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PART IV

EU International Agreements
in Uncertain Times



Social and Legal Relevance of Sincere Cooperation in EU External Relations Law in an Era of Expanding Trade

The Belt and Road Initiative in Context

ELAINE FAHEY* AND JULIJA BRSAKOSKA BAZERKOSKA**

I. Introduction

The complexity of the EU in the international legal order entails that arriving at an EU position does not arise from happenstance. Proof of a failure of unity, a lack of cooperation, a lack of participation and so on does not necessarily arise easily. The Court of Justice has provided for a notoriously broad definition of sincere cooperation to dominate the core and periphery of EU action across the board.¹ This ‘lightly’ legalised understanding of conduct increasingly takes place against extraordinarily backdrops – departing Member States or increased negotiation of agreements with third countries using soft law only.² It is commonly considered that joint participation³ and the many legal principles surrounding Member State action are in fact heavily legalised or simply just *legal* concepts, rules and ideas and their attendance proof, evidence and causality.⁴ They are framed as contestation or isolated disputes. In reality, there is a

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¹Case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462; Case C-246/07 *Commission v Sweden* ECLI:EU:C:2010:203; Case C-355/04, *Segi and Others v Council* ECLI:EU:C:2007:116.

²Ramses A Wessel, ‘Normative Transformations in EU External Relations: the Phenomenon of “Soft” International Agreements’ (2020) 44 *West European Politics* 72.

³In cases when the EU and its Member States are jointly participating in negotiations, or as members of international agreements or international organisations, the duty of sincere cooperation mainly represents the Member States obligation to remain silent in order not to undermine the EU position. In other cases, when the EU cannot be represented on the international arena, it is the duty of the Member States to sincerely cooperate and to represent actively the EU position internationally.

⁴See Andres Delgado Casteleiro, ‘No More Mr. Nice Guy: the Evolution of the Duty of Sincere Cooperation in EU External Relations Law’, in Javier Diez-Hochleitner and others, *Recent trends in the case-law of the Court*

distinctly law-light dimension to sincere cooperation where rules, if they are that, are often more regarded in their breach. The chapter will examine how much EU Member States increasingly disrespect the duty of cooperation within trade and at its margins by focussing upon its most complex international opponent and potential partner, China and its Belt and Road Initiative (BRI).

The Belt and Road Initiative (BRI) of China is understood to constitute a law-light, institution-light, treaty-light ‘top-down’ non-institutionalised form of globalisation, differing from the EU’s globalisation through institutionalisation in ‘bottom-up’ structures at the core of the EU’s deep and comprehensive post-Lisbon trade agreements.⁵ It has thrived upon soft law instruments and a lack of ‘hard’ treaty power and institutional structure.⁶ Instead, it relies on processes *outside* of traditional frameworks for the protection and promotion of investments, eg heavily conditional loans and adopts approaches which are a-legal such as disregarding local labour and environmental laws.⁷ As a result, it might be said that any EU Member State engagement with the BRI is on its face contrary to EU commitments to good global governance and the commitments to upholding international law in Article 21 TEU. EU Member State engagement with the Belt and Road Initiative (BRI) of China is, as a result, highly significant, particularly in the wake of EU-China agreement in principle on investment⁸ in late 2020. It is also a key study of joint participation, sincere cooperation and the ostensible irrelevance of EU action. The BRI is *not* an international organisation yet in its scale, span and

of Justice of the European Union (La Ley 2012); Joris Larik, ‘Pars Pro Toto: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity’ in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018); Marise Cremona, ‘EU Treaty-Making after the Lisbon Treaty – A Test Case for Mutual Sincere Cooperation?’ in Jenő Czuczai and Frederik Naert (eds), *The EU as a Global Actor, Bridging Legal Theory and Practice, Liber Amicorum in Honour of Ricardo Gosálbo Bono* (Brill Nijhoff 2017); Peter Van Elsuwege, ‘The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations’ in Marton Varju (ed), *Between Compliance and Particularism* (Springer 2019).

⁵Julien Chaisse and Jamieson Kirkwood, ‘Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty’ (2020) 23 *Journal of International Economic Law* 245; Benedict Kingsbury, ‘Infrastructure and InfraReg: on Rousing the International Law ‘Wizards of Is’ (2019) 8 *Cambridge International Law Journal* 171; Mark Wu, ‘Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System’ (2017) RTA Exchange International Centre for Trade and Sustainable Development and Inter-American Development Bank, <https://perma.cc/KHM9-33U>; Julien Chaisse and Jędrzej Górski, *The Belt and Road Initiative: Law, Economics and Politics* (Koninklijke Brill 2018); Chi He, ‘The Belt and Road Initiative as Global Public Good: Implications for International Law’, in Wenhua Shan, Kimmo Nuotio and Kangle Zhang (eds), *Normative Readings of the Belt and Road Initiative* (Springer 2018); Giuseppe Martinico, ‘Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative’ in Giuseppe Martinico and Xueyan Wu, *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* (Palgrave Macmillan 2020); Sten Idris Verhoeven, ‘EU Legal Obstacles to the Belt and Road Initiative: Towards a China-EU Framework on the Belt and Road Initiative’ in Francisco José B S Leandro and Paulo Afonso B Duarte (eds), *The Belt and Road Initiative* (Palgrave Macmillan 2020). Although see Mingjiang Li, ‘The Belt and Road Initiative: Geo-economics and Indo-Pacific Security Competition’ (2020) 96 *International Affairs* 169 on the role of Chinese officials.

⁶Chaisse and Kirkwood (n 5); Martinico (n 5).

⁷Matthew Steven Erie, ‘Chinese Law and Development’ (2020) 61 *Harvard International Law Journal*, forthcoming; Sonia Rolland and David Trubek, *Emerging Powers in the International Economic Order* (CUP 2019) 196; Fleur Johns, *Non-legality in International Law: Unruly Law*, (CUP 2013).

⁸European Commission, ‘EU and China Reach Agreement in Principle on Investment’ (30 December 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541?mc_cid=51ec175ba0&mc_eid=d59f683373. See below xx



ambitions increasingly is impacting upon global and EU understandings of international law, regions and nation states vis-à-vis China and so it has a heightened relevance for the study of joint participation as a result.

