CHINA PAKISTAN ECONOMIC CORRIDOR: LEGAL INJUNCTIONS AND PROTECTION OF CHINESE INVESTMENT IN PAKISTAN UNDER OBOR INITIATIVE

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ABSTRACT

Pakistan and China have a protracted history of military and diplomatic relations. Though, a close economic collaboration of both countries is the latest evolution. China's flagship developments aspiring One Belt One Road Initiative (OBOR) and the China-Pakistan Economic Corridor (CPEC) are likely to support Pakistan with $ 46 billion in terms of foreign investment. CPEC project is the latest venture in the history of bilateral relations and demonstrates the historically demonstrated Sino-Pak relations. This project is on the verge of facilitating China's economic access to the Middle East and the regional countries by connecting the Pakistani seaport Gwadar to western China. While the developments with regard to CPEC are under way, there is a need to look it from legal and policy perspective to figure out the legal issues concerned with this project. Hence, this article is based on the China-Pakistan Economic Corridor arrangements between Pakistan and China from a legal standpoint. Further, it also highlights the relevance of the application of international investment law in the emerging scenario.

Keywords: Chinese Investment, China Pakistan Economic Corridor, Bilateral Investment Treaty, Free Trade Agreement.

INTRODUCTION

Pakistan and China have a long history of a steady and reputable tie. Pak-China friendship has been demonstrated to be miniature of friendship among bordering states. Both states have robust social, defense, political and economic relations. Further, both states have strong social, defense and economic relations and attach great importance to strengthening their economic relations. Chinese investment in Pakistan is gradually increasing, which is very important for economic development. Pakistan is a pioneer country in South Asia which has a free trade agreement with China. China and Pakistan signed a Free Trade Agreement (FTA) in 2006, which entered into force in 2007. In the first five years of the Free Trade Agreement, Pakistan's exports increased and trade between Pakistan and China increased rapidly from $ 6.9 billion in 2007 and in 2014 $ 16 billion. With 15.3 percent growth per annum, import rate of China from Pakistan is significantly lower than that from Pakistan and the negotiations on the subsequent phase of the execution of the Pakistan China Free Trade Agreement are underway. The China-Pakistan Economic Corridor Project (CPEC) was officially launched in 2015. This project is a vital part of China's One Belt One Road initiative. It is expected that China-Pakistan bilateral trade and investment regime will further improve as the result of CPEC.

Through CPEC, China initially planned to invest about $ 46 billion in development projects over the next 10 to 15 years, equivalent to 20 percent of Pakistan's GDP Of this amount; approximately $ 34 billion is to be invested in the energy sector to enhance the capacity of

Pakistani energy sector by feeding approximately 17,000 megawatts of electricity into the national grid. The remaining 12 billion is to be spent on transport, communications, and infrastructure including the modernization of the railway lines between Peshawar and Karachi. All projects under CPEC have been designed to be accomplished in three major phases. Small projects under CPEC will be completed by 2020, the medium by 2025 and long terms by 2030.[1] As per the original plan, the investment is to be allocated on the projects as mentioned in the figure below.

