protection of the individual against the public. The Razian rule of law, although asserted to be value neutral, takes the liberal fundamentals into account: The right to apply the courts to challenge administrative decisions or law-making. The ECJ has also held that it is a violation of rule of law if law is retrospectively applied.<sup>49</sup>

In EU’s external relations, the rule of law is more limited although the actions by the EU institutions must be guided by rule of law. Art. 21 of the TEU provides:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law

As mentioned above, *Kadi* is from an EU internal perspective an example of rule of law protection of an EU citizen. However, given the fact that the UN Security Council had provided a binding resolution, it can be asked whether the ECJ runs into a rule of law conflict. On one hand, the ECJ must comply with law, which in this case goes through the international obligations to comply with UN Security Council Resolutions. This is a rule of law question on international level; states must comply with their international obligations. On the other hand, there is the protection of the individual, Kadi, as fundamental EU law, as mentioned above. In *Air Transport Association of America and Others* the ECJ referred to *Kadi* emphasising that the EU institutions are bound by their international treaty obligations which will prevail over EU law.<sup>50</sup> That must be seen in relation with EU constitutional law as the ECJ stated in *Kadi*

the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court

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<sup>49</sup> See for example Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and judgment of 15 April 2008 in *Impact*, C-268/06, EU:C:2008:223, paragraph 100.

<sup>50</sup> *Air Transport Association of America and Others*, C-366/10, ECR, EU:C:2011:864, para. 50

to review in the framework of the complete system of legal remedies established by the Treaty.<sup>51</sup>

In addition, the ECJ referred to core values of the EU:

It is true also that Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security. Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.<sup>52</sup>

In that respect, the ECJ distinguished between secondary EU law, where, as mentioned above, international law will prevail in case of conflict, and fundamental rights in which international law will not have primacy. However, the ECJ also emphasised that the UN system provides the Sanctions Committee where a person may ask to be removed from the terror list but that it is “still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.”<sup>53</sup> It seems that the ECJ does not overrule the UN Security Council. By contrast it finds with reference to the ECtHR that

“the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate.”<sup>54</sup>

Even though that the fundamental guarantees of Kadi had been ignored in the contested EU Regulation and thus should be annulled, the ECJ stated that

“the annulment to that extent of the contested regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again. (...) the effects of the contested regulation must (...) be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account

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<sup>51</sup> *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 285

<sup>52</sup> *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 302-303

<sup>53</sup> *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 323

<sup>54</sup> Referring to *Bosphorus*, paragraph 26, and the judgment of the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, § 167, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 363.

of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms."<sup>55</sup>

Thus, the ECJ recognizes the obligations under international law, including those implementing Resolutions from the Security Council. International law is binding on the EU institutions. For example, in *Air Transport Association of America and Others*, the ECJ found with basis in Art. 3(5) of the TEU that the EU institutions are bound by international law, including customary international law, when they adopt acts.<sup>56</sup> In addition, the ECJ finds support in international jurisprudence. In the same case, it referred to the International Court of Justice (ICJ) and the Permanent Court of Justice as basis for establishing the principle that each State has complete and exclusive sovereignty over its airspace, the principle that no State may validly purport to subject any part of the high seas to its sovereignty, and the principle of freedom to fly over the high seas are customary international law.<sup>57</sup> However, even though international law is binding in the EU system, it cannot derive a person a right from testing EU law implementing international law against fundamental rights. It seems that the ECJ is trying to strike a balance between international law and EU human rights where both systems are satisfied through a harmonious approach instead of a conflict-based approach.<sup>58</sup>

Even though EU institutions are bound by international law, there is a question of the individual's access to apply international law before the EU courts. The approach taken by the ECJ in respect of the direct applicability of international law is mixed. The ECJ has demonstrated a monistic approach in *Hageman*<sup>59</sup> and *Kupfberg*.<sup>60</sup> However, when it comes to the applicability of WTO law, the ECJ takes a more dualistic approach. In *Portugal v. Council* the ECJ stated:

As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of

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<sup>55</sup> *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paras. 373-375.

<sup>56</sup> *Air Transport Association of America and Others*, C-366/10, ECR, EU:C:2011:864, para. 101.

<sup>57</sup> The ECJ referred in that respect to Article 1 of the Chicago Convention (see, on the recognition of such a principle, the judgment of the International Court of Justice of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 392, paragraph 212), in Article 2 of the Geneva Convention of 29 April 1958 on the High Seas (United Nations Treaty Series, Vol. 450, p. 11) (see also, on the recognition of this principle, the judgment of the Permanent Court of International Justice of 7 September 1927 in the Case of the *S.S. 'Lotus'*, PCIJ 1927, Series A, No 10, p. 25) and in the third sentence of Article 87(1) of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, which entered into force on 16 November 1994 and was concluded and approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1), see para. 104.

<sup>58</sup> See also Juliane Kokott and Christoph Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?* *The European Journal of International Law*, 23 (4) (2012), 1015-1024, advocating that the ECJ does not take a rigid dualist approach here but rather attempts to strike a balance between EU constitutional core values and effective international measures against terrorism.

<sup>59</sup> *Hageman*, Case 181/73, judgment of the EC Court on 30 April 1974, ECR 1974, p. 449

<sup>60</sup> *Kupfberg*, Case 104/81, judgment of the EC Court on 26 October 1982, ECR 1982, p. 3641, para. 18

integration with the Community, such as the agreement which the Court was required to interpret in Kupferberg.<sup>61</sup>

The ECJ found that a number of courts of the other WTO Members do not review the legality of their respective legislation in light of WTO law and do not allow direct applicability. According to the ECJ, if the ECJ allowed direct applicability of WTO law, it “would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.”<sup>62</sup> The ECJ then rejected direct applicability of WTO law.<sup>63</sup> However, the ECJ will allow direct applicability of WTO law if the EU intends to implement a specific WTO obligation, for example it can be expressed in general in secondary acts, or if there in secondary acts are express reference to specific provisions of WTO law.<sup>64</sup>

It is a mixed rule of law line adopted by the ECJ. One internal line which has a basis in a formal rule of law, although with strong emphasis on fundamental rights, whereas a more power oriented line in the external trade relations.

The next sub-part concerns a Chinese rule of law. As China is taking a leading role in OBOR, China's approach to rule of law is important. Differences between European and Chinese rules of laws are essential to understand for the OBOR investors in their cross-border investments and transactions.

### **Chinese Approaches to Rule of Law**

Rule of law might have a liberal underpinning which is reflected in the overall rule of law framework but its elements vary in degrees. China has on domestic level promoted rule of law, which is also a requirement under its WTO commitments,<sup>65</sup> but special characteristics of Chinese rules of law with a strong centralized state and with emphasis on the collective over the individual is different from the more liberal oriented European rule of law systems.<sup>66</sup>

In the 1980s, politicians and academics in China discussed the particular political structure of China post-Mao. Should China be a *rule of man* or a *rule of law* society? The difference between those concepts, although the classification cannot be clearly established, is that in a rule of man system the ruler is not bound by *law* but must instead comply with *moral virtues*.<sup>67</sup>

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<sup>61</sup> *Portugal v Council*, Case C-149/96, judgment of the EC Court on 23 November 1999, ECR I-8395, para 42

<sup>62</sup> *Portugal v Council*, Case C-149/96, judgment of the EC Court on 23 November 1999, ECR I-8395, para 46

<sup>63</sup> Paras. 42-47

<sup>64</sup> See for example *Biret v Council*, Case C-93/02 P, judgment of the EC Court on 30 September 2003, ECR 2003, p. I-497, para. 63.

<sup>65</sup> Accession of the People's Republic of China, of 23 November 2001, WT/1/432, 2C and 2D and Henrik Andersen, China and the WTO Appellate Body's Rule of Law, *Global Journal of Comparative Law* 5 (2016) 146 at 158. See lately Supreme People's Court Deputy Secretary Jiang Bixin addressing “Implementing the Rule of Law for Guaranteeing the Five Development Concepts” on June 8, at the “Hundred Jurists and Hundred Lectures”, cf. David Gitter, Why China Both Loves and Fears the Rule of Law, *The Diplomat*, June 25 2016.