This chapter explores the ironies, margins and outer limits of joint participation between the EU and the Member States in the context of the BRI. Joint participation is argued here to be chronically under-enforced and creates unnecessary power imbalances. Its case law favours repeat players or erratically tracks core competences; the EU is disincentivised from litigating; and informally also irrationally.⁹ Case law on enforcement of joint participation is largely centred around ‘repeat players’, is rarely enforced and only where it bears upon more integrated competences or extraordinary levels of conflict. There is a severe lack of case law, which hampers serious analytical work upon the subject as an ordinary area of EU law. Where such case law exists, its precedential status is perhaps questionable. For instances, the decision of the Grand Chamber in *Germany v Council (OIV)* grants considerable powers to the EU to ‘develop’ itself in international organisations and act so as to protect its *acquis* where the EU has no formal status and not all Member States are members – yet where EU law still prevails.¹⁰ This is despite the lack of legal basis in the treaties for joining international organisations and internationalisation. This legalisation of a de facto delegalised space has developed the intellectual threshold of sincere cooperation there arguably beyond its deserved station.

Critical approaches to EU international relations law are few and far between, a subject of a highly court-centric nature focusing upon the role of the Court. The chapter explores how it is bound up with an extraordinary array of principles from effectiveness, coherence and consistency. The absence of treaty rules on the seemingly grey areas surrounding the boundaries of EU action appears readily deployed by the EU itself. Joint participation state of the art does not capture how trade is increasingly embedded in legal and political ironies as evidenced by the BRI. The BRI is a useful template for critical analysis of the contours of trade with security, investment and development. The broader parameters of EU international relations law are also important to pinpoint – EU international relations are increasingly subject to degrees of informalisation, where soft law or non-binding instruments are used in key EU international relations contexts of controversy, evading scrutiny, judicial review, institutional analysis, and removing citizen scrutiny.¹¹ It is arguably no surprise to see the erosion of the contours of sincere cooperation as a serious legal principle. These informalisation developments take place principally in areas of shared competences, such as migration. However, they pose important challenges to the firmness of judicial control in areas of exclusive competence.

In this regard, the relationship between the Belt and Road Initiative (BRI) and Europe is an important one in the broader scheme of reflecting upon soft law and sincere cooperation in the context of joint participation. China is acknowledged by many as seeking regional influence but lacking experience, deep capital markets, soft power and legitimacy. It has as a result sought to expand its influence through instruments other than

⁹ Eg Case C-399/12 *Germany v Council* ECLI:EU:C:2014:2258, because of agriculture; Case C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345 ECLI:EU:C:2006:345, nuclear.

¹⁰ *Germany v Council* (n 9).

¹¹ Wessel (n 2); Manon Damestoy and Nicolas Levrat’s chapter in this edited volume.

formal international law, principally the Belt and Road Initiative (BRI).¹² The BRI has a strong foothold in Europe and has managed arguably to divide the EU bilaterally and ‘carve up’ the Member States in ways in which no other global power has so managed. The BRI is ultimately a set of domestic policies and economic instruments supported by Chinese domestic institutions and law but devoid of multilateral or bilateral agreements, seemingly contrary to key EU principles of external action. The BRI activities are increasingly harmful, operating to threaten EU unity on human rights activities or thwarting EU negotiations with China.

The chapter will analyse the case of EU Member States joining in the BRI and will further explore whether EU itself should or is likely become a part of the BRI within the framework of joint participation or whether it is in breach of sincere cooperation. It will also argue, that the duty of sincere cooperation should be extended as an example to the future EU Member States from the Western Balkan region and explore these countries behaviour in connection with the BRI.

Section II explores the core of sincere cooperation, section III considers the BRI of China in Europe, section IV assesses the example set by the EU and the Members States engagement with the BRI for the new enlargement in the Western Balkans, while section V focuses on the analysis of the BRI and EU MS breach of sincere cooperation, followed by Conclusions.

II. EU External Representation: On Disintegration

The duty of sincere cooperation as defined in Article 4(3) TEU, as a mutual legal obligation for the EU and its Member States ‘to assist each other in carrying out the tasks which flow from the Treaties’, is especially important in relation to the Union representation in the international arena. This duty is important in those cases where the Member States and the Union have shared competences on the issues that arise in the EU’s external relations. It is essential both for the Union and third parties in international relations to have security in terms of certainty who is the partner on the other side. The obligation of close cooperation in fulfilling the commitments between the Union and the Member States was established by the CJEU. It was developed primarily in Opinion 2/91¹³ that was connected with the ILO and furthermore accomplished in Opinion 1/94.¹⁴ Opinion 1/94 concerning the implementation of the WTO agreements, to which the Community was an original party alongside its Member States, provided that close cooperation between the Member States and Community institutions is essential both in the process of negotiating and concluding the agreements, and in the fulfilment of the commitments entered into.¹⁵ The Court stated that the ‘obligation to

¹² Rolland and Trubek (n 7).

¹³ Opinion 2/91 of the Court of 19 March 1993 ECLI:EU:C: 1993:106.

¹⁴ Opinion 1/94 of the Court 15 November 1994 ECLI:EU:C:1994:384.

¹⁵ See further: Stephen Hyett, ‘The Duty of Cooperation: A Flexible Concept’ in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet and Maxwell 2000); Marcus Klammert, *The Principle of Loyalty in EU Law* (OUP 2014); Christophe Hillion, ‘Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation’ (2009) CLEER Working Papers 2009/2;

cooperate flows from the requirement of unity in the international representation of the Community.¹⁶

The duty of cooperation refers to all stages of external action, starting from negotiation; conclusion and execution of the international obligations either by concluding international treaties or agreeing to decisions of organs of international organisations. When negotiating with another international organisation, the Member States' positions should be coordinated and the coordination between the position of the Member States and the Union needs to be ensured in order to have stronger position. In case the coordination fails and a common position is not achieved, there will be no participation in the negotiations. The requirement of unity in the international representation of the Union is incompatible with individual behaviour of the Member States. When the shared competences are linked and complex, Member States acting alone would usurp Union powers. It might commit the Union under international law, by agreeing to international commitments in Union areas. Therefore, the logical conclusion is that there should be either coordinated action or no action at all.¹⁷ Although it is very important to consider the EU position that is reached in due coordination, the Member States are mainly cautious in this area. Moreover, the Commission does not have any tool to force the Member States to enter into informal inter-institutional arrangements that are aimed at improving the process of coordination. The duty of sincere cooperation in the EU's external relations happens in the complex mix of exclusive, shared, parallel, and sui generis competences in this area. It has been developed in the broader context of the EU continuous support for multilateralism in trade issues and for those reasons it has been challenged in the case of the BRI, which is not an international organisation and rests upon the soft law instruments, and unlike the EU's multilateral approach to international trade, it uses bilateral and state-centric agreements.