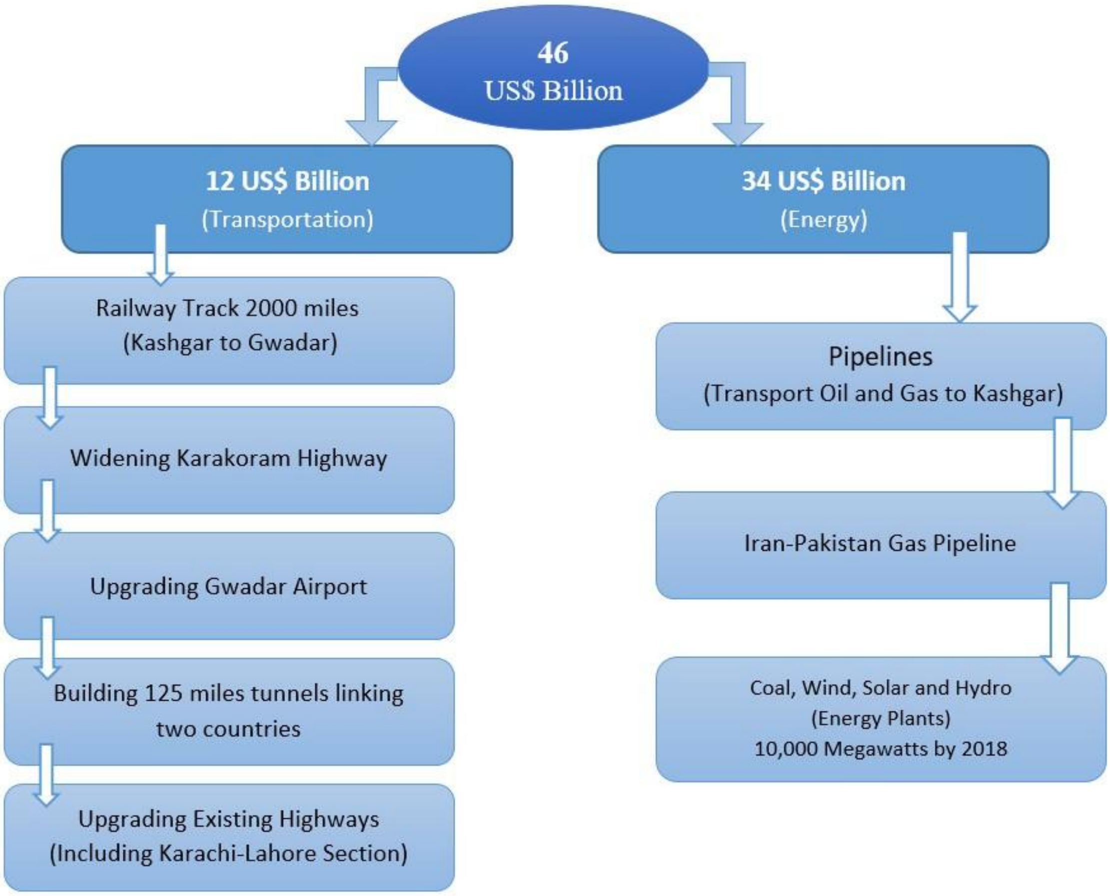

FIGURE 1: CPEC projects and values in US$ **Source**[2]

Under the latest developments the volume of CPEC investment has been raised to $62 billion USD.[3] The CPEC is more important for China and more than half of the world's oil reserves in the Middle East, from leading suppliers of crude oil to China. So far, oil tankers have dragged more than 10 000 nautical miles to the terminals on China's eastern and southeastern coast. In this way, each trip is flooded with one of the riskiest chokepoints of the world, the Strait of Malacca. CPEC provides easy access to the Middle East, Europe, Africa and Iran through Pakistan. China has long been dependent on oil from these territories; this route will also open for private sectors and Chinese business people in the world's fastest-growing

[1] See Two CPEC Projects enter last stage of Completion, available at https://www.gwadarcentral.com/blog/Two-CPEC-Projects-enter-last-stage-of-Completion.html (Last Visited 30 March 2018)
[2] Irshad, Muhammad Saqib. "One Belt and One Road: Does China-Pakistan Economic Corridor Benefit for Pakistan's Economy?." (2015).
[3] See CPEC investment pushed from $55b to $62b, available at https://tribune.com.pk/story/1381733/cpec-investment-pushed-55b-62b/ (Last Visited 30 Jan 2018)

economies via Pakistan. China will be able to fully utilize the technological advantages and further leverage through increased cooperation in the development of exploration of mineral resources, biological resources and another side to promote and support the country's industrial competitiveness free trade zone.[4]

Chinese investments are intended to the rule of law effectiveness and improving the rights of property and governance in Pakistan. Though, extensive policy and legal point, the CPEC faces objections like legal transformation, transparency, global governance, labor standards. Commentators in Pakistan stated that transparency would ensure that the dialogue between Pakistan and China, unlike the provincial interests of a few, stays concentrated on the nation's national advantages.

This article describes the legal perspective, in this regard, first discusses the legal structure of Chinese investment in Pakistan and also states Pakistan-China bilateral regime. The first part provides an explanation of Pakistan's current national legal system for promoting and protecting investment and its impact on Chinese investors and investment. The provisions of the Free Trade Agreement and bilateral investment treaty Pakistan –China have also been taken into consideration. The goal is to notify current and forthcoming investors from China in Pakistan about their potential risks, legal rights, and remedies in the event of their host losing or damaging their investments.

