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CONSTRUCTING A THEORETICAL FRAMEWORK FOR A RULES-BASED APPROACH IN BRI DISPUTE RESOLUTION

Jamieson **Kirkwood***

This article constructs a theoretical framework that sets out the basis for instituting a rules-based approach in BRI dispute resolution. This article is a response to the fact that there have been numerous calls for instituting a rules-based approach in BRI dispute resolution, but there has been little written in terms of laying a theoretical foundation for doing this. In such way, this article fills this gap by analysing what a rules-based approach to dispute resolution means, exploring what the BRI actually is and considering why rules are understood to be necessary in BRI dispute resolution. Although the article principally adds to the ongoing academic discussion regarding the reform of BRI dispute resolution it is also of use to practitioners and policy makers active in this field.

I. Introduction

Although the benefits of and need for a rules-based approach in Belt and Road Initiative ("BRI") dispute resolution have already been raised, comprehensive proposals for a rules-based system have not yet been produced.[1] For instance, whilst scholars have argued that "regulation by law and a rule-oriented structure for the BRI" is needed, the scholarship is rather vague regarding the implementation of such a system.[2] This article contributes to this discussion by constructing a theoretical framework for introducing a rules-based approach in BRI dispute resolution.[3]

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* Post-doctoral Fellow in Finance, Technology, Regulation and Sustainable Development, The University of Hong Kong and Barrister (Middle Temple, England and Wales) (Email: jamieson.kirkwood@hku.hk).

1 From a legal point of view, the BRI's establishment in 2013 has produced uncertainty, because there were no formal legal sources promulgated, which led scholars such as Lingliang Zeng to state that the BRI could not be defined "conceptually" and that it was "uncertain what the BRI is": see Lingliang Zeng, "Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny" (2016) 15(3) Chinese JIL 517 at 539. See also Heng Wang, "China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability" (2019) 22(1) J Intl Econ L 29 [Wang, "Scope, Character and Sustainability"].

2 Yanning Yu, "China's Implementation of Its 'One Belt One Road' Initiative: Legal Challenges and Regulation by Law" (2021) 16 Asian Journal of WTO and International Health Law and Policy 121 at 121–122, 133 and 145.

3 See *eg*, Olga Boltenko, "Resolving Disputes Along the Belt and Road: Are the Battle Lines Drawn?" (2017) 19(4) Asian Dispute Review 190; Guiguo Wang, "The Belt and Road Initiative in Quest for a Dispute Resolution Mechanism" (2017) 25(1) Asia Pac L Rev 1 [Wang, "Quest for a Dispute Resolution Mechanism"]; Patrick Norton, "China's Belt and Road Initiative: Challenges for Arbitration in Asia" (2018) 13 U Pa Asian L Rev 72; Jiangyu Wang, "Flexible Institutionalization: A Critical Examination of the Chinese Perspectives on Dispute Settlement for the Belt and Road" (2021) 29 Asia Pac L Rev 70

In such way, this article explores the theoretical framework underpinning the institution of a rules-based approach in international economic law ("IEL") on the one hand, and then, alongside this (and on the other hand), considers (at a theoretical level) whether a rules-based approach in BRI dispute resolution could be implemented. In other words, the article first considers a rules-based approach more generally before delving deeper into the main purpose of implementing a rules-based approach in BRI dispute resolution. Additionally, the article is not limited by a purely legalistic approach and also considers various cross-disciplinary theories, which introduce and explain observable features of a rules-based approach, and also the BRI, from outside of the law.

There are various reasons for instituting a rules-based approach in IEL (such as fairness, consistency, predictability, transparency *etc*) and the article discusses these reasons from a theoretical perspective before the article considers whether BRI dispute resolution currently follows a rules-based approach and explores why a rules-based approach might be considered necessary in BRI dispute resolution. Additionally, the article specifically considers (the origins of and extent of) theoretical power imbalances in the BRI and how a rules-based approach can mitigate these.

The power imbalances are because of the size and power of China (on the one hand) and then the extent of the BRI (on the other hand).[4] Further, the BRI is also

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[Wang, "Flexible Institutionalization"]. See also Henrik Andersen, "Rule of Law Gaps and the Chinese Belt and Road Initiative: Legal Certainty for International Businesses?" in Giuseppe Martinico & Xueyan Wu, eds. *A Legal Analysis of the Belt and Road Initiative* (United Kingdom: Palgrave Macmillan, 2020) 103; Steven Chong J, "Dispute Settlement in the Belt and Road Initiative: Lessons from the Singapore Experience" (2020) 8(1) The Chinese Journal of Comparative Law 32; Guiguo Wang & Rajesh Sharma, "The International Commercial Dispute Prevention and Settlement Organization: A Global Laboratory of Dispute Resolution with an Asian Flavor" (2021) 115 Am J Intl L Unbound 22; Julien Chaisse & Jamieson Kirkwood, "Adjudicating Disputes Along China's New Silk Road: Towards Unity, Diversity or Fragmentation of International Law?" (2021) 68(2) Neth Intl L Rev 219; Ernst-Ulrich Petersmann, "Trade and Investment Adjudication involving 'Silk Road Projects'" in Wenhua Shan, Sheng Zhang & Jinyuan Su, eds. *China and International Dispute Resolution in the Context of the 'Belt and Road Initiative'* (Cambridge: Cambridge University Press, 2021) 51 [Petersmann, "Trade and Investment Adjudication"].

[4] For example, it was already estimated that by 2016, the BRI already encompassed around a third of global gross domestic product and by 2018, that total BRI investment had reached USD $1 trillion and it is commonly expected that these trends will continue: see Belt and Road Big Data Technologies Ltd and Dalian Infobank Co Ltd 2017, "The Belt and Road Big Data Center of the State Information Center, Northeast Asia Big Data Center" <www.yidaiyilu.gov.cn/wcm.files/upload/CMSydylgw/201703/201703241243039.pdf> (May 2017) (stated that in 2016 the BRI connected China to over 60 countries and about 62% of the world's population, comprised about 31% of global GDP and 33% of the world's total merchandise trade). See also The Center for Strategic and International Studies, "How Big is China's Belt and Road" (3 April 2018) <https://www.csis.org/analysis/how-big-chinas-belt-and-road> accessed 3 February 2023 (stated that trends until 2018 suggested it would take six to seven years for the BRI to reach the USD $1 trillion mark); McKinsey & Company, "One Belt, One Road: From dialogue to action" <http://chinatraderesearch.hktdc.com/resources/MI_Portal/Article/obor/2015/12/472622/1450170975595_OneBeltOneRoadfromDialoguetoActionEN.pdf> (April 2015) (states that by 2050, the BRI region could realistically aim to contribute 80 percent of global GDP growth); Lutz-Christian Wolff, "Legal Responses to China's 'Belt and Road' Initiative: Necessary, Possible or Pointless Exercise?" (2020) 29(2) Transnat'l L & Contemp Probs 261 [Wolff, "Legal Responses to China's BRI Initiative"] (states that "commentators have guessed that the economic value

reported to be continuously expanding, despite the COVID-19 induced slowdown,[5] and considering the BRI is said to be president Xi Jinping's "signature project" and "the pursuit of the BRI" has already been added to the Chinese constitution, there is no sign of the BRI's expansion being halted.[6]

As regards dispute resolution, John H Jackson has famously said that disputes are generally settled by a rules-based approach or a power-based approach.[7] However, as regards BRI projects, there seems to be a lack of rules, *ie*, transparency and consistency in how BRI projects are managed, and this has led to criticism of the BRI as regards the potential exploitation of weaker parties by a more powerful China (*eg*, financial exploitation, environmental exploitation, labour exploitation) as well as a plethora of other issues, such as corruption, legal issues, and community opposition.[8] This is amplified because BRI projects also have other unique characteristics, such as the fact that practically all projects are operated and financed by Chinese state-owned enterprises.[9]

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of Chinese investments in the BRI area will be twelve times the value of the Marshall Plan, with which North America helped re-build Europe after World War II").

5 For example, according to the Chinese Ministry of Commerce, in 2021 there were "560 newly signed projects with a contract value of over US$100 million": see Ministry of Commerce of People's Republic of China, "Chinese investment cooperation with countries along the 'Belt and Road' in January 2021" <http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/202103/20210303044017.shtml> (28 February 2021). See also Christoph Nedopil Wang, "China Belt and Road Initiative (BRI) Investment Report 2021" <https://greenfdc.org/wp-content/uploads/2022/02/Nedopil-2022_BRI-Investment-Report-2021.pdf> (January 2022); Vera Schulhof, Detlef van Vuuren & Julian Kirchherr, "The Belt and Road Initiative (BRI): What Will it Look Like in the Future?" (2022) 175 Technological Forecasting and Social Change 121306.

6 See Yamei, "Full text of resolution on amendment to CPC Constitution", *Xinhua News Agency* <http://www.xinhuanet.com//english/2017-10/24/c_136702726.htm> (24 October 2017) (the resolution of the communist party specifically added the text "pursue the BRI" (推进"一带一路"); Suisheng Zhao, "China's Belt-Road Initiative as the Signature of President Xi Jinping Diplomacy: Easier Said than Done" (2020) 29(123) The Journal of Contemporary China 319.

7 John H Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2d ed. (United States: MIT Press, 1997) at 110–111 [Jackson, *The World Trading System*].

8 Asia Society Policy Institute, *Navigating the Belt and Road Initiative* <https://asiasociety.org/sites/default/files/201906/Navigating%20the%20Belt%20and%20Road%20Initiative_0.pdf> (June 2019) at 9 (as a consequence of instances where BRI projects have been perceived negatively the institute says that the BRI brand has become tarnished). See also Deloitte Insights, "Embracing the BRI ecosystem in 2018. Navigating pitfalls and seizing opportunities" <https://www2.deloitte.com/us/en/insights/economy/asia-pacific/china-belt-and-roadinitiative.html> (12 February 2018).

9 See *eg*, Ran Li & Kee Cheok Cheong, *China's State Enterprises: Changing Role in a Rapidly Transforming Economy* (Singapore: Springer Singapore, 2019) 2. See also Carsten A Holz, *China's Industrial State-owned Enterprises: Between Profitability And Bankruptcy* (Singapore: World Scientific Publishing Company, 2003); Craig C Julian, Zafar U Ahmed & Junqian Xu, eds. *Research Handbook on the Globalization of Chinese Firms* (United Kingdom: Edward Elgar Publishing, 2014); Xiuping Zhang & Bruce P Corrie, *Investing in China and Chinese Investment Abroad* (Singapore: Springer Singapore, 2018); Karen Jinrong Lin *et al*, "State-owned enterprises in China: A review of 40 years of research and practice" (2020) 13(1) China Journal of Accounting Research 31; Peter J Buckley & Hinrich Voss, eds. *Chinese Outward Foreign Direct Investment* (United Kingdom: Edward Elgar Publishing, 2020); Wendy Leutert, "State-Owned Enterprises in Contemporary China" in Luc Bernier, Massimo Florio & Phillippe Bance, eds. *The Routledge Handbook of State-Owned Enterprises* (United Kingdom: Routledge, 2020).

Consequently, the BRI is often seen as a project pushed by the Chinese State in pursuit of China's national interests and at the expense of weaker stakeholders.[10] It is also generally perceived that China has geopolitical interests that mean that risk factors, which might discourage commercial investors pursuing an investment altogether or might require commercial investors to seek a higher rate of return to justify acceptance of the risks, can still be accepted.[11]

Therefore, in constructing such a theoretical framework, the structure of the article is as follows: Firstly, in part II we consider in more depth the history of and meaning of a rules-based approach. Then, in part III we *paint a picture* to try to understand what the BRI is, posing the hypothesis that the BRI is an economic project that demonstrates Chinese soft power. Similarly, in part IV we consider the BRI as a "hybrid-model of regionalism". Then, in part V we look more closely at rules-based trade specifically and in parts VI and VII we look at techniques of economic statecraft in the BRI (and other economic considerations). In part VIII we look at the key-concepts of a rules-based approach and in part IX there is an exploration of the key-concepts of a rules-based approach *vis-à-vis* BRI dispute resolution specifically. Part X provides a brief discussion about how the BRI actually operates in terms of current dispute resolution and considers how to apply the identified framework to the BRI. Finally, Part XI provides a conclusion.

II. Understanding a rules-based approach

This part (and the following parts III to part VII) is (are) a precursor to considering what the dispute resolution landscape in the BRI currently is? And whether this is a rules-based approach? That is because, in order to analyse whether BRI dispute resolution is currently pursued according to a rules-based approach (part IX), the concept of a rules-based approach needs to be defined and explored. Therefore, this part II defines a rules-based approach and presents the history of a rules-based approach.[12]

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[10] See Zhiqiong June Wang & Jianfu Chen, "BRI 2.0: Cosmetic Repairs or a Change of Course?" (2020) 54(5) J World Trade 791 at 796. See also Paul Dibb, "Is China's One Belt, One Road a Dangerous Idea?" EconVue <https://econvue.com/panels/chinas-one-belt-one-road-dangerous-idea.html> (May 2017); James Kynge, "China's Belt and Road difficulties are proliferating across the world", *Financial Times* (Beijing, 9 July 2018) <www.ft.com/content/fa3ca8ce-835c-11e8-a29d-73e3d454535d>; James Politi & Demetri Sevestopulo, "China's $1.3tn global spending spree will collapse, says top US official", *Financial Times* (Washington, 23 December 2019) <www.ft.com/content/5b6f73e6-233a-11ea-b8a1-584213ee7b2b> (each of these articles are critical of the BRI *eg*, due to financial exploitation, environmental exploitation, labour exploitation *etc*).

[11] See Norton, *supra* note 3 at 81 (refers to reports that suggest how Chinese officials might anticipate losing between 50% and 80% of their investment on BRI projects in Pakistan and Myanmar but, nevertheless are still willing to proceed). A specific example where it was perceived that China's geopolitical interests took precedence over the economic viability of the project is Hambantota Port Development project in Sri Lanka (where some observers have said that China encouraged Sri Lanka to become overindebted so that it could gain control of a port in a strategic location): see Kiran Stacey, "China signs 99-year lease on Sri Lanka's Hambantota port", *Financial Times* <www.ft.com/content/e150ef0c-de37-11e7-a8a4-0a1e63a52f9c> (11 December 2017).

[12] The terms "rules-based" approach or "rule-oriented structure" are interchangeable.

Our discussion starts with Adam Smith (who is sometimes called the father of economics) who was opposed to the use of power-oriented techniques and mercantilism in international economic relations (as far back as the eighteenth century).[13] Then, writing two hundred years later, Jackson (who is sometimes said to have established IEL), has been a leading proponent of a rules-based approach in IEL (sharing some of the same principles).[14] Jackson explicitly highlighted a rules-based approach in international economics can ensure that international trade is conducted with greater predictability, consistency, equitability, transparency – which collectively enable efficiency in international relations and international trade.

Smith was writing in the late 18th century around the start of the industrial revolution, when many States (especially European States) were operating colonies and when there was practically no institutional framework for international relations or international trade.[15] Smith considered that States operating mercantilist policies (which are power-oriented techniques) operated quite differently from (and had disadvantages compared with) States that did not.[16] In such a way Smith's work, *The Wealth of Nations* is an early example for how the law can be used to direct, restrict and promote economic development.[17] *The Wealth of Nations* generally builds "a detailed case that mercantilist policies make countries poorer rather than wealthier".[18] Mercantilist policies were basically perceived by Smith as power-oriented techniques that interfere with the smooth operation of capitalism.[19]

Furthermore, despite the fact that Smith was more famously known for his *laissez-faire*[20] approach to economics and *invisible-hand*[21] theory, in arguing vehemently against the implementation of mercantilist policies (power-oriented techniques) Smith is arguably a precursor to rules-based techniques. This is because rules-based techniques do not seek to interfere with capitalism, but rather to support

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13 See Adam Smith, *The Theory of Moral Sentiments* (first published 1759) (United Kingdom: Clarendon Press, 1976); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776) (United Kingdom: Clarendon Press, 1976).

14 See Joel P Trachtman, "John Jackson and the Founding of the World Trade Organization: Empiricism, Theory and Institutional Imagination" (1999) 20 Mich J Intl L 175 [Trachtman, "Jackson and the Founding of the WTO"] (describes Jackson as being "one of the creators" of the WTO and having "established the field of international economic law").

15 See *eg*, Curtis P Nettels, "British Mercantilism and the Economic Development of the Thirteen Colonies" (1952) 12(2) The Journal of Economic History 105; Harald B Malmgren, "Coming Trade Wars? (Neo-Mercantilism and Foreign Policy)" (1970) 1 Foreign Policy 115.

16 According to Smith, mercantilist policies distorted international markets.

17 See also D C Coleman, "Mercantilism Revisited" (1980) 23(4) The Historical Journal 773; Björn Hettne, "Neo-Mercantilism: The Pursuit of Regionness" (1993) 28(3) Cooperation and Conflict 211.

18 See Paul G Mahoney, "Adam Smith, Prophet of Law and Economics" (2017) 46(1) J Leg Stud 207. See also Simon Chesterman, "An International Rule of Law?" (2008) 56(2) Am J of Comp L 331.

19 Mercantilist policies were policies that were aimed at protecting domestic merchants by limiting foreign imports (and the physical outflow of gold in the 18th, 19th and 20th centuries).

20 In essence, that governments should not interfere with the natural tendencies of human beings to seek maximum profit. See also Tahany Naggar, "Adam Smith's Laissez Faire" (1977) 21(2) The American Economist 35; Jacob Viner, "ADAM SMITH AND LAISSEZ FAIRE" in Jacob Viner edited by Douglas A Irwin, *Essays on the Intellectual History of Economics* (United States: Princeton University Press, 2014) 85.

21 According to the theory, individuals and entrepreneurs will inherently maximise their own profits if left to their own devices (guided by an invisible hand), *ie*, with less government interference (a physical hand), which will provide related benefits to society: see Smith, *supra* note 13 at 215.

capitalism by providing greater predictability, consistency, equitability and transparency (which collectively enable efficiency) in international relations and in the international trading system (which Jackson more explicitly described).

In contrast to Smith, Jackson was writing in the late 20th century, at a time when there had already been substantial institutionalization in international relations and international trade.[22] Specifically, Jackson was writing alongside and after the development of the World Trade Organization (WTO),[23] which was designed to update significantly the General Agreement on Tariffs and Trade (GATT) agreed in 1947. Jackson called the WTO the missing "third leg of the Bretton Woods Stool".[24] In fact the WTO is considered to have been largely modelled on Jackson's work, *Restructuring the GATT*.[25]

In a nutshell, Jackson was similarly concerned with the non-interference by governments with capitalism and considered that "creating free trade" requires rules that enable "interrelated activities" such as "the flow of capital, the movement of labour, and the flow of technology and services".[26] Further, Jackson explained that the primary objective of a rules-based structure is "creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions".[27]

Therefore, in Jackson's view a rules-based approach involves creating institutions that enable predictability, consistency, equitability, transparency (which collectively enable efficiency in international relations and international trade). For instance, as regards international trade, Jackson considered that rules-based techniques are a means of institutionalizing the trading system so that it can operate in accordance with said principles. Indeed, Jackson is considered by Trachtman to have brought constitutionalisation (explained in part VIII) to the WTO.[28] This is because Jackson

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[22] More generally, Jackson also provided examples of the history of the United Kingdom, the US, and the EU as sovereign territories (or sovereign territories in a customs union) that have implemented a greater reliance on rules commensurate with their increasing level of development and stated that, "To a large degree, the history of civilization may be described as a gradual evolution from a power-oriented approach … towards a rule-oriented approach": see Jackson, *The World Trading System*, *supra* note 7 at 110.