<sup>66</sup> Tao Li and Zuoli Jiang, Does China follow the West? A Perspective of State-Citizen Interaction in Foreign Trade Governance, *Baku State University Law Review*, 2 (2) (2015-2016) 177 at 192-195. See for a nuanced discussion on rules of law in China; Randall Peerenboom, ‘Competing Conceptions of Rule of Law in China’ in R. Peerenboom (ed), *Asian Discourses of Rule of Law – Theories and implementation of rule of law in twelve Asian countries, France and the US* (London: RoutledgeCurzon, 2004), 113.

<sup>67</sup> Leigh K. Jenco, “Rule by Man” and “Rule by Law” in Early Republican China: Contributions to a Theoretical Debate, *The Journal of Asian Studies*, 69 (1) (February 2010) 181.

The *de facto* leader, Deng Xiaoping, wanted economic and social reforms of China where rule of law should be the instrument to achieve the goals. He established 5 principles of laws that should govern China; 1) there must be laws for people to follow, 2) laws must be observed, 3) law breakers must be dealt with accordingly, 4) law enforcement must be strict, and 5) we are all equal before the law.<sup>68</sup> The instrumental approach to rule of law might fit the Razian rule of law claim that rule of law cannot pass judgment on law. But as mentioned above, there are some essential elements of rule of law which law should not violate in order to keep rule of law effective. Thus rule of law cannot be solely instrumental and value-neutral. Deng Xiaoping's system has been characterized as *rule by law*, i.e. the law is used as instrument to carry out the ruler's ideas without constraints on the ruler.<sup>69</sup> However, China has gradually changed from a planned economy towards a socialist market economy, and it has moved to a judicial oriented governance system.<sup>70</sup> Rule of law is now codified in Art. 5 of the Constitution of the PRC. The Constitution is *fundamental law* and must be complied with by citizens, Government and political parties.<sup>71</sup> But in contrast to the European liberal versions of rule of law, the Chinese rule of law must be understood in context of its socialist system. Art. 5 provides;

The People's Republic of China governs the country according to law and makes it a socialist country under rule of law.

The State upholds the uniformity and dignity of the socialist legal system.

No laws or administrative or local regulations may contravene the Constitution.

All State organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws. All acts in violation of the Constitution or other laws must be investigated.

No organization or individual is privileged to be beyond the Constitution or other laws.

In the 1980s, China advanced court adjudication as the preferred dispute resolution in civil cases although lately there has been a turn towards increased mediation.<sup>72</sup> The Chinese

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<sup>68</sup> Carlos Wing-hung Lo, *China's Legal Awakening – Legal Theory and Criminal Justice in Deng's Era*, (Hong Kong: Hong Kong University Press, 1995) at 38.

<sup>69</sup> Jiefen Li, *Legal Reform Versus the Power of the Party and State in the People's Republic of China – Rule of Law or Rule By Law?* (Lewiston/Lampeter/Queenston: The Edwin Mellen Press, 2008) at 30-39.

The difference between "rule of law" and "rule by law" lies with the accountability of the ruler for the laws formulated, which must comply with constitutional principles but both systems require the ruler to comply with law. However, in a rule by law system, the ruler can change law in a manner which will fit the ruler's will. A *rule of men* and *rule by law* debate took place in China after the Republic was established in 1911 and new political institutions were formed to govern. See more about the theoretical scope and interaction between rule of men and rule by law in Leigh K. Jenco, "Rule by Man" and "Rule by Law" in Early Republican China: Contributions to a Theoretical Debate, *The Journal of Asian Studies*, 69 (1) (February-2010) 181

<sup>70</sup> Tao Li and Zuoli Jiang, Does China follow the West? A Perspective of State-Citizen Interaction in Foreign Trade Governance, *Baku State University Law Review*, 2 (2) (2015-2016) 177 at 186

<sup>71</sup> Albert H. Y. Chen, China's Long March Towards Rule of Law or China's Turn Against Law? *Chinese Journal of Comparative Law*, 4 (1) (2016) 1 at 7

<sup>72</sup> Carl F. Minzner, China's Turn Against Law, *American Journal of Comparative Law*, 59 (4) (2011) 935

Constitution does not give room for judicial control of law production. In the constitutional system, the People are supreme and their will is expressed through the representatives of the law making organ; the National People's Congress (NPC). Its standing organ, the Standing Committee of the National People's Congress (NPCSC), has the interpretative authority of the Constitution and authority to provide legislative reviews of law. That authority is not granted the Supreme People's Court (SPC). However, the courts of China have occasionally referred to the Constitution as a source of law, although the line of constitutional application by the SPC is not clear and appears to be limited.<sup>73</sup>

Even though Chinese law appears to have a positive legal basis in the legislation by the NPC and NPCSC, it cannot be ruled out that a higher ranking norm system can serve as guiding convention of Chinese leaders and law making. In line with Western natural law theories, Chinese traditional law theories had higher ranking norms which should guide the leaders. For example, cosmological approaches seeking harmony in the universe between *tian* (Heaven) and *ren* (Human) where the early Confucians saw the moral role of the ruler was to carry out the intentions of Heaven. Moral Confucian and Neo-Confucian approaches differed from the cosmological approaches by deducing principles of morality from humans instead of Heaven, and which Maccormick compares with some reservations to the European legal and political philosophers Grotius and Pufendorf,<sup>74</sup> and their secular approaches to law and the relationship between natural and positive law with natural law's higher ranking set of norms.<sup>75</sup> One moral approach derives from human nature which through the mind constructs a universal set of higher law. Another moral approach derives from Confucius' *li* (rite or custom) which has been compared to Western natural law. However, it is criticised as *li* – in contrast to the universal, static nature of natural law – is based on custom and is changeable and thus may not be comparable to a Western natural law.<sup>76</sup> Where the Confucian *li* would consider the moral code as fundamental for guiding society, and law with only an inferior role due to its penal character, later legalists advocated for codification of law and punishment for its violations.<sup>77</sup>

It cannot be ruled out that Confucian philosophy has an important impact on Chinese society. Even though Deng Xiaoping took a pragmatic approach to law – and pragmatism is important as seen in the OBOR – the idea of overall guiding principles, which is channelled through the Communist Party of China (CPC), and strong authority by the CPC, can be in line with

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<sup>73</sup> Cheng Xueyang, Institutional Developments, Academic Debates and Legal Practices on the Constitutional Review in China: 2000-2013, *Frontiers of Law in China*, 9 (4) (2014) 636 at 640; Zou Keyuan, International Law in the Chinese Domestic Context, *Valparaiso University Law Review* 44 (2010) 935 at 953.

<sup>74</sup> In his prolegomena to the 'On the Law of War and Peace', Grotius, after stating that maintenance of social order is desired in every human being and thus through reason natural law is established, went on to say "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him", Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres, Vol Two* (1625), translated by Francis Kelly, (Buffalo, New York: William S. Hein & Co., Inc., 1995), Prolegomena, para 11, at 13. See also Pufendorf's natural law where law is discovered through reason and where self-preservation of ourselves makes it necessary for human beings to create order and sociality. See Samuel von Pufendorf, *Political Writings – On the Duty of Man and Citizens* (1673), Tully (ed), (Cambridge: Cambridge University Press, 1991), Book I, Chapter 3, pp. 33-38

<sup>75</sup> Geoffrey MacCormick, Natural Law in Traditional China, *Journal of Comparative Law*, 8 (2) (2013-2014) 104 at 117.

<sup>76</sup> Geoffrey MacCormick, Natural Law in Traditional China, *Journal of Comparative Law*, 8 (2) (2013-2014) 104 at 121.

<sup>77</sup> See for example Luke T. Lee and Whalen W. Lai, The Chinese Conceptions of Law, *Hastings Law Journal*, 29 (6) (1978) 1307 at 1309.