PAKISTAN’S LEGAL FRAMEWORK FOR CHINESE INVESTMENTS

CPEC is part of China’s One Belt, One Road (OBOR), which essentially focuses on creating a road network that expands from Europe to South East Asia and from China to Africa. On April 20, 2015, the project was launched, when Chinese President Xi Jinping and Pakistani Prime Minister Nawaz Sharif signed 51 agreements and Memorandum of Understanding worth $ 46 billion.

CPEC project consists of $ 46 billion direct investment in Pakistan; it will be used on roads, electric power projects, better communication facilities, industrial zones, exclusive development of Gwadar City to make it at international standards etc. Chinese investment in Pakistan will increase enormously execution of CPEC. High Stakes, with many political and lawful connotations for investments regarding these two nations. Even though investments by some Chinese enterprises in Pakistan may have planned aspirations, Chinese banks provided finance for these investments and should be profitable, like other commercial companies.[5]

Pakistan has relatively liberalized its trade and investment regimes, The Pakistan Board of Investment (BOI) issued quite comprehensive foreign investment policy in 2013[6]. Under the provisions of the investment policy of Pakistan 2013 vast range of sectors and activities are open to foreign investors. Almost all the fields and areas are open for foreign investors except some areas restricted due to public safety and national security.[7]

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[4] SHAPIEE, ROHIMI, RAO QASIM IDREES, and LUO HANWEI. "How Logistics Investment Arrangement is a key Concern to China-Pakistan Economic Corridor (CPEC)? A Legal and Policy Analysis of CPEC Logistics Investment Model and Future Challenges for Pakistan."

[5] Salidjanova (n 108) 6.

[6] See Pakistan Investment Policy 2013The policy can be found on the Pakistan Board of Investment (BOI) website, http://boi.gov.pk/Home.aspx (Last Visited 29 January 2018).

[7] See Ibid

Pakistan welcomes Chinese investors in every field of economy. There are 68, 61 articles in Pakistan's offer list in response to China Pakistan FTA 2006. All these articles are available for Chinese investors to make their investment. These articles include almost all sectors of economic activities especially mining and exploration, science and technology, communication technology and equipment, energy sector, infrastructure development, agriculture and activities related to it, textile industry, manufacturing, food processing, construction and real estate, rocks and minerals, heavy machinery, electrical appliances, industrial machinery and equipment, fruits, vegetables, animals and their products, automotive industry including automobile parts and accessories and military equipment.[8]

Moreover, Pakistan welcomes Chinese investors in the services sector, which includes construction and related financial, engineering, cultural, sporting and recreational services, communication services, educational services, business services, health social, environmental, tourism and travel related services.[9]

The Pakistan Board of Investment promulgates that foreign investments are protected under the provisions of Foreign Private Investment (Promotion & Protection) Act 1976 and Protection of Economic Reforms Act 1992.[10] Under section 5 of 1976 Act, the government cannot acquire any property of the foreigner except by due process of law. Ample compensation in the form of currency of the origin of investment is also required to be paid to the foreigner without delay. Any agreement entered into by the Federal Government with the foreign investor shall not be affected by such acquisition.[11] Further, Pakistan allows convenient repatriation of the foreign investments.

Under Section 6 of the 1976 Act;

"a foreign investor in an industrial undertaking approved by the federal government, subject to the provisions of the 1947 Act, may at any time repatriate in the currency of the country from which the investment originated:
a) Foreign private investment to the extent of original investment;
b) Profits earned on such investment; and
c) Any additional amount resulting from the reinvested profits or appreciation of capital investment".[12]

Article 199 of the Pakistani Constitution authorizes high courts to hear cases of violations of legal rights.[13] High courts may override an unlawful act by senior officials if no other appropriate remedy is available.

