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China's approach to the Belt and Road Initiative: Scope, character and sustainability

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China's Approach to the Belt and Road Initiative

Heng Wang*

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Abstract: The Belt and Road Initiative (BRI) is China's most significant strategic move for engagement with its partners following its accession to the World Trade Organization (WTO). As a new form of regional multilateralism, the BRI is a hub-and-spoke network with China as the hub. This paper analyses China's approach to the BRI from a legal perspective, focusing on two questions: first, is there an identifiable approach that China adopts in the BRI context; and second, what is the essence that underlies this project? The article argues that China's approach to the BRI has three primary qualities: it is (i) less-institutionally focused; (ii) non-treaty-based; and (iii) proactive rather than reactive. However, the stability of these characteristics across different contexts should not be exaggerated, since China chiefly employs a "middle-of-the-road" strategy in engaging with the BRI. Flexibility is arguably the essence of China's approach, and reflects the government's adaptive attitude. Such a path not only diverges from China's engagement with the WTO, but also could constitute a kind of Chinese counter-model to deep trade agreements pursued by developed economies.

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I. Introduction

As “the most ambitious geo-economic vision in recent history”, the Belt and Road Initiative (BRI) could involve around 70 countries and over two-thirds of the global population.¹ China has taken many steps to promote the BRI, ranging from various BRI projects to establishing an expanded trade and investment network. Closely related to the BRI, a \$40 billion Silk Road Fund (SRF) was established in 2014, with the launch of the Asian Infrastructure Investment Bank (AIIB) occurring the following year. Other institutions, such as the New Development Bank (NDB), could also contribute to the BRI. The BRI could involve legal, economic, geopolitical, development, and security considerations. It remains open whether the BRI will lead to fundamental changes in political and economic philosophy in global governance.²

The BRI is part of regional multilateralism,³ with multilateralism here referring to “the practice of coordinating national policies in groups of three or more states, through ad hoc arrangements or by means of institutions.”⁴ The BRI represents China’s most significant strategic move for engagement with its partners after its accession to the WTO in 2001. In China’s view, the BRI augurs and builds a community of shared destiny.⁵ China’s BRI Action Plan calls for the creation of “an open, inclusive and balanced regional economic cooperation architecture.”⁶ More specifically, the BRI is an essential part of Chinese trade and investment initiatives to advance regional and wider economic integration.⁷ China utilizes its status as a

¹ Jonathan Hillman, *China’s Belt and Road Initiative: Five Years Later*(2018), available at https://csis-prod.s3.amazonaws.com/s3fs-public/publication/ts180125_hillman_testimony.pdf?mSTOaqZbgZdRpx4QWoSt1HtIa4fN42uX.

² Michael M. Du, *China’s “One Belt, One Road” Initiative: Context, Focus, Institutions, and Implications*, 2 *THE CHINESE JOURNAL OF GLOBAL GOVERNANCE* 30, 43 (2016).

³ Weifeng Zhou & Mario Esteban, *Beyond Balancing: China’s Approach Towards the Belt and Road Initiative*, *JOURNAL OF CONTEMPORARY CHINA* 1, 10 (2018).

⁴ Robert O. Keohane, *Multilateralism: An Agenda for Research*, 45 *INTERNATIONAL JOURNAL* 731, 731 (1990).

⁵ He Lifeng, *Belt and Road Initiative Builds Human Community of Shared Destiny*(2018), available at <https://eng.yidaiyilu.gov.cn/ghsl/wksl/14789.htm>.

⁶ National Development and Reform Commission, et al., Full text: Action Plan on the Belt and Road Initiative Part I (2015).

⁷ Joshua P. Meltzer, *China’s One Belt One Road initiative: A view from the United States*(Jun. 19, 2017), available at <https://www.brookings.edu/research/chinas-one-belt-one-road-initiative-a-view-from-the-united-states/>.

leading trading nation (both in export and import) to promote the BRI.⁸ In turn, the BRI can also help China to increase its importance in the world economy by expanding trade and investment.

It is crucial to understand China's approach to the BRI.⁹ On the one hand, this approach has not yet been fully explored through the lens of law and, in particular, international economic law.¹⁰ Current research on China's approach is often conducted through lenses other than law, such as political science and international relations.¹¹ On the other hand, this approach profoundly affects China's future engagement in international economic law since the initiative is its major strategic move. Therefore, this article explores two questions from a legal perspective: first, what is China's approach to the BRI; and second, what is the true essence of this approach? Parts two to four explore three facets of China's approach to the BRI: first, that it is less institutionally-focused; second, that it is not treaty-based; and third, that it is proactive. This discussion is followed by Part five, which probes into the essence of China's approach. Part six concludes by reflecting on the implications and future of the approach.