Confucian philosophy, although the check-and-balance of compliance with a higher ranking morality can be a challenge. The strong authority of the CPC must be seen in light of different cultural understandings of “democracy” between various Western traditions and a Confucius inspired Chinese version with the Chinese maxim *minben*, i.e. the welfare of the people is the basic foundation of the wealth and power of the State. Tianjian Shi and Jie Lu explain the two different approaches to democracy. They define Western approaches as

“A set of institutional arrangements created to reach decisions on public issues and to ensure good governance. At the heart of these arrangements lie open and competitive elections. The system must allow the free flow of information so that people can make informed decisions”<sup>78</sup>

The Confucian cultural inheritance is reflected to in Chinese perceptions of democracy which differs from the liberal European approach by suggesting a leadership from specifically qualified elite; legitimacy for government is not based on fair elections but through substance and results of policies applied; and participation by ordinary people is limited and mostly left to political leaders.<sup>79</sup> Thus a more authoritarian approach is legitimate and in order to reach the welfare of society and the goals of a strong economy to the benefit of the people, a pragmatic approach might be necessary. It is in that context that the relationship between the CPC and the Chinese courts must be seen. The Chinese courts do not have the same level of independence as courts in Europe. Instead, they are under guidance from the Political-Legal Committee which is a part of the CPC organization.<sup>80</sup>

A rule of law in China must be understood in light of the specific philosophical, cultural and political Chinese traits. What is not clearly formulated in respect of rule of law is where to set the balance between the private and the public protection, where a European approach will tilt more towards the protection of the private in contrast to a stronger emphasis on the public in China.<sup>81</sup> The role of the courts are approached differently where the European courts usually will be independent and with reviewing authority of acts from legislator, whereas the courts of China is under an overall guidance of the CPC and only have limited reviewing authority of legislations’ constitutional conformity. Regardless of the Chinese-European differences, it is clear that rule of law has been growing and developed in China since the 1980s. The growing importance of rule of law was stressed at the “Hundred Jurists and Hundred Lectures” event on 8 June 2016 where the SPC Deputy Secretary Jiang Bixin explained that economic and social development in China cannot take place without the rule of law. That is in line with President Xi Jinping’s construction of rule of law. However, the CPC issued an opinion that lawyers should be under guidelines of political correctness in order to not challenge the state on every possible occasion for human rights violations while defending their clients.<sup>82</sup> That

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<sup>78</sup> Tianjian Shi and Jie Lu, *The Shadow of Confucianism*, *Journal of Democracy*, 21 (4) (2010) 123 at 125

<sup>79</sup> Tianjian Shi and Jie Lu, *The Shadow of Confucianism*, *Journal of Democracy*, 21 (4) (2010) 123 at 125-126

<sup>80</sup> Zou Keyuan, *International Law in the Chinese Domestic Context*, *Valparaiso University Law Review* 44 (2010) 935 at 954.

<sup>81</sup> See Randall Peerenboom who distinguishes between thin and thick versions of rules of law, Randall Peerenboom, ‘Varieties of Rule of Law’ in Randall Peerenboom (ed), *Asian Discourses of Rule of Law – Theories and implementation of rule of law in twelve Asian countries, France and the US* (London, New York: RoutledgeCurzon, 2004) 1.

<sup>82</sup> “Implementing the Rule of Law for Guaranteeing the Five Development Concepts” on June 8, at the “Hundred Jurists and Hundred Lectures”, cf. David Gitter, *Why China Both Loves and Fears the Rule of Law*, *The Diplomat*, June 25 2016.

might be a result of human rights getting wider space in Chinese laws, like the 2012 revision of the Criminal Procedure Law.<sup>83</sup> Rule of law is developing through the interaction between on one side a strong authoritative system with economic and social aims realized through rule of law as well as a desire to keep face from critique from individuals and the other side the individuals' access to challenge the system.

In respect of applying international law in the Chinese legal system, it is a legislative task left to the NPCSC to decide whether an international treaty can be applied by the courts.<sup>84</sup> The direct effect of international law in China must be seen in light of the supremacy of international law in China. Once it is ratified, international law prevails over national law in case of conflict.<sup>85</sup> However, in Chinese legislative practice there is wide opening to apply international law without reference to specific treaties. For example, Art. 260 of the Civil Procedure Law 2012 provides:

If an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are the ones on which China has announced reservations.<sup>86</sup>

It seems that international law can be applied before the Chinese courts even if there is no express reference to the international treaty as long as it is ratified. However, it is not clear what the position is in respect of international customary law.<sup>87</sup>

Rule of law in China has similarities with European rules of law when it comes to the overall framework of a rule of law, like access to courts, supremacy of law, equality etc. But those similar elements vary in degrees, and there is a stronger political link to rule of law and courts in China compared to Europe. Where courts have a higher degree of independence in Europe, the courts in China are under the overall guidelines of the CPC. When it comes to those human rights which are part of rule of law on abstract level, like the individual's access to justice, the approaches in Europe are different compared to China which favours the collective and social rights over the individual and civil rights.<sup>88</sup> However, as it was mentioned above, human rights are increasingly being written into Chinese law and thus will provide the courts the legal and

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<sup>83</sup> Albert H. Y. Chen, China's Long March Towards Rule of Law or China's Turn Against Law? *Chinese Journal of Comparative Law*, 4 (1) 2016, 1 at 19. China does not have a specific bill of human rights but instead they are written into the Constitution and into various domestic legislations which might affect the effectiveness of human rights in China. See Zou Keyuan, International Law in the Chinese Domestic Context, *Valparaiso University Law Review* 44 (2010) 935 at 942-944

<sup>84</sup> B. Ahl, Chinese Law and International Treaties, *Hong Kong Law Journal* 39 (3) (2009) 735

<sup>85</sup> Zou Keyuan, International Law in the Chinese Domestic Context, *Valparaiso University Law Review* 44 (2010) 935 at 936

<sup>86</sup> The Civil Procedure Law Of The People's Republic Of China (2012), adopted at the Fourth Session of the Seventh National People's Congress on 9 April 1991, and amended for the first time according to the "Decision on Amending the 'Civil Procedure Law of the People's Republic of China'" as adopted at the 30th Session of the Standing Committee of the 10th National People's Congress on 28 October 2007, and amended for the second time according to the "Decision on Amending the 'Civil Procedure Law of the People's Republic of China'" as adopted at the 28th Session of the Standing Committee of the 11th National People's Congress on 31 August 2012

<sup>87</sup> See also Zou Keyuan, International Law in the Chinese Domestic Context, *Valparaiso University Law Review* 44 (2010) 935 at 937-939

<sup>88</sup> Peerenboom, 'Competing Conceptions of Rule of Law in China', (n. 55) at 113

interpretative tool to include those rights when they interpret the specific acts. But the overall constitutional protection of human rights is a legislative matter.

The OBOR investors must be aware of the rule of law differences between the various OBOR states. The differences will be exposed when they want to protect investments and fundamental rights. For example, there will be legal expectations in case of investigations against companies for competition violations, that could for example be in case an investor allegedly has been abusing a dominant position in the construction business to eliminate competitors or if competitors have collaborated to the detriment of the public for example by price fixing or by collaborating on bids for public procurement, where the investigations against them must be in conformity with law and with the necessary protection of their rights to be heard and to access the courts. Even though violation of competition law is grave for the market and usually will be heavily fined, it is important to keep the balance that the authorities cannot use their power to take a company out of the game in order to favour another company. But at the same time, rule of law is there to protect the authorities' right to investigate and to provide justice against companies which try to buy their way out through other parts of the political system. That is where rule of law must be backed up with sufficient openness in the public system to avoid corruption and to hit hard on companies which bribe public officials or judges. In addition, rule of law is not there just to protect companies, but it is also there to protect employees against abuse by employers, to protect employees against forced labour situations, and to protect health and safety at work as long as law provides for it. Thus a comparison between the levels of rules of laws in different systems should be carried out by the companies and other participants involved in OBOR. It is where China through OBOR can make requirements on participating states to uphold at least a minimal level of rule of law.<sup>89</sup>

Where this sub-part mainly has focused on differences between rules of laws from systems with authority to punish and to make law, the next sub-part will look at some rule of law challenges at international level.

### **Globalization and Transnational Rule of Law**

OBOR is a global project and it will pose both international and transnational rule of law challenges but where China can make an important input. Globalization is in itself a concept which is part of shaping the legal barriers. It has been defined by Stiglitz as

”The closer integration of the countries and the peoples of the world which has been brought about by enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders”<sup>90</sup>

Globalization involves cross-border issues and it is necessary to facilitate the transnational activities by providing relevant legal tools for investors. However, globalization brings according to Coleman and Maogoto “systems of governance and regulation that sit above

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<sup>89</sup> See more below about China's promotion of transnational rule of law.