[23] The WTO is perhaps the most relevant example in relation to constructing a rules-based approach in BRI dispute resolution since it has arguably a strong rules-based dispute resolution system said to be the jewel in the crown of the WTO: see *eg*, Barnaby W V Stewart, "Polishing the Jewel in the Crown: A Timely Review of the WTO Dispute Settlement Understanding" (2000) 9(1) Auckland UL Rev 25. Further, the WTO is in fact, frequently given as an example of an institution with a rules-based trading system and where its members can rely on each other and the entire WTO system: see *eg*, Roberto Echandi, "The Impact of an Idea: John Jackson's Striving for a Rule-Oriented International Economic System" (2016) 19(2) J Intl Econ L 359. The WTO is also the leading global trading organisation, which has implemented a rules-based approach in dispute resolution (in fact the WTO's website states that the "WTO is the only global international organization dealing with the rules of trade between nations"): see 'About WTO' available at <www.wto.org/english/thewto_e/thewto_e.htm>.

[24] The other two legs are the International Monetary Fund and the World Bank.

[25] See John H Jackson, *Restructuring the GATT System* (New York: Council on Foreign Relations Press, 1990). See also Rachel Brewster, "Rule-Based Dispute Resolution in International Trade Law" (2006) 92 Vand L Rev 251.

[26] See Jackson, *The World Trading System*, *supra* note 7 at 7.

[27] See Jackson, *The World Trading System*, *supra* note 7 340.

[28] See Trachtman, "Jackson and the Founding of the WTO", *supra* note 14 at 178.

wished to ensure the WTO operated on the basis of rules and was protected against power-oriented techniques.

Other proponents of a rules-based approach in IEL are Ernst-Ulrich Petersmann,[29] Hersch Lauterpacht,[30] Alfred Verdross,[31] and Hans Kelsen[32] (and there are also many more).[33] Petersmann for instance stated that, international trade requires "legal rules" so that "economic agents" may form "expectations regarding future economic transactions".[34] Additionally, an explicit definition is provided by Gerhard Erasmus who stated that a rules-based approach means, "[transparent] trade arrangements between states governed by international agreements which contain specific obligations regarding outcomes and practices", and that complying with these obligations ensures "certainty and predictability".[35]

These definitions identify that a rules-based approach, as regards IEL, primarily has two elements: First, the presence of defined legal rules to conduct transactions. Second, the extent to which agents have confidence in using the defined legal rules.[36] These two elements can be satisfied through the means of institutionalizing the rule of law (the application of rules and legal methods underpinning the rules).[37]

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[29] See *eg*, Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Kluwer Law International, 1997); Ernst-Ulrich Petersmann, "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization" (1995) 6(2) Eur J Intl L 161.

[30] See *eg*, Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933) [Lauterpacht, *Function of Law*].

[31] See *eg*, Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer, 1926).

[32] See *eg*, Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Germany: Mohr, 1920).

[33] See *eg*, Martti Koskenniemi, *The Politics of International Law* (United Kingdom: Hart, 2011) 41 (states Lauterpacht, Verdross and Kelsen led the way towards the establishment of a rules-based approach to international law – stressing the law's normativity and its capacity to oppose state policy as the key to its constraining relevance). See also H L A Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1997) (addresses several topics such as the nature of law, whether laws are rules, and the relation between law and morality and presents his theory of legal positivism, *ie*, the view that laws are rules made by humans and that no connection between law and morality is required); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Oxford University Press, 1993) (presents a philosophical and non-technical analysis of the very idea of a rule and on the role of rules in the legal system).

[34] See Ernst-Ulrich Petersmann, "Trade Policy as a Constitutional Problem. On the 'Domestic Policy Functions' of International Trade Rules" in Robert Howse & Petrus van Bork, eds. *The World Trading System: Historical and Conceptual Foundations* (United Kingdom: Taylor & Francis, 1998) 121.

[35] See Gerhard Erasmus, "Is the SADC Trade Regime a Rules-based System?" (2011) 1 Southern African Development Community LJ 17 at 17–18.

[36] See also John Locke edited by Peter Laslett, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) at [135]–[137] (emphasized the requirement that governance be through "established standing Laws, promulgated and known to the People" as opposed to "extemporary Arbitrary Decrees"); Charles de S Montesquieu translated and edited by Anne M Cohler, Basia C Miller & Harold S Stone, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) (advanced the requirement for the law to protect private rights through, amongst others, the separation of powers doctrine); A V Dicey edited by E C S Wade, *Introduction to the study of the law of the constitution* (United States: St. Martin's Press, 1967) (emphasised that all persons must be equally subject to the law).

[37] Legal methods are understood in terms of the confidence an agent has in relying upon the rules, which confidence will mainly be built upon the agent's expectations of the enforcement of the rules and the satisfactory resolution of disputes arising under the rules.

The analysis in this part II, at face value, has mostly considered rules-based techniques in terms of the facilitation of international trade in IEL, however, the same arguments apply in terms of international relations in general and the applicability to the BRI will be further discussed following a deeper consideration of what the BRI is (see the following parts).

Similarly, in relation to dispute resolution *per se*, Jackson explicitly stated,

> The 'rule-oriented approach' focuses the disputing parties' attention on the rule, and on predicting what an impartial tribunal is likely to conclude about the application of a rule. This, in turn, will lead parties to pay closer attention to the rules of the treaty system, and this can lead to greater certainty and predictability which is essential in international affairs, particularly economic affairs driven by market-oriented principles of decentralized decision making, with participation by millions of entrepreneurs.[38]

III. Considering the BRI as an Economic Project that Demonstrates Chinese Soft Power

In this part (and the following parts IV, VI and VII) we will consider whether or not the BRI is primarily about trade (or what is the BRI all about?). Moreover, we will do this by trying to *paint various pictures* of what the BRI is in this part III by considering the hypothesis that the BRI is an economic project that demonstrates Chinese soft power. The concept originates from the fact that in the last forty years or so China has become more authoritative in international economic law (and also international law and international affairs) and the BRI is therefore often reputed to be (primarily) an economic project that demonstrates Chinese soft power.[39]

In fact, the BRI has been seen as China's third most significant step in its modern history in that it reaffirms China's commitment to participate in multilateral market access, and also marks a major shift from the "reactive, selective adaptation of external rules toward a proactive, selective reshaping of international economic law institutions and rules".[40] This concept is significant as it also helps to provide an understanding of the effect of the BRI.[41]

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[38] See John H Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006) at 88.

[39] See *eg*, Colin Sparks, "China's soft power from the BRICS to the BRI" (2018) 3(2) Global Media and China 92. See also Richard Turcsanyi & Eva Kachlikova, "The BRI and China's Soft Power in Europe: Why Chinese Narratives (Initially) Won" (2020) 49(1) Journal of Current Chinese Affairs 58; David M Lampton, *The Three Faces of Chinese Power: Might, Money, and Minds* (United States: University of California Press, 2008).

[40] Ernst-Ulrich Petersmann, "International Settlement of Trade and Investment Disputes Over Chinese 'Silk Road Projects' Inside the European Union" in Giuseppe Martinico & Xueyan Wu, *A Legal Analysis of the Belt and Road Initiative* (Springer International Publishing 2020) 47. See also Heng Wang, "Selective Reshaping: China's Paradigm Shift in International Economic Governance" (2020) 23(3) J Intl Econ L 583 at 584 [Wang, "China's Paradigm Shift"]; Boltenko, *supra* note 3 at 190 (describes the BRI as having grown so vast and at such a steady pace that it has transformed itself into probably the most successful global trade initiative of the 21st century).

[41] Whilst the effect of the BRI is not necessarily the same as the purpose or the intention of the BRI, the effect of the BRI in international economic governance might be more significant than its purpose or intention.

Nevertheless, the concept of Chinese soft power is not only a phenomenon that relates to the BRI. Moreover, the origins of Chinese soft power, particularly in China's recent history, are perceived to be because China has undergone a massive shift in its economic strategy since its "opening up" in 1978. Then, after acceding to the WTO in 2001, China had (for the first time) engaged in multilateralism, being open to global competition and foreign investment in most sectors, although according to rules that were not of its own making.[42] China's accession to the WTO was an example of "selective adaptation", which is concerned with the "downloading" of external norms, in the form of rules, structures, processes, and practices.[43] Moreover, the "downloading" of western norms was required because many western States had hesitated about agreeing for China to participate in the WTO, but finally agreed as there was also perhaps suspicion that if China was denied the chance to "join in the game that the major powers have been playing, it might well decide to make its own".[44] Therefore, the "selective adaptation" of the WTO rules by China was a necessary compromise in order for China to join the WTO.

Now arguably the BRI has been established by China as an alternative to the WTO. Although the BRI and the WTO are compatible, the BRI has even a chance to outlast the WTO (considering the various issues with the WTO currently).[45] For instance, the co-existence of the WTO with other international systems has already been explained by the former director-general of the WTO Pascal Lamy. Lamy explained that the effectiveness and legitimacy of the WTO is stated to depend upon how it relates to the norms of other legal systems and on the nature and quality of its relationships with other international organizations.[46] As regards the BRI, whilst

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[42] See *eg*, Jeffrey D Sachs and Wing Thye Woo, "China's Economic Growth After WTO Membership" (2003) 1(1) Journal of Chinese Economic and Business Studies 1.

[43] See Wang, "China's Paradigm Shift", *supra* note 40 at 588 (states that "the clearest examples of China's engagement in selective adaptation emerged during the lengthy WTO entry process and around its compliance with WTO requirements. Due to substantial concerns among WTO members regarding inconsistencies between China and the WTO on regulatory practices, China made commitments to comply with WTO rules on matters including non-discrimination, transparency, and uniform administration").

[44] See Henry Gao, "China's ascent in global trade governance: from rule taker to rule shaker and, maybe rule maker?" Making Global Trade Governance Work for Development, Research Collection School Of Law 25 <https://ink.library.smu.edu.sg/sol_research/956> (2011) (considers China joining the WTO as an attempt by major powers to constrain China).

[45] See *eg*, Chad P Bown & Samaya Keynes, "Why Trump shot the sheriffs: The end of WTO dispute settlement 1.0" Peterson Institute Working Paper 20–24 <https://www.piie.com/publications/working-papers/why-trump-shot-sheriffs-end-wto-dispute-settlement-10> (May 2020) (considers the crisis at the WTO DSB, said to largely be the result of the US blocking new appellate body members, as reflective of a larger need for reform at the WTO DSB); Rajesh Sharma, "WTO Appellate Body at Cross Roads: Options and Alternatives" in Chang-fa Lo, Junji Nakagawa & Tsai-fang Chen, eds. *The Appellate Body of the WTO and Its Reform* (Germany: Springer, 2020) 239 (examines the US position and interests behind the WTO DSB crisis and proposes some options to handle the crisis); Giorgio Sacerdoti, "Solving the WTO Dispute Settlement System Crisis" (2019) 20(6) Journal of World Investment & Trade 785 (introduces a special issue of the journal discussing the WTO DSB crisis); see Ernst-Ulrich Petersmann, "How Should WTO Members React to Their WTO Crises?" (2019) 18(3) World Trade Rev 503 (considers that WTO members have been violating their legal duties and democratic mandates to maintain the WTO Appellate Body and that European 'ordo-liberalism' policies offer coherent strategies for overcoming the crisis); Rémi Bachand, "What's Behind the WTO Crisis? A Marxist Analysis" (2020) 31(3) Eur J Intl L 857 (explores the WTO crisis using Marxist theories of political economy and international relations).

[46] Pascal Lamy, "The Place of the WTO and its Law in the International Legal Order" (2006) 17(5) Eur J Intl L 969.

it is arguable that the BRI is neither a legal system nor an organization, it is very possible that the BRI is (or could soon become) the type of "trading arrangement" that Lamy had in mind when he said these words.[47] This is not only about the WTO though: for instance Henry Huang Ningning and Terri Tian Chenyue explain how, more than ten years after China acceded to the WTO, the BRI coincided with the fact that, "regulatory burdens on Chinese outbound investors have been eased from 2014" and that, "2014 was a remarkable turning point" as regards China's outbound investment.[48]

According to Ernst-Ulrich Petersmann, the BRI is also an opportunity for China to become further embedded into multilateral pluralism and that the "embedding" of China's BRI project into multilateral trade, investment and regional agreements "[could] contribute to legitimizing [BRI] governance and related adjudication through multilevel legal restraints on 'market failures' and 'government failures'".[49]

The literature also shows us that, as a demonstration of soft power the BRI is vastly different from the China of previous years (particularly prior to 1978). Due to the BRI, not only has a "paradigm shift in International Economic Governance" been observed, but the BRI is considered to be a demonstration of China's new pro-active approach vis-à-vis international economic governance, largely because China has become "unsatisfied with its role as a rule taker" and is now "taking its first steps as a rule-maker".[50] In essence, China has quickly shifted from being perceived as a "Passive Rule-Taker" to become an "Active Player with a Leadership Potential".[51] Indeed, the shift in China's foreign policy from "keeping a low profile" to "striving for achievement" has been profound and is in stark contrast to the approach taken by China previously, *ie*, "hide brightness and nourish obscurity".[52]

The BRI therefore highlights a move from "selective adaptation" to "selective reshaping" of the rules implemented by China and is a demonstration of the emergence of Chinese soft power. Selective reshaping is the "uploading" of "China-led institutions and China-preferred rules at the extra-regional level" and will "likely support China in shifting its position from that of an economic power to a governance power".[53] This is said by Heng Wang to be driven by the BRI in particular,

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47 See *eg*, Ran Guo, "Is China's Belt and Road Initiative Moving towards a Silk Road Union?: A Legal and Policy Consideration" (2020) 6(1) China and WTO Rev 49 (considers the advantages and problems stemming from the flexibility of the BRI).

48 Henry H Ningning & Terri T Chenyue, "'One Belt, One Road' and China's Outbound Investment Regime" in Lutz-Christian Wolff & Chao Xi, eds. *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer Hong Kong Ltd, 2016) 142 at 143 (explains the significant easing of regulatory obstacles as regards China's outbound investments after 2014).

49 Petersmann, "Trade and Investment Adjudication", *supra* note 3 at 63.

50 Wang, "China's Paradigm Shift", *supra* note 40 at 599.

51 See *eg*, Yong-Shik Lee & Xiaojie Lu, "China's Trade and Development Policy under the WTO: An Evaluation of Law and Economics Aspect" (2016) 2 China and WTO Rev 339.

52 See Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures" (2016) 27 Eur J Intl L 945 at 967 (states how Deng Xiaoping famously urged his colleagues in the 1990s to "hide brightness and nourish obscurity" (韬光养晦)).

53 See Wang, "China's Paradigm Shift", *supra* note 40 at 586–587 (considers how selective reshaping allows China to shift from that of an economic power to a governance power).

both through "an unprecedented network of BRI agreements" and through "China-led institutions".[54] Consequently, the BRI is also understood to be feared in the West, similar to how China's accession to the WTO was feared. However, despite the emergence of Chinese soft power it is currently thought by some scholars not to be in China's interest to change the current rules in a substantial way.[55] In fact, Wang confirms that China "remains deeply committed to" many traditional institutions, and supports existing investment law, "which works in China's favour as an exporter under the BRI".[56]

Additionally, the increasing size and significance of the BRI is likely to continue (mentioned above) and therefore, the paradigm shift of China becoming increasingly active in international economic governance, which had already become visible following China's "opening up" and reinforced by China's accession to the WTO, is purported to have been extenuated even further via the establishment of the BRI.[57] Furthermore, the continued development of Chinese soft power is because whilst these reforms have supported the rapid growth in China's economy and influence, the reforms also raise (according to Vivienne Bath) "the question of the role of the Chinese government in both deal making and protecting the rights and interests of Chinese investors".[58] Bath also suggests that the many policy documents relating to the BRI indicate that the Chinese government sees itself as playing an active role in planning and supporting the BRI's outward expansion.[59]

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[54] *Ibid* at 585–589 (Wang points to the approximately 200 BRI agreements and also references the AIIB, the Multilateral Cooperation Center for Development Finance (MCDF) and the CICC as BRI institutions).

[55] For example see the research paper by Scott Kennedy & Shuaihua Cheng, eds. "From Rule Takers to Rule Makers: The Growing Role of Chinese in Global Governance: The Growing Role of Chinese in Global Governance" (Research Center for Chinese Politics & Business, Indiana University) available at https://www.files.ethz.ch/isn/154720/the-growing-role-of-chinese-in-global-governance.pdf (September 2012) (the authors consider that, although China will surely become more active on the multilateral stage, we should not equate China's increased activity with a desire to reform the status quo: first, the current multilateral system is consistent with China's interests; second, many of those in power in China have benefitted from the current system; third, China has already become heavily enmeshed in the current order in ways that make disengagement or opposition overly costly; and fourth, that sceptics anyway overstate the disparity of China's place in the current system and the difficulties of adjustment).

[56] See Wang, "China's Paradigm Shift", *supra* note 40 at 594 (considers reasons it is in China's interests to support the WTO).

[57] See *eg*, Weifeng Zhou & Mario Esteban, "Beyond Balancing: China's Approach Towards the Belt and Road Initiative" (2018) 27(112) J of Cont China 487 at 496 (considers that Chinese policymakers realized that China's rise to great power status relies not only on formidable hard power but also on soft power and that Beijing is keen to promote its soft power through various means, including not only culture and public diplomacy but also economic and diplomatic levers such as aid, investment and participation in or creation of regional multilateral organizations and institutions).

[58] Vivienne Bath, "'One Belt, One Road' and Chinese Investment" in Lutz-Christian Wolff & Chao Xi, eds. *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer Hong Kong Ltd, 2016) 188.

[59] *Ibid*.

IV. Considering the BRI as a "Hybrid-Model of Regionalism"

The second concept, which helps to *paint a picture* of what the BRI is, and from which the sub-concept of new regionalism is also distinguished, is regionalism. The work of Björn Heetne can help us to distinguish between the concepts of regionalism and new regionalism. Despite the fact that Heetne views regionalism as an "elusive phenomenon" that has baffled social scientists for years due to a significant "problem of definition",[60] Heetne states a concept of regionalism clearly emerged between the 1950s and 1960s and "refers to a tendency and a political commitment to organise the world in terms of regions" or more narrowly according to "a specific regional project".[61] Further, Heetne understands old regionalism as the close cooperation amongst different sovereign States in a largely one-dimensional way, *ie*, focusing primarily on economic gains or security alliances.[62]

Heetne then states that, in contrast, the concept of new regionalism, which emerged in the late 1980s, can be defined as a "multidimensional form of integration which includes economic, political, social and cultural aspects", which goes beyond the goal of "creating region-based free trade regimes or security alliances".[63] According to Heetne there are accordingly notable differences between "old" and "new" regionalism, such as that, the process of regionalisation is now "more from 'below' and 'within' than before", "extroverted rather than introverted" and regional integration is based not only on "economic, but also ecological and security imperatives".[64] This may provide a perfect explanation of what the BRI is perhaps about, *ie* "trade ++".

Additionally, Heetne also differentiates between core regions and peripheral regions. Heetne states that core regions are more "politically stable and economically dynamic and organize for the sake of being better able to control the world," but peripheral regions are "politically more turbulent and economically more stagnant… [and] organize in order to arrest a process of marginalization".[65] Heetne also states how regionalism is connected with globalisation, as both a cause and a consequence. Indeed, Heetne explains that regionalisation and globalisation represent "related but different aspects of the contemporary transformation of world order" and that there is similarly a "transnational struggle" over the "political content of regionalisation, as well as over that of globalisation".[66]

Therefore, a consideration of transnational law is also relevant to the discussion regarding regionalism because the concepts of regionalism and new regionalism

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60 Björn Hettne, "Beyond the 'new' regionalism" in Anthony Payne, ed. *Key Debates in New Political Economy* (United Kingdom: Routledge, 2006) 129 [Hettne, "Beyond the New Regionalism"].