With the increasing economic activities in Pakistan, Arbitration system is being promoted for the resolution of commercial disputes. Arbitration in Pakistan is conducted in accordance with the provisions of the Arbitration Act 1940; which was adopted by the British Parliament in 1940. The High Courts of the relevant province in Pakistan may lay down rules in accordance with the 1940 Arbitration Act and the provisions of the Arbitration Act of 1940 are to be followed by the federal and the provincial governments of Pakistan.

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[8] China Pakistan FTA, Pakistan's offer list.
[9] China-Pakistan Agreement on trade in services, 2009
[10] Pakistan Investment Policy 2013 (126) paras 3.1.1, 3.1.2, 15.
[11] Section 5 of Foreign Private Investment (Promotion & Protection) Act 1976
[12] Section 6 of Foreign Private Investment (Promotion & Protection) Act 1976
[13] Constitution of Pakistan 1973 (127) art 199.

New York Convention was incorporated into the domestic legislation through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (REFA), previously, foreign awards in Pakistan were executed in Pakistan under the Arbitration (Protocol and Convention) Act 1937, which has been repealed by REFA. ICSID convention also has been promulgated in Pakistan through The Arbitration (International Investment Disputes) Act, 2011 (AIDA), which provides that the Arbitration Act of Pakistan 1940 will not apply in the cases pursuant to the ICSID convention falling under BITs.[14]

The new law on Special Economic Zones, which will have a direct impact on the implementation of the CPEC, also provides for arbitration as an alternative dispute resolution system.[15] Lack of recognized institute to administer the settlement of dispute and arbitration services, the advance domestic commercial arbitration will remain an appropriate alternative to legal disputes.

Pakistan's domestic law on foreign investment is depending on both constitutional assurance and legal security. This legislation is quite extensive and covers all significant condition of foreign investment, with treatment standards and compensation of expropriations. The government of Pakistan wants to fascinate foreign investment and has created the excellent impetus for investors.

PAKISTAN –CHINA BILATERAL REGIME OF INVESTMENT

Pakistan contains a comprehensive system of BITs, the first BIT was signed by Germany and Pakistan in 1959[16], and the treaty regime has remained calm for the last fifty years; Pakistan has concluded 47 BITs (until 2017)[17]. Pakistan and China signed BIT in 1989, which was entered into force in September 1990. In accordance of the BIT Article 13, it may be ended after ten years from the date of entry by any party by consideration to the other party and ceases to exist one year after notification by any party. While no notice has been given, the BIT is still in effect. The China-Pakistan Free Trade Agreement 2006 entered in force in 2007 also contains a detailed chapter on investment[18]

Since FTA and the BIT are both in force at the same time, the combination of their respective provisions raises some concern about the relationship and separation of investor protection standards under both mechanisms. It is also vital to note that the Free Trade Agreement does not have retrospective application[19] and that investments made earlier to its entry into force should be regulated by of the BIT. Similarly, investments made after the entry into force of the Free Trade Agreement may be governed by the Free Trade Agreement. If both the Free Trade Agreement and the BIT are on the same subject, it would be appropriate to evaluate their various provisions to obtain a fair picture of the investment protection standards provided by both agreements. This will also disclose whether the Free trade agreement has broadened or limited the scope of the BIT.

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[14] Section 7 of Arbitration (International Investment Disputes) Act of Pakistan 2011
[15] SEZs Act (n 95) s 39.
[16] Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959,available at:
http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef (Last Visited 20 December 2017)
[17] Pakistan investment policy hub available at:http://investmentpolicyhub.unctad.org/IIA/CountryBits/160,accessed 5 January 2018
[18] Ibid ch IX.
[19]Ibid art 81.

FTA and BIT use particular access for the term "investor". BIT contains two distinct definitions for Pakistani and Chinese investors. All natural persons are included in the category of Pakistani investor, who are Pakistani nationals or have registered companies of Pakistan. While, any "natural person" can be Chinese investor who is national of China and a having residence in China.[20]

According to China -Pakistan FTA 2006 the term "investor" means;

a)Natural persons who are nationals of one of the parties in accordance with the laws of that party;

b)legal persons, including corporations, partnerships, associations and other organizations established or constituted under the laws and regulations of one of the parties and having their seat in that party.[21]

While under the bilateral investment treaty 1989 the term "investors" means: With respect to Chinese investors in Pakistan;

a)Natural persons who have the nationality of the People's Republic of China;

b)Economic Entities established under the laws of the People's Republic of China and located on the territory of the People's Republic of China.[22]

It is clear from the above mentioned statutory definitions about the nature of investors that it includes and invites both the natural and legal person to invest in Pakistan for mutual benefits. Bilateral Investment Treaty and Free Trade agreement are considered as the strong initiatives towards the strong bonding relationship between both countries in economic, legal and strategic fields.