This article provides a deeper understanding of China's paths forward for participating in the international economic legal order. It should be noted that this article focuses on China's approach to the BRI rather than the merits of BRI projects and rules,¹² which deserve separate analysis.

II. A less institutionally-focused approach

As a preliminary step, it is helpful to look at the structure of non-domestic-law¹³ documents and rules that may apply to the BRI. Although it is difficult to list all of them, these documents and rules can be classified under two categories.

The first category comprises BRI-specific documents,¹⁴ including bilateral documents, that specifically refer to the BRI and deal with relevant issues. Notably, it

⁸ Dilip K. Das, *A Chinese Renaissance in an Unremittingly Integrating Asian Economy*, 18 JOURNAL OF CONTEMPORARY CHINA 321, 321-338 (2009).

⁹ Although one could argue that the BRI is a Chinese initiative, China needs its own approach to the BRI so that it can deal with situations or problems therein.

¹⁰ It seems that current research often addressed investment or bilateral investment treaties (BITs) issues in respect of the BRI. See, e.g., Shu Zhang, *China's Approach in Drafting the Investor-State Arbitration Clause: A Review from the 'Belt and Road' Regions' Perspective*, THE CHINESE JOURNAL OF COMPARATIVE LAW, 1-31 (2017); Vivienne Bath, "One Belt, One Road" and Chinese Investment 1-36 (2016).

¹¹ For the most recent research, see, e.g., Zhou & Esteban, JOURNAL OF CONTEMPORARY CHINA, 1-15 (2018); Yong Wang, *Offensive for Defensive: The Belt and Road Initiative and China's New Grand Strategy*, 29 THE PACIFIC REVIEW 455, 455-463 (2016).

¹² A clear definition of BRI projects seems to be lacking.

¹³ Given the space limit, it is difficult to analyse the national law of the large number of the BRI states.

¹⁴ For many of BRI-specific documents, see, HKTDC, *The Belt and Road Initiative: Implementation Plans and Co-operation Agreements* (January 10, 2018), available at <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road->

is difficult to find “formal legal sources, either domestic or international” regarding the BRI.¹⁵ These BRI-specific documents are often soft law, which, as discussed below, is understood here to include hortatory rather than legally binding obligations.¹⁶ Moreover, BRI-specific documents usually involve states and international organizations. An example of the former is the Memorandum of Arrangement (MOA) on the BRI between China and New Zealand (China-New Zealand MOA),¹⁷ while an example of the latter is the Memorandum of Understanding (MOU) between China’s National Development and Reform Commission (NDRC) and the United Nations Economic Commission for Europe (UNECE) (UNECE-NDRC MOU).¹⁸

The other category consists of BRI-related rules, which do not refer to the BRI but can be applied to trade and investment under the BRI. They include WTO rules and preferential trade and investment agreements (PTIAs), including free trade agreements (FTAs), and bilateral investment treaties (BITs).¹⁹ BRI-specific documents are representative of how the initiative is intended to operate, while BRI-related rules play an important role in the actual practice of the initiative.

A. The selective innovation of informal or related institutional mechanisms

It is more correct to observe that the BRI is less institutionally-focused, rather than operating without any institutional arrangement whatsoever. The BRI does not have a stringent international institutional structure in the legal sense. It lacks a rigid regulative legal structure,²⁰ or an overarching institutional system, consisting, for example, of plenary and executive organs, and a regional dispute settlement agency (like a multilateral court).²¹ There does not seem to be a clear plan for a strict BRI legal framework.

Initiative/The-Belt-and-Road-Initiative-Implementation-Plans-and-Co-operation-Agreements/obor/en/1/1X000000/1X0A3857.htm.

¹⁵ Lingliang Zeng, *Conceptual Analysis of China’s Belt and Road Initiative: A Road towards a Regional Community of Common Destiny*, 15 CHINESE JOURNAL OF INTERNATIONAL LAW 517, 539 (2016).

¹⁶ Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 JOURNAL OF LEGAL ANALYSIS 171, 172 (2010).

¹⁷ Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative Between the Government of the People’s Republic of China and the Government of New Zealand (2017).

¹⁸ Memorandum of Understanding between the United Nations Economic Commission for Europe and the National Development and Reform Commission of China (2017).

¹⁹ It should be noted that there is a trilateral investment treaty: China-Japan-Korea Investment Agreement. For the sake of simplicity, BITs are deemed to include this trilateral investment agreement in this article.