<sup>90</sup> Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: Norton & Company, 2002), 9.

states.”<sup>91</sup> The problem is when different systems of law cross into each other as illustrated above with the EU and the *Kadi* case; rule of law works on different levels. It has a territorially confined domestic scope but it is also applied on international level.

The rapid transactions of ideas, goods, services, capital as well as global threats like terrorism etc. is a challenge to the statist assumptions of sovereignty which are the fundamental pillars of international law. From a European angle, state sovereignty is often associated with the 1648 Westphalian peace which fundamentally changed the view on law as universal and given by God. Instead, law took a turn towards man-made positive law and gradually shifted from the universal divine and natural law towards a territorially delimited norm system.<sup>92</sup> Westphalian sovereignty implied that a state’s internal political structures and policies could not be challenged by other states.

The concept of sovereignty has developed in theory over time and has neither in theory nor in practice achieved a clear definition. For example, Krasner categorises ‘sovereignty’ as either; Westphalian, domestic, international legal, or interdependence.<sup>93</sup> Coleman and Magoto writes that sovereignty is a fluid concept where differences in degree of absoluteness between Europe and China lies in how Europe and China rose from chaos in the feudal time.<sup>94</sup> The importance of considering the concept of sovereignty lies in the methodological approaches to legal questions and rule of law on international level. European states have through their economic and political integration in the EU been granting authority to regional institutions to both interfere into national matters, i.e. the internal sovereignty, and with strong acceptance of European courts to handle human rights issues, demonstrated a soft intra-European sovereignty approach in contrast to China where institutions outside China only have limited impact in the Chinese legal system. But where the intra-European approach might be soft, the EU takes a harder approach in its external relations as mentioned above, for example in respect of its WTO policies.

Rule of law on international level is limited by the sovereign states. Where rule of law protects the minor power against the major power and has some inherent protection of the individual against the state; the individuals access to try governmental decisions against her/him before an impartial, third-party institution; and with the right to expect law not to be retrospective, rule of law on international level must be understood with some reservations. Protection of the individual’s right under international law and access to courts is on international level limited as most international courts do not grant individuals standing with exception of, for example, the International Centre for Settlement of Investment Disputes (ICSID), which offers arbitration in investment disputes where private investors can challenge ICSID Member States in any legal dispute arising out of an investment between the state and the individual,<sup>95</sup> or as

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<sup>91</sup> Andrew Coleman and Jackson Nyamuya Maogoto, “Westphalian” Meets “Eastphalian” Sovereignty: China in a Globalized World, *Asian Journal of International Law*, 3 (2013) 237 at 239

<sup>92</sup> See below in note 74 about Grotius and Pufendorf who took the perception of law towards a secular basis. Grotius had also an important impact on international law as a system based on natural law, state consent and practice instead of a God-given system.

<sup>93</sup> Krasner, *Sovereignty: Organised Hypocrisy*, (New Jersey: Princeton University Press, 1999) at 3

<sup>94</sup> Andrew Coleman and Jackson Nyamuya Maogoto, “Westphalian” Meets “Eastphalian” Sovereignty: China in a Globalized World, *Asian Journal of International Law*, 3 (2013) 237 at 241-245

<sup>95</sup> Art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965. The arbitration award is binding on the disputing parties, cf. Art. 53 and Art. 54. China has signed but not ratified the ICSID Convention.

mentioned above, the ECtHR. Application of international law at national level is under the constraints of the respective states monistic, soft Chinese dualist or hard dualist approaches to international law. Nevertheless, the concept of rule of law has found its way into the international arena and it is an important principle in respect of providing legal certainty in international disputes. As mentioned above, rule of law has different definitions within the UN and it is expected that international organizations, besides the states, comply with a rule of law. Rule of law is a concept that is applied and developed in various international regimes. For example, in the WTO it is held by both Appellate Body Members and by Director-Generals that the Appellate Body is upholding 'rule of law'. For example, the Appellate Body reviews the conformity of WTO member states' law with WTO law.<sup>96</sup> Clearly a rule of law in that context must be understood with state sovereignty as basis of international law where the Appellate Body should not put a state in a situation where its WTO or other obligations under international law can potentially be violated. In addition, the development of a rule of law in the WTO might take another direction than rule of law developed in other regimes, like the UN, ICSID, EU, International Labour Organization (ILO), etc.

In addition, a distinction must be made between different sectors where some have a stronger hard-law approaches compared to some soft-law oriented. For example, the WTO treaties are binding on the WTO Members and in general regional trade organizations have a similar pattern by providing hard law treaties. In contrast, international financial law is largely soft law oriented. For example, the Basel Accords (Basel I, II and III) which were agreed by the Members of the Basel Committee and Banking Supervision are non-binding although they turn into hard law instruments through their implementation in national and/or EU law.<sup>97</sup> In the intergovernmental relations, the Basel Accords in themselves do not create legal expectations but rather political expectations of implementation.<sup>98</sup> Thus rules of law in the financial sector might be more fragmented due to their national implementation in various systems compared to the stronger rule of law development in the WTO.

OBOR is a global project with transnational and international rule of law challenges. Private and public investors and companies from different jurisdictions will be involved with law from other states and international institutions in cross-border transactions and with legal expectations deriving from national, regional and international law. OBOR must establish institutions to handle the various legal, economic and political issues that may appear. As mentioned above, the AIIB is established to handle infrastructural projects in Asia and is an important institution in the OBOR plans. Other institutions have a wider global purpose, like the WTO, where OBOR will have to comply with the WTO requirements, like free trade

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<sup>96</sup> Henrik Andersen, China and the WTO Appellate Body's Rule of Law, *Global Journal of Comparative Law* 5 (2016) 146 at 166.

<sup>97</sup> The members are national central banks, like People's Bank of China. The Basel Committee on Banking Supervision (BCBS) Charter of January 2013, Art. 3 and Art. 5. It is expected that the Members implement the BCBS standards in the domestic systems. See for example the EU; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (Text with EEA relevance) and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance.

<sup>98</sup> See also another example; The International Organization of Securities Commissions (IOSCO) which is the global standard setter for securities regulations. From China it is the China Securities Regulatory Commission which is a member and also a member of the IOSCO Board which is the governing and standard-setting body of IOSCO.

agreements, the EU-China antidumping issues, and trade facilitation, and will thus come under the WTO regime's emerging rule of law.<sup>99</sup> However, as rule of law is not well developed on the international stage – and with its sectorial differences, like human rights, security, trade, labour, environment, health, investment, finance etc. administrated by functional communities like the UN, the WTO, the ILO, ICSID, World Health Organization (WHO), IOSCO etc. – China will through OBOR have the opportunity to influence on that development.

## The OBOR Rule of Law Challenges: Soft and Hard Approaches

Rules of laws from various systems and from different levels will be a challenge when they interact through OBOR. There might be rule of law gaps leading to legal uncertainty for the market agents. It is important that the policy coordination between the OBOR participating states and other major OBOR institutions takes rule of law challenges into consideration. Commentators have pointed out that Chinese influence will spread with OBOR. Economic cooperation in around 60 countries requires some central planning between a number of jurisdictions with China as primus motor. It will manifest China as a Great Power on the international stage. A Great Power is an actor which according to Arase has “the ability to determine the nature of international order”.<sup>100</sup> This is where China can take an important part in defining and reshaping rules of laws at transnational and international level. China has officially promoted transnational rule of law. At a UN General Assembly Session, the representative of China, Mr. Wang, suggested that

“in an increasingly globalized world, the international community should facilitate the promotion of the rule of law at the national and international levels, allowing them to inform and complement each other (...) [and] “there was a need to take into account individual States’ specificities while upholding universal principles”<sup>101</sup>

A transnational rule of law should then avoid conflict with the legal and political systems it enters into and instead keep harmony between the systems. Thus the specific cultural, economic, and political differences between the systems, where in particular human rights can be an issue, must be balanced by the transnational rule of law. The question is how far rule of law can take such differences. As mentioned above, rule of law should not be detached from certain values in order to have a minimum level of effectiveness.