The FTA 2006 and the BIT 1989, signed by China and Pakistan, provide a comprehensive dispute settlement procedure for investment disputes between States_ Parties and between an investor and State Party. The 2009 Agreement on Trade in Services also mentions the same dispute settlement procedure as in the 2006 FTA. In both treaties, the first means of settling disputes among States_ parties is by the diplomatic channel. The diplomatic channel is considered as peaceful and comfortable way of resolving a dispute between the states, therefore, under Article 53 of FTA and Article 9 of BIT signed by Pakistan and China, first preference is given to diplomatic ways. Article 53 of the FTA 2006 and article 9 BIT 1989 provide further that if a dispute cannot be resolved within specified period through consultations then it may be submitted to ad hoc tribunal upon the request of any party.

In BIT, the settlement of investor-state disputes is very narrow. Disputes are limited over the indemnity of the expropriation amount and do not cover any other violation of the treatment standards provided in the BIT. An investor may lodge a complaint before the competent departments of the expropriating country to contest the expropriation compensation. If the complaint is not settled within one year, the investor may bring the dispute before the host State's competent national jurisdiction or an international arbitral tribunal[23]. The BIT does not provide details on the procedures and formation of the International Arbitral Tribunal.

[20] China–Pakistan BIT (n 22) art 1(b).
[21] Article 46 (3), China Pakistan FTA 2006
[22] Article 1 (b), BIT concluded between China and Pakistan in 1989
[23] Ibid

The 2006 Free Trade Agreement between China and Pakistan provides an effective resolution mechanism for the settlement of investor-state disputes. It gives investors a unilateral right to choose from a variety of jurisdictions.

The first and most important step in resolving a dispute between investor-states is to negotiate it as it is considered the most efficient and fastest process. Article 54 of the 2006 Free Trade Agreement provides: *"Any dispute between an investor of one party and the other party in connection with an investment in the territory of the other party shall, as far as possible, settled amicably through negotiations between the parties to the dispute."*[24]

However, sometimes the negotiations do not result in the settlement of a dispute, therefore, Article 54 (2) of the 2006 Free Trade Agreement provides for two legal forums in such a case. Article 54 (2) provides that where a dispute between investor and the State cannot be resolved by negotiation, the investor will have the opportunity to rely on the jurisdiction of the competent court or ICSID.

According to the 2006 FTA, an investor may apply to the competent court of disputing country. Under China-Pakistan BIT, an investor may challenge the compensation amount in case of expropriation before the competent court. Investors also have the opportunity to submit their disputes to the International Center for Settlement of Investment Disputes. The disputing party may require the investor to use the review procedures in accordance with national law before submitting the dispute to ICSID.[25]

Article 54 (2) of the 2006 FTA stipulates that the choice of the Forum is final once the investor submits the dispute to the local court or to the International Center for Settlement of Investment Disputes[26]. Article 54 (3) of the 2006 Free Trade Agreement stipulates that the arbitral award rendered by arbitration must be based on the disputing party's law, including the rules of the party to the conflict. In addition, the agreement should be in line with the provisions of the agreement (China-Pakistan FTA).[27]

According to the 2006 FTA, the arbitral award announced by the arbitral tribunal is final. It shall be binding upon both the parties and the parties shall commit themselves to enforce the award.[28] Under the provisions of the FTA, the award shall be based on the host country's domestic laws, as well as rivalry of rules, the Free Trade Agreement provisions and generally accepted principles of international law. According to the provisions of AIDA, the award announced by the ICSID is considered as the judgment of the High Court, and the same is enforced in Pakistan by the Provincial High Courts at the request of the party.