61 *Ibid* at 130 (Heetne says the problem is due to the fact that region, regional cooperation, regional integration, regionalism, regionalisation and region building are moving targets).

62 *Ibid* at 132 (Heetne also says that "Europe was the centre of the debate about old regionalism").

63 Björn Hettne, András Inotai & Osvaldo Sunkel, eds. *Globalism and the New Regionalism* (United States: Macmillan, 1999) at xvi.

64 *Ibid* at xvii (As regards regionalisation being from 'below' and 'within', Heetne is referring to the fact that regionalisation in old regionalism was often imposed upon States according to terms set by a few major powers *ie*, from 'above').

65 *Ibid* at xviii.

66 Hettne, "Beyond the New Regionalism", *supra* note 60 at 133 (discusses the connection between regionalism and globalization).

inform us that the world has moved beyond individual States into regional blocs. In such way the concepts of Phillip Jessup, who is the harbinger of transnational law, are applicable.[67] Furthermore, transnational disputes are often disputes involving regions. This is because transnational situations, *ie*, involving individuals, corporations, States, organizations of States and other groups commonly occur within a regional context. Indeed, as the world has become more interconnected through regionalism, many disputes are inevitably transnational. Similarly, Jackson said that "the problem of international economics today, then, is largely a problem of "managing interdependence".[68]

To return to our purpose of identifying the BRI, it is necessary to outline how China has been involved in new regionalism in the recent decades and why the BRI is said to demonstrate a "hybrid-model of regionalism".[69] This is because the BRI is a product of regionalism and multiple scholars (as follows) have identified a particular type of new regionalism that China has been pursuing in recent decades. For instance, Suisheng Zhao states that, since the mid-1990s, China has been keen to organize regional economic and security cooperation in East Asia due to China's pivot "from a single minded preference for bilateralism to embrace multilateralism".[70] Furthermore, Kai He has suggested that this shift has gathered pace since the 2008 global financial crisis and now China has become a major player in "contested multilateralism 2.0" in the Asia-Pacific region.[71] As regards the BRI,

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[67] Jessup's description of transnational law is widely known and includes all laws, from both public and private international law, which regulate actions or events that transcend national frontiers. Furthermore, Jessup stated that transnational situations involve individuals, corporations, States, organizations of States and other groups. As regards the application of transnational law, Jessup explained that we should not think in terms of any particular forum, since transnational tribunals might not use any particular national law or the corpus of international law. See Phillip C Jessup, *Transnational Law* (United States: Yale University Press, 1956). After Jessup's seminal work, many others developed the theory of transnational law *eg*, see Harold H Koh, "Why Transnational Law Matters" (2006) 24(4) Pennsylvania State Intl L Rev 745; Christian Tietje & Alan Brouder, eds. *Handbook of Transnational Economic Governance Regimes* (Netherlands: BRILL, 2009); Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (United Kingdom: Routledge, 2010); Calliess Gralf-Peter & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (United Kingdom: Hart Publishing, 2010); Peer Zumbansen, ed. *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge: Cambridge University Press, 2020). See also James A Caporaso, "Regional integration theory: Understanding our past and anticipating our future" (1998) 5(1) Journal of European Public Policy 1; Ramesh Thakur & Luk Van Langenhove, "Enhancing Global Governance Through Regional Integration" (2006) 12(3) Global Governance 233; Wolfram Kaiser, Brigitte Leucht & Michael Gehler, eds. *Transnational Networks in Regional Integration* (United Kingdom: Palgrave Macmillan UK, 2010); Laszlo Bruszt & Gerald A McDermott, eds. *Leveling the Playing Field: Transnational Regulatory Integration and Development* (Oxford: Oxford University Press, 2014).

[68] Jackson, *The World Trading System*, *supra* note 7 at 8.

[69] See Andreas Grimmel & Yuan Li, "The Belt and Road Initiative: A hybrid model of regionalism" in Yuan Li & Markus Taube, eds. *How China's Silk Road Initiative Is Changing the Global Economic Landscape* (United Kingdom: Routledge, 2019) (suggests that the BRI constitutes a type of hybrid regionalism that eludes the old-new-regionalism divide and embraces elements of both traditions).

[70] Suisheng Zhao, "China's Approaches toward Regional Cooperation in East Asia: Motivations and Calculations" (2011) 20(68) The Journal of Contemporary China 53 [Zhao, "Motivations and Calculations"].

[71] Kai He, "Contested Multilateralism 2.0 and Regional Order Transition: Causes and Implications" (2018) 32(2) Pac Rev 210–220 (proposes a new concept of "contested multilateralism 2.0" to describe

He explains that in "multilateralism 2.0" China is using the Asian Infrastructure Investment Bank (AIIB) and the BRI as a means to "increase its regional power and influence through forming new rules and norms" for economic and financial governance in the Asia-Pacific region.[72]

In fact, these scholars and others, *eg*, Carla Freeman, have stated that China specifically has a "regionalism foreign policy" and that Beijing sees it necessary to boost regional development as this contributes to improving the "[security and] stability of its complicated regional neighbourhood".[73] Also, with particular regard to the BRI, Freeman contends that China's regionalism policy has now become "China's regionalism policy 2.0" and the announcement of the BRI in 2013 marked a "turning point in China's regionalism foreign policy".[74] Therefore, China's regionalism strategy arguably hovers between both *old* and *new* regionalism, and this is what is meant by a "hybrid-model of regionalism". Such hybrid-model perhaps echoes what will be seen in part VII of this article as regards Chinese economic statecraft.

There are also many examples of how the BRI can be considered as a project that focuses on cultural and social issues and not only on trade and security. For instance, virtually all of the BRI policy documents, such as the 'Vision And Actions On Jointly Building Silk Road Economic Belt And 21st-Century Maritime Silk Road' emphasise how the BRI is to operate through "people to people bonds", "strengthening exchanges" and "common development" *etc*.[75] A specific example in the area of science is the 'Special Plan on Advancing Cooperation of Science and Technology Innovation in the Belt and Road Construction' issued in September 2016 by China's Ministry of Science and Technology.[76] Similarly, in the area of

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the puzzling institutional building efforts by non-ASEAN members after the 2008 global financial crisis ("GFC") in the Asia-Pacific).

72 *Ibid* at 215 (considers China's approach to "contested multilateralism 2.0").

73 Carla P Freeman, "China's 'Regionalism Foreign Policy' and China-India Relations in South Asia" (2018) 24(1) Contemporary Politics 81 (considers China's objectives in engaging in regional groupings with India and other South Asian states and finds that China is pursuing a "regionalism foreign policy" which reflects a 'comprehensive' approach to international security). See also Moritz Pieper, "The linchpin of Eurasia: Kazakhstan and the Eurasian economic union between Russia's defensive regionalism and China's new Silk Roads" (2021) 58(3) International Politics 462; Marcin Kaczmarski, "Non-western visions of regionalism: China's New Silk Road and Russia's Eurasian Economic Union" (2017) 93(6) International Affairs (London) 1357; Ikboljon Qoraboyev & Kairat Moldashev, "The Belt and Road Initiative and Comprehensive Regionalism in Central Asia" in Maximilian Mayer, ed. *Rethinking the Silk Road* (Singapore: Springer Singapore, (2017) 115; Bushra Fatima & Mubeen Adnan, "China's Economic Strategy and Challenges in Central Asia" (2017) 17(2) Journal of Political Studies 351; Tatyana V Kolpakova & Tatiana N Kuchinskaya, "China's 'new regionalism' as a mechanism to strengthen the influence of China in the global integration processes: An example of Eurasian economic union" (2015) 5(2S) Intl J of Economics and Financial Issues 109.

74 Freeman, *supra* note 73 at 86 (considers that the BRI signifies a shift in China's regionalism foreign policy towards "China's regionalism policy 2.0").

75 Belt and Road Portal, "Vision And Actions On Jointly Building Silk Road Economic Belt And 21st-Century Maritime Silk Road" <https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm> (30 March 2015).

76 Belt and Road Portal, 'Special Plan on Advancing Cooperation of Science and Technology Innovation in the Belt and Road Construction' <https://eng.yidaiyilu.gov.cn/zchj/qwfb/35985.htm> (22 November 2017).

information technology, Yun Zhao notes how Chinese president Xi Jinping has often emphasised how the BRI includes "a common destiny in cyberspace".[77]

Additionally, China's attitude to international organizations has been characterized by Samuel Kim as moving from a "system-transforming" approach, which prevailed during the exclusion period of 1949–70 to a "system-reforming" approach, which prevailed in the 1970s, to the "system-maintaining and system-exploiting" approach which prevailed in the 1980s and 1990s. Kim also argued that China's behaviour here can be characterized by a "maxi-mini approach", that is, a strategy of maximizing the benefits of participating in international organizations through "state-enhancing" rather than "state-diminishing" functionalism and also minimizing normative costs and other costs such as loss of sovereignty or dependency.[78]

Therefore, these scholars identify an increase in Chinese soft power through China's regionalism strategy. However, the primary driver of China's regionalism strategy is perceived as motivated primarily by China's domestic interests to create a "peaceful peripheral environment" for its "economic growth and political stability".[79] Pasha L Hsieh also provides an important analysis regarding "New Asian Regionalism", which work provides the first systematic analysis of "New Asian Regionalism" as a paradigm shift in IEL.[80] This also has significant implications as regards dispute resolution, since it means that China's regionalism strategy is not expected to contribute towards regional dispute resolution since such drivers have shaped China's "preference for an informal approach, emphasizing voluntarism and consensus building rather than legally binding resolutions" and, in particular, China's "soft approach is a major barrier for many regional institutions to move beyond the stage of talking shops to effectively resolve conflicts in the region".[81]

Additionally, greater regionalism has also provided the possibility to observe conflict management opportunities in other ways. Firstly, regionalism is an expression of the transactional approach to conceding sovereignty because States are willing to partially exchange their sovereignty in return for the efficiencies (*eg*, economic, security) to be obtained by being part of a regional bloc.[82] Secondly, studying regionalism by analysing its networked approach is a means to better "reveal the

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77 Yun Zhao, "Cyber Law and China's New Global Presence: Current Status" in Lutz-Christian Wolff & Chao Xi, eds. *Legal Dimensions of China's Belt and Road Initiative* (Hong Kong: Wolters Kluwer Hong Kong Ltd, 2016) 432 (Zhao analyses how the BRI involves, "working together to build a common destiny in cyberspace").

78 Samuel S Kim, "China's international organizational behaviour" in Thomas W Robinson & David Shambaugh, eds. *Chinese Foreign Policy: Theory and Practice* (Oxford: Oxford University Press, 1994) 425.

79 Zhao, "Motivations and Calculations", *supra* note 70 at 54 (emphasizes the importance to China of maintaining a peaceful peripheral environment).

80 See also Pasha L Hsieh, *New Asian Regionalism in International Economic Law* (Cambridge: Cambridge University Press, 2021) [Hsieh, *New Asian Regionalism*]; Pasha L Hsieh, "What is New Asian Regionalism" (2022) 2(12) United StatesAsian Law Institute Perspectives <https://usali.org/usaliperspectivesblog/whatisnewasian-regionalism>.

81 Hsieh, *New Asian Regionalism*, *supra* note 80.

82 See Joel P Trachtman, *The Economic Structure of International Law* (United States: Harvard University Press, 2008) at 10 [Trachtman, *Economic Structure of International Law*] (defined the transactional approach as where individual actors or groups of actors encounter one another and sometimes have occasion to cooperate, to engage in what may broadly be termed "transactions"').

limits and opportunities for conflict management and resolution that various types of regional arrangements possess".[83]

V. Towards rules based trade

Further, if we consider the BRI as both an economic project that demonstrates Chinese soft power and also a "hybrid-model of regionalism", then trade rules and the resolution of economic disputes are highly significant. Not least, this is because trade (and geopolitics) in the 21st century is (are) quite different from that which existed in the last century and also regionalism, which generally promotes rules-based trade, is a key reason for this change.[84] For instance, there is a link between the differing requirements placed upon trade rules over time, and, there is also a connection between regionalism and dispute resolution, *eg*, just as regionalism has evolved, different kinds of rules have also been considered more or less important over time.

For instance, Richard Baldwin stated that 20th century regionalism was primarily concerned with preferential market access, but 21st century regionalism is concerned with disciplines that underpin the "trade investment-service nexus".[85] Additionally, as we have seen, the BRI is considered both as a regional project (emphasising trade and security) and also part of the movement of new-regionalism (which also includes other economic, political, social, and cultural aspects).[86]

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[83] Anna Ohanyan, *Networked Regionalism As Conflict Management* (United States: Stanford University Press 2015) at 41 (considers that "frozen conflicts" in regions require alternative regional approaches to the classic, state-focused, and sovereignty-based conflict management models that are practiced in traditional diplomacy). In her study, Ohanyan also informs us that on the one hand most conflict management "interventions are state-centric, even when conflicts have a pronounced regional dimension", *ie*, conflict resolution often does not take into account regional or transnational elements, but on the other hand "networks are emerging as the key mode of operation for the new regionalism" at 2, 35.

[84] See *eg*, Andrew Hurrell, "Explaining the Resurgence of Regionalism in World Politics" (1995) 21(4) Rev of Intl Studies 331; Richard Pomfret, "Is Regionalism an Increasing Feature of the World Economy?" (2007) 30(6) World Economy 923.

[85] See Richard Baldwin & Patrick Low, *Multilateralizing Regionalism* (Cambridge: Cambridge University Press, 2009) (a collection of revised papers from the "Multilateralizing Regionalism" conference, held at the WTO in September 2007). See also Tanja Börzel & Thomas Risse, eds. *The Oxford Handbook of Comparative Regionalism* (Oxford: Oxford University Press, 2016).

[86] Note how the regionalism movement throughout the entire Eurasian context is also developing rapidly: see *eg*, Anna Aseeva & Jędrzej Górski, eds. *The Law and Policy of New Eurasian Regionalization* (Netherlands: Brill Nijhoff, 2021) (considers new Eurasian regionalisation with a focus on legal and institutional matters). See also Vladimir S Izotov & Anastassia V Obydenkova, "Geopolitical games in Eurasian regionalism: ideational interactions and regional international organisations" (2021) 33(2-3) Post-Communist Economies 150; Efe Can Gürcan, "Geopolitical Economy of Post-hegemonic Regionalism in Latin America and Eurasia" in Paul Zarembka, ed. *Class History and Class Practices in the Periphery of Capitalism* (United Kingdom: Emerald Publishing Ltd, 2019) 59; Jeffrey D Wilson, "Rescaling to the Indo-Pacific: From Economic to Security-Driven Regionalism in Asia" (2018) 35(2) East Asia 177 (considers the "Indo-Pacific" region as a is a security-focused regional project, reflecting the desire of its proponents to form a quadrilateral bloc to resist China's growing maritime assertiveness); Jorge F Garzón, "Multipolarity and the future of economic regionalism" (2017) 9(1) Intl Theory 101; Mark Beeson & Troy Lee-Brown, "The Future of Asian Regionalism: Not What It Used to Be?" (2017) 4(2) Asia & the Pacific Policy Studies 195; William W Grimes, "East Asian financial regionalism: Why economic enhancements undermine political sustainability" (2015) 21(2) Contemporary Politics 145.

Moreover, Baldwin specifically studied the link between regionalism and international trade. Baldwin not only helped identify a domino-effect as regards the trade aspects of regionalism, whereby non-members of regional groups react to exclusion, but Baldwin also pinpointed the causes of regionalism from an international trade perspective.[87] Similarly, the movement towards regionalism is perhaps most visible in terms of trading blocks, *ie*, the establishment of regional institutions. For example, when the GATT was agreed in 1947 it was basically the first and only significant trading agreement (at that time).[88] However, since then regional trade agreements have been entered into all across the world (and the regionalism in trade agreements also appears to be gathering pace in recent decades).[89] Nevertheless, Leon Trakman demonstrated in his study that regional approaches towards regionalism vary significantly as regards the forms of agreements and regional approaches taken as regards regional integration.[90]

In relation to international trade, Baldwin suggested that although the institutions established by Jackson *et al* (primarily the WTO) have generally served us well until now, it was already time to update the institutions to handle the radically more complex "trade-investment-service nexus" of 21st century trade, which demands deeper disciplines and have quite different implications for the world trading system than was presented by traditional thinking.[91] For instance, countries now pursue domestic reforms and the implementation of new regulations – in other sovereign countries – rather than only the exchange of market access and the lowering of tariffs. In such way, 21st century regionalism is seen as a threat to the WTO's central role in global trade governance, not as a tariff cutter, but as a rule writer.[92]

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87 See Richard Baldwin, "A Domino Theory of Regionalism" in Richard Baldwin, Haaparanta Pertti & Kiander Jaakko, eds. *Expanding Membership of the European Union* (Cambridge: Cambridge University Press, 1995) 25 (considers why are countries eager to open markets regionally, but reluctant to do so multilaterally); Richard Baldwin, "The Causes of Regionalism" (1997) 20(7) World Economy 865.

88 The General Agreement on Tariffs and Trade 1947, <www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>.

89 For instance, the European Union ("EU") (formerly the European Economic Community) has been developing since 1957, the Association of South East Asian Nations ("ASEAN") has been developing since 1967, the Gulf Cooperation Council has been developing since 1981, the Common Market of the Southern Cone ("MERCOSUR") has been developing since 1991, the United States, Mexico and Canada Agreement ("USMCA") (formerly the North American Free Trade Agreement ("NAFTA")) has been developing since 1994, and there are also many others.

90 See Leon Trakman & Nicola Ranieri, eds. *Regionalism in International Investment Law* (Oxford: Oxford University Press, 2013) (provides a multinational perspective on international investment law, a critical and comprehensive understanding of issues in the field of foreign direct investment and analyses different bilateral, regional, and multinational agreements). See also Anna G Tevini, *Regional Economic Integration and Dispute Settlement in East Asia: The Evolving Legal Framework* (United Kingdom: Hart Publishing, 2018) (analyses how China's WTO accession served as a catalyst for the establishment of Regional Trade Agreements in East Asia, which is a novel development for the region. Also provides a systematic, comparative account of the scope, depth and (hard law versus soft law) quality of the rules-based economic integration achieved).

91 See Richard Baldwin, "21st Century Regionalism: Filling the gap between 21st century trade and 20th century trade rules" <www.wto.org/english/res_e/reser_e/ersd201108_e.pdf> (November 2010). See also Rajan S Neeraj, "Trade Rules for the Digital Economy: Charting New Waters at the WTO" (2019) 18(S1) World T Rev 121.

92 *Ibid.*

This approach to looking at trade governance parallels with the approaches to be considered in parts VI and VII of this article (below), *ie*, techniques of economic statecraft (and other economic considerations) and Chinese economic statecraft. In particular, the ebbing and flowing between centralized trade rules and regional trade rules might also represent a return to *power-bargaining* and can (potentially) be seen as collective economic statecraft on the part of stronger regional groups of States versus weaker regional groups of States.[93]

Additionally, Joost Pauwelyn proposed to differentiate between the old trade rules, which he terms "Rules-based trade 1.0", and the new trade rules, which he terms "Rules-based trade 2.0". Pauwelyn asserted that, whilst the old rules primarily focused on the input and content of the rules, the new rules are less formal and can evolve to meet stakeholder needs.[94] The ideas advanced by Pauwelyn are similar to Baldwin's identification of 20th century regionalism and 21st century regionalism.