### China: Soft and Hard Approaches to International Law and Relations

China adheres to the “Five Principles of Peaceful Co-Existence” which are mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, and peaceful

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<sup>99</sup> See about the WTO rule of law; Henrik Andersen, China and the WTO Appellate Body's Rule of Law, *Global Journal of Comparative Law* 5 (2016) 146

<sup>100</sup> David Arase, China's Two Silk Roads Initiative – What It Means for Southeast Asia, *Southeast Asian Affairs*, (2015) 25 at 28

<sup>101</sup> The Sixth Committee of the 66th session of the un General Assembly (Item 83: The rule of law at the national and international levels), 5th meeting, 5 October 2011, A/C.6/66/sr.5, Para. 44 and 45

coexistence. The five principles originated in the Soviet Communist vocabulary in the 1920s and were codified in a treaty between China and India in 1954. The principles caused some debate between Western and Eastern states as the Soviet Union wanted the principles to be incorporated into the UN system. The question was what the principles contained and whether peaceful coexistence was rather “a balance of peace through strength.”<sup>102</sup> In 1970, the UN General Assembly, after years of considerations of form and content, adopted the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* which reflects the Five Principles of Peaceful Co-Existence.<sup>103</sup> China has consistently referred to the Five Principles of Peaceful Co-Existence in its international relations in the last 60 years. They form the core framework which cannot be derogated from in the international relations.<sup>104</sup> They are in some way part of international law but the question is how to conceptualise them. It is important to bear in mind that the East-West Cold War era is changed today and thus the principles must be understood in their contemporary context.<sup>105</sup> Where China on the one side stands strongly on those basic pillars, China on the other side demonstrates flexibility by the high engagement in international law, in particular in the WTO, and by complying with international law and by importing principles from other systems into China. For example, China has to a large degree changed and strengthened its judicial system as part of its WTO commitments.<sup>106</sup>

The Five Principles of Peaceful Co-Existence will play an important part in the OBOR plans. They were mentioned by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China in their statement concerning OBOR:

“The Belt and Road Initiative is in line with the purposes and principles of the UN Charter. It upholds the Five Principles of Peaceful Coexistence: mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence”<sup>107</sup>

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<sup>102</sup> Russell H. Fifield, The Five Principles of Peaceful Co-Existence, *The American Journal of International Law*, 52 (3) (1958) 504 at 509

<sup>103</sup> UN General Assembly Resolution 2625(XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625. The Declaration considers the following principles: The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; The duty of States to co-operate with one another in accordance with the Charter; The principle of equal rights and self-determination of peoples; The principle of sovereign equality of States; The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

<sup>104</sup> See Ella Gorian and Kristina Gorian, Chinese Conception of International Law as the Response to the challenges of Today, *Mediterranean Journal of Social Science*, 6 (3) (2015) 236-240.

<sup>105</sup> However, there are recent events in Europe with EU countries on one side and Russia on the other side which seem to cause increased tensions between them, like the Crimean Crisis of 2014.

<sup>106</sup> Accession of the People's Republic of China, of 23 November 2001, WT/L/432

<sup>107</sup> Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, 2015/03/28, Issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, March (2015), part II: Principles.

With that basic framework, China will exercise its soft power. Where ‘power’ from a European perspective will refer to the ability to change behaviour or attitude of someone else, the concept of ‘power’ is in Chinese philosophy related to morality where, from a Confucian perspective, the morality from within will provide a strong outside power.<sup>108</sup> Thus soft power is the ability to change behaviour of other states without exercising hard power like political, legal or economic pressure. It is dialogue-based instead of conflict-based. Where China will take a hard line on territorial issues, it will take a soft approach when it comes to creating win-win situations with OBOR and international trade. There is the pragmatic element; China gains economic and diplomatic advantages, but there is also the idea of attempting higher level of harmony among all participants without imposing the Chinese system on others and in particular without overstepping territorial boundaries.

The OBOR rule of law challenges must be seen in context of the soft and hard power oriented Chinese policies. The economic OBOR cooperation is from a Chinese angle best served with a policy-led trade facilitation with diplomatic solutions to disputes in contrast to a European approach with binding rules and dispute settlement system.<sup>109</sup> According to Arase, the key principles for governing OBOR will be 1) bilateral agreements and reciprocity, 2) protection of “the principles bottom line” (yuanze dixian) which are Chinese core interests, i.e. protection of its political system with a strong and authoritative CPC and its hard approach to state sovereignty, and 3) an international rule of law to avoid arbitrary state power and to ensure compliance with bilateral agreements.<sup>110</sup> As mentioned above, OBOR will not only establish institutions for the specific OBOR purposes, but OBOR will also step into already established institutions with emerging rules of law. If those established institutions form a hard frame of economic, political and legal commitments, China can exercise its soft power within those frames. For example, in the WTO Dispute Settlement System China intervenes as third party providing its suggestions on legal interpretation, which in my view is a soft approach, in contrast to the cases where China is involved as one of the disputants. Thus a WTO rule of law can be influenced both through the soft and hard channels. However, the question is whether OBOR will establish other dispute settlement mechanisms to handle issues which cannot be resolved through diplomatic channels and which are not already established in the existing multilateral frameworks.

One issue which can lead to some differences of opinion between China and Europe is human rights. For example, OBOR will require millions of workers performing in the construction sector. However, it will be problematic if OBOR opens up for mistreatment of workers as, for example, the forced labour-like conditions for migrant workers in Qatar in the preparation for the FIFA World Cup 2022.<sup>111</sup> On one side, China wants to comply with the UN Charter and its international obligations which includes human rights, although they are not clearly defined.

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<sup>108</sup> Yiwei Wang, Public Diplomacy and the Rise of Chinese Soft Power, *The Annals of the American Academy of Political and Social Science*, (Special issue; Public Diplomacy in a Changing World) 616 (March, 2008) 257 at 263.

<sup>109</sup> David Arase, China’s Two Silk Roads Initiative – What It Means for Southeast Asia, *Southeast Asian Affairs*, (2015) 25 at 33

<sup>110</sup> David Arase, China’s Two Silk Roads Initiative – What It Means for Southeast Asia, *Southeast Asian Affairs*, (2015) 25 at 34

<sup>111</sup> See UN General Assembly, Human Rights Council, Twenty-sixth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Qatar, A/HRC/26/35/Add.1 of 23 April 2014

There are treaty obligations in ICESCR and overall commitments in the UN Charter and indirectly human rights obligations as interpretative context for other treaties, but on the other side, the CPC wants to provide guidance to lawyers defending their clients about application of human rights in order to avoid criticism. It must as a rule of law minimum be expected that China complies with its treaty obligations under international law. The question is what requirements to human rights OBOR will have and whether a soft or hard approach will be taken. If the aim is not to interfere into other states internal affairs by following the Five Principles of Peaceful Coexistence, it should, both from a moral and legal hard perspective, be required that the international human rights are complied with in order to follow both the UN Charter's abstract human rights requirements as well as complying with rule of international law. However, hard and soft approaches should not be considered as two diametrically opposites. The hard and soft approaches can complement each other; where law provides the frame for rights and obligations, it is not unchangeable. Law is changed through negotiation and through its application as the world changes. Even if a soft approach is taken towards OBOR, there will still be some hard points of reference, like existing law, The UN Charter and China's Five Principles of Peaceful Co-Existence. Thus the soft works in the hard, and the hard works in the soft. States involved with OBOR can be influential on suggesting that they will comply with international human rights and international labour standards – in this case their treaty obligations as a minimum. A harder line through legal, political or economic pressure concerning OBOR and its expected trade benefits should be adopted if it shows that the states do not comply with their legal commitments. Otherwise market uncertainties may be created to the detriment of the OBOR aims of highly efficient allocation of resources and integration of markets. In addition, non-compliance will be a violation of the OBOR aim of common ground between the different civilizations. But there can be different ways to communicate a hard approach where it can be fruitful as a starting point to approach violations of law in an informal manner in order to avoid public embarrassment. If that does not change anything, a harder approach should be adopted as OBOR otherwise may lose credibility for investors and may appear weak by not protecting the legal expectations through rule of law.