The sequence of BIT and FTA provides the most contemporary and comprehensive bilateral regime to protect Chinese investment in Pakistan. In terms of protection, the BIT requires protection and "fair treatment" "in the region of the other Contracting Party"[29]. This term is not normally used in most BITs today that requires "fair and equitable treatment" (FET) and

[24] Article 54(1) of China Pakistan FTA, 2006
[25] Article 54(2) of China Pakistan FTA , 2006
[26] Ibid
[27] Article 54(3) of China Pakistan FTA 2006
[28] Article 54(4) of China Pakistan FTA 2006
[29] BIT of China–Pakistan (n 22) art 3(1).

comprehensive security and protection[30]. The idea behind FET is to lead the utilization between the investor and the state with "rule of law" and “good faith".

The ‘national treatment’ provision has not been provided in the BIT, that’s mean to make an equal opportunity among the domestic and Chinese investors. Pakistan being an original member of WTO has incorporated the provisions of GATT 1994 in its international trade agreements. Under article 7, 48 (2) of Free trade agreement (Trade in goods and investments) 2006 and article 15 of the Free Trade agreement, National treatment provisions have been extended to Chinese businessmen and investors. Chinese investors are given treatment not less favorable than the investors of Pakistan.[31]Under Article 12 of China-Pakistan BIT, Chinese investors in Pakistan are given MFN treatment. Similarly, MFN treatment has also been extended to Chinese investors under the article, 48 (3), article 50 and article 55 of China-Pakistan FTA 2006[32].

Under article 48(1) of China Pakistan FTA 2006 and article 3 of China Pakistan BIT 1989, Chinese investors are given fair and equitable treatment in Pakistan.[33]Although full security and full protection are equated with the fair and equitable treatment in the treaties, however separate provisions focusing this specific element are also given in the instruments. These separate provisions show the commitment of contracting parties towards the protection of investments. Under article 3 of China Pakistan BIT and article 47 of China Pakistan FTA 2006, Chinese investments are provided full protection and security in Pakistan.[34]

CONCLUSION

Pakistan has a quite liberal foreign investment regime in the region. Except restricted, areas all fields of investment are open to foreign investors for investment. Under the 2013 Policy, foreign investors are granted the same status as that of local and domestic investors, and all facilities available to local and domestic investors are extended to foreign investors on an equal basis. Pakistan and China possess a long term investment relations. A lot of benefits and advantages are being given by the government of Pakistan to foreign investors, especially to Chinese investors in order to encourage them.

The CPEC is significantly important project for China and Pakistan. The two countries expect several benefits and increase investment, thus accelerating the economic development of a region. Chinese investments in Pakistan cover a large number of sectors and are compatible with legal and transaction-specific procedures for investment. Pakistani investment laws intensely protect foreign investment under Pakistani laws. Arbitration is also available to foreign investors and the arbitration is being developed progressively.

The latest laws emphasizing the ICSID Convention and New York Convention have provided security to the investments in Pakistan for the enforcement of arbitral awards. In prospect of an expeditious expansion in Chinese investment in Pakistan subsequent to the CPEC execution and moreover to expedite accessible investments, both states should contemplate the establishment of common arbitration centers.

[30] See Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law(2nd edition , Oxford University Press 2012) page 130–2.
[31] China Pakistan FTA 2006,Art 7, China Pakistan FTA 2009,Art 15.
[32] 48(3), article 50 and article 55 of China Pakistan FTA. 2006.
[33] Article 48(1) of China Pakistan FTA 2006, article 3 of China Pakistan BIT 1989
[34] article 3 of china Pakistan BIT 1989, article 47 of China Pakistan FTA 2006

Both countries have a quite robust BIT investment regime and a section on investment in the FTA. In a comparison of the BIT, the free trade agreement has further comprehensive and contemporary rules on disputes settlement between investor-states that cover any legal dispute relating out of an investment. The FTA allows investors to proceed for legal action directly to international arbitration without the exhaustion of domestic remedies. Though, the FTA does not permit similar proceedings prior to national and international arbitration procedure that could prevent conflicting results from different routes. The option of ICSID as an arbitration abroad is both restraining and difficult to handle, as both states should aim to establish regional capacity and the creation of local centers for international arbitration. After going through this comprehensive study of CPEC, it may be concluded that the Pakistani legal system is in the process of protecting Chinese investment.

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