²⁰ Maria Adele Carrai, *It Is Not the End of History: The Financing Institutions of the Belt and Road Initiative and the Bretton Woods System*, 14 TRANSNATIONAL DISPUTE MANAGEMENT 1, 2-3 (2017).

²¹ Zeng, CHINESE JOURNAL OF INTERNATIONAL LAW, 527 (2016); Ernst-Ulrich Petersmann, Trade and investment adjudication involving ‘silk road projects’: Legal methodology challenges 15 (2018).

Instead, China has adopted a dual-track approach towards the BRI's interaction with institutions. On one track, the BRI utilizes and builds on existing bilateral and multilateral arrangements and mechanisms in various fields such as energy.²² In this respect, one may argue that the BRI proceeds on a largely ad hoc basis. Current mechanisms include the Shanghai Cooperation Organization (SCO), Asia-Pacific Economic Cooperation (APEC), Asia-Europe Meeting (ASEM), Asia Cooperation Dialogue (ACD), Conference on Interaction and Confidence-Building Measures in Asia (CICA), China-Arab States Cooperation Forum (CASCF), China-Gulf Cooperation Council Strategic Dialogue, Greater Mekong Subregion (GMS) Economic Cooperation, and Central Asia Regional Economic Cooperation (CAREC).²³ There are regional platforms focusing on the link with regions other than Asia, particularly the 16+1 Group (G16+1), involving China and Central and Eastern European states (CEEs), that was established in 2012 in Warsaw, over a year ahead of the announcement of the BRI.²⁴ Some of the mechanisms are not limited to BRI states, such as the Asia-Pacific Economic Cooperation (APEC).

On the other track, China has undertaken selective innovation in respect of BRI-related mechanisms or informal institutional arrangements. This reflects China's desire for "new models of international cooperation and global governance",²⁵ and the Chinese government's view of the BRI as "an important international public good."²⁶ To promote China's global governance ambitions,²⁷ China has developed BRI-related institutions (particularly the AIIB), and sponsored informal BRI multilateral mechanisms of various kinds. The latter include the Belt and Road Forum for International Cooperation (BRF) that is to be regularly held,²⁸ and BRI platforms for commercial arbitration.²⁹ As an illustration, the Asian Financial Cooperation Association (AFCA) has been established as one outcome of the BRF, which is reported to be "work[ing] to establish a liaison mechanism,... an information sharing

²² National Development and Reform Commission, et al., Part V. 2015; *Vision and Actions on Energy Cooperation in Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* (2017), available at <https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydy/gw/201705/201705161049036.pdf>

²³ National Development and Reform Commission, et al., Part V. 2015.

²⁴ Manzoor Ahmad, et al., *One Belt One Road Initiative ("OBOR"): Editorial*, 14 *TRANSNATIONAL DISPUTE MANAGEMENT* 1, 1 (2017).

²⁵ National Development and Reform Commission, et al., Part I. 2015.

²⁶ *Ministry of Foreign Affairs Holds Briefing for Chinese and Foreign Media on President Xi Jinping's Attendance and Chairing of Related Events of the BRF* (Apr. 18, 2017), available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1455115.shtml.

²⁷ Alice Ekman, *China's New Silk Roads: A Flexible Implementation Process*, in *THREE YEARS OF CHINA'S NEW SILK ROADS: FROM WORDS TO (RE)ACTION?* 15, (Alice Ekman, et al. eds., Feb. 2017).

²⁸ China.org.cn, *Full text: List of Deliverables of the Belt and Road Forum for International Cooperation* (Jun. 7, 2017), available at http://www.china.org.cn/chinese/2017-06/07/content_40983146.htm. (the Belt and Road Forum for International Cooperation is to be held regularly)

²⁹ Ekman, 15. Feb. 2017.

platform, as well as a regional financial idea exchange platform.”³⁰ The BRF could develop as a major BRI negotiation avenue or forum,³¹ and a way to collect ideas and responses according to which the BRI could be shaped and adjusted.³² However, the current institutional development does not involve BRI-specific institutions with a stringent or rigid legal structure, as discussed above.

B. The BRI as a hub-and-spoke network

The BRI is of a hub-and-spoke networked nature with China as the hub, which helps to develop “an international environment of prosperity and stability friendly to China.”³³ The BRI strategy aims for “an ambitious China Circle.”³⁴ This networked nature can be seen particularly in the BRI’s framework and documents. First, the initiative provides an organizing framework rather than a strict institutional structure. The BRI lacks an “institutional framework or decision-making mechanism through which participating countries are connected with one another.”³⁵ The initiative is neither a top-down (through the imposition of multinational treaties) nor bottom-up approach.³⁶ Instead, China intends to build a partnership network through the BRF,³⁷ which reflects its desire to build a “a global network of partnership.”³⁸ Accordingly, the BRI is loosely organized:³⁹ the new or existing bilateral and multilateral mechanisms utilized by the BRI are often “loose” mechanisms (like dialogues or forums), which highlight communication and consultation.⁴⁰ These mechanisms, such as the G16+1, could develop into networks of national regulators.