### **The Transnational and International OBOR Rule of Law Challenges**

Even though soft approaches might be a starting point for OBOR disputes, it seems impossible not to involve courts and the harder legal approaches. OBOR involves questions concerning comparative law, transnational law, and international law and it will involve both private and public parties in a web of contracts, joint ventures, public-private partnerships etc. as well as new and already existing bilateral and multilateral agreements between states. From a rule of law perspective, a number of issues may arise. Different understandings of rule of law in functional communities, like the UN, WTO, ILO etc., and between states may in the first place be a core issue as it is decisive for the balance between law and politics and for the legal expectations of the private and public participants in OBOR. The strength of rule of law differs between the various states and functional communities involved in OBOR. Thus comparative approaches to rule of law must be carried out as a strong rule of law will provide a strong protection of law against arbitrary decisions compared to a weaker one and will be a benefit for the agents on the market. A transnational rule of law can strengthen the weaker systems and, as mentioned above, China has advocated for transnational rules of law. The idea of transnational rule of law could be an important part of OBOR.

The various participating parties in OBOR will face a number of rule of law challenges in their cross-border activities. A contract between a party in China and a party in Europe can be called into question for various issues. There will be questions of jurisdiction and enforcement of other jurisdictions' decisions and there will be questions concerning choice of law. In pure intra EU affairs, such issues are resolved through treaties. The Brussel I Convention and the Lugano Convention concern jurisdiction in civil and commercial matters and enforcement of judgments from participating states.<sup>112</sup> Enforcement of judgments from non-parties to Brussels I and Lugano is left to national law.<sup>113</sup> It is similar in China, where enforcement of judgment from other jurisdictions is regulated in the Civil Procedure Law 2012.<sup>114</sup> The Civil Procedure Law 2012 also stipulates that Chinese courts have jurisdiction to handle cases concerning contract or property with foreigners if; "the contract is signed or performed within the territory of the People's Republic of China, or the object of the action is within the territory of the People's Republic of China, or the defendant has detainable property within the territory of the People's Republic of China, or the defendant has its representative agency, branch, or business agent within the territory of the People's Republic of China, may be under the jurisdiction of the people's court located in the place where the contract is signed or performed, the subject of the action is located, the defendant's detainable property is located, the infringing act takes place, or the representative agency, branch or business agent is located."<sup>115</sup>

In respect of arbitration, the New York Convention, which China and most European States are parties to, requires that its Members give effect and recognize arbitration awards from other Member States. Even though the New York Convention has been a success, different legal approaches by different jurisdictions and, in the case of China, inappropriate intervention by the SPC, have caused legal uncertainties,<sup>116</sup> and it has been criticised in literature that Chinese courts reject foreign arbitration awards if the disputing companies, although with owners from different states, are both registered in China.<sup>117</sup> The SPC issued in 2015 an opinion concerning OBOR which also referred to international arbitration. It stated that it would promote the use of international commercial and maritime arbitration and that it would promote the use of the New York Convention in the judicial system to recognize foreign arbitration awards. In

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<sup>112</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 28 March 2007, where contractual parties have autonomy to decide the jurisdiction. If nothing is agreed, it will be in the courts for the place of performance of the obligation in question.

<sup>113</sup> For example, in the UK, recognition and enforcement of foreign judgments is based on common law unless specifically regulated in statutory law like the Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933. See more about the UK in C. M. V. Clarkson and Jonathan Hill, *The Conflicts of Law*, (Oxford: Oxford University Press, 2011), 4<sup>th</sup> edition.

<sup>114</sup> It is based on either bilateral treaties between China and other states or on the principle of reciprocity, cf. Art. 281 of the Civil Procedure Law of the People's Republic of China (2012), SCNPC, 31 August 2012.

<sup>115</sup> Art. 265.

<sup>116</sup> Jian Zhou, Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts, *Pacific Rim Law & Policy Journal*, 15 (2) (2006) 403.

The New York Convention is applied by Chinese Courts. See for example a recent case concerning the enforcement of Glencore's arbitration award against a Chinese seller where the Ningbo Intermediate People's Court refused the Chinese seller's claim that the London Court of International Arbitration had made procedural errors; Ningbo Intermediate People's Court, [2014] ZYZQZ no.1, 24 June 2016.

<sup>117</sup> Jian Zhou, Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts, *Pacific Rim Law & Policy Journal*, 15 (2) (2006) 403; Weidong Zhu, The Recognition and Enforcement of the Foreign Arbitral Awards "with No Foreign Element" in China, *Journal of International Arbitration*, 32 (3) 2015 351.

addition, the SPC stated that lower courts should limit the range of cross-border contracts being declared invalid and that it would improve the enforcement of judgments from foreign jurisdictions by extending the principle of reciprocity.<sup>118</sup>

Besides questions concerning jurisdiction and enforcement, the courts and arbitrators must handle questions about choice of law. In Europe, Rome I Regulation concerns contract and Rome II Regulation concerns non-contractual obligations.<sup>119</sup> In respect of conflict of law of contract, Rome I Regulation has universal application which means that if a court in Europe has to handle a case between a Chinese and an Egyptian party, the Rome I Regulation must be used to decide the law governing the contract.<sup>120</sup> In China, the NPCSC adopted in 2010 the Law on the Application of Law for Foreign-Related Civil Legal Relationships of the People's Republic of China which regulates all conflict of law matters in civil cases.<sup>121</sup> China is also party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) together with 84 other states<sup>122</sup> and it must be assumed that CISG – or principles from CISG – can be applied between private parties concerning commercial goods and products.<sup>123</sup> However, there can be cultural differences concerning “contract” where a European approach takes a contract as a binding, final document with rules governing amendments whereas a Chinese approach is that the contract is to be filled out and where difference in opinion is a matter of negotiation instead of litigation.<sup>124</sup>

OBOR will also cross into international organizations and their dispute settlement. In the complex picture of international law, there are various international courts with different mandates. To start with the ICJ; Under Art. 93 of the UN Charter, all UN Members are parties to the ICJ. However, the state consent is fundamental for the ICJ. There is no jurisdiction unless the disputing parties have given their consent. Some do that multilaterally, for example in the Pact of Bogota (1948)<sup>125</sup> or the European Convention for the Peaceful Settlement of Disputes (1957)<sup>126</sup> or unilaterally by an optional clause.<sup>127</sup> States like China and France are not bound by the ICJ unless they give their consent in specific cases. However, as China is bound by the WTO Dispute Settlement System, it will indirectly accept ICJ case law as WTO panels and

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<sup>118</sup> Supreme People's Court Monitor, Supreme People's Court and “One belt One Road”, July 14, 2015; <https://supremepeoplescourtmonitor.com/2015/07/14/supreme-peoples-court-and-one-belt-one-road/> (retrieved on 3 August 2016)

<sup>119</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

<sup>120</sup> See Art. 2 of the Rome I.

<sup>121</sup> Guangjian Tu and Muchi Xu, Contractual Conflicts in The People's Republic of China: The Applicable Law in the Absence of Choice, *Journal of Private International Law*, 7 (1) 2011 179. See about conflict of law concerning contracts in Art. 41 of the Law on the Application of Law for Foreign-Related Civil Legal Relationships of the People's Republic of China (2010), NPCSC, 28 October 2010

<sup>122</sup> The UK is not a party to CISG.

<sup>123</sup> CISG does not apply to sales of stocks, shares, investment securities, negotiable instruments or money and of ships, vessels, hovercraft or aircraft, CISG Art. 2.

<sup>124</sup> Roman Tomasic, Globalization, Legal Culture, and the Handling of Sino-Australian Commercial Disputes, *Chinese Journal of Comparative Law*, 4 (1) (2016) 149 at 156

<sup>125</sup> American Treaty on Pacific Settlement (Pact of Bogota), A-42, Signed at Bogotá, April 30, 1948, Art. V and Art. XXXI.

<sup>126</sup> European Convention for the Peaceful Settlement of Disputes, ETS No.023, Strasbourg, 29/04/1957, Art. 1.

<sup>127</sup> See Art. 36(2) of the Statute of the ICJ.

Appellate Body refers to ICJ case law as part of their methodology.<sup>128</sup> Even though China has had reservations towards courts on international level, China is very active in WTO Dispute Settlement. Not only as a disputing party but China will in most cases, where China is not a disputing party, reserve the third party right to influence on the case.<sup>129</sup> WTO panels and AB have also referred to other international dispute settlement institutions as part of their methodological approach to WTO law, like ICSID.<sup>130</sup> For example, in *US – Stainless Steel (Mexico)*,<sup>131</sup> the AB referred to *Saipem S.p.A. v. The People's Republic of Bangladesh* in support of its role to provide certainty in law, where the ICSID Tribunal had stated about its own role that:

“It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law”<sup>132</sup>

Thus, rule of law is developed through various dispute settlement mechanisms on international level. Where China influences on WTO Dispute Settlement, WTO Dispute Settlement brings indirectly the evolvement of international rules of law by the ICJ and other international tribunals to China through its decisions.