Furthermore, there is now discussion of *trade 3.0*. This is concerned with converting global trade rules into a digitized form (*ie*, through coding) and the Organization for Economic Cooperation and Development (OECD) already released a working paper in October 2020, which aims to prepare governments worldwide to implement "digitized law".[95] For instance, Craig Atkinson stated that the development of interoperable, accessible and consumable rules on the internet (what Atkinson and others call "Internet of Rules") could usher in a new era of trade or "Trade 3.0" where, "the distinctive character…is that countries will be able to publish both natural language and digitally executable language versions of laws and regulations".[96]

This also allows us to continue the more general economic discussion of whether rules are principally applicable in IEL, rather than other fields. For instance, Joel Trachtman emphasized the importance of economic considerations when

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[93] See Ann Capling & John Ravenhill, "Multilateralising regionalism: What role for the Trans-Pacific Partnership Agreement?" (2011) 24(5) Pac Rev 553; Tania Voon, "Consolidating International Investment Law: The Mega-Regionals as a Pathway towards Multilateral Rules" (2018) 17 World T Rev 33.

[94] See Joost Pauwelyn, "Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How they May Outcompete WTO Treaties" (2014) 4 J Intl Econ L 739 [Pauwelyn, "Rise of Informal Rules and International Standards"] (considers the international trade system moving from a "power-oriented" to a "rule-oriented" regime and how recently the formation of traditional treaty rules has been replaced by informal rules and international standards).

[95] See James Mohun & Alex Roberts, "Cracking the code: Rulemaking for humans and machines" (2020) *OECD Working Papers on Public Governance*, No 42, OECD Publishing, Paris <https://doi.org/10.1787/3afe6ba5-en> (12 October 2020) (Rules as Code is a project which proposes that governments create rules (*eg*, laws and regulations) in a machine-consumable form, so that the rules can be understood and actioned by computers in a consistent way).

[96] See Craig Atkinson, "Disruptive trade technologies will usher in the 'internet of rules'" <https://blogs.lse.ac.uk/businessreview/2018/04/26/disruptive-trade-technologies-will-usher-in-the-internet-of-rules/> (26 April 2018) (for Atkinson Trade 2.0 was achieved by the WTO Trade Facilitation Agreement in 2017 and coding trade law would bring about Trade 3.0). Similarly, in October 2021 the ICC published the "Uniform Rules for Digital Trade Transactions" Version 1.0, which rules are designed to, "serve as an overarching framework for Digital Trade Transactions [and] providing global standardisation, consistency and conformity": see International Chamber of Commerce, "Uniform Rules for Digital Trade Transactions" <https://2go.iccwbo.org/uniform-rules-for-digital-trade-transactions-urdtt-version-1.html>.

considering the implementation of various techniques in international law.[97] There are also specific examples from economics of the idea that rules-based techniques have provided stability to the development of an economy *eg*, the success stories of certain markets and even regions. For instance, the success of Singapore provides a strong case for the merits of rules-based techniques, *eg*, the Chief Justice of Singapore, Chief Justice Sundaresh Menon stated that "Singapore's remarkable journey is a testament to the foundational importance of the rule of law to economic success".[98] Similarly, Jackson referenced several Nobel prize winning economists such as Stiglitz, North and Coase who all emphasized that markets fail unless there is an institutional framework supporting them.[99]

VI. Looking at Techniques of Economic Statecraft in the BRI (and Other Economic Considerations)

Whereas parts III and IV *paint a picture* of the BRI as a *power-oriented* project, utilising a "hybrid-model of regionalism", parts VI and VII aim to continue to *paint a picture* of the BRI, but also to further reinforce the idea of rules-based techniques as the alternative to power-oriented techniques. As such these parts both help to *paint a picture* of what the BRI is and to contrast rules-based techniques as the alternative to power-oriented techniques. The techniques considered, *ie*, *the theory of essential security, economic statecraft* and *the empire trap* are about the use of either non-consensual strategies to attempt to influence another sovereign state, or, in the alternative, consensual and neutral economic settlement as a way to shift dispute resolution away from non-consensual determination based on the relative power of a party. These theories are primarily addressed in the field of political science and not law, but in these parts an attempt is made to discuss the relevant legal considerations. These theories also point towards the idea that rules are necessary in international law to primarily mitigate against power imbalances, rather than just to facilitate international trade.

The theory of essential security, at its most fundamental level, implies the ability to defend core values through the threat of waging war.[100] In a nutshell, certain States

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97 Trachtman, *Economic Structure of International Law*, *supra* note 82 at 2 (considers economic analysis beneficial as regards the implementation of various techniques in international law).

98 See Sundaresh Menon CJ, "The Settlement of International Commercial Disputes: Alternative Dispute Resolution, Commercial Courts, and the Converge of Commercial Laws" speech at the National Judges College, Beijing (29 August 2019) at [18] (considers the importance of the rule of law to Singapore's economic growth).

99 See John H Jackson, "The Case of the World Trade Organization" (2008) 84(3) International Affairs 437 at 438. See also "Target 16.3" of the United Nations Sustainable Development Goals 2013 which is to "Promote the rule of law at the national and international levels and ensure equal access to justice for all": United Nations Sustainable Development Goals 2030 Target 16.3 <https://unstats.un.org/sdgs/metadata/?Text=&Goal=16&Target=16.3>. Additionally, Hong Kong's Department of Justice has launched a task force for "Rule of Law 2030", which would push codified rules to the forefront: see Department of Justice of HKSAR, "Vision 2030" <www.doj.gov.hk/en/legal_dispute/vision_2030.html> (29 October 2021).

100 See Walter Lippmann, *U. S. Foreign Policy: Shield of the Republic* (United States: Little Brown, 1943) at 51.

might consider certain matters to infringe on their overwhelming national interests and are not prepared to allow such matters to be undertaken. Therefore, essential security claims are both a defence against power bargaining and also a part of power bargaining itself. The theory of essential security is particularly relevant to this study, because not only does the theory further amplify the consideration of a State's sovereignty, but also since this theory has been partly counter-balanced by rules-based techniques. For instance, subsequent to the Second World War, there have been attempts to codify the protection of essential security interests in a way that shifts potential military conflict onto the economic sphere. Indeed, nowadays essential security exceptions are well established in many international agreements such as the General Agreement on Trade in Services (GATS) 1994 Article XIV and the Energy Charter Treaty 1994 Article 3;[101] many regional agreements such as the ASEAN Comprehensive Investment Agreement 1998 in Article 18;[102] and most Bilateral Investment Treaties (BITs).[103]

Similarly, the theory relating to techniques of economic statecraft involves considering States' power-oriented techniques (albeit expressed through economic measures). For instance, scholars have studied a State's use of economic strategy when conducting external affairs, *ie*, "to consider the instruments used by policy makers in their attempts to exercise power, *ie*, to get others to do what they would otherwise not do".[104] Indeed, the study of economic statecraft asks the question of under what conditions might States "modify the behaviour of other states by

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[101] General Agreement on Trade in Services 1994 <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf>; Energy Charter Treaty 1994 (consolidated on 15 May 2016) <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

[102] ASEAN Comprehensive Investment Agreement 1998 (as amended) <http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf>.

[103] See William J Moon, "Essential security interests in international investment agreements" (2012) 15(2) J Intl Econ L 481 (analyses the historical origins and state usage of essential security provisions in BITs); James Mendenhall, "The Evolution of the Essential Security Exception in U.S. Trade and Investment Agreements" in Karl P Sauvant, Lisa E Sachs & Wouter P F Schmit Jongbloed, *Sovereign Investment* (Oxford: Oxford University Press, 2012) 310 (examines the evolution of the essential security exception in trade and investment agreements in the US, whereby the latest generation of US agreements now explicitly remove the exception from review); Ridhi Kabra, "Return of the Inconsistent Application of the 'Essential Security Interest' Clause in Investment Treaty Arbitration: *CC/Devas v India* and *Deutsche Telekom v India*" (2019) 34(3) ICSID Rev 723 (considers the criteria necessary for successfully invoking an essential security interest clause and the inconsistent interpretation and application of such clauses in investment treaty arbitration); Wolfgang Weiß, "Interpreting Essential Security Exceptions in WTO Law in View of Economic Security Interests" in Wolfgang Weiß & Cornelia Furculita, *Global Politics and EU Trade Policy* (European Yearbook of International Economic Law) (United States: Springer International Publishing, 2020) 255 (considers the usage of and the methodical preliminaries when applying security exceptions at the WTO); Daria Boklan & Amrita Bahri, "The first WTO's ruling on national security exception: Balancing interests or opening Pandora's box?" (2020) 19(1) World T Rev 123 (analyses the WTO Panel Ruling in Russia – Measures Concerning Traffic in Transit which is the first attempt by the WTO to clarify the scope and ambit of the National Security Exception). See also Nayef R F Al-Rodhan, *The Five Dimensions of Global Security: Proposal for a Multi-Sum Security Principle* (Germany: Lit Verlag, 2007) (suggests the theory of essential security should be expanded into a "multi-sum security principle" that also includes the five dimensions of human, environmental, national, transnational, and transcultural security).

[104] David A Baldwin, *Economic Statecraft* (United States: Princeton University Press, 1985) at 9 (describes, considers, and challenges the utility of techniques of economic statecraft).

offering them tangible economic rewards or by threatening to disrupt existing economic relations?".[105]

This theory therefore also involves power-oriented techniques and often the desire of shifting potential military conflict onto the economic sphere. It is similar to the theory of essential security and to the discussion of the empire trap (see below) since all of these theories involve power-oriented techniques because a more powerful State attempts to extract concessions from a less powerful State based on their relative economic (or political) power.[106]

One of the most detailed studies of economic techniques of statecraft was made by David Baldwin, who followed on from Quincy Wright.[107] Baldwin's work had three main purposes. First, Baldwin wished to subject the conventional wisdom that economics is not a very useful instrument of politics to critical review. His hypothesis was that previous analysts had underestimated the utility of economic techniques of statecraft. Second, Baldwin aimed to increase the general awareness of economic statecraft in its various forms. His hypothesis was that the study of economic statecraft had been relatively neglected (as compared to other policy tools). Third, Baldwin intended to build an analytical framework to reassess the utility of economic techniques of statecraft. His hypothesis was to utilise the social power studies that developed after the 1950s.[108]

In relation to Baldwin's first purpose, Baldwin first reaffirms the conventional wisdom, "that everybody knows, that it does not work",[109] but then, in his study, Baldwin states his intention "to generate healthy scepticism with respect

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[105] Jean-Marc F Blanchard & Norrin M Ripsma, *Economic Statecraft and Foreign Policy: Sanctions, Incentives, and Target State Calculations* (United Kingdom: Taylor & Francis Group, 2013) at 2 (the study develops a unified theory of economic statecraft to clarify when and how sanctions and incentives can be used effectively to secure meaningful policy concessions).

[106] See also Daniel W Drezner, *The sanctions paradox: Economic statecraft and international relations* (Cambridge: Cambridge University Press, 1999) (discusses why nation-states initiate economic sanctions, what determines their success and argues that conflict expectations actually have a paradoxical effect because adversaries will impose sanctions frequently, but rarely secure concessions, whilst allies will be reluctant to use coercion, but once sanctions are used, they can result in significant concessions); David Cortright & George A Lopez, *Smart Sanctions: Targeting Economic Statecraft* (United States: Rowman & Littlefield, 2002) (analyses the use of targeted, "smart" sanctions that minimize unintended humanitarian consequences and focus coercive pressure on responsible decision makers); Chris Brummer, *Minilateralism: How trade alliances, soft law, and financial engineering are redefining economic statecraft* (Cambridge: Cambridge University Press, 2014) (considers that "minilateral" strategies like trade alliances, informal "soft law" agreements, and financial engineering to manage the global economy are modes of economic statecraft, aimed at both liberalizing and supervising international financial policy in a world of diverse national interests that are now post-American (and post-Western)); Peter A G van Bergeijk & Selwyn J W Moons, *Research Handbook on Economic Diplomacy: Bilateral Relations in a Context of Geopolitical Change* (United Kingdom: Edward Elgar Publishing, 2018) (studies bilateral economic diplomacy as a method of ensuring both commercial and broader economic interests and the conditions required for economic diplomacy to be most effective); Anatole Boute, "Economic Statecraft and Investment Arbitration" (2019) 40 U Pa J Int'l L 383 (considers States such as China or Russia using SOEs as tools to perform economic statecraft).

[107] See Quincy Wright, *The Study of International Relations* (United States: Appleton-Century-Crofts, 1955) at 239 (Wright observed that "the fields of economics and politics often overlap [and] politics may be an instrument of economics and economics may be an instrument of politics").

[108] Baldwin, *supra* note 104 at 4.

[109] Baldwin, *supra* note 104 at 3.

to the conventional wisdom".[110] Indeed, Baldwin shows us that the conventional wisdom should not simply be assumed and that what is needed is "more qualification, more patience, more rigour and more caution in generalizing about economic statecraft".[111]

As regards Baldwin's second purpose, Baldwin has clearly increased the general awareness of economic statecraft in its various forms. In particular, Baldwin identified several forms of economic statecraft at either a trade level or a capital level and provides examples of both positive and negative sanctions.[112]

In relation to Baldwin's third purpose of providing an analytical framework to reassess the utility of economic techniques of statecraft, this is also provided and "condensed into a set of guidelines that should help in avoiding the more common pitfalls in evaluating the techniques of economic techniques of statecraft".[113]

Additionally, other recent analysis also confirms that the success of economic techniques of statecraft has long been contested. The explanation is that, on the one hand, scholars in the commercial liberal tradition have argued that economic statecraft is frequently effective and can represent a powerful foreign policy instrument, however, on the other hand, political realists have argued that economic statecraft usually fails since economic statecraft often only obtains minor policy aims.[114] In summary, economic statecraft is a power-oriented technique and hence it is a method that a rules-based technique would seek to avoid. Baldwin provided a means to reassess episodes of economic statecraft. Baldwin explained the conventional wisdom that economic techniques of statecraft often have little effect and provided methods to challenge this conventional wisdom. Baldwin did not offer any view on whether economic techniques of statecraft are good or bad and similarly it is relevant for this article that economic statecraft techniques are being employed and not whether the techniques are good or bad or even whether the economic techniques of statecraft always achieve the intended results.[115] The extremely large variety of the forms of

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[110] Baldwin, *supra* note 104 at 370.

[111] *Ibid*.

[112] See Baldwin, *supra* note 104 at 41–42: The negative sanctions at a trade level might consist of an embargo, a boycott, a tariff increase, tariff discrimination, withdrawal of most favoured nation ("MFN") treatment, a blacklist, quotas, license denial, dumping, preclusive buying (and threats of any of these). The positive sanctions at a trade level might consist of a tariff reduction, tariff discrimination, granting MFN status, direct purchase, subsidies to exports or imports, granting licenses (and promises of any of these). The negative sanctions at a capital level might consist of freezing assets, controls on import or export, aid suspension, expropriation, taxation, withholding dues to international organizations (and threats of any of these). The positive sanctions at a capital level might consist of providing aid, investment guarantees, encouragement of private capital exports or imports, taxation (and promises of any of these).

[113] Baldwin, *supra* note 104 at 371–372 (provides an analytical framework to study economic statecraft in the form of guidelines).

[114] See Blanchard & Ripsma, *supra* note 105 at 2 (introduces the explanation that the success of economic statecraft is contested between scholars in the commercial liberal tradition and political realists).

[115] See also Jacob J Lew & Richard Nephew, "The Use and Misuse of Economic Statecraft: How Washington Is Abusing Its Financial Might" (2018) 97(6) Foreign Affairs 139 (discusses the US's use of economic tools to advance its foreign policy goals which rest on a recognition that unrivalled economic power gives the United States a singular capacity to pursue its interests without resorting to force); Vinod K Aggarwal & Andrew W Reddie, "New Economic Statecraft: Industrial Policy in an Era of Strategic Competition" (2020) 56(2) Issues and Studies – Institute of International Relations (argues

economic statecraft that Baldwin identifies shows us that it is important that any rules imposed to mitigate against economic statecraft, *eg*, WTO rules (or future BRI rules) need to be comprehensive.[116]

The theory of the empire trap is described by Noel Maurer and this theory considers the shift from politicized confrontations *(eg,* an imbroglio in Venezuela in 1900) to legalized disputes (*eg*, investment arbitration since the 1980s). Maurer's work has four basic findings. First, that US government intervention on behalf of US investors was successful at extracting compensation throughout the 1980s (primarily via Investor-State Dispute Settlement (ISDS)). Second, that US domestic interests frequently had more importance than US strategic concerns (and for small gains relative to the size of the US economy and the potential strategic losses). Third, the US was unable to impose institutional reform in foreign locations (such as in Latin America and West Africa). Finally, the methods used by the US government to protect the property rights of US investors overseas changed substantially over time (and showed US investors how they could protect their overseas investments without recourse to the US government).[117]

These findings are relevant to constructing a rules-based approach in BRI dispute resolution in a variety of ways. First it can be expected that investors will push their own governments to protect their investments and extract compensation from foreign governments, using ISDS where it applies or in State-to-State negotiation where ISDS does not apply (ISDS will generally be applicable if there is a BIT or other Free Trade Agreement (FTA) which provides for investment arbitration). Second, that domestic interests might often trump strategic interests, in the respective country where the investor is incorporated. Third, that it is unlikely that institutional reform can be implemented easily in the host countries of investments. Fourth, that the investors might pursue claims themselves where their own government is reluctant or unable to advance their interests.

Additionally, unlike the theory of economic statecraft, where it is the governments who take the lead, the empire trap describes a theory that the corporations in a country lead the governments. Furthermore, although Maurer's study focuses on the US (its success at obtaining investment compensation, particularly in the 1980s to the detriment of US strategic concerns and for small economic gains relative to the US economy), the analysis can also be extrapolated to other international situations. Indeed, other scholars have similarly said that, "multiple creditor nations had an

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that economic statecraft has become an increasingly central aspect of geostrategic consideration and considers how economic statecraft is being transformed in the current era).

[116] See *eg*, J Tyson Chatagnier & Haeyong Lim, "Does the WTO exacerbate international conflict?" (2020) 58(5) Journal of Peace Research (studies how the WTO has the potential to aggravate disputes because, it removes the opportunity for States to use economic policies as instruments of structural linkage in resolving disputes and it deprives its members of powerful economic tools that could be used in lieu of militarized responses); Vinod K Aggarwal & Andrew W Reddie, "Economic Statecraft in the 21st Century: Implications for the Future of the Global Trade Regime" (2021) World T Rev 1 (argues that economic statecraft is largely overlooked in our understanding of industrial policy, trade restrictions, and new investment rules).

[117] Noel Maurer, *The Empire Trap* (United States: Princeton University Press, 2013) at 2–3.

identical problem. They all struggled to "protect citizens' property abroad, whether through sanctions, negotiations, bribery, or force".[118]

Further, it can also be seen that one key factor that Maurer confirms for us is how the US government (and other governments), which previously acted in a power-oriented way, since the introduction of sophisticated investment arbitration, have acted in a more rules-based way. Therefore, in exploring a rules-based approach to BRI dispute resolution, it is important to take into consideration the above-described limitations and proceed in a way that offers a comprehensive and smooth system to all stakeholders.

VII. "Chinese economic statecraft"

To return to the aim of *painting a picture* of the BRI, we can consider the phenomenon of *Chinese economic statecraft*. In recent years a substantial amount of scholarship on this topic has emerged, which scholarship is often concerned with how China has embraced "comprehensive and aggressive economic statecraft as part of its grand strategy".[119] China is said to have been a recipient of techniques of economic statecraft prior to its "opening up" and is now said to be an active user of such techniques. This is said to have become more visible since the 2008–2009 financial crisis, where China is said to have enjoyed "relative economic success", which has "injected more confidence and ambition" into its economic statecraft.[120]

An important and comprehensive study was made by William Norris who explained the links between the domestic Chinese political economy and China's strategic foreign policy interests. Norris identified three prongs to China's grand

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[118] Elizabeth C Hoffman, "Escaping the Intellectual Trap of Empire" (2014) 42(4) Rev in Am History 746.