Second, BRI-related and BRI-specific documents form a kind of loosely connected network. The BRI is based on “a series of unrelated but nonetheless interconnected

³⁰ Li Xiang, *Asian Financial Cooperation Association Launched in Beijing*(July 24, 2017), available at https://news.cgtn.com/news/3d67444e796b444e/share_p.html.

³¹ Ministry of Foreign Affairs Holds Briefing for Chinese and Foreign Media on President Xi Jinping's Attendance and Chairing of Related Events of the BRF. Apr. 18, 2017.(During the BRF, it is expected that "China will negotiate and sign cooperation documents with nearly 20 countries and over 20 international organizations")

³² Ekman, 13. Feb. 2017.

³³ William H. Overholt, *One Belt, One Road, One Pivot*(Sep. 26, 2015), available at <http://theoverholtgroup.com/media/Article-Southeast-Asia/One-Belt-One-Road-One-Pivot-Global-Asia-Corrected-Oct2015.pdf>.

³⁴ Shuaihua Cheng, *China's New Silk Road: Implications for the US*(2015), available at <http://e15initiative.org/blogs/chinas-new-silk-road-implications-for-the-us/>.

³⁵ Vinay Kaura, *Understanding India's response to China's Belt and Road*(10 June 2017), available at <http://www.atimes.com/understanding-indias-response-chinas-obor/>.

³⁶ Rochelle Cooper Dreyfuss, *Harmonization: Top down, Bottom up — And Now Sideways? The Impact of the IP Provisions of Megaregional Agreements on Third Party States* 4 (2017).

³⁷ Xinhua, *Belt and Road Forum Agenda Set*, China Daily(April 18, 2017), available at http://europe.chinadaily.com.cn/china/2017-04/18/content_28982925.htm.

³⁸ Xinhua, *Xi Eyes More Enabling Int'l Environment for China's Peaceful Development*(2014), available at <http://www.globaltimes.cn/content/894240.shtml>.

³⁹ *Greening the belt and road initiative: WWF's recommendations for the finance sector*(2018), available at <http://www.sustainablefinance.hsbc.com/our-reports/greening-the-belt-and-road-initiative>.

⁴⁰ National Development and Reform Commission, et al., Part V. 2015.

bilateral trade pacts and partnerships.”⁴¹ In particular, the BRI utilizes a network of predominantly non-binding bilateral agreements (like MOUs).⁴² The non-binding MOUs under the BRI show China’s intention to engage with other parties through a less rigid structure, while these documents create network effects.⁴³ These documents appear to gradually be forming a set of instruments for policy coordination on financial integration, trade liberalization, and people-to-people connectivity across Asia and beyond.⁴⁴ Such a policy coordination network may expand: these BRI-specific instruments will in all likelihood increase in number, as evidenced by the BRI Action Plan which calls for more MOUs between China and other states in areas such as cooperation in bilateral financial regulation.⁴⁵

Notably, the BRI is a network with considerable thought put into it, rather than being haphazard. China has taken a gradual approach to the BRI and developed a plan (such as devising economic corridors to promote China’s trade and linkage with BRI states⁴⁶).

That said, it remains to be seen whether the BRI will establish a strict institutional arrangement in the long term, as the structure of the BRI is currently at a rudimentary development stage. The BRI may grow into a legal framework or remain as an open forum or framework.⁴⁷

III. A non-treaty-based approach

A. The maximized mobilization of soft law

China adopts a non-treaty-based approach to the BRI.⁴⁸ 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), as is the case with international organizations, nor formal membership protocols.⁴⁹ Moreover, it does not have many formal international law instruments (e.g., few new BRI-specific treaty obligations), unlike most mega-regional agreements.

⁴¹ Wade Shepard, *Why the Ambiguity of China's Belt and Road Initiative Is Perhaps Its Biggest Strength*, *Forbes*(October 19, 2017), available at <https://www.forbes.com/sites/wadeshepard/2017/10/19/what-chinas-belt-and-road-initiative-is-really-all-about/#49dc2a4be4de>.

⁴² Donald J. Lewis & Diana Moise, *OBOR Roadmaps: The Legal and Policy Frameworks*, 14 *TRANSNATIONAL DISPUTE MANAGEMENT* 1, 8 (2017).