Besides the binding nature of WTO Dispute Settlement, China is bound by the Arbitral Tribunals established under the United Nations Conventions on the Law of the Sea (UNCLOS).<sup>133</sup> However, in *Philippines – China*,<sup>134</sup> China rejected the mandate of the Arbitral Tribunal as it, according to China, handled territorial issues outside its jurisdiction. In addition, China claimed that the dispute should be handled through negotiation as stipulated in bilateral agreements between China and the Philippines. Nevertheless, the proceeding continued and on 12 July 2016, the Permanent Court of Arbitration issued an arbitration award which mostly favoured the Philippines’ arguments. China rejected the award and upheld its argument that the arbitral tribunal had acted beyond its mandate as the case concerned territorial issues which are

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<sup>128</sup> See for example *EC – Tariff Preferences*, WT/DS246/AB/R, adopted on 20 April 2004, footnote 220; *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, adopted on 20 May 2008, footnote 308; *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted on 19 January 2010, footnote 705.

<sup>129</sup> Henrik Andersen, China and the WTO Appellate Body’s Rule of Law, *Global Journal of Comparative Law* 5 (2016) 146.

<sup>130</sup> See for example the Panel in *China – Rare Earths*, WT/DS431, 432, and 433/R, adopted on 29 August 2014 with corrections by the AB, para. 7.319, where the Panel referred to the ICSID Arbitration Tribunal, Award on Merits, *MTD Equity Sdn. Bhd. And MTD Chile S.A.*, ICSID CASE NO. ARB/01/7, to substantiate its interpretation of the terms “fair” and “equitable”.

<sup>131</sup> *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, adopted on 20 May 2008, footnote 313.

<sup>132</sup> ICSID Arbitration Tribunal, Case No. ARB/05/07, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID IIC 280 (2007), p. 20, para. 67

<sup>133</sup> See Art. 287 of UNCLOS which stipulates that a Member is free to choose the particular means of peaceful settlement, including the ITLOS by declaration. As China has not made such declaration, it will automatically be Arbitral Tribunal which will settle the issue.

<sup>134</sup> *The Republic of the Philippines v The People’s Republic of China (South China Sea Arbitration)*, PCA Case N° 2013-19, Award by the Arbitral Tribunal on 12 July 2016.

beyond the scope of UNCLOS.<sup>135</sup> The Chinese argument has found support in literature.<sup>136</sup> However, the case illustrates one of the challenges with international rules of law; 1) if states do not accept a court does it render international law ineffective from a rule of law perspective? 2) how does the international law system ensure check-and-balances of the international courts or arbitral tribunals? Those questions are relevant to ask as the OBOR programme is taking form and as it progresses. It is from a rule of law perspective unacceptable if OBOR does not provide efficient dispute resolution mechanisms at all levels and all sectors of OBOR. Dispute resolution mechanisms might vary in OBOR depending on the specific sector and issue where some are more flexible than others.<sup>137</sup> The main point is that all parties involved in OBOR should know in advance what to expect should a dispute occur. That requires that law can be effective and that a check-and-balance system applies to institutions involved in settling disputes. It might not be sufficient to just let states exercise their influence and power to control dispute settlement as there is a risk that those institutions only will reflect the views of the most powerful states, in contrast to a soft approach, and that a state can veto against a decision from a court if that court has been accepted in the first place to handle disputes with a clearly defined mandate and jurisdiction.<sup>138</sup>

Where China is forming its international policy on the Five Principles of Peaceful Integration, we must understand those principles in light of China's international obligations which China wants to honour. China accepts and complies with the rulings of the WTO panels and Appellate Body.<sup>139</sup> The core of those issues are trade-related, and may conform with the economic goals of China, but there are spill-over effects as environment, human health, animal protection, public morality etc. are part of the issues raised in the WTO Dispute Settlement System.<sup>140</sup> Those spill-over effects may cause rule of law developments in other regimes or other regimes may influence on WTO law as mentioned above with the ICJ and ICSID. OBOR will involve a number of sectorial issues in respect of trade, environment, labour, human rights, financial and investment law, climate, etc. Its cross into the WTO will result in WTO rule of law developments which may find their way into some of those institutions which will be created as a result of OBOR. That could be third party reviews of alleged OBOR inconsistent national

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<sup>135</sup> It follows from Art. 298 of UNCLOS, a Member can make a declaration where it does not accept compulsory dispute settlement procedures. According to the Declaration "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."

<sup>136</sup> See for a discussion, Shicun Wu (ed) and Keyuan Zou (ed), *Arbitration Concerning the South China Sea: Philippines Versus China*, (Abingdon: Routledge, 2016); Anonios Tzanakopoulos, *Resolving Disputes Over the South China Sea Under the Compulsory Dispute Settlement System of the UN Convention on the Law of the Sea* (April 10, 2016). *The South China Sea Disputes and International Law*, Forthcoming; *Oxford Legal Studies Research Paper* No. 31/2016. Available at SSRN: <http://ssrn.com/abstract=2772659>

<sup>137</sup> As mentioned above, some sectors, like the financial sector, are more soft law oriented than the hard law based, like the WTO.

<sup>138</sup> In the GATT system, all GATT Members had a veto against decisions from the dispute settlement system. That was changed with the establishment of the WTO and the introduction of the Dispute Settlement Body where a rejection of a decision requires full consensus from all the WTO Members.

<sup>139</sup> Henrik Andersen, *China and the WTO Appellate Body's Rule of Law*, *Global Journal of Comparative Law* 5 (2016) 146 at 168

<sup>140</sup> See about neo-functionalism and its spill-over effects; Stone Sweet, Alec and Sandholtz, Wayne, *Neofunctionalism and Supranational Governance* (April 6, 2010). Available at SSRN: <http://ssrn.com/abstract=1585123> or <http://dx.doi.org/10.2139/ssrn.1585123>. Retrieved on 31 July 2016.

law, development of legal predictability, harmonious approaches to issues concerning overlapping values, and by upholding law over economic factors.<sup>141</sup>

### **Final Thoughts on OBOR Rule of Law Challenges**

OBOR will carry out the Chinese dream of a Eurasian cooperation facilitating trade, exchange of culture etc. and it will involve public and private parties at national, regional, and international level and will from a legal perspective involve a number of comparative law, transnational law, and international law issues where various legal systems will cross into one another. The question is which rule of law will apply. As mentioned above, rule of law has different dimensions and is applied at different levels. Rule of law is applied in liberal systems as well as in more authoritarian systems. It is necessary for investors of OBOR to make comparative analyses of those differences. The challenge of the regional and international level is to find the line between state sovereignty, which in itself is a vague concept, and the rule of law. In particular, the role of courts at international level can be a challenge.

The fragmentation of relevant OBOR legal regimes leads to rule of law gaps as it reduces legal certainty and it may cause frustrations for investors if they potentially cannot uphold their contractual or other claims due to weak enforcement.<sup>142</sup> It is necessary to find solutions to such rule of law problems where OBOR should provide some overall framework solutions. It will here be naive to assume that China will continue the gradually increasing involvement with international law and international tribunals without setting its mark on the system. It has done so already in a number of occasions, like the Five Principles of Peaceful Coexistence expressed in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, and China continues its active participation in WTO Dispute Settlement. It is also important to bear in mind that international law itself is not static. It is evolving as the World is changing with different great powers in the system. It is not only states developing international law. International organizations, multinational enterprises and NGOs have their saying in that development. From the European conference based model of international law, it has turned into a more judicialized system with increase in the numbers of international courts, tribunals etc. and certain principles are entrenched in international law. In literature there are debates between supporters of constitutional pluralism, where meta-constitutional principles are developed from national systems as well as from international law but with deference to the respective regimes' and states' constitutional limits,<sup>143</sup> in contrast to legal pluralism which suggest a fragmented picture of international law with political solutions to conflicts.<sup>144</sup> China

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<sup>141</sup> Henrik Andersen, China and the WTO Appellate Body's Rule of Law, *Global Journal of Comparative Law*, 5 (2016) 146 at 161-181.