A. The CCP 'Core' of Sincere Cooperation

The EU Common Commercial Policy (CCP) has always been the core of its external relations. By negotiating trade agreements with a wide range of partners and by providing unilateral trade preferences, the EU has been promoting its strategic interests, standards, values, as well as its development objectives. The EU is a strong proponent of multilateral trade cooperation in the WTO, but also it has been negotiating bilateral and regional trade agreements. In the past several years it has increasingly linked its trade policy to the pursuit of non-trade external policy goals and values established in the Lisbon Treaty. This was especially reflected in conditioning the preferential access to the EU market with respect for human rights and fundamental freedoms. When the WTO was created back in 1995, soon after the Maastricht treaty entered into force, the CCP

Peter Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in Marton Varju (ed), *Between Compliance and Particularism* (Springer 2019).

¹⁶ Opinion 1/94 (n 14) para 108.

¹⁷ See further: Christiaan Timmermans, 'Organizing Joint Participation of EC and Member States' in Dashwood and Hillion (n 15).

was in the shared competence of both the Community and the Member States. In these complex times, at the beginning of EU's membership in the WTO, there were numerous cases that were raised before the CJEU which questioned the boundaries of the CCP.¹⁸ During that period, these circumstances made sincere cooperation in the area of the CCP more important. However, since the entry into force of the Lisbon Treaty, the CCP falls within the exclusive competence of the EU as a whole. According to Article 2(1) TFEU in cases of exclusive Union competence 'only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts'. With the Lisbon Treaty, the CCP was redefined and its competences include also trade in services, trade-related aspects of intellectual property, and foreign direct investment as integral components.¹⁹

According to Larik,²⁰ although the CCP is under the EU's exclusive competence, it again underlines the future importance of the principle of sincere cooperation in the CCP, especially in the context of the Member States using their right to be part of the WTO on their own, together with the EU. According to the Lisbon judgement of 2009 from the German Federal Constitutional Court, 'there is no need to address whether and to what extent the membership of the Member States of the European Union in the World Trade Organization would no longer exist at the substantive level but only at the institutional and formal level', because 'the Treaty of Lisbon may at any rate not force the Member States to waive their member status'.²¹ According to the German Federal Constitutional Court, 'this particularly applies to the negotiations on multilateral trade relations within the meaning of Article III.2 of the WTO Agreement whose possible future content is not determined by the law of the European Union, and for which a competence of the Member States may therefore emerge in the future, depending on the course of future trade rounds'.²²

At this point in time, there are numerous major challenges in adjusting the global trade to rapid technological changes and the growth of the digital economy; also to adapt it to global problems such as climate change, and at the same time to try and address the universal values on human rights. In this rapidly evolving and uncertain context, both the EU and the WTO need to reposition themselves. The WTO was not designed to address the trade issues in a world of a digital economy. It was intended to be the global forum where countries agree on rules of the game for trade policies and resolve trade disputes. It seems that it failed that task too and that there has been an ongoing crisis of the WTO, with one blow adding to another. Just in the past year, the organisation has been faced with the demise of the Appellate Body, with trade

¹⁸Case C-53/96 *Hermès International v FHT Marketing Choice* ECLI:EU:C:1998:292; Joined Cases C-300/98 and C-392/98 *Dior and Others* ECLI:EU:C:2000:688; Case C-431/05 *Merck Genéricos Produtos Farmacêuticos* ECLI:EU:C:2007:496; Opinion 1/08 of the Court (Grand Chamber) of 30 November 2009 ECLI:EU:C:2009:739.

¹⁹Consolidated Version of the Treaty of Functioning of the European Union (TFEU) [2012] OJ C326/47, art 207(1) TFEU.

²⁰Joris Larik, 'Sincere Cooperation in the Common Commercial Policy: Lisbon, a "Joined-Up" Union, and "Brexit"' in *European Yearbook of International Economic Law* (Springer 2017).

²¹Judgment of the German Federal Constitutional Court (Second Senate) of 30 June 2009, 2 BvE 2/08, para 375.

²²*ibid.*

disputes and with the COVID crisis. The WTO is most visible with the dispute resolution mechanism, which cannot function because the Trump administration refused to renew the judges after 11 December 2019 when the terms of two of the remaining three members of the World Trade Organization's Appellate Body came to an end. With only one member left, the Appellate Body can no longer meet the three-member quorum required to review appeals. This development brings the WTO's dispute resolution mechanism to a standstill, but challenges the rules-based trading system as well. It also raises questions regarding the relevance of multilateral institutions in the current geopolitical environment.²³

The role of the EU in this case, as a long-standing proponent of multilateralism, is to provide leadership to strengthening the existing alliances and building new ones which will contribute to defending the rules-based trading system. This includes an active support for WTO reform and addressing the stalemate in dispute settlement processes. Moreover, it needs to include a range of critical issues, such as addressing the negative spillover effects of subsidies and the behaviour of state-owned enterprises, climate change in line with the Paris Agreement, digitalisation and artificial intelligence.²⁴ The new EU Commission has declared its aims to become a role model for the digital economy, support developing economies in going digital, develop digital standards and promote them internationally.²⁵

Sincere cooperation by the Member States has always been undermined by the geopolitical interests of individual states and the global powers' influence in Europe. The EU has traditionally been a close ally to the US, but after the Trump challenge to global trade and the decision by the Trump administration to revert to 'aggressive unilateralism' and pursue a more protectionist trade policy, this position has been challenged. In this context, trade has become a much higher-profile policy area for the EU. Trade policy is as well a core dimension of the rising concern in the EU regarding the competitive implications of China's industrial policies. While EU's approach in international trade is through multilateralism, it seems that the BRI projects which are financed and carried out by Chinese companies continues to be based on flexible legal instruments that tend to *avoid* multilateral BRI treaties and institutions. As will be outlined below, China's BRI projects are often based on informal, bilateral and state-centred practices.²⁶ Even though the BRI is an inclusive project, its ambiguous institutional and constitutional design creates rule of law gaps to the disadvantage of international trade.²⁷ The Union

²³ More on this issue in: Petros C Mavroidis and others, 'WTO Dispute Settlement and the Appellate Body: Insider perceptions and Members' revealed preferences' (2020) 54 *Journal of World Trade* 667 and Bernard M Hoekman and Petros C Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis' (2019) EUI Working Paper RSCAS 2019/56.

²⁴ San Bilal and Bernard M Hoekman (eds), *Perspectives on the Soft Power of EU Trade Policy* (CEPR Publishing 2019).

²⁵ The Data Strategy and the White Paper on Artificial Intelligence are the first pillars of the new digital strategy of the Commission. The European strategy for data aims at creating a single market for data that will ensure Europe's global competitiveness and data sovereignty. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European strategy for data', 19.2.2020 COM(2020) 66 final; 'White Paper on Artificial Intelligence – A European approach to excellence and trust', 19.2.2020 COM(2020) 65 final.