[119] Yi Edward Yang & Wei Liang, "Introduction to China's Economic Statecraft: Rising Influences, Mixed Results" (2019) 24(3) Chinese Journal of Political Science 381.

[120] *Ibid* at 382. See also Gregory T Chin, "China's Bold Economic Statecraft" (2015) 114(773) Current Hist (1941) 217 (considers China's changing global profile and geostrategic calculations, where it aspires to sit at the centre of the table, making rules and setting standards); Saori N Katada, Cynthia Roberts & Leslie Elliott Armijo, "The Varieties of Collective Financial Statecraft: The BRICS and China" (2017) 132(3) Political Science Quarterly 403 (discusses the impact of the BRICS group of countries on global economic governance); Mingjiang Li, ed. *China's Economic Statecraft: Co-Optation, Cooperation and Coercion* (Singapore: World Scientific Publishing Co Pte Ltd, 2017) (analyses China's economic statecraft in the contemporary era through exploring China's approaches to using its economic, trade, investment, and financial power for the pursuit of its political, security, and strategic interests at the regional and global levels); Yi Edward Yang & Wei Liang, eds. *Challenges to China's Economic Statecraft: A Global Perspective* (United States: Lexington Books, 2019) (explores China's use of economic tools such as trade, foreign aid, foreign direct investment, and sanctions to pursue strategic and security interests on the world stage); Stephen Noakes & Charles Burton, "Economic Statecraft and the Making of Bilateral Relationships: Canada-China and New Zealand-China Interactions Compared" (2019) 24(3) Chinese Journal of Political Science 411 (assesses the "strategic value" for China of New Zealand and Canada and identifies that Chinese economic policy is selectively sculpted to suit China's higher strategic purposes); Vida Macikenaite, "China's Economic Statecraft: the Use of Economic Power in an Interdependent World" (2020) 9(2) Journal of Contemporary East Asia Studies 108 (studies how China's exercise of economic statecraft has changed with the growth of its economic power and observes the quantitative change (how intensively the same economic tools were utilized), the qualitative change (what means specifically were employed) and the change in goals (what national objectives these economic means were aimed at achieving).

strategy: first, China's efforts to secure access to raw materials located abroad; second, Chinese relations with Taiwan; and third, China's sovereign wealth funds. Furthermore, Norris considered how the Chinese State, through its tightly structured system of business-government relations, has (or has not) been able to control and direct the behaviour of related economic actors.[121]

In particular, Norris presents and reconciles two competing perspectives regarding Chinese economic statecraft. On the one hand, Norris states that "China's growing economic clout and the dominant role of the state" suggest that China is "an emerging, mercantilist juggernaut of twenty-first-century economic statecraft". On the other hand, Norris also states that the "growing complexity and modernization that has underpinned China's economic liberalization" inherently limits Chinese economic power, meaning that the "Chinese state is simply too weak to effectively direct and control its growing economic clout". Norris reconciles the two perspectives since he argues that "framing the issue as an eitheror question does not capture the rich variation found in recent history". Moreover, Norris concludes that, "modern China is such a complex entity that any semblance of a grand strategy is impossible; the state is simply never able to marshal its economic power in a strategic way".[122]

Even though still less than 10 years old, the BRI has been said to already have "become an essential component of Beijing's economic statecraft" as China "seeks to gain influence with the use of economic inducements and coercive measures".[123] In this way the BRI is thought to be both a "vehicle for developing China's economic statecraft" and as demarcating a "shift towards a new approach that uses China's immense and growing economic strength to achieve political objectives".[124]

Primarily, it is stated that the BRI is used by China to "provide inducements to attain political goals by offering reassurances, limiting distrust, and, ultimately, shaping the behaviour" of the BRI Countries.[125] Moreover, economic statecraft under president Xi Jinping is understood to "include an explicit aim to sustain and

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[121] See William J Norris, *Chinese Economic Statecraft: Commercial Actors, Grand Strategy and State Control* (United States: Cornell University Press, 2016).

[122] *Ibid* at 2–4 (states that asserting Chinese economic statecraft is part of China's grand strategy is far too simplistic and that a far deeper analysis is required); See also S Shirk, *China: Fragile Superpower* (Oxford: Oxford University Press, 2008) (discusses the Chinese leadership's priority for survival ahead of economic growth, which priority motivates many of their decisions when dealing with foreign nations); David L Shambaugh, *China Goes Global: The Partial Power* (Oxford: Oxford University Press, 2013) (discusses how China has become more active and assertive throughout the world but argues that China's global presence is more broad than deep and that China still lacks the influence befitting a major world power – what he terms a "partial power").

[123] Ramon Pacheco Pardo, "Europe's Financial Security and Chinese Economic Statecraft: The Case of the Belt and Road Initiative" (2018) 16(3) Asia Europe Journal 237 at 238 (considers the BRI as an integral part of China's economic statecraft). See also Karl Yan, "The Railroad Economic Belt: Grand Strategy, Economic Statecraft, and a New Type of International Relations" (2021) 23(2) British Journal of Politics & Intl Relations 262 (considers that the BRI marks a "Xi-change" in China's grand strategy, which from an economic statecraft perspective, has meant that the Chinese state has replicated the domestic state industrial complex to support its geopolitical and geoeconomic objectives).

[124] Andreas Grimmel & Viktor Eszterhai, "The Belt and Road Initiative and the Development of China's Economic Statecraft: European Attitudes and Responses" (2020) 57(3) Intl Studies (New Delhi) 223 at 224 (states that the BRI is used to develop new multilateral institutions to expand China's influence).

[125] Pardo, *supra* note 123 at 247 (considers how China uses the BRI to expand its influence).

project economic power in China's near- and far" and to "resist Western dominance of the international institutions of global finance and commerce".[126] Furthermore, the BRI is identified as the spearhead of China's broader effort "to use new multilateral institutions to expand its influence and help stabilize its borders".[127]

However, at the same time, the promotion of the BRI is said to have also created a "strategic overdraft" whereby China is "advancing the infrastructure projects identified by the BRI" despite the "internal and external pressures of economic growth". As regards economic statecraft, this is said to have raised the question of whether the "priority on sustaining a floor for growth of the domestic economy [*will*] crowd out other economic statecraft, including outbound investment" under the BRI.[128]

Another way of considering this issue is to consider whether China is focusing increasingly on its regionalism strategy and on developing the BRI and is less focused on developing investments outside of its sphere of influence and the BRI (and particularly in *restraining* investments that the government does not control). An example of this could be seen in China's so called *reigning-in* of Chinese technology companies in recent years. Scott McKnight and others state that,

> Chinese platform firms… must be understood in relationship to the Chinese party-state's core goals of sustaining economic growth, attaining technological self-sufficiency, and, most importantly maintaining single party rule… [but if the platforms] market power became too concentrated and thus threatened those goals… the government responded with a "restraining" approach.[129]

Chinese government pressure has hindered some Chinese companies from listing on US stock exchanges and may cause other Chinese technology companies to delist from US stock exchanges. This has led some scholars, such as Samantha Hoffmann to develop the term "tech-enhanced authoritarianism" as a way of describing China's perceived strategy in relation to the operation of Chinese technology companies.[130] This may be connected with the Chinese government's wish to control these companies or it might also be due to other countries' aversion to being dominated by Chinese technology companies.

VIII. The key concepts of a rules-based approach

This part VIII identifies the key concepts of a rules-based approach and identifies six key concepts which are considered as especially relevant as regards constructing a rules-based approach in BRI dispute resolution. However, this list is not exhaustive and there may also be other significant concepts.

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[126] Zhang Xiaotong & James Keith, "From Wealth to Power: China's New Economic Statecraft" (2017) 40(1) The Washington Quarterly 185 at 186 (states some methods of how China uses the BRI to expand its regional influence).

[127] *Ibid* at 199 (states China's purposes of the BRI vis-à-vis the Western dominance of financial institutions).

[128] *Ibid* at 193.

[129] Scott McKnight, Martin Kenney & Dan Breznitz, "Platformizing the Economy? Building and Regulating Chinese Digital Platforms" <https://ssrn.com/abstract=3885190> (12 July 2021).

[130] Samantha Hoffman, "China's Tech-Enhanced Authoritarianism" 2022 33(2) Journal of Democracy 76.

A. *Rules-based Techniques as the Alternative to Power-oriented Techniques*

The first key concept of a rules-based approach is that rules are necessary to prevent a power-oriented approach from prevailing. For instance, according to Jackson the two alternative techniques of modern diplomacy are either rules-based techniques, or power-oriented techniques.[131] Furthermore, Jackson explained that a rules-based approach is the "superior" alternative since the advantages of a rules-based approach vastly outweigh the alternative power-oriented approach. In particular, Jackson stated that the advantages include: first, less reliance on power-politics; second, a fairer break for the smaller countries; third, the development of agreed procedures to achieve necessary compromises; and fourth, enabling businesses and others to rely upon the stability and predictability of governmental activities.[132] In other words, according to Jackson, without the introduction and application of defined legal rules, the advantages of rules-based techniques cannot exist. Hence, without such rules there would be more reliance on power-politics; potential unfair treatment as regards smaller countries; the absence of agreed procedures to achieve necessary compromises; and businesses and others would not be able to rely upon the stability and predictability of governmental activities.

A specific example of the idea that power-oriented techniques are not conducive to efficient international trade is the history of power-bargaining. In power-bargaining, the most powerful can adjudicate, however, as Jackson argues, democracies in the 21st century can apply rules-based techniques and no longer need to resolve disputes through using power-oriented techniques.[133] In this way power bargaining can be seen as *uncivilized*, especially since it often involves the use of (or threat to use) force, *eg*, gunboat diplomacy in the Don Pacifico affair (where the British navy blockaded a Greek port in 1850).[134] Hence, the need for protection against power-bargaining has been recognised by sovereign States signing up to all manner of international institutions and particularly, in the theory of essential security (see part VI above).

B. *The Uniformity of the Rules*

A second key concept of a rules-based approach is the necessity for *uniformity* in dispute resolution. This means both that each party has access to the same dispute

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[131] *Ibid* at 110–111 (stated the dichotomy between either power-oriented diplomacy or rule-oriented diplomacy is visible in international economic policy).

[132] See Jackson, *The World Trading System*, *supra* note 7 at 111.

[133] *Ibid* at 110 (states the governments of Western countries "have passed far along the scale toward a rule-oriented approach").

[134] See Geoffrey Hicks, "Don Pacifico, Democracy, and Danger: The Protectionist Party Critique of British Foreign Policy, 1850–1852" (2004) 26(3) Intl History Rev 515. See also James Cable, *Gunboat Diplomacy 1919–1991 – Political Applications of Limited Naval Force* (United States: Macmillan, 1994) 15 (identified four types of gunboat diplomacy: first, definitive (*ie*, with a specific objective); second, purposeful (aimed to change a rival's policy); third, catalytic (to increase policy options); and, fourth, expressive (*ie*, wishing to convey a political message)); Christian Le Mière, "The Return of Gunboat Diplomacy" (2011) 5 Survival 54 (argues that gunboat diplomacy never actually disappeared in the post-imperialist age).

resolution *tools* and that each dispute is treated/handled in the same way. For instance, Rodolfo Sacco said that one of the purposes of law is to "guarantee a social architecture and promote a system for dispute resolution that is both predictable and the same for everyone".[135] Similarly, the United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 with the basic mandate "to further the progressive harmonization and unification of the law of international trade".[136]

The need for uniformity in dispute resolution was explained by Paul Davidson in the following way:

> Traders are more likely to deal with partners in countries where they are familiar with the legal system and can be ensured that their rights will be enforced with the least amount of difficulty.[137]

The BRI is arguably a specific example of a regime with a lack of uniformity in some aspects and particularly in dispute resolution, since there are multiple overlapping types of dispute and dispute resolution fora, which means that uniformity is lost. To say this another way, "Uniformity is lost where there are multiple solutions for two identical hypotheses".[138]

Similarly, Brandt and Kan put it as follows:

> A unified system will undoubtedly promote greater certainty for parties from legally distinctive geographies in the region that are involved in dispute resolution, and ultimately will make it more attractive for parties in their commercial agreements.[139]

Therefore, a rules-based approach in BRI dispute resolution includes the predictability, consistency, equitability and transparency (collectively efficiency) that can be obtained through dispute resolution uniformity. Indeed, uniformity in BRI dispute resolution is potentially a major response to concerns regarding multiple proceedings (*ie*, overlapping) and abuse of procedure in BRI disputes.

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[135] See Rodolfo Sacco, "Diversity and Uniformity in the Law" (2001) 49(2) Am J Comp L 171 at 173 (explains that uniformity is one of the purposes of law). See also P Jessup, "Diversity and Uniformity in the Law of Nations" (1964) 58(2) Am J Intl L 341 (considers the diversity and uniformity in the law of nations, as attributes perennially present in many, if not all, legal systems); Armand C M De Mestral, 'Dispute Settlement under the WTO and RTAs: An Uneasy Relationship' (2013) 16(4) J Intl Econ L 777 (considers uniformity in dispute resolution considering the overlapping jurisdiction of the WTO and some 400 Regional Trade Agreements).

[136] Paul Davidson, "Uniformity in International Trade Law: The Constitutional Obstacle" (1988) 11 Dalhousie LJ 677 (details the original mandate and purpose of UNCITRAL).

[137] *Ibid* (explains the need for uniformity in international trade).

[138] Sacco, *supra* note 135 at 173 (explains that multiple solutions to identical problems results in uniformity being lost).

[139] Keith M Brandt & Michael KH Kan, "China" in James H Carter, ed. *International Arbitration Law – Seventh Edition* (United Kingdom: Law Business Research Ltd, 2016) 136 (states the advantages of a unified system vis-à-vis BRI dispute resolution).

C. *The Institutionalisation and Constitutionalisation of the Rules*

A third key concept as regards a rules-based approach is the similar ideas of *institutionalisation* and *constitutionalisation*. The concept of institutionalisation is the idea that there needs to be both rules and legal methods underpinning the rules. The concept of constitutionalisation is the idea to fundamentally embed an institutionalisation approach within a regime.[140] For instance, Petersmann emphasized that rules alone were insufficient to ensure the efficient conduct of international trade and that for international trade to be conducted efficiently, the rules of international trade are required to undergo a process termed constitutionalisation. Petersmann defines constitutionalisation as referring to,

> legal methods aimed at strengthening constitutional principles, rules and institutions in the diverse forms of national and international rule-making, rule-administration and rule-enforcement.[141]

Hence, as regards a rules-based approach in international trade law, constitutionalisation is effectively the means of applying the rule of law, *ie*, the introduction of legal methods underpinning the defined legal rules. Indeed, it is via the introduction of sufficient legal methods that an agent may have confidence in relying upon the rules, in terms of the agent's expectations of the enforcement of the rules and the agent's anticipation of the satisfactory resolution of disputes arising under the rules. Additionally, in relation to constructing a rules-based approach in BRI dispute resolution it means that rules alone are insufficient to ensure that international trade can be conducted efficiently. With institutionalisation and constitutionalisation, the legal methods underpinning the rules, *eg*, the establishment of legal institutions, are suggested to be essential for the rules to be effective. As regards the BRI, Petersmann even questions whether the entire "legitimacy of OBOR Law and Governance Depends on Constitutionalism".[142]

Further, in their work *Ruling the World?: Constitutionalism, International Law, and Global Governance* Trachtman and Jeffrey Dunoff explain that there is a "demand for constitutionalisation" stemming from both the globalisation and the

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[140] See Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Deborah Z Cass, "The 'constitutionalization' of international trade law: judicial norm-generation as the engine of constitutional development in international trade" (2001) 12(1) Eur J Intl L 39; David Schneiderman, "Global Constitutionalism and International Economic Law: The Case of International Investment Law" in Marc Bungenberg *et al*, eds. *European Yearbook of International Economic Law 2016* (Germany: Springer, 2016); Ernst-Ulrich Petersmann, "From Fragmentation to Constitutionalisation of International Economic Law? Comments on Schneiderman's 'Constitutionalism'" in Marc Bungenberg *et al*, eds. *European Yearbook of International Economic Law 2016* (Germany: Springer 2016); Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (United Kingdom: Hart, 2012).

[141] Ernst-Ulrich Petersmann, 'Constitutional Functions and Constitutional Problems of International Economic Law in the 21st Century' in *Collected Courses of the Xiamen Academy of International Law* (Volume 3, 2010) 167 <https://doi.org/10.1163/ej.9789004192911.i-541> (22 June 2011) (defines constitutionalisation).

[142] Petersmann, "Trade and Investment Adjudication", *supra* note 3 at 61–63.

fragmentation of international law.[143] However, as regards the BRI, Jiangyu Wang states that the BRI already has pervasive "flexible institutionalization".[144]

Nevertheless, methods which contribute to the institutionalisation and constitutionalisation of international trade law, such as the introduction of a system of enforcement of legal rights or the introduction of acceptable dispute resolution processes, consequently, limit the ability of power-oriented techniques to be employed.

D. *Enabling a Transactional Method for Conceding Sovereignty*

A fourth key concept as regards a rules-based approach is the idea of enabling a *transactional method* for conceding sovereignty. The transactional method for conceding sovereignty was developed in the field of international relations by Kenneth Abbot, Robert Keohane, Stephen Krasner and Kenneth Waltz and informs us that States may give up sovereignty in a transactional way (where the State may gain by conceding sovereignty).[145] This discussion is important for this article since moving from a power-oriented approach to a rules-based approach involves a State conceding certain aspects of its sovereignty and a transactional method for conceding sovereignty in international relations is a means of reconciling the partial concession of sovereignty in order to obtain multilateral benefits, *ie*, multiple States agreeing to receive adjudication according to certain agreed rules. This concept also ensures that any dispute system proposed is as workable as possible, *ie*, that multiple stakeholders from different countries can see the advantages in using the system and are willing to join the system.

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[143] Jeffrey L Dunoff & Joel P Trachtman, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009) at 6 (explains how globalization makes it more valuable for actors to enter into denser legal and institutional relationships, including constitutionalized relationships).

[144] Wang, "Flexible Institutionalization", *supra* note 3.

[145] Trachtman, *Economic Structure of International Law*, *supra* note 82 at 9 (explains the development of the "transactional approach"). See also Kenneth N Waltz, *Theory of International Politics* (United States: Addison-Wesley Pub Co, 1979) (develops the neorealist theory of international relations and argues that the fundamental "ordering principle" of the international political system is anarchy and that state behaviour can be understood as a response to the anarchy *eg*, in seeking security); Robert O Keohane, "The Demand for International Regimes" (1982) 36(2) Intl Organization 325 (considers international regimes as results of rational behavioural choices because they facilitate the making of agreements, by providing information and reducing transactions costs); Stephen D Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" (1982) 36(2) Intl Organization 185 (defines international regimes as principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area); Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (United States: Princeton University Press, 1984) (studies cooperation among advanced capitalist countries and analyses the institutions, or "international regimes" through which cooperation has taken place); Kenneth W Abbott *et al*, "The Concept of Legalization" (2000) 54(3) Intl Organization 401 (develops the concept of international legalisation, which is a form of institutionalisation characterized by obligation (states are legally bound by rules), precision (the rules are definite and unambiguous), and delegation (grants authority to third parties for the implementation of rules); Luca Fiorito, "John R Commons, Wesley N Hohfeld, and the Origins of Transactional Economics" (2010) 42(2) Hist Pol Econ 267 (discusses different theoretical approaches as regards constructing a transactional approach in the study of institutions).