<sup>142</sup> See also Ernst-Ulrich Petersmann, *International Economic Law in the 21<sup>st</sup> Century*, (Oxford: Hart Publishing, 2012) p. 59.

<sup>143</sup> N. Walker, The Idea of Constitutional Pluralism, *The Modern Law Review* 65 (3) (2002) 317; A. Stone Sweet, Constitutionalism, Legal Pluralism, and International Regimes, *Indiana Journal of Global Legal Studies*, 16 (2) (2009) 621; E. U. Petersmann, International Economic Law, 'Public Reason', and Multilevel Governance of Interdependent Public Goods, *Journal of International Economic Law*, 14 (1) (2011) 23

<sup>144</sup> N. Krisch, 'The Case for Pluralism in Postnational Law', in G. de Búrca & J. H. H. Weiler, (eds), *The Worlds of European Constitutionalism*, (Cambridge: Cambridge University Press, 2012) 203; M. Koskeniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law* 15 (3) (2002) 553

has accepted the framework of the international law model by signing and ratifying a number of treaties in various areas and accepting some international courts, like the WTO Dispute Settlement System and UNCLOS arbitration. China has also stressed that OBOR must comply with the principles of the UN Charter. Thus there is from an international law perspective a constitutional, legal and political barrier which OBOR should not cross and which can provide some minimum legal expectations for OBOR investors although on a general and abstract level. Those expectations relate to enforcement of arbitration awards, inclusiveness in OBOR development, protection of international human rights as ratified by the participating states, treaty compliance by states, respect of territory, compliance with WTO decisions, and upholding rule of law.<sup>145</sup>

Where China will protect the Five Principles of Peaceful Coexistence, those principles must also be understood in its contemporary form. Even though there will be strong emphasis of the power of the CPC and with protection of the group over the individual, China has still undergone a number of changes towards a more legal-oriented system with judicial reforms and with increased human rights instruments in both Constitution and law, and is – as mentioned above – in the process of strengthening the use of international commercial and maritime arbitration and the use of the New York Convention to recognize foreign arbitration awards.

It is possible to find rule of law solutions even though rules of law might have inherent elements which overlap with one another in a transnational and multilevel system of rules of laws. It is in that situation that deference of respective constitutional limits must be recognized and where harmonious solutions should be sought but at the same time it must be expected that states comply with their international obligations. An example is the abovementioned *Kadi* case where the ECJ found a solution harmonizing a potential overlap between rule of law principles. One was to protect the individual's fundamental rights. Those were treaty based in EU law and thus should be upheld in order to comply with rule of law. The other was to comply with the UN Charter and the Security Council Resolution. If the ECJ had rejected the Security Council, it would have violated another level of rule of law. Instead the ECJ provided the relevant institutions the possibility to bring the secondary EU act into conformity with the treaty based fundamental rights and at the same time be in conformity with the Security Council Resolution. As China has recognised and codified "rule of law" as a fundamental constitutional principle of the Chinese political, administrative and judicial system, China and Europe share a common concept with both similar and different meanings. Focus should first of all be on what is shared – thereafter a look at the differences. Through the differences, it is possible to develop the concept of rule of law even further in the OBOR relations. Rule of law will be an abstract principle and thus will have room for different political approaches. In addition, the application of rule of law will differ between the respective sectors, where some sectors have more soft law based approaches with wider flexibility, like the financial sector, compared to the hard law oriented sectors, like the trade sectors. However, as mentioned above, in my opinion there are some fundamental aspects of rule of law which must be present and which form the lowest level of its conceptual and legitimate basis and which should be fundamental in the

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<sup>145</sup> See also different approaches and discussions concerning constitutionalization of international law; Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century*, (Oxford: Hart Publishing, 2012) with a high level of citizen participation in a bottom-up model in contrast to a more authoritarian and group-oriented proposal by Tao Li and Zuoli Jiang, Does China follow the West? A Perspective of State-Citizen Interaction in Foreign Trade Governance, *Baku State University Law Review*, 2 (2) (2015-2016) 177.

development of OBOR in order to overcome potential rule of law challenges. If individuals participating at any level of OBOR cannot have access to justice if legal obligations or fundamental rights have been violated, the incentive to participate may decline. If China wants to be a great power, it should through OBOR inspire the OBOR participants to find rule of law solutions to reduce the rule of law gaps which will be beneficial for the market participants.

What can be asked in respect of OBOR is; will there be rule of law requirements on those states which will benefit from OBOR? What role will human rights and labour rights, which are codified in a number of different international treaties but not all with universal acceptance, have in OBOR, like equality before law,<sup>146</sup> rights to access justice and fair trial,<sup>147</sup> non-discrimination between men and women in the work place,<sup>148</sup> non-acceptance of forced labour,<sup>149</sup> and health and safety standards at the workplace?<sup>150</sup> Can participating companies protect their legal expectations through rule of law, like enforcement of contract,<sup>151</sup> non-discrimination in public procurement,<sup>152</sup> protection against anticompetitive behaviour?<sup>153</sup> Those questions will require independent third party institutions to handle those legal issues which cannot be solved through negotiation or where there is uneven negotiating power between the disputing parties. They will require counter measures against corruption in the political system,<sup>154</sup> and they will require that law can be enforced.

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<sup>146</sup> Art. 26 of ICCPR.

<sup>147</sup> Art. 14 of ICCPR.

<sup>148</sup> Art. 3 and Art. 6 of the ICESCR; Art. 2 of the ILO 1998 Declaration on Fundamental Principles and Rights at Work; ILO Equal Remuneration Convention, 1951 (No. 100), Adoption: Geneva, 34th ILC session (29 Jun 1951); ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Adoption: Geneva, 42nd ILC session (25 Jun 1958).

<sup>149</sup> Art. 8 of ICCPR, Art. 2 of the ILO 1998 Declaration on Fundamental Principles and Rights at Work; ILO Forced Labour Convention, 1930 (No. 29), Adoption: Geneva, 14th ILC session (28 Jun 1930); Abolition of Forced Labour Convention, 1957 (No. 105), Adoption: Geneva, 40th ILC session (25 Jun 1957); ILO Worst Forms of Child Labour Convention, 1999 (No. 182), Adoption: Geneva, 87th ILC session (17 Jun 1999).

<sup>150</sup> Art. 7 of ICESCR.

<sup>151</sup> See above about private international law issues and enforcement of judgments in other states.

<sup>152</sup> Non-discrimination is fundamental in public procurement. See for example Art. IV of the WTO Revised Agreement On Government Procurement, Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113) which China has observer status to but is not party. See also the preamble of the United Nations Commission on International Trade Law (UNCITRAL) Model on Public Procurement (2011), (United Nations document, A/66/17, annex I, adopted by UNCITRAL on 1 July 2011). See also the Core Procurement Principles of the World Bank Policy, Procurement in IPF and Other Operational Procurement Matters, OPSVP 5.05-POL.144, 28 June 2016.

<sup>153</sup> There is no overall international competition law. However, there are on a general level some direct or indirect competition law requirements. For example, in the WTO General Agreement on Trade in Services, it is provided in Art. IX that a WTO Member may enter into consultation with another WTO Member if there are business practices from service providers which are restraining competition. The Organization for Economic Co-operation and Development (OECD) has produced a number of recommendations concerning competition. See for example OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels, 25 March 1998 - C(98)35/FINAL, or about cooperation between national competition authorities; OECD Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings, As approved by Council on 16 September 2014 [C(2014)108]. Hard law prohibition of anticompetitive behaviour is mostly regulated at regional and national level, like Art. 101 and Art. 102 of the Treaty on the Functioning of the EU, and in the Anti-Monopoly Law of the People's Republic of China, NPC 30 August 2007.

Anticompetitive behaviour can also be bid rigging in government procurement. See for example; Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement, approved by Council on 17 July 2012, [C(2012)115 - C(2012)115/CORR1 - C/M(2012)9].

<sup>154</sup> See for example the United Nations Convention against Corruption, General Assembly Resolution 58/4 of 31 October 2003, A/RES/58/4; and OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on 21 November 1997.