²⁶ More on this in: Giuseppe Martinico and Xueyan Wu, *A Legal Analysis of the Belt and Road Initiative: Towards a New Silk Road?* (Palgrave Macmillan 2020).

²⁷ Martinico (n 5).

needs to design appropriate responses to international trade conflicts and tensions, a task which is further complicated by the increasing complexity of the trade and external policy agenda given that these policies increasingly include dimensions of security. These issues are exacerbated by the BRI investments, as this account will consider below.

The following section examines the BRI in more detail, prior to considering its operation in the EU Member States.

III. The Belt and Road Initiative (BRI) of China

A. Overview

The BRI may have its effect of bringing Europe and Asia together, less through institutions but more through investments and structural developments. The BRI is not an international organisation, but it has managed through a highly complex network of agreements to influence EU–China relations in a very intricate manner. The emerging gap between EU and Chinese approaches to globalisation poses an important series of questions. As Menon pithily observes, as to China there is no single EU foreign policy: the EU is the 28th foreign policy in addition to those of each Member State.²⁸ However, to a degree this may be too harsh and fails to acknowledge the difference between the EU as a global trade actor and the EU in foreign and security policy. One of the greatest challenges in engaging with China is that there is no agreed understanding in law of the meaning of the Chinese state and its reach with respect to global governance.²⁹ Equally, China is one of the other most unusual powers in the world today, and poses considerable challenges in international economic law for the definition of a market economy and state capitalism. Yet what is at stake is not primarily the degree of institutional diversity permitted by international trade rules. In fact, what is at stake, as Lang eloquently argues, is the existence of the capacity and opportunity to innovate institutionally, its direction and its distribution between different states within the global economic system.³⁰ Tensions caused by institutional diversity have for the most part been resolved by gradual institutional convergence around Western market models.³¹ Unsurprisingly, EU country reports on China, issued in accordance with its new trade defence rules, identify a huge array of sources of state disruption in the Chinese economy.³²

²⁸ Evidence from Malcolm Chalmers and Anand Menon to the Lords EU Sub-Committee on Foreign Affairs, Defence and Development inquiry into European security and EU military capabilities (10 November 2011). Steven Erlanger, 'E.U. Failure to Impose Sanctions on Belarus Lays Bare Its Weakness' *New York Times* (24 September 2020), www.nytimes.com/2020/09/24/world/europe/europe-sanctions-belarus-cyprus.html.

²⁹ See Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 *Harvard International Law Journal* 261.

³⁰ Andrew Lang, 'Heterodox Markets and 'Market Distortions' in the Global Trading System' (2019) 22 *Journal of International Economic Law* 677, 681.

³¹ *Ibid* 682.

³² These range in a staggeringly long list, from state and party involvement in corporate management, the basic legal structure of socialist market economy, the risk assessment practices of financial firms, preferential government procurement practices, mechanisms for allocating land, investment screening systems, divergence of Chinese labour laws and practices from fundamental international labour standards as well as a wide range of sector specific policies, from research and development subsidies, preferential loads to favoured

Although China has become a very prolific advocate of soft law, it is a particular feature of financial law and global governance and sources such as declarations, recommendations, guidelines, resolutions, codes of conduct, opinions, MoUs and memoranda of guidance dominate the BRI as much as the Chinese approach to internationalism. Adopting a steadfastly conventional view of international economic law as to BRI matters tends to skew the place of development in its construction of law, as to the BRI but also more broadly, which may be seen to be more of a globalisation study.³³ Still, the BRI represents a radical widening of the operation of soft law in international trade and investment law, given its scale.

Some contend that the BRI consists of primary agreements that can be regarded as a form of soft law, but those that repurpose soft law characteristics for project development rather than rule development. While they may have characteristics with respect to minimal legalisation, project-based activities that are coordinated and hub and spoke network structures, they are argued to display an increasing incongruence with existing soft law classifications.³⁴ This law-light approach to external relations sits perhaps at a notable turning point or juncture in Chinese legal culture, where in 2020 a civil code was adopted to come into force in 2021, after half a century of codification efforts.³⁵

The EU and China launched negotiations on the Comprehensive Agreement on Investment (CAI) in 2014 and by summer 2020, 33 rounds of negotiations had taken place. The negotiations cover level playing field disciplines (state-owned enterprises, transparency rules for subsidies and rules tackling forced technology transfers) and sustainable development. In 2016, the EU and China agreed on the scope of the future agreement, that it would go beyond a traditional investment protection agreement to cover market access for investment and a number of important disciplines. It would also include provisions on sustainable development and dispute resolution. In July 2020, the first significant bilateral trade agreement was signed between the EU and China. Recently, the European Council has adopted decisions on the signature of the agreement between the EU and the government of China on geographical indications (GIs).³⁶ The agreement also includes a mechanism to add more GIs after that period in four years' time.³⁷ It constitutes a highly significant development between the two legal orders.

enterprises, export restrictions and incentives, tax incentives, land use cost relief, employment stabilisation plans and more: European Commission, 'Staff Working Document on Significant Distortions in the Economy of the People's Republic Of China for the Purposes of Trade Defence Investigations' SWD (2017) 483 final/2, considering factors including: the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; state presence in firms allowing the state to interfere with respect to prices or costs; public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws; wage costs being distorted; access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

³³ Erie (n 7); Heng Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale and Challenges' (2021) 20 *World Trade Review*, forthcoming; Heng Wang, 'China's Approach to the Belt and Road Initiative' (2019) 22 *Journal of International Economic Law* 29.

³⁴ Wang, 'China's Approach to the Belt and Road Initiative' (n 33).

³⁵ Hao Jiang, 'The Making of a Civil Code in China: Promises and Perils of a New Civil Law' (2020) *Tulane Law Review*, forthcoming, also noting the major problem of applying contract law to state-owned enterprises SOEs, with the lack of competitiveness of market conditions in which SOEs operate.

³⁶ Agreement between the European Union and the Government of the People's Republic of China on cooperation on, and protection of, geographical indications, Council of the European Union [2020] OJ L 408I/3.

³⁷ *Ibid.*

It follows in the wake of multiple EU-China Strategies increasingly lengthening-out, increasingly legalising and converging on a vast array of issues but in particular investment, development and trade more broadly.³⁸ In very late December 2020, agreement in principle on an investment agreement was finally reached.³⁹ This decision provoked a wide diversity of reactions and controversies as to Chinese human rights standards and conflicts between EU institutional actors and EU diplomats as to Chinese developments, but also a transatlantic divide.⁴⁰ Doubts about the deal were raised when in March 2021, the EU imposed sanctions against China for its treatment of the Uyghur Muslim minority in the Xinjiang region. These were the first human rights sanctions against China since the 1989 Tiananmen Square massacre. In response to these sanctions, Beijing announced counter-sanctions against members of the European Parliament and other officials. This move led to suspension of the ratification process on the EU side. Nevertheless, reaching the deal supports the view that significant development is taking place in EU-China relations across a brand range of areas, increasingly backed up by successful and ‘law-heavy’ negotiations, with binding agreements as outcomes.