Additionally, the related concept of sovereignty as it relates to dispute resolution is looked at as a pre-requisite, *ie*, the idea that each party to a dispute is autonomous and that consensual resolution in a neutral way can only be achieved to the extent that a party agrees to concede part of their sovereignty. Hersch Lauterpacht informed us that it is the sovereignty of the State that is the most important factor as regards choosing between rules-based and power-oriented techniques. Specifically, Lauterpacht stated it is anyhow difficult to reconcile these different approaches to dispute resolution since any inquiry in the field of international law is immediately confronted with the doctrine of sovereignty and this doctrine inherently limits the function of law in the resolution of disputes.[146] In other words, this means that the conditions necessary for a rules-based approach to prevail over a power-oriented approach in dispute resolution is for States to agree to give up aspects of their sovereignty. Consequently, the concept of a transactional approach to conceding sovereignty in dispute resolution developed, *ie*, where a party agrees to partially concede sovereignty in order to participate in a transaction (whether short-term or long-term, *eg*, joining the WTO (or joining the BRI?)). Trachtman explained the transactional method for conceding sovereignty as follows,

> international society, like any society, is a place where individual actors or groups of actors encounter one another and sometimes have occasion to cooperate, to engage in what may broadly be termed 'transactions'.[147]

E. *Enabling the Justiciability of all Disputes*

A fifth key concept as regards a rules-based approach is the idea that all disputes can be made justiciable. This concept provides for the avoidance of the distinction in terms of whether certain disputes are or are not suitable for legal adjudication. Lauterpacht challenged the distinction of disputes based on their justiciability and introduced the concept that all disputes can be made justiciable. In particular, Lauterpacht provided a renunciation of the categorization of disputes based on their justiciability, *ie*, that certain disputes are not suitable to be resolved by legal adjudication and moreover asserted that *all* international disputes are capable of judicial resolution. Lauterpacht stated that dividing conflicts between States into justiciable and non-justiciable differences is, "formally untenable and legally unsound".[148]

Here Lauterpacht made the following proposals. First, Lauterpacht argued that every dispute is justiciable and can be addressed by the application of legal rules, so long as the rule of law is recognized.[149] Second, Lauterpacht contended that a dispute is never inherently non-justiciable due to the intrinsic nature of the controversy

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[146] Lauterpacht, *Function of Law*, *supra* note 30 at 3 (explains the problem of sovereignty in international law).

[147] Trachtman, *Economic Structure of International Law*, *supra* note 82 at 10.

[148] Hersch Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law" (1928) Economica 277 at 315.

[149] Lauterpacht, *Function of Law*, *supra* note 30 at 166.

but becomes non-justiciable due to the refusal of the State to submit the dispute to judicial resolution.[150]

This is more or less saying the same thing as enabling a transactional method for conceding sovereignty (explained above), *ie*, that a potentially non-justiciable dispute can become justiciable by a State accepting to submit the dispute to judicial resolution. It is also related to the concept of sovereignty and is a relevant consideration as regards constructing a rules-based approach in BRI dispute resolution so as to minimize the possibility that multiple stakeholders from different countries attempt to avoid (or challenge) some parts of any dispute system proposed. Moreover, the discussion of the justiciability of a dispute was an obstacle in moving from power-oriented techniques to rules-based techniques and parallels the diplomatic choice of rules-based techniques versus power-oriented techniques, *ie*, disputes either being settled by means of the rule of law or by power bargaining.[151] Further, the categorization of disputes based on their justiciability is part of a "tug-of-war" dilemma as regards attempts by States to agree to any form of judicial or externally led resolution of disputes.[152]

However, whilst the controversy of whether or not a dispute is justiciable has not been solved, the discussion has faded somewhat by means of the transactional approach to conceding sovereignty and additionally by the realisation that international law is now concerned, first and foremost, with issues of *allocation of authority*.[153] The discussion of the concept that all disputes can be made justiciable is important for this article since, similar to the transactional method for conceding sovereignty in international relations, it is another means of reconciling the partial concession of sovereignty in order to obtain multilateral benefits, *ie*, multiple States agreeing to receive adjudication according to certain agreed rules (and if the State agrees to receive adjudication then the dispute (by definition) is justiciable).

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[150] Lauterpacht, *Function of Law*, *supra* note 30 at 172.

[151] The distinction of disputes based on their justiciability had been largely accepted for over a century and was widely utilized during the formation of international legal institutions: see Lincoln Bloomfield, "Law, Politics, and International Disputes" (1958) Intl Conciliation 260 (states such distinction was endorsed by the League of Nations in 1921, which declared in Article 13 of the League of Nations covenant, that only: "Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement". Bloomfield adds that these are also the same four categories which were later adopted in the Statute of the Permanent Court of International Justice and subsequently the International Court of Justice). See also Article 13 of the League of Nations Covenant <https://avalon.law.yale.edu/20th_century/leagcov.asp> and Article 36 of the Statute of the Permanent Court of International Justice <www.icj-cij.org/en/statute>.

[152] The distinction based on justiciability that was fixed in 1919–20 had not been altered since, for example, treaties drafted after 1920 generally referred to the previously drafted categories of justiciable disputes: see Bloomfield, *supra* note 151 at 268.

[153] Trachtman, *Economic Structure of International Law*, *supra* note 82 at x (Preface) (defines "issues of allocation of authority" in international economic law as referring to the question of which international organizations or tribunals have greater or lesser authority). See also Tomer Broude & Yuval Shany, eds. *The Shifting Allocation of Authority in International Law* (United Kingdom: Bloomsbury Publishing Plc, 2008).

F. *Enabling Rules to Evolve over Time*

A sixth key concept as regards a rules-based approach is the idea of rules evolving over time *eg*, 20th and 21st century trade rules. In relation to the concept of rules evolving over time Anthea Roberts, Henrique Moraes and Victor Ferguson (who looked at the global approaches to trade in the 20th century) and Joost Pauwelyn (who considered the 21st century approach to trade – see part V) show that not only are rules applied in different ways and to different targets over time, depending on the identity and objectives of the *rule-makers*, but also that the rules are being established in evolutionary ways.[154] Moreover, there has not been a smooth evolution from power-oriented techniques to rules-based techniques and the evolution is not an irreversible process, but has seen a movement back and forth between power-oriented techniques and rule-oriented techniques.[155] Roberts, Moraes and Ferguson asserted, as regards the 20th Century and since the second world war, that there have been two main international economic and security orders: the first from the 1940s until the 1970s, underpinned by the Bretton Woods Institutions and centred around the principles of embedded liberalism; the second, following the economic turmoil of the 1970s and 1980s, called the Washington Consensus and centred on the principles of neoliberalism (which emphasises that market forces should prevail rather than the State, *ie*, encouraging further deregulation, liberalization, and privatization).[156]

Pauwelyn, similarly, (as mentioned in part V above) suggested that whilst the old trade rules (20th Century), which he terms "Rules-based trade 1.0", were generally codified and focused on output and effect (*ie*, predictability and stability of the rules and their neutral application to all), the new trade rules (21st Century), which he terms "Rules-based trade 2.0", are generally not codified and instead focus on the input and content of the rules in the first place (*ie*, who defines the rules, how are they adopted, whether the rules are welfare enhancing, coherent and adapted to new developments?).[157] Furthermore, Pauwelyn considers that "Rules-based trade 2.0" consists of informal rules and standards that have evolved in a positive way from "thin state consent" to "thick stakeholder consensus".[158] Pauwelyn also suggests that this approach is not actually in conflict with the institutions constructed in the first economic and political order (as identified by Roberts, Moraes and Ferguson)

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[154] See Anthea Roberts, Henrique Moraes & Victor Ferguson, "Toward a Geoeconomic Order in International Trade and Investment" (2019) 4 J Intl Econ L 655 (Considers a shift toward a new geoeconomic order characterized by a growing "securitisation of economic policy and economisation of strategic policy" which, will likely see the rules, norms, and institutions of international trade and investment law undergoing significant change). See also Pauwelyn, "Rise of Informal Rules and International Standards", *supra* note 94.

[155] See also Joost Pauwelyn, 'The Transformation of World Trade' (2005) 104(1) Mich L Rev 1 (challenges the conventional wisdom that the world trade system evolved from a power-based to a rules-based regime and that trade law has gradually replaced trade politics, instead Pauwelyn proposes a frequent bidirectional interaction between law and politics).

[156] See Roberts, Moraes and Ferguson, *supra* note 154 at 656 (traces the history of the economic orders in the 20th century).

[157] See Pauwelyn, "Rise of Informal Rules and International Standards", *supra* note 94 at 740.

[158] *Ibid*.

and suggests that the WTO seems to be supportive of "Rules-based trade 2.0".[159] Furthermore, Pauwelyn suggests that, although the informal rules and standards might not appear to meet Jackson's requirements to be considered as effective rules-based techniques (*ie*, in terms of effectiveness, predictability, neutrality and legitimacy), any perceived gap is only a matter of perception and that actually informal rules and standards can even "out-compete" more rigid structures.[160]

In part V the concept of "trade 3.0" was also introduced, which is concerned with converting global trade rules into a digitized form *(ie,* through coding). It is important to consider the concept of rules evolving over time in order to provide the necessary flexibility into any rules-based system for BRI dispute resolution, *ie*, to allow the rules space to emerge over time in different ways and also to evolve over time when different rules become more important or less important at different points of time. Failure to consider this concept might lead to a rules-based system for BRI dispute resolution that is too rigid to be workable. Similarly, Jackson was also acutely aware of the need to balance the necessity for legal rules conducive to stability and predictability on the one hand, with the human need for solutions to short term and ad hoc problems on the other hand.[161]

IX. Exploring the Key-Concepts of a Rules-Based Approach vis-à-vis BRI Dispute Resolution

To show the applicability of the concept of a rules-based approach to BRI dispute resolution and to demonstrate the hypothesis that BRI dispute resolution does not currently follow a rules-based approach, this part IX builds on the previous parts of the article which has explored the BRI on the one hand and a rules-based approach to dispute resolution on the other hand. For instance, the previous discussion in parts III, IV, VI and VII involved exploring how the BRI is power-oriented and that a rules-based approach might be required to mitigate against power imbalances. Then, part VIII introduced six key concepts of a rules-based approach. This part IX provides a brief overview regarding the presence of these six key concepts of a rules-based approach in the BRI (and as regards BRI dispute resolution).

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[159] *Ibid*. Pauwelyn also explains how the WTO Appellate Body report in US – Tuna II reviewed the transparency, impartiality and effectiveness of "international standards" prior to giving those standards their legal effect under the WTO's Technical Barriers to Trade Agreement: see Appellate Body Report on United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012 (WTO appellate body report).

[160] Pauwelyn, "Rise of Informal Rules and International Standards", *supra* note 94 at 745–749 (explains firstly the effectiveness and predictability and secondly the neutrality and legitimacy of informal rules and mechanisms).

[161] Jackson, *The World Trading System*, *supra* note 7 at 10 (stated the need to balance the necessity for legal rules with the human need for immediate solutions). See also Dylan Geraets, "Ensuring Continued Support for the Rules-Based Multilateral Trading System: The Need for a Public–Private Approach", (2018) 21(2) J Intl Econ L 433 (considers whether the multilateral trade system fails to address domestic problems in the nation States and results in those "left-behind" by globalisation).

A. *Do Rules or Does Power Dominate in the BRI?*

The first key concept explained that rules are understood as necessary to prevent a power-oriented approach from prevailing. However, in the BRI since there is an absence of explicit rules (*ie*, a clearly defined legal framework to support the BRI), arguably this paves the way to allow a power-oriented approach to dominate. Zeng explained the absence is because there have not been any direct formal legal sources as regards the BRI and instead we are left to decipher the sporadic reports and speeches from the Chinese state, which documents are only a kind of soft law source consisting of various policy, strategy orientation and proclamation papers, *etc*.[162] Furthermore, the absence of explicit rules in the BRI has been described by some as a strategic policy choice, for example Wang describes the BRI as a new form of "regional multilateralism" consisting of (i) a hub-and-spoke network, (ii) a three-track institutional and mechanism approach, and (iii) a dualtrack normative approach, which qualities reveal the key characteristic underpinning the BRI which is, "maximised flexibility regarding institutions and norms to address uncertainties and challenges".[163] Therefore, it is suggested that power (and not rules) dominates in the BRI.

B. *Is there Uniformity in BRI Dispute Resolution?*

The second key concept identified that a rules-based approach includes the requirement of *uniformity* in dispute resolution. This means both that each party has access to the same dispute resolution *tools* and that each dispute is treated/handled in the same way. However, there are overlapping jurisdictions in the domain of BRI disputes, *eg*, Petersmann identifies at least seven types of BRI disputes.[164] This means that any particular BRI dispute could (potentially) be resolved in accordance with a variety of dispute resolution methods, depending more upon the *power* of the stakeholders, than the *rules* of the game.[165] Furthermore, not only is there difficulty in identifying BRI disputes, but also there is difficulty in understanding how BRI projects should be governed. For instance, it was also shown that this is not just a theoretical problem, since at a practical level it is considered that substantial difficulties arise due to stakeholders in BRI projects simply not knowing how best to proceed

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[162] See Zeng, *supra* note 1 at 517, 527, 539 (contended that it is therefore uncertain what the BRI is and that the designers of the BRI had no intention of formulating a new mechanism for co-operation, but instead preferred to utilize the existing bilateral and multi-lateral mechanisms for cooperation to advance the development of the BRI and enhance regional cooperation).

[163] See Wang, "Scope, Character and Sustainability", *supra* note 1 at 29 (describes the BRI and explains the key characteristic underpinning the BRI of "maximum flexibility"). See also Wolff, "Legal Responses to China's BRI Initiative", *supra* note 4 at 251 (states, "In fact, in light of the global interest in BRI, it is somewhat surprising that until now, legal responses to BRI have hardly attracted any attention at all").

[164] Petersmann, "Trade and Investment Adjudication", *supra* note 3 at 55–56 (identifies seven types of BRI disputes).

[165] Yanning Yu for example, contended the BRI resolves "frictions and disputes" with a "power-oriented mechanism" and, instead, "regulation by law and a rule-oriented structure for the BRI" is needed "to protect the interests of all stakeholders" and make the global trading system "more predictable and fairer": see Yu, *supra* note 2 at 121–122, 133, 145.

or participate, *eg*, Boltenko had observed misconceptions that the BRI is a treaty, an organisation, a bank or a government agency, whereas [she states] the BRI is simply "a series of measures designed and redesigned on a rolling basis by the Chinese government to promote investment and trade in and among the BRI Countries".[166]

Therefore, it is suggested that there is not currently uniformity in BRI dispute resolution.

C. *Is there Institutionalisation and Constitutionalization in the BRI?*

The third key concept provided that a rules-based approach includes the ideas of *institutionalisation* and *constitutionalisation*. The concept of institutionalisation is the idea that there needs to be both rules and legal methods underpinning the rules. The concept of constitutionalisation is the idea to fundamentally embed an institutionalisation approach within a regime. However, the BRI appears to fall short as regards institutions, rules and legal methods underpinning the rules. For instance, in the BRI there is no particular BRI-wide institution and there is also (potentially) a wide variety of sources of rules in the form of both hard law and soft law (which may or may not be applicable). Furthermore, soft law (which is arguably the opposite of constitutionalisation) appears to dominate BRI governance. This is because soft law is generally not codified and not binding law, *ie*, it is not written down comprehensively and does not have clear and obvious authority. By contrast, in constitutionalism, rules are written down and do have clear authority. For instance, Wang identifies a "dualtrack normative approach" (referred to above) which is referring to a "greater use of soft law rather than hard law treaties?".[167] Then, in this regard, Wang stated,

> To sum up, soft law is preferred to treaties in China's BRI approach. Although existing treaties remain relevant, the BRI does not have many formal international law instruments. There is no BRI-wide treaty or similar international law instrument establishing the BRI. The BRI neither has a constituting treaty with all BRI states (a BRI-wide treaty) nor formal membership protocols. China, as such, does not appear to have a strong intention to bring in BRI-wide hard law obligations at this stage.[168]

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[166] See Boltenko, *supra* note 3 at 191–192 (explains also that it is important to be aware that these measures are evolving and that the BRI infrastructure projects, as well as the financing arrangements required are in a constant state of development).

[167] Wang, "Scope, Character and Sustainability", *supra* note 1 at 39 (explains a "dualtrack normative approach"). See also Wang, "China's Paradigm Shift", *supra* note 40 at 282–305 (explains the BRI agreements, which consist of primary agreements (particularly MOUs) and secondary agreements (like performance agreements) and considers the legal status and characteristics of these agreements); Chris Brummer, "Why Soft Law Dominates International Finance – and not Trade" (2010) 13(3) J Intl Econ L 623 (considers that international financial law is an example that shows soft law's value as a coordinating mechanism).

[168] See Wang, "Scope, Character and Sustainability", *supra* note 1 (explains the BRI governance framework).

This "maximised flexibility" of the BRI appears at odds with any possible *institutionalisation* and the *constitutionalisation* of the BRI.

D. *Is there a Transactional Method in BRI Dispute Resolution?*

The fourth key concept explained previously is that a rules-based approach facilitates enabling a *transactional method* for conceding sovereignty. However, until now, it appears difficult to promote a transactional method in BRI dispute resolution since, not only is there difficulty as regards understanding and defining the membership of the BRI, but also it appears the divergence of BRI Countries (*ie*, the substantial differences amongst the BRI Countries) has not been adequately addressed. For instance, Boltenko observed that "no line in the sand" is drawn to separate countries participating in the BRI from countries not participating in the BRI and that "no state ratification is required to participate in the BRI, no legislation needs to be passed and no government is required to accept or reject the initiative".[169]

It is also contended that the international and regional situations faced by most of the BRI Countries has become increasingly complicated in recent years.[170] Furthermore, many of the BRI projects are frequently situated in territories that have a combination of political instability and undeveloped and/or unreliable legal systems, and a reputation for weak corporate governance, which generally includes corruption.[171] The divergence has a particular effect as regards the resolution of BRI disputes. For example, it has been said *eg*, by law firms active in this field, that since the BRI extends to so many nations with each being subject to differing degrees of economic and political development, then BRI related project participants might face the possibility of interfacing with underdeveloped and possibly unreliable systems of law, and may frequently have to manage without specialised intermediaries, regulatory systems and contract-enforcing mechanisms.[172] In this way, both the BRI's very open membership criteria and the substantial differences between many of the BRI Countries is an obstacle as regards promoting a transactional approach in BRI dispute resolution.

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[169] See Boltenko, *supra* note 3 at 192 (Boltenko also states that even the very expression "Belt and Road" is so loosely defined that it has perhaps achieved the most inclusive nature ever known in the context of trade initiatives).

[170] Zeng, *supra* note 1 at 518 (at the time of writing there were estimated to be around 60–70 BRI Countries which number is now significantly higher, the increase in the number of BRI Countries amplifies this opinion).

[171] See Norton, *supra* note 3 at 80 (considers that many BRI projects are situated in territories that have political instability, undeveloped and unreliable legal systems and weak corporate governance, which includes corruption).

[172] D'Andrea & Partners Legal Counsel, "BRI: Dispute Resolution and Jurisdictional Issues" (*Eurobiz online*) <www.eurobiz.com.cn/bridisputeresolutionandjurisdictionalissues/> (3 May 2019) (states that when contractual commitments are unable to be enforced, then BRI related investment projects or partnerships might be jeopardised).