B. The Member States Engaging with the BRI: On Depth and Breadth

i. Direct Engagement

The first countries in Europe with whom China signed memorandums of understanding to join the BRI were Central, Eastern and South Eastern European countries, with Hungary being the first European country to sign a BRI-related memorandum of understanding with China in 2015, a clear and direct form of engagement, politically at least.⁴¹ By 2019, a further 22 European countries had signed BRI cooperation instruments – although the tally appears very complex on account of the lack of transparency of the operation of the BRI legally. Ties between China and Europe continue to grow with the latest European countries to sign BRI cooperation instruments being Luxembourg and Italy in March 2019. Three Member States in particular have particularly interesting

³⁸ EU-China Strategic Agenda for Cooperation (2020), https://eeas.europa.eu/archives/docs/china/docs/eu-china_2020_strategic_agenda_en.pdf.

³⁹ ‘EU and China Reach Agreement in Principle on Investment’ (n 8); See Jack Ewing and Steven Lee Myers, ‘China and E.U. Leaders Strike Investment Deal, but Political Hurdles Await’ *New York Times* (30 December 2020), www.nytimes.com/2020/12/30/business/china-eu-investment-deal.html; Alexandra Brzozowski, ‘EU seeks to rebalance China ties with controversial investment agreement’ (*Euractiv*, 30 December 2020), www.euractiv.com/section/eu-china/news/eu-seeks-to-rebalance-china-ties-with-controversial-investment-agreement/; Theresa Fallon, ‘The Strategic Implications of the China-EU Investment Deal’ *The Diplomat* (4 January 2021), <https://thediplomat.com/2021/01/the-strategic-implications-of-the-china-eu-investment-deal/>; Sofia Baruzzi, ‘EU, China Reach Agreement on Investments in Principle: What Does it Mean for Businesses’ (*China Briefing*, 14 January 2021), www.china-briefing.com/news/eu-china-reach-agreement-on-investments-in-principle-what-does-it-mean-for-businesses/; Annabelle Timsit, ‘Was the investment deal Europe signed with China worth it?’ (*Quartz*, 15 January 2021), <https://qz.com/1956673/the-eu-china-investment-deal-broken-down/>.

⁴⁰ Noah Barkin, ‘Watching China in Europe- January 2021’ (2021), [https://sites-gmf.vulturevx.com/61/6509/january-2021/january-2021\(1\).asp?sid=504eac4-a13f-4a0b-bd39-56dbbc033363](https://sites-gmf.vulturevx.com/61/6509/january-2021/january-2021(1).asp?sid=504eac4-a13f-4a0b-bd39-56dbbc033363).

⁴¹ Anastas Vangel, ‘China’s Engagement with the Sixteen Countries of Central, East and Southeast Europe under the Belt and Road Initiative’ (2017) 25(5) *China & World Economy* 101.

relations with the BRI: the Netherlands, Italy and Austria.⁴² As the largest of the EU Member States with a memorandum of understanding, though not the only EU Member State engaging in such negotiations, many raise the question as to the compatibility of the Italian position, as a non-binding statement of intent.⁴³ Austria, on the other hand, has been engaged as part of a third-party market cooperation agreement, which is aimed at using China's production capacity together with Austria's advanced technology to explore the markets of developing countries – and this is especially important in the context of Austrian ties with the CESEE countries, which seem to have great strategic importance for China.⁴⁴ Some Member States such as the Netherlands explicitly identify tensions in EU approaches to the future of EU-China relations as warranting coherence, unity and compromise as the key concepts.⁴⁵ Yet here the span of exclusive external compromise becomes complex. There is a delicate balance between negotiating individual relationships tainted by their lack of legal infrastructure/legality and the EU investment negotiations. The areas of Italy's MoU cooperation with China relate to unimpeded trade and investment and promoting market cooperation between Italy and China. It is an extremely lengthy and detailed document, signed in April 2019.⁴⁶ Ironically, the EU Council met on 22 March 2019 to discuss a common EU strategy toward China, to serve as a basis for the EU-China Summit to be held on 9 April 2019.⁴⁷ Extraordinarily, the next day the Italian government signed a memorandum of understanding (MOU) with Beijing to officially become a member of the BRI.⁴⁸ Trade remains first and foremost the successful and far-reaching exclusive competence of EU law, entailing that the EU alone can act internationally. It seems apparent that Member States such as Italy have been content to utilise the non-binding nature of BRI MoUs. Instead, here the scope of the MoU indicates a broadening of the significance of the trade relations being undertaken and increasingly puts the contours of the EU actions into doubt.

⁴² Enrico Fardella and Giorgio Prodi, 'The Belt and Road Initiative Impact on Europe: An Italian Perspective' (2017) 25(5) *China & World Economy* 125; Steven Langendonk, 'Discourse Power as a Means to 'Struggle for Position': a Critical Case Study of the Belt and Road Narrative's Effects on Foreign Policy Formulation in the Netherlands' (2020) 25 *Journal of Chinese Political Science* 241; Alexandra Bykova and others, 'Economic Policy Implications of the Belt and Road Initiative for CESEE and Austria' (2018) *Policy Notes and Reports* No 23, The Vienna Institute for International Economic Studies; Federiga Bindi, 'Why Did Italy Embrace the Belt and Road Initiative?' (*Carnegie Endowment for International Peace*, 20 May 2019), <https://carnegieendowment.org/2019/05/20/why-did-italy-embrace-belt-and-road-initiative-pub-79149>; Femke van der Eijk and Angela Pandita Gunavardana, 'The Road that divided the EU: Italy joins China's Belt and Road Initiative' (*European Law Blog*, 25 June 2019), <https://europeanlawblog.eu/2019/06/25/the-road-that-divided-the-eu-italy-joins-chinas-belt-and-road-initiative/>.

⁴³ Bindi (n 42).

⁴⁴ Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale and Challenges' (n 33); Bykova and others (n 42).

⁴⁵ Steven Langendonk, 'Discourse Power as a Means to 'Struggle for Position': a Critical Case Study of the Belt and Road Narrative's Effects on Foreign Policy Formulation in the Netherlands' (2020) 25 *Journal of Chinese Political Science* 241; 'Engaging but not Endorsing China's Belt and Road Initiative' (2019) Clingendael Policy Brief, www.clingendael.org/sites/default/files/2019-05/PB_China_Belt_and_Road_Initiative_May_2019.pdf.

⁴⁶ See Martinico (n 5).

⁴⁷ European Council, Conclusions March 21-22 2019 EUCO 1/19, p 4.

⁴⁸ Memorandum of Understanding between the Government of the Italian Republic and the Government of the People's Republic of China on Cooperation within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative (2019), www.governo.it/sites/governo.it/files/Memorandum_Italia-Cina_EN.pdf.

ii. *Indirect Engagements*

One indirect aspect of EU Member States unilaterally becoming part of the BRI is the fact that it strengthens Chinese economic and political influence and contributes towards undermining the EU position on the international arena. One particular case is the Greek blocking of the European Union statement at the United Nations in June 2017, criticising China's human rights record.⁴⁹ The Greek decision undermined efforts to confront Beijing's crackdown on activists and dissidents and furthermore it also undermined EU effort to engage strongly within UN. This move has been seen as a sign that China has gained political sway with its Greek port purchase. As part of China's 21st Century Maritime Silk Road, which aims to better connect the country to commercial hubs in Africa, Asia, Europe and Oceania, buying Greece's Piraeus port was one of the cornerstones for further infiltration by China of the EU market. Since the purchase of Piraeus port by COSCO company in August 2016,⁵⁰ Greece has become a major stopover along the new Silk Roads. However, it was not until August 2018 that Greece formally joined the BRI. With the signing of the memorandum of understanding regarding cooperation within the framework of the 'Belt and Road Initiative' during a meeting in Beijing,⁵¹ Greece deepened its relations with China, positioning itself as the main Mediterranean gateway to the new Silk Roads in Europe. The question is whether this investment in Piraeus port will bring the same developments as in connection with Chinese investments in the ports of Djibouti, Sri Lanka and Pakistan, which have been followed by Chinese naval deployments. Even though there are no public plans up until this point to turn European ports into Beijing's military bases, Chinese warships have already paid a 'friendly' visit to Greece's Piraeus port.⁵²

We next consider the broader impact of BRI investment upon EU Enlargement members and the example being set for them.

IV. An Example to New Enlargement Members? On the Western Balkans and China

The issue of sincere cooperation goes beyond the borders of the European Union and has a spillover effect to the countries that want to become EU members in the future. The example given by the Member States in terms of how sincere their cooperation is in the external relations at this period of time will affect the future relationship of the candidate countries with the EU. It cannot be argued that the duty of sincere cooperation should be followed by the candidate countries for EU membership, since there is no such obligation in the Stabilisation and Association Agreements, but there is a

⁴⁹ 'Greece Blocks EU Statement on China Human Rights at UN' (*Euroactive*, 19 June 2017), www.euractiv.com/section/china/news/greece-blocks-eu-statement-on-china-human-rights-at-un/.

⁵⁰ George Georgiopoulos, 'China's Cosco Acquires 51 Pct Stake in Greece's Piraeus Port' (*Reuters*, 10 August 2016), www.reuters.com/article/greece-privatisation-port/chinas-cosco-acquires-51-pct-stake-in-greeces-piraeus-port-idUSL8N1AR252.

⁵¹ *Ibid.*

⁵² 'Chinese Naval Fleet Arrives in Greece for Friendly Visit' (*Ekathimerini*, 24 July 2017), www.ekathimerini.com/220324/article/ekathimerini/news/chinese-naval-fleet-arrives-in-greece-for-friendly-visit.

strong argument that the EU standards and the requirements of the Stabilisation and Association Agreements should be respected in both internal and external policies of the candidate countries. The period of association to the EU is supposed to be a period of time in which the potential member state should implement the EU *acquis*, but also incorporate the EU values in its policies. This section will focus on the Western Balkans–China relationship in the context of EU enlargement and respect of EU standards.

The enlargement context in the Western Balkans has changed, mainly because the region is characterised by legacies of war and a political climate that enabled the flourishing of organised crime, corruption and illegal migration. The EU first had to stabilise the region after the dissolution of Socialist Federal Republic of Yugoslavia and then associate the newly emerged countries. The Stabilisation and Association Process was launched in 1999 and granted the countries from the Western Balkans the status of potential candidate countries. In 2003, the Thessaloniki Agenda promoted political dialogue and cooperation in the area of the Common Foreign and Security Policy (CFSP), the strengthening of parliamentary cooperation and institution-building.⁵³ Therefore, the EU conditionality policy in the Balkans was designed as a multi-dimensional instrument directed towards reconciliation, reconstruction and reform. In addition to the 1993 Copenhagen criteria, the Western Balkans countries are expected to meet other criteria that are country-specific. The six Western Balkan countries that are moving towards EU membership are all at different stage of integration. Serbia and Montenegro have already opened negotiations with the Union, in 2014 and 2012 respectively, while the draft negotiating framework was presented to Macedonia and Albania in July 2020 following the decision of the Council in March 2020. Bosnia and Herzegovina and Kosovo are at the very early stages of their Euro integration path as potential candidates –the Stabilisation and Association Agreements having entered into force only in 2015 and 2016 respectively.

A. The Western Balkans and China: A Key Strategic Region for Investment

The Western Balkans is one of the key strategic regions for investment for China and is crucial for the Belt and Road Initiative. The region is important as a focal point in China's logistical and economic access to the EU. Even though, China's foreign direct investment remaining fairly low in the region – approximately only 3% of China's total FDI – their economic presence is strong due to loans, not investments.⁵⁴ All the Western Balkan countries except for Kosovo (since it is not recognised by China) are members of the '16+1' (now known as 17+1) framework. The Western Balkans' importance for China has become evident with the purchase of the Greek port of Piraeus, transforming it into the second largest port in the Mediterranean. With this purchase, China brings

⁵³ Council of the European Union, 'The Thessaloniki Agenda for the Western Balkans – Moving towards European integration' (2003) 10369/03 (Presse 166).