E. *Are all BRI Disputes Justiciable?*

The fifth key concept of a rules-based approach included the idea that all disputes can be made justiciable. This concept provides for the avoidance of the distinction in terms of whether certain disputes are or are not suitable for legal adjudication. In this regard, it is unclear whether any particular BRI dispute is justiciable (and if so, where?). If it is the case that some BRI disputes are not justiciable, but similar BRI disputes are justiciable, then this again shows the lack of *uniformity* in BRI dispute resolution. Further, it was explained that Lauterpacht stated that justiciability ultimately depends on sovereignty and therefore it can be hypothesized that BRI Countries need to be motivated to concede their sovereignty, and that this would result in a greater justiciability of the BRI disputes involving that particular BRI Country.

F. *Are the Rules involved in BRI Dispute Resolution Evolving to Suit the Time?*

The sixth key concept of a rules-based approach is the idea of rules evolving over time *eg*, 20th and 21st century trade rules. In relation to the BRI, this means that whilst some *flexibility* is not necessarily a bad thing (since it can allow workable norms to develop), allowing too much *flexibility* might also not be the best policy choice, since extreme anomalies should be avoided. Further, it remains too soon to make any firm conclusions on this point (with the BRI only being a decade old), but the construction of a rules-based approach to BRI dispute resolution can act as the anchor, which allows some flexibility, but not too much.

X. Applying the Identified Framework to the BRI

The analysis set out in this article hitherto has mostly been in terms of identifying the BRI (on the one hand) and describing the development of the literature on the existence of a rules-based order (on the other). However, whilst it is not the main purpose of the article to go much further than combining this twin analysis and thereby constructing a theoretical framework that sets out the basis for instituting a rules-based approach in BRI dispute resolution, since the article would benefit from a brief discussion about how the BRI actually operates in terms of current dispute resolution, this is set out below.

Hence, this part of the article fills this research gap by exploring current BRI dispute settlement and applies the theoretical framework, that BRI disputes might not be currently settled according to a rules-based approach, to the reality, *ie*, exploring how BRI disputes are being resolved currently and whether or not this is a rules-based approach.

The structure of this part of the article is built around two theories of why the current BRI dispute settlement system might not be rules-based.[173] Firstly, there

[173] There are also other theories *eg*, the general overlap between BRI disputes and other international disputes, but it was decided just to focus on the two main theories (in the author's opinion) for the sake of brevity.

are overlapping BRI dispute settlement forums and the parties do not have equal choices. Secondly, BRI dispute settlement is dominated by Chinese State-owned Enterprises (SOEs), which means that BRI dispute settlement might have become power-oriented (and not rules-based) and also means that the boundaries between the different categories and different types of BRI disputes might be somewhat blurred. These theories are presented below.

A. *Overlapping BRI Dispute Settlement Forums and Unequal Choices*

In this theory, it is suggested that the wide range of dispute settlement options in the BRI currently might be incompatible with a rules-based approach since BRI dispute settlement is not structured and different parties can take different approaches in similar cases. For instance, at the June 2019 East Asia Forum Vivienne Bath summarized the current situation as regards the settlement of BRI disputes, as follows:

> There are already a significant number of competing options available for the resolution of disputes arising from BRI projects — domestic courts, nominated foreign courts, domestic arbitration institutions, international arbitration institutions, ad hoc options, mediation institutions, investor-state arbitration under the auspices of the ICSID and so on. The Chinese government is also actively interested in strengthening Chinese institutions' participation in BRI dispute resolution.[174]

On the one hand, such a wide range of dispute settlement options in the BRI is a positive thing since it increases party choice and the expertise available. On the other hand, and especially from the perspective of a rules-based approach to BRI dispute settlement, the wide range of dispute settlement options in the BRI is a negative thing since it might decrease the predictability, consistency, transparency, equitability (and collectively, efficiency) of BRI dispute settlement.[175]

1. *State-State negotiation and adjudication by local courts (traditional solutions)*

The traditional solutions for the settlement of BRI disputes are currently utilized the most, *ie*, (mostly) State-State negotiation (some examples are *Beijing*

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[174] Vivienne Bath, "Dispute resolution along the Belt and Road", *East Asia Forum* <https://www.eastasiaforum.org/2019/06/07/dispute-resolution-along-the-belt-and-road/> (7 June 2019) [Bath, "Dispute resolution along the Belt and Road"]. See also Petersmann, "Trade and Investment Adjudication", *supra* note 3 at 57 (stated that the large choice of venue for BRI dispute settlement inevitably generates "forum shopping").

[175] In the author's opinion BRI dispute settlement could be weakened where different parties have many different options to resolve similar cases *eg*, where the parties to a BRI related dispute have many options in order to resolve the dispute, and especially when added to the complexity of many BRI related projects, in terms of the overlapping frameworks of governing laws and avenues for dispute settlement, then a lack of structure vis-à-vis the settlement of a BRI related dispute is generated.

Urban Construction v. Yemen,[176] *Hambantota Port Development Project*,[177] *East Coast Rail Link,*[178] *Kyauk Pyu Deepwater Port*,[179] *Jakarta–Bandung High Speed Railway*,[180] and *Lower Sesan II Dam*[181]) and (rarely) adjudication by local courts

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[176] Although this case (which represents the first investment treaty claim in relation to a BRI dispute) was first lodged at ICSID in 2014, the case was ultimately settled by the parties by State-State negotiation. See also *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30, Decision on Jurisdiction <https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf>.

[177] In this case the governments of Sri Lanka and China engaged in State-State negotiation since Sri Lanka was unable to repay the loans provided by China's Exim Bank (a Chinese SOE). Following the negotiation, Sri Lanka agreed to lease the Hambantota Port on a 99-year lease to China Merchant Port Holdings (also a Chinese SOE), erasing an estimated USD $1 billion in debt for the project. In the context of this dispute Pathirana said that this approach signals "a return to a power-oriented approach to settling investment disputes": see Dilini Pathirana, "The Paradox of Chinese Investments in Sri Lanka: Between Investment Treaty Protection and Commercial Diplomacy" (2020) 10(2) Asian J of Intl L 375. See also Maria-Adele Carrai, "China's Malleable Sovereignty along the Belt and Road Initiative: The Case of the 99-Year Chinese Lease of Hambantota Port" (2019) 51 NYUJ Intl L & Pol 1061.

[178] In this case the governments of Malaysia and China engaged in State-State negotiation since Malaysia refused to stick to the terms and conditions originally agreed as regards the high-speed rail project and suspended the project. The project was then restarted after the costs were renegotiated: see *eg*, Joseph Sipalan, "China, Malaysia restart massive 'Belt and Road' project after hiccups", *Reuters* <https://www.reuters.com/article/us-china-silkroad-malaysia-idUSKCN1UK0DG> (25 July 2019). See also Edmund Terence Gomez *et al*, "Introduction: State-State Relations and New State-Business Relations—China in Malaysia" in *China in Malaysia: State-Business Relations and the New Order of Investment Flows* (United Kingdom: Palgrave Macmillan 2020) 7 at 7–8.

[179] In this project the governments of Myanmar and China engaged in State-State negotiation since Myanmar was unwilling to stick to the terms and conditions originally agreed and suspended the project. After the costs (and financing terms) were renegotiated, the project was restarted: see, *eg*, Kanupriya Kapoor & Aye Min Thant, "Exclusive: Myanmar Scales Back Chinese-Backed Port Project Due to Debt Fears—Official", *Reuters* <https://www.reuters.com/article/usmyanmarchinaportexclusive/exclusivemyanmarscalesbackchinese-backed-port-project-due-to-debt-fears-official-idUSKBN1KN106> (2 August 2018). See also Jenn-Jaw Soong & Kyaw Htet Aung, "Myanmar's Perception and Strategy toward China's BRI Expansion on Three Major Projects Development: Hedging Strategic Framework with State-Market-Society Analysis" (2021) 54(1) The Chinese Economy 20; Stephen Crowther, "Legal Constraints of China's BRI: The Case of Myanmar" (Institute for Security & Development Policy: Issue Brief, 2020) 6 <https://isdp.eu/content/uploads/2020/04/Legal-Constraints-of-China's-BRI-Myanmar-IB-24.04.20.pdf> (24 April 2020).

[180] In this case the governments of Indonesia and China engaged in State-State negotiation since Indonesia was unhappy with the terms and conditions originally agreed and suspended the project. After the terms and conditions were renegotiated, the project was re-started and the 2019 completion date of the project was pushed back until 2021: see, *eg*, Siwage Dharma Negara & Leo Suryadinata, "Jakarta-Bandung High Speed Rail Project: Little Progress, Many Challenges" <http://hdl.handle.net/11540/7938> (January 2018). See also Siddhartha Nath & Gusti Raganata, "An Assessment of Economic and Financial Impacts of Jakarta-Bandung High-Speed Railway Project" (2020) 2(1) J Bus & Pol Econ: Biannual Review of The Indonesian Economy <http://www.journal.indef.or.id/index.php/BisnisEkonomiPolitik/article/view/27/11>.

[181] In this case the governments of Cambodia and China engaged in State-State negotiation since the Cambodian government was unhappy with the terms and conditions (especially the environmental impact assessment) originally agreed and delayed the project several times. Following negotiation, the completion date was extended until 2018: see *eg*, Kimkong Heng & Savinda Po, "Cambodia and China's Belt and Road Initiative: Opportunities, Challenges and Future Directions" (2017) 1(2) UC Occasional Paper Series 5 <http://uc.edu.kh/userfiles/image/2017/10.%20UCOPS%20Vol%201_Iss%202.pdf#page=8>. See also Oliver Hensengerth, "Regionalism, Identity, and Hydropower Dams: The Chinese-Built Lower Sesan 2 Dam in Cambodia" (2017) 46(3) Journal of Current Chinese Affairs 85.

(*eg*, *Dolareh Container Terminal/Dolareh Multi-purpose Port*).[182] These solutions can also be described as sovereignty driven solutions since the solutions basically revolve around the fact that the host state is unwilling to give up its sovereignty as regards a particular dispute (*ie*, insisting upon local law). However, the resulting dispute settlement infrastructure has several limitations.

State-to-State negotiation has substantial power and information asymmetries and relies on the goodwill of the parties as regards efficiency and equitability (which goodwill may be unlikely following a major project dispute). Additionally, State-to-State negotiation is generally unstructured and involves informal and amicable methods to reach a compromise with each party conscious regarding both using diplomatic etiquette, *eg,* keeping face, and preserving a long-term relationship that is more substantial than a single project.[183] This analysis supports the fact that only a few Chinese parties have actually engaged the mechanisms in BITs to enforce their rights (there are some examples in subsection B below), despite opportunities to do so, which indicates that there are other interests at play that counsel against being drawn into a hard-law, adversarial mechanism.

Alternatively, in relation to the settlement of BRI disputes in local courts, where host States generally wish to preserve their sovereignty and insist upon using local law, this BRI dispute settlement process (which could be mandatory) also adds to the general lack of predictability, consistency, transparency, equitability (and collectively, efficiency) in BRI dispute settlement. Additionally, proceeding to local

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[182] In this complicated set of cases, which arguably relate to a BRI dispute since the principal cause of the dispute was because China Merchants (a Chinese SOE) was tasked with constructing (and operating) a new port in Djibouti the claimant DP World made several connected claims (including at the London Court of International Arbitration) and two of these also went to local courts, firstly at the UK high court and secondly at the Hong Kong high court: see *eg,* Sam Bridge, "UK High Court grants injunction to protect DP World deal in Djibouti", *Arabian Business* <https://www.arabianbusiness.com/transport/403818ukhighcourtgrantsinjunctiontoprotectdpworld-deal-in-djibouti> (5 September 2018); Odindo Ayieko, "DP World Wins Arbitration Case Against Djibouti In London", *East Africa Business Week* <https://www.busiweek.com/dp-world-wins-arbitration-case-against-djibouti-in-london/> (15 May 2020); Gavin Gibbon, "DP World wins sixth legal ruling in $1bn Djibouti port dispute", *Arabian Business* <https://www.arabianbusiness.com/transport/437554-dp-world-wins-sixth-legal-ruling-in-1bn-djibouti-port-dispute> (14 Jan 2020) – these articles report how the UK High Court and the London Court of International Arbitration made awards in favour of DP World; As regards Hong Kong, see Accesswire, "Legal Battle for Control of Djibouti Ports Comes to Hong Kong", *Bloomberg* <https://www.bloomberg.com/press-releases/2019-02-13/legal-battle-for-control-of-djibouti-ports-comes-to-hong-kong> (13 February 2019); Staff Reporter, "Roadbelt case goes to High Court", *The Standard* <https://www.thestandard.com.hk/sectionnews/section/11/204856/RoadbeltcasegoestoHighCourt> (11 February 2019) – these articles report how DP World has launched a claim in the Hong Kong High Court in 2019. See also EQS News Service, "DP World slams Djibouti government's attempt to overturn port ruling", *Bloomberg* <https://www.bloomberg.com/press-releases/2019-08-01/dp-world-slams-djibouti-government-s-attempt-to-overturn-port-ruling> (1 Aug 2019) – reports that DP World considers Djibouti's application to have its high court in Djibouti rule international adjudications null and void contravenes global legal system and threatens investment; *DP World v Djibouti* LCIA Case No 183886; IA Reporter <https://www.iareporter.com/arbitration-cases/dp-world-v-djibouti/>.

[183] Petersmann, "Trade and Investment Adjudication", *supra* note 3 at 57 (notes that many Asian countries (and not just China) have a preference for political rather than judicial dispute settlement methods (as illustrated by the rejection of ICSID by India, Thailand and Vietnam)). Note also Wang, "Flexible Institutionalization", *supra* note 3 at 74 (states that the East Coast Rail Link project, "offers an example on how bilateral disagreements in the Belt and Road were addressed through the 'Asian way' of amicable diplomatic resolution").

courts might only achieve a pyrrhic victory, *ie*, the local court might be technically competent to adjudicate the case, but the verdict will be insufficient if it is neither recognised by the investor nor the international community (as happened with the complex case of *Dolareh Container Terminal/Dolareh Multi-purpose Port*).

2. *Alternative dispute resolution (transnational solutions)*

Since the host state in BRI related projects is likely to avoid conceding sovereignty (or the perception of conceding sovereignty) as far as possible, consequently the traditional forms of BRI dispute settlement (*ie*, State-State and local court), fosters an environment where disputes cannot always be resolved predictably, consistently, transparently or equitably (and collectively, efficiently). However, some of the weaknesses of the traditional forms of dispute settlement have been addressed by ADR, which includes arbitration (both investment arbitration and commercial arbitration) and mediation. Mitigation of the weaknesses of the traditional solutions is principally achieved by the relinquishing of sovereignty achieved via the acceptance by many States of the "transactional approach" to international law (*ie*, as regards dispute settlement this means the common benefits to be obtained when both sides submit to a neutral forum).[184]

Arbitration in particular (both investment arbitration and commercial arbitration) is understood to be a reasonably popular form of BRI dispute settlement. As regards investment arbitration, many countries hosting a BRI project have entered into a BIT with China (or another applicable State). Furthermore, even without an applicable BIT, the contracting parties could still select the use of investment arbitration in their contracts. This is especially possible considering that China and many countries participating in the BRI are members of the International Centre for Settlement of Investment Disputes (ICSID). As regards investor-investor disputes, the investors can agree to submit their disputes to commercial arbitration instead. The enforcement of arbitration awards (both investment awards and commercial awards) will generally be available in the BRI under the New York Convention on Arbitration (New York Convention).[185]

Mediation is also an ADR option available for all types of BRI dispute (*ie*, State-to-State, investor-State or investor-investor), although mediation has its own limitations (such as not always resulting in dispute settlement).[186] Nevertheless, mediation is frequently mentioned as suitable for the settlement of BRI disputes,

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[184] See the discussion in part VIII.D.

[185] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Resolution adopted by the General Assembly (New York, 1958) <https://www.newyorkconvention.org/english>. The New York Convention lists 167 countries as member states and this includes most BRI Countries, however, there still remains a significant number of countries participating in the BRI, which are not member states of the New York Convention (these were found to be 21 countries by the author and are the following: Chad, Congo, Equatorial Guinea, Gambia, Grenada, Libya, Micronesia, Moldova, Namibia, Niue, Palestine, Samoa, Solomon Islands, Somalia, South Sudan, Suriname, Tanzania, Timor-Leste, Togo, Vanuatu and Yemen).

[186] See *eg*, Hong Kong Mediation Council, "What is Mediation" <https://www.hkiac.org/mediation/what-is-mediation>.

since the BRI's vast scale is likely to produce a plethora of cross-border disputes and the cultural preference of the Chinese State (and many Asian states) favour the settlement of disputes through mediation.[187] Furthermore, since one of the key principles of mediation is confidentiality, the extent to which mediation may already have been employed in BRI related dispute settlement is not known. As regards enforcement of settlement agreements resulting from mediation, these will soon be able to be enforced in signatory states (following ratification) of the recent Singapore Convention.[188]

3. *Hybrid dispute settlement, international commercial courts and online dispute resolution (solutions of the future)*

In addition to both the traditional solutions and the alternative solutions described above, there are additional measures that either have been implemented or could be implemented to improve the current system of dispute settlement in the BRI. The solutions of the future consider modern and innovative methods to resolve BRI related disputes.

Firstly, there is the concept of hybrid dispute settlement, which generally consists of combining both arbitration and mediation in the same process in different sequences. The two best known forms of hybrid procedures in which both mediation and arbitration components are utilized fully are "Med-Arb" (mediation then arbitration) and "Arb-Med" (arbitration then mediation).[189] "Med-Arb" might be particularly suitable for the BRI because, not only does it focus on conciliation at first (which is understood to be consistent with the traditional Chinese approach to conflict resolution), but further, the temporal arrangement of having mediation first, followed by arbitration, is consistent with the suggestions of many scholars who have argued that dispute settlement procedures should be arranged in a low-to-high-cost sequence for the users.[190] For instance, the International Chamber of Commerce published guidance notes in 2019 which recommends the adoption of

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[187] See *eg*, Singapore International Mediation Centre, "SIMC and CCPIT Mediation Center establish international mediator panel to resolve BRI-related disputes" <https://simc.com.sg/blog/2019/01/25/simc-and-ccpit-mediation-center-establish-international-mediator-panel-to-resolve-bri-related-disputes/> (25 May 2019). See also Mark McLaughlin, 'Investor-State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement' (2021) 24(3) J Intl Econ L 609.

[188] United Nations Convention on International Settlement Agreements Resulting from Mediation. Resolution adopted by the General Assembly on 20 December 2018 [on the report of the Sixth Committee (A/73/496)] (text of the convention). There are, however, a few potential obstacles as regards the Singapore Convention and BRI disputes (such as whether Chinese SOEs would be covered) and hence enforcement under the Singapore Convention is uncertain, *eg*, see Fenwick Elliott "The Singapore Mediation Convention: raising the profile of mediation in cross-border disputes" <https://www.fenwickelliott.com/research-insight/annual-review/2019/singapore-mediation-convention> (31 October 2019).

[189] See William H Ross & Donald E Conlon, "Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration" (2000) 25(2) The Academy of Management Rev 416 at 416–417.