⁵⁴ Valbona Zeneli, 'The Western Balkans: Low Hanging Fruit for China?' *The Diplomat* (24 February 2020), <https://thediplomat.com/2020/02/the-western-balkans-low-hanging-fruit-for-china/>.

into life its plans to improve infrastructure in the Western Balkans which would further contribute to transport of goods being shipped from Piraeus through the Western Balkans and into the EU. Very often, China's investments in the Western Balkans are seen as a way to gain economic positions in the countries which may impact their potential accession in the EU.⁵⁵ Serbia is geopolitically the most important country in the region, where China's economic presence is illustrated with the investment financing and loans of \$5.62 billion, whereas the ongoing Chinese infrastructure investments are almost 5 billion euros.⁵⁶ Perhaps the most worrying aspect of the Chinese investments in Serbia is Huawei's surveillance system of facial and licence-plate recognition which has been implemented in Serbia, while police officers have taken part in joint exercises with their Chinese counterparts.⁵⁷

One of the most vulnerable countries in the Western Balkans region is Montenegro. China's influence through its so-called debt trap diplomacy⁵⁸ can be seen in the Bar–Belgrade highway project. The first phase of the China's highway project that is designed to connect the Montenegrin port city of Bar with Belgrade, the capital of Serbia has cost Montenegro approximately 1.3 billion euros, which is equivalent to a quarter of its 2018 GDP.⁵⁹ The loan that Montenegro took out with the Export-Import Bank of China has caused its GDP-to-debt ratio to increase to just over 80%. Montenegro is a candidate country for EU membership and opened negotiations back in June 2012, but these developments may endanger its EU future. Additionally, it makes Montenegro's economy highly vulnerable and its debt situation very prone to Chinese dependencies.⁶⁰ Furthermore, BRI also causes concerns over corruption risks. China was embroiled in a corruption scandal when leaked tapes suggested collusion between local politicians and Chinese state-owned companies and massive inflation of highway construction costs in North Macedonia. Sinohydro, a Chinese state-owned firm was contracted to build two highways in the country, and wiretaps in 2015 unveiled that the former Prime Minister and Transportation Minister were going to award the contract to Sinohydro at least in part because Sinohydro was willing to pay a bribe of around 25 million euros.⁶¹ As for Bosnia and Herzegovina, another Western Balkan country where Chinese economic influence is significant, the issues of Chinese investments undermining the Energy Community Treaty (ECT), to which all the Western Balkan countries are parties, are growing. The ECT is designed to bring the environmental policies and pollution standards of these countries in line with those of the EU. Despite the EU's standards, there are cases of Western Balkan countries contracting Chinese state-owned firms to build

⁵⁵ Austin Doehler, 'How China Challenges the EU in the Western Balkans' *The Diplomat* (25 September 2019), <https://thediplomat.com/2019/09/how-china-challenges-the-eu-in-the-western-balkans>.

⁵⁶ Aleksandar Vasovic, 'Serbia wants billions in foreign loans to invest in infrastructure', *Reuters* (12 July 2019), www.reuters.com/article/us-serbia-investment-china/serbia-wants-billions-in-foreign-loans-to-invest-in-infrastructure-minister-idUSKCN1U71VG.

⁵⁷ Noah Buyon and others, 'Nations in Transit 2020' (*Freedom House*, 2020), https://freedomhouse.org/sites/default/files/2020-05/NIT_2020_FINAL_05062020.pdf.

⁵⁸ Brahma Chellaney, 'China's Debt-Trap Diplomacy', *Project Syndicate* (23 January 2017).

⁵⁹ 'Montenegro Fears China-backed Highway Will Put it on Road to Ruin' *Financial Times* (10 April 2019), www.ft.com/content/d3d56d20-5a8d-11e9-9dde-7aedca0a081a.

⁶⁰ More on this issue in: Boris Vukicevic, 'Foreign Relations of Post-Independence Montenegro: A Change of Direction' (2017) 26 *Lithuanian Foreign Policy Review* 107.

⁶¹ Doehler (n 55).

coal power units. One example is the coal power plant in Tuzla, Bosnia and Herzegovina with a Chinese investment that is supposed to replace the older plant and cause less pollution.⁶² However, building a coal power plant does not contribute towards the EU and ECT principles for sustainable development and climate change action. This move is damaging to Bosnia's already unsteady EU aspirations. It is becoming obvious that in the past, the EU might have overestimated Russian influence in the region, while it has clearly underestimated China's. There needs to be a clear action from the EU which will ensure more coherent external action and to show through the example of sincere cooperation how the future member states need to act on the international arena.

V. Analysis: The BRI and the EU Member States – Breach of Sincere Cooperation?

Given the vast number of EU Member States involved in the BRI in various ways and the EU's intensifying relations with China, the involvement of the EU with the BRI appears more essential than ever, perhaps as a form of constrained mixity. There are those who contend that the EU itself should join the BRI.⁶³ Others go further and argue that the EU should create its own rival BRI initiative.⁶⁴ Whatever the view taken, it is an extraordinary state of affairs that the scope of Member State non-binding initiatives and EU actions traverses so many comparable crossing points. It appears that a highly artificial view of sincere cooperation and the common commercial policy prevails despite an ever-increasing span of case law to the contrary. 'Does Europe matter?' is now a common refrain on EU-China BRI relations where the EU has been unable to halt the 'divide and rule' approach of China ongoing with Europe for some time.⁶⁵ This Chinese approach has challenged the EU's role on the international scene. The EU has been promoting its strategic interests, standards, values, as well as development objectives by negotiating trade agreements with a wide range of partners and by profoundly supporting the multilateral trade cooperation. Nowadays, with BRI being a megaregional arrangement⁶⁶ that strongly affects the world in the twenty-first century, the EU role in connection to the BRI needs to be reassessed. Having a unified EU position towards BRI is especially important in the context of the autonomous EU Member States actions that have been damaging to EU unity, competence and foreign policy goals. After the agreement in principle we contend that little will change in the short-term. Several more immediate and likely points of concern and breach of sincere cooperation by the independent EU Member State actions are assessed here.

⁶² Mladen Lakic, 'Bosnia's China-Funded Power Plant Gets Green Light' (*Balkan Insight*, 7 March 2019), <https://balkaninsight.com/2019/03/07/bosnias-china-funded-power-plant-gets-green-light/>.

⁶³ Eg Ken Moak, 'Why the EU should join the BRI' (10 April 2019), <https://news.cgtn.com/news/3d3d414f324d544f33457a6333566d54/index.html>.

⁶⁴ 'Europe needs its own Belt and Road Initiative' *Financial Times* (28 November 2019), www.ft.com/content/a282e618-1120-11ea-a7e6-62bf4f9e548a.

⁶⁵ Jinghan Zeng, 'Does Europe Matter? The Role of Europe in Chinese Narratives of "One Belt One Road" and "New Type of Great Power Relations"' 55 *Journal of Common Market Studies* 1162; Kingsbury (n 5).

⁶⁶ According to Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale and Challenges' (n 33).