[190] See William L Ury, Jeanne M Brett & Stephen B Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (United States: Jossey-Bass, 1988) (Principle 5 in their article is to arrange Procedures in a Low-to-High-Cost Sequence). See also Frederick A Starke & William W Notz

a tiered approach of mediation followed by arbitration in BRI related contracts.[191] Furthermore, the International Academy of the Belt and Road published its "Blue Book" model dispute settlement mechanism for the settlement of BRI disputes, which proposed Med-Arb (mediation then arbitration).[192]

Secondly, in the past few years, new international commercial courts – English-language domestic courts that focus on international commercial disputes – have been established in various countries.[193] Many of these are part of the growth of so-called "new legal hubs" – one-stop shops for international commercial dispute settlement, primarily for private parties but also potentially for investor-state disputes.[194] The common theme regarding these new legal hubs are that they are reputedly an attempt to offer a safe harbour within a challenging landscape.[195] China is the host of one of these new legal hubs, in the form of the China International Commercial Court (CICC).[196] The establishment of the court was part of a trilogy of measures designed to resolve BRI related disputes fairly, efficiently and conveniently.[197]

Finally, many countries are also advancing proposals for online dispute resolution (ODR) and other legal tech solutions, including blockchain based arbitration,

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"Pre-and post-intervention effects of conventional versus final offer arbitration" (1981) 24(4) Academy of Management Journal 832.

[191] International Chamber of Commerce, "Guidance Notes On Resolving Belt And Road Disputes Using Mediation And Arbitration" <https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf>.

[192] See Guiguo Wang, Yuk Lun Lee & Mei-fun Leung, *Dispute Resolution Mechanism for the Belt and Road Initiative* (Singapore: Springer Singapore, 2020) (this is the published version of the International Academy of the Belt and Road's Blue Book method released at the 4th International Forum On The Belt And Road: Dispute Settlement Mechanisms <http://interbeltandroad.org/en/major_events/the-4th-international-forum-on-the-belt-and-road-dispute-settlement-mechanisms> (11 October 2016).

[193] In emerging Eurasian economies, like the United Arab Emirates (Dubai, 2004), Qatar (2009), Singapore (2015) and Kazakhstan (2018), as well as in continental European jurisdictions like France (2010), Germany (2018), and the Netherlands (2019).

[194] In connection with these new legal hubs there are also some other novel forms of dispute settlement that have emerged in recent years. For instance, the Dubai International Financial Center Courts have created a mechanism to convert its judgments into arbitral awards: see Allen and Overy, "DIFC Courts introduce unique mechanism to convert DIFC money judgments into arbitral awards" <https://www.allenovery.com/en-gb/global/news-and-insights/legal-and-regulatory-risks-for-the-finance-sector/middle-east/difc-courts-introduce-unique-mechanism-to-convert-difc-money-judgments-into-arbitral-awards-n> (2015). Additionally, Singapore is innovating with new procedures, merging arbitration and mediation into "Arb-Med-Arb" and promoting the Singapore Mediation Convention: see Withersworldwide "Arb-Med-Arb: Connecting the Dots between Arbitration and Mediation" <https://www.withersworldwide.com/en-gb/insight/arb-med-arb-connecting-the-dots-between-arbitration-and-mediation> (8 August 2018).

[195] See Mathew S Erie, "The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution" (2020) 60(2) Va J Intl L 225.

[196] China International Commercial Court, "A Brief Introduction of China International Commercial Court" <http://cicc.court.gov.cn/html/1/219/193/195/index.html>.

[197] See Justice Zhang Yongjian, "Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-related International Commercial Disputes: China's Practice and Innovation", Speech at the Forum on the Belt and Road Legal Cooperation (2 July 2018) <http://cicc.court.gov.cn/html/1/219/199/203/831.html> (text of his speech which explains the trilogy of measures. The other two measures were the establishment of an international commercial experts committee and the establishment of a "one-stop" dispute resolution centre to effectively integrate diversified mechanisms including litigation, mediation and arbitration).

which are purported to offer the dispute settlement solutions of the future.[198] Please note that China has already announced plans to become a "cyber superpower" and has begun experimenting with "smart contracts" and "smart courts" which integrate artificial intelligence, big data, and machine learning into the adjudication process to minimize over-burdened court dockets and increase access to justice in the domain of ODR.[199]

B. *The Dominance of Chinese SOEs in BRI Dispute Settlement.*

In this subsection, there is an explanation of how BRI dispute settlement appears to be dominated by Chinese SOEs, which means BRI dispute settlement might frequently be power-oriented and not rules-based.[200] It is also shown that the boundaries between the three categories (State-to-State, investor-to-investor and investor-State)[201] and types (*ie*, up to seven different types as per Petersmann, *eg*, Trade Disputes and WTO Disputes, Investment Disputes, Financial Disputes, Intellectual Property Disputes, Commercial Disputes, Maritime Disputes and Energy Trade and Investment Disputes)[202] of BRI disputes might be somewhat blurred, which is primarily because BRI dispute settlement is dominated by Chinese SOEs. In addition, this subsection also presents an analysis of the significance of Chinese SOEs in BRI dispute settlement and Chinese SOE access to arbitration (which seems to open the door to State-to-State arbitration).

In the seven examples given in subsection A.1., (*ie*, *Beijing Urban Construction v Yemen*, *Hambantota Port Development Project*, *East Coast Rail Link*, *Kyauk Pyu Deepwater Port*, *Jakarta–Bandung High Speed Railway*, *Lower Sesan II Dam* and *Dolareh Container Terminal/Dolareh Multi-purpose Port*) Chinese SOEs were involved as either contractors and/or as the main financing party. Then, since State-to-State negotiation was used in most of these cases, it can be said that BRI dispute settlement appears to be dominated by Chinese SOEs, which risks that BRI dispute settlement might be perceived as power-oriented and not rule-oriented and also means that the boundaries between the different categories and the different types of BRI disputes are likely to be blurred. The consequences of this are expanded upon in the following two subsections.

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198 See *eg*, Wendy Carlson, "Increasing Access to Justice through Online Dispute Resolution" (2020) 6(1) Intl J of Online Dispute Resolution 17.

199 See Sophie Hunter, "China's innovative Internet Courts and their use of blockchain backed evidence", *Conflict of Laws* <https://conflictoflaws.net/2019/chinas-innovative-internet-courts-and-their-use-of-blockchain-backed-evidence/> (28 May 2019).

200 See Yu, *supra* note 2 at 138 (states that SOEs dominate the BRI and provides statistics that SOEs were drivers of 60% of infrastructure projects, which was 80% of the total value of all BRI projects).

201 Wang, "Quest for a Dispute Resolution Mechanism", *supra* note 3 at 1 (stated that disputes related to the Belt and Road Initiative may be subdivided into those between governments, between enterprises, and between a government and an enterprise).

202 Petersmann, "Trade and Investment Adjudication", *supra* note 3 at 55–56 (detailed seven types of BRI disputes).

1. *Negotiation with Chinese SOEs is similar to negotiation with the Chinese State*

Considering that most (if not all) major BRI projects appear to be driven by Chinese SOEs (as exemplified above and as further reinforced in the next subsection) and that Chinese SOEs are considered to be a driver of Chinese state capitalism, perhaps it can be assumed that negotiation with a Chinese SOE is similar to negotiation with the Chinese State. This is because it is reported (see Yu and others below) that Chinese SOEs can be considered as an extension of "state-capitalism" and therefore as having the equivalent negotiating power as if the investor was the State.[203] For instance, Yu describes Chinese SOEs as an example of "state capitalism" since,

> SOEs are representatives of the Chinese government abroad. This closer relationship with governments is particularly important in the context of the existing framework of the BRI. This is because the BRI mainly employs the relationship of the two governments to discuss the frictions when it is absent from regulation by law to resolve disagreements and disputes. In this sense, the factor of obtaining the standing support from the government is essential for enterprises to be involved with the BRI.[204]

Dian and Menegazzi state that "the BRI initiative was conceived to improve and strengthen the activities of Chinese SOEs at the global level" and the BRI's specific function is:

> the resistance to Western style free-market capitalism; the survival and consolidation of state capitalism as the economic foundation of the Chinese path to development; and internationalization, through the expansion of the Chinese economic clout.[205]

This argument therefore highlights that SOEs have been viewed as an extension of state capitalism and that sometimes the Chinese government may instruct SOEs to perform activities and make decisions that they would not otherwise do from a business perspective. It is therefore understood, as regards BRI project disputes, the Chinese government may be involved in disputes involving private companies where there are issues important to the government. In fact, some scholars, such as Vivienne Bath, argue that Chinese investors in BRI projects "may well assume that the Chinese government will continue to be closely involved in their operations and in the behind-the-scenes settlement of disputes".[206]

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[203] See Qingxiu Bu, "The One Belt and One Road (OBOR) Initiative: Reconceptualisation of State Capitalism Vis-à-Vis Remapping of Global Governance?" in Steffan Hindelang & Andreas Moberg, eds. *YSEC Yearbook of Socio-Economic Constitutions* 2020 (Germany: Springer, 2020) 637; Jakob Arnoldi *et al*, "Multi-Level State Capitalism: Chinese State-Owned Business Groups" (2019) 15(1) Management and Organization Rev 55; Johannes Petry, "Same same, but different: Varieties of capital markets, Chinese state capitalism and the global financial order" [2020] Competition & Change <https://journals.sagepub.com/doi/10.1177/1024529420964723> (1 November 2020).

[204] Yu, *supra* note 2 at 139 (considers the importance of Chinese SOEs as regards the BRI).

[205] Matteo Dian and Silvio Menegazzi, "Belt and Road, State Capitalism and China's Economic Interests" in *New Regional Initiatives in China's Foreign Policy* (United Kingdom: Palgrave Macmillan 2018) 71.

[206] See Bath, "Dispute resolution along the Belt and Road", *supra* note 174.

2. *Chinese SOE Access to Arbitration*

The theory of why arbitration claims launched by Chinese SOEs open the door to State-to-State arbitration is because on the few occasions where a Chinese SOE has launched an investment arbitration claim, the arbitration tribunal has not declined jurisdiction based on the enterprise's SOE status. Anatoule Boute states as follows:

> Following existing arbitral practice, SOEs are likely to benefit from access to investment arbitration, including such cases where the geopolitical dimension of their investments is obvious. The focus of the tribunals on the commercial nature, rather than on the purpose, of the investment activity to accept jurisdiction opens the door to the arbitration of geopolitical and thus state-to-state disputes.[207]

Indeed, until now there have been two cases adjudicated by arbitration tribunals where Chinese SOEs launched claims in international arbitration. In both cases (described below) the Chinese SOEs were not denied access to arbitration.

(a) Beijing Urban Construction v. Yemen

In this case, it was not contested that *Beijing Urban Construction* was a SOE, but the State of *Yemen* contended that *Beijing Urban Construction* was not a qualified investor under the ICSID convention.[208]

The ICSID tribunal ruled that *Beijing Urban Construction* was not disqualified under the *Broches*[209] test, since:

> In the Tribunal's view, the evidence establishes that BUCG was performing its work on the airport site under a construction contract as a commercial contractor and not as an agent of the Chinese Government.[210]

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[207] See Boute, *supra* note 106 at 416.

[208] See *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30, Decision on Jurisdiction <https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf> at [32] [*Beiing Urban Construction Group*] (the tribunal stated that the SOE status of *Beijing Urban Construction* is not disputed). See World Bank, "ICSID Convention, Regulations and Rules" <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> (Yemen contended that the ICSID tribunal lacked jurisdiction because the Claimant, as an SOE, failed to qualify as "a national of another Contracting State" under Article 25(1)).

[209] See Christoph H Schreuer *et al*, *The ICSID Convention: A commentary : A commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2009) 161 (details the *Broches* test: for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless *it is acting as an agent for the government* or *is discharging an essentially governmental function*); See also Anran Zhang, "The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases" (2018) 17(4) Chinese Journal of International Law 1148 at 1148–1150 (which explains how the *Broches* test was applied in the *Beijing Urban Construction* case).

[210] *Beijing Urban Construction Group*, *supra* note 208 at [41].

(b) Beijing Shougang and others v Mongolia

In this case, the State of Mongolia claimed that neither *China Heilongjiang*, nor *Beijing Shougang* were qualified as "economic entities" under the China-Mongolia BIT (1991) (since both *China Heilongjiang* and *Beijing Shougang* were SOEs).[211] However, the tribunal found that *China Heilongjiang* and *Beijing Shougang* were qualified as economic entities under the relevant BIT. The tribunal stated:

> the fact that the Chinese State directly or indirectly owns Beijing Shougang and China Heilongjiang has no relevance for the purpose of their qualification as "economic entities" under Article 1(2) of the Treaty.[212]

In Zhang's analysis of this case, he states that: "The award recalled that the distinction between the purpose and the nature of SOEs' activities, both of which are applied to determine the jurisdiction in practice, are unclear".[213]

However, it can be argued that such distinction is not only "*unclear*" but also practically impossible. Indeed, Boute states:

> the alternative of blocking access to arbitration based on geopolitical considerations is unrealistic because it involves second-guessing the motivation of investors in projects that often involve a complex mix of commercial and strategic objectives.[214]

C. *The Desirability and Feasibility of a Rules-based Approach to BRI Dispute Settlement*

As stated in the introduction, this article does not set-out to specifically confirm whether the pursuit of a rules-based approach in the BRI is desirable (as scholars such as Yu have argued – see above).[215] Rather this article aims to outline the theoretical basis for considering the implementation of a rules-based approach in BRI dispute resolution. Nevertheless in identifying the existence of potential power imbalances in the BRI in parts III, IV, VI and VII of this article and then demonstrating in parts IX and X of this article, that BRI dispute resolution seems to be power-based, the article has confirmed that a rules-based structure might improve BRI dispute resolution.

Similarly, this article has deliberately not specifically addressed the feasibility of implementing a rules-based approach in BRI dispute resolution. Not only might such analysis require a full article itself, but papers on this topic already exist, *eg*,

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[211] *Beijing Shougang and others v Mongolia*, PCA Case No 2010-20.

[212] *Ibid* at [417] (the tribunal stated that it was irrelevant that Beijing Shougang and China Heilongjiang were SOEs).

[213] Zhang, *supra* note 209 at 1152 (stated that the distinction between the purpose and the nature of SOEs' activities in *Beijing Shougang* is unclear).

[214] Boute, *supra* note 106 at 417 (stated that blocking access to arbitration based on geopolitical considerations is unrealistic).

[215] See footnotes 1–3.

scholars such as Zhiping He and Jianzhou Zhou urge caution in introducing a "comprehensive" and "rule-oriented" approach to BRI dispute settlement prematurely.[216] For instance, He and Zhou's article considers how the pursuit of a rules-based order is consistent with the existing structure of the BRI.

Furthermore, it should be noted that the six concepts identified in part VIII, which were shown to be lacking in the BRI in part IX, are not necessarily consistent with the BRI as currently constituted. Moreover, as stated, this article wishes to continue the discussion on BRI dispute resolution reform and consider rules-based solutions and the article does not aim to propose perfect solutions. Indeed, currently a more flexible approach seems to be more feasible (since it remains unsettled as to whether China or the recipient host states would consider a more rigid approach to be desirable).[217] However, as previously stated, whilst some "flexibility" is not necessarily a bad thing (since it can allow workable norms to develop), allowing too much "flexibility" might also not be the best policy choice, since extreme anomalies should be avoided. Therefore, the construction of a rules-based approach to BRI dispute settlement can truly act as the anchor, which allows some flexibility, but not too much.

Further, although the case has been made that a power-based approach might be obviated by a rules-based approach, this distinction is likely to be not as binary as suggested. This is because international relations – particularly Chinese relations with BRI countries – are more nuanced than a mere expression of power, *eg*, as regards Chinese investment in Pakistan, even though China is the dominant power in terms of international influence, economic strength, and military power, the implementation of Chinese investments in Pakistan is not always favourable to Chinese companies and the different interests of both parties inform the bilateral relationship.[218] In the other examples given, *eg*, *Beijing Urban Construction v. Yemen*, *Hambantota Port Development Project*, *East Coast Rail Link, Kyauk Pyu Deepwater Port*, *Jakarta–Bandung High Speed Railway*, and *Lower Sesan II Dam Hambantota Port Development Project,* it can also be argued that these projects were renegotiated to reflect less favourable terms for Chinese parties. Hence, it is also necessary to consider, not only the international power dynamics – expressed through military strength and economic statecraft – but also the internal power dynamics of recipient host states. Even though China might be the more powerful

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[216] See Zhipeng He & Jianzhou Zhao, "A China-led comprehensive dispute settlement mechanism for the Belt and Road Initiative: is it too early?" (2022) 29 (1) Asia Pac L Rev 86 (although the authors caution that, despite the perceived "need", China "should not hasten to construct specialized dispute settlement institutions or even mechanisms at this stage"; they acknowledge that China "should take a long-term position regarding BRI dispute settlement mechanisms" and state that there is clear consensus that "in the long run, China will not be able to effectively promote its foreign policy in the absence of an efficient dispute settlement system".

[217] So far, there appears to have been a reluctance for BRI states to concede issues of sovereignty in legal instruments, preferring instead a soft law approach to norm-setting and an aversion to adversarial dispute resolution. On this point, see McLaughlin, *supra* note 187.

[218] For a detailed account of the motivations on both sides, not necessarily informed by rules or power, see Siegfried Wolf*, The China-Pakistan Economic Corridor of the Belt and Road Initiative: Concept, Context and Assessment* (Germany: Springer 2019).

actor on the world stage, sovereign countries ultimately hold sovereignty over the land on which Chinese investments are built.[219]

XI. Conclusion

This article constructed a theoretical framework that sets out the basis for instituting a rules-based approach in BRI dispute resolution. As such the article offers a response to the calls for instituting a rules-based approach in BRI dispute resolution and chiefly adds to the ongoing academic discussion regarding the reform of BRI dispute resolution – especially since hitherto there has been little written in terms of laying a theoretical foundation for instituting a rules-based approach in BRI dispute resolution. The article is equally useful to academics, policy makers and practitioners.

In analysing both, the meaning of a rules-based approach in dispute resolution (on the one hand), and what the BRI actually is and why rules are understood to be necessary in BRI dispute resolution (on the other hand), something of a *mini-guide* as regards instituting a rules-based approach in BRI dispute resolution was introduced.

The two analyses were conducted simultaneously and the theoretical framework analysis also provided the means to explore certain definitional issues and then to suggest problems that exist in BRI dispute resolution (and to build the foundations to solve these problems). On the one hand, part II presented the history of and meaning of a rules-based approach, part V looked more closely at rules-based trade specifically and part VIII described the key-concepts of a rules-based approach. Then, on the other hand, part III and part IV *painted a picture* of the BRI as an economic project that demonstrates Chinese soft power and considered the BRI as a "hybrid-model of regionalism", Part VI and part VII looked at techniques of economic statecraft in the BRI (and other economic considerations) and part IX explored the key-concepts of a rules-based approach (as previously provided) *vis-à-vis* BRI dispute resolution specifically. Part X also provided a brief discussion about how the BRI actually operates in terms of current dispute resolution and considered how to apply the identified framework to the BRI.

The article's main finding is to confirm that power-imbalances in the BRI are apparent and that a rules-based system is recommended to mitigate against these imbalances. The power imbalances stem largely from the relative economic or political power of the States (and investors) who are parties to BRI projects (especially the power of China and Chinese SOEs). Therefore, this article wishes to recognise Chinese "soft power" present in the BRI and then facilitate additional "selective reshaping" and "uploading" by China to allow rules-based BRI dispute resolution to curtail potential power imbalances.

Rules-based approaches toward dispute resolution also reinforce a trend of governments acting in a more rules-based way since the introduction of investment arbitration. For instance, the consideration of "the empire trap" in part VI introduced

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[219] For a deeper analysis on this point, see *eg*, Pathirana, *supra* note 177.

how governments who previously acted in a power-oriented way (*eg*, the US), have acted in a more rules-based way since the introduction of investment arbitration. This is highly relevant as regards the analysis of BRI dispute resolution since we are fundamentally concerned with shifting disputes from a field where power-oriented techniques dominate to a field where rule-oriented techniques can dominate.