At present, over 15 and likely under 22 EU Member States have signed MoUs or other types of cooperation agreements with China within the BRI.⁶⁷ In the process of negotiating and signing these agreements, the Member States have been systematically ignoring the EU rules, mainly by bypassing the European Commission before entering into trade deals with China. The Commission does not appear to have contemplated actions against the Member States, arguably being careful not to take action with respect to China in any form that might jeopardise its broader engagements on the CAI. Member States are obliged in the area of trade and energy to inform the Commission and other Member States about opening negotiations and to submit for scrutiny the negotiated agreements or MoUs. In all cases and to the best of our knowledge, the EU executive has not been consulted prior to any of the agreements being made.⁶⁸ Moreover, there is a deficit of publicly available information and data on Chinese investments into the EU, since there is no publicly available inventory of official BRI projects, nor is there an inventory of Member States' contributions to financial institutions involved in the BRI. Notably, the EU has been developing a subsidies Regulation to be used against state-supported foreign companies operating in the EU bringing competition tools to bear on international trade where foreign hand-outs distort the European market – to be applied to market competition, mergers and acquisitions, and public procurement – arguably with China as its key subject and object.⁶⁹ Some suggest the number of EU actions against China in the form of legal tools continues to grow as a lengthy list.⁷⁰ Additionally, these MOUs have had a significant political impact, especially because of how they diverge from the EU-China 2020 Strategic Agenda for Cooperation. The Strategic Agenda defines conditions and guarantees that should be expected from China, such as rule of law, fair trade and investments. However, the MOUs prioritises bilateral strategic and economic cooperation, with little attention to the rule of law and fair economic competition.

The main concern about Member States' MoUs with China is located in the Chinese lack of transparency in international trade, which favours unfair economic competition. The Chinese companies which are controlled by the government and benefit from the state's financial backing are playing a different game in the international trade arena. Also, as Andersen observes, a problem for European businesses arises from the fact that there will not be an even playing field if they compete with businesses along the Belt and

⁶⁷ For a detailed typology of the BRI Agreements see: Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale and Challenges' (n 33).

⁶⁸ More on this issue can be found in the Report of the European Court of Auditors, 'The EU's response to China's state-driven investment strategy' (2020), www.eca.europa.eu/Lists/ECADDocuments/RW20_03/RW_EU_response_to_China_EN.pdf.

⁶⁹ European Commission, 'Commission proposes new Regulation to address distortions caused by foreign subsidies in the Single Market' (5 May 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982.

⁷⁰ Eg evolving trade defence instruments (anti-dumping and anti-subsidy duties); allowing those duties to be used against companies subsidised by the Chinese government but exporting from another country; tightening up screening of inward foreign direct investment (FDI) for national security reasons; developing an anti-coercion tool to use against foreign governments acting illegally; producing a toolbox for member states to manage risky entities (Huawei) from 5G networks; banning imports made with forced labour; and requiring European companies to exercise 'due diligence' in eliminating labour and environmental abuses from their supply chains Alan Beattie, 'The EU is trailing China's trade distortions all round the world' *Financial Times* (10 May 2021), www.ft.com/content/0e94cd4e-16f9-4bfc-8bba-333027fb95ed.

Road, if they do not meet and guarantee the same levels of human rights protection.⁷¹ It might also lead to an indirect penetration of lower human rights and labour standards into the European markets.

Reciprocity when it comes to the market access is another important issue concerning the EU in its relations with China.⁷² When it comes to the EU position towards China, the EU has to consider the balance between the protection of values and human rights with ensuring strategic interests, especially in the field of investments and trade relations. The EU went a step further by adopting a mechanism to screen foreign investment at EU level, clearing the path for closer monitoring of third country companies willing to invest in the EU's critical sectors.⁷³ This will allow the EU for the first time to collectively address investments that represent potential risks to the bloc's security or public order. This does not mean that existing national screening mechanisms will be harmonised or national powers to approve foreign investment operations will be removed, but instead, it will boost cooperation in this field among EU partners.

EU Member State engagement with the BRI appear contrary to the EU commitments to good global governance and commitments to upholding international law in Article 21 TEU. The underlying idea of Article 21 – to have the EU as a responsible actor in international relations – is therefore undermined. According to Article 21, the fundamental principles of the European Union shall be exported to the outside world, but at the same time the Union will conduct its external actions in accordance with the fundamental principles underlying international law in general, and the UN Charter in particular. The EU external action rests on values and principles that are oriented towards peaceful coexistence, respect of international law and promotion of human rights and democracy, all of which seem to be weakened by individual Member States' involvement with the BRI. It appears also increasingly obvious that the Member state actions thwart EU global action, impinging upon unity and espouse non-European values or weaken the protection of rights, standards and values indirectly through Chinese financial supports and investments.

VI. Conclusions

This chapter has considered how the social and legal relevance of sincere cooperation is put in doubt every time the Member States impeded EU action in connection to the BRI, done mainly because of the lack of legal infrastructure, increasing breadth of EU negotiations, or the murky legal contours of the sincere cooperation. The subject of EU international relations continues to witness a chronic informalisation, with the rise in the use of soft law instruments. These developments are significant in connection

⁷¹ Henrik Andersen, 'Rule of Law Gaps and the Chinese Belt and Road Initiative: Legal Certainty for International Businesses?' in Martinico and Wu (n 26).

⁷² Alexandra Brzozowski and Jorge Valero, 'Don't be naive with China', EU leaders tell Italy' (*Euractiv*, 22 March 2019), www.euractiv.com/section/economy-jobs/news/dont-be-naive-with-china-eu-leaders-tell-italy/ accessed 15 January 2021.

⁷³ Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1, which is effective starting 11 October 2020.

with the EU's most complex international opponent and potential partner – China and its Belt and Road Initiative. China is acknowledged to be seeking regional influence through mechanisms other than formal international law, principally BRI, as a set of domestic policies and economic instruments which are seemingly contrary to the key EU principles of external action. EU Member State engagement with the BRI is contrary to EU commitments to good global governance and commitments to upholding international law. With BRI building its strong foothold in Europe, China has managed to divide the EU bilaterally and carve up the Member States in ways in which no other global power has so managed. The EU Member States increasingly disrespect the duty of sincere cooperation as to the BRI or show its irrelevance by hindering EU action. The role of the EU as a long-standing proponent of multilateralism is to provide leadership to strengthening the existing alliances and building new ones which will contribute to defending the rules-based trading system. There needs to be a clear action from the EU which will ensure more coherent external action and to show through the example of sincere cooperation how the future member states need to act on the international arena.

The chapter has critically explored the gaps in the reality of joint participation and its excessive formalism which is argued to be mismatched with practice in regards to the BRI. The chapter considered how sincere cooperation is chronically under- and over-enforced, creates unnecessary power imbalances, with minimalist case law which favours larger states. It is bound up with an extraordinary array of principles from effectiveness, coherence and consistency. The absence of treaty rules on the seemingly grey areas surrounding the boundaries of EU action appears readily deployed by the EU itself. Joint participation state of the art is argued not to capture contemporary practice, especially it does not capture how trade is increasingly embedded in subjects such as security where significant national competences exist, and therefore warrant more critical reflection as a future research agenda.