⁴³ *Id.* at, 10, 19-20.

⁴⁴ Tommi Yu, *China's 'One Belt, One Road Initiative': What's in It for Law Firms and Lawyers?*, 5 *THE CHINESE JOURNAL OF COMPARATIVE LAW*, 2 (2017).

⁴⁵ National Development and Reform Commission, et al., Part IV. 2015.

⁴⁶ HKTDC, *The Belt and Road Initiative*(September 13, 2017), available at <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative/obor/en/1/1X000000/1X0A36B7.htm>.

⁴⁷ Julien Chaisse & Matsushita Mitsuo, *China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 *JOURNAL OF WORLD TRADE* 1, 23 (2018).

⁴⁸ Given the different definitions of soft law, it is perhaps more accurate to use the term “non-treaty-based approach”.

⁴⁹ Shepard. October 19, 2017.

China has frequently mobilized soft law under the BRI, which in this paper is understood as consisting of hortatory rather than legally binding obligations. Despite the lack of an accepted definition of soft law, the term usually refers to “any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior.”⁵⁰

First, BRI-specific documents are not binding. China seems to prefer avoiding treaties with measurable compliance requirements in favor of less formal but more flexible arrangements.⁵¹ BRI-specific documents call for voluntary cooperation instead of hard law-imposing treaty obligations backed by enforcement mechanisms. For example, the MOA and MOUs under the BRI are non-binding documents.⁵² The documents are carefully drafted; for example, the China-New Zealand MOA typically uses the word ‘will’ rather than ‘shall.’

Second, soft law under the BRI should be understood according to its own terms and different contexts. BRI-specific documents are devised ad hoc, and vary dramatically: there are general cooperation agreements,⁵³ guiding principles,⁵⁴ joint communiques (a major one is the Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation (BRF Joint Communique)),⁵⁵ joint statements,⁵⁶ agreements,⁵⁷ an MOA (i.e., the China-New Zealand MOA), MOUs,⁵⁸ a letter of intent,⁵⁹ initiatives,⁶⁰ and consensuses.⁶¹

⁵⁰ Dinah L. Shelton, *Soft Law* 3 (2008).

⁵¹ Du, *THE CHINESE JOURNAL OF GLOBAL GOVERNANCE*, 40 (2016).

⁵² Decision time: Australia’s engagement with China’s Belt and Road Initiative. (2017).

⁵³ Vivienne Bath, *The South and Alternative Models of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements*, in *RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH* 80, (Fabio Morosini & Michelle Ratton Sanchez Badin eds., 2017).

⁵⁴ See, e.g., *Guiding Principles on Financing the Development of the Belt and Road* (2017).

⁵⁵ *Joint Communique of the Leaders Roundtable of the Belt and Road Forum for International Cooperation* (2017).

⁵⁶ OFFICE OF THE LEADING GROUP FOR THE BELT AND ROAD INITIATIVE, *BUILDING THE BELT AND ROAD: CONCEPT, PRACTICE AND CHINA’S CONTRIBUTION* 26 (Foreign Languages Press first ed. 2017). (e.g., Chongqing Joint Statement related to quarantine cooperation, and Joint Statement on the Belt and Road Food Safety Cooperation)

⁵⁷ China.org.cn. Jun. 7, 2017. (e.g., Intergovernmental Agreement on the Peaceful Use of Nuclear Energy with the government of Thailand)

⁵⁸ See, e.g., id. at. (MOU in the Field of Water Resources with the government of Malaysia, and the UNECE-NDRC MOU)

⁵⁹ Letter of Intent between the United Nations Economic and Social Commission for Asia and the Pacific and the Ministry of Foreign Affairs, People’s Republic of China on Promoting Regional Connectivity and the Belt and Road Initiative (2016).

⁶⁰ See, e.g., *Initiative on Promoting Unimpeded Trade Cooperation along the Belt and Road Released in Beijing* (May 16, 2017), available at <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201705/20170502578235.shtml>.

⁶¹ See, e.g., *Suzhou Consensus of the Conference of Presidents of Supreme Courts of China and Central and Eastern European Countries* (May 5, 2017), available at http://www.sohu.com/a/73518080_117927.

These BRI-specific documents are patchy among BRI states, given the huge variation among these countries. They are adapted to BRI states and international organizations (e.g., the China-New Zealand MOA, and UNECE-NDRC MOU), areas and sectors (e.g., the MOU in the Field of Water Resources with the Government of Malaysia), or projects (e.g., the Protocol on Establishment of Joint Ocean Observation Station with the Ministry of Environment of Cambodia).⁶² They need to be understood on a case-by-case basis. As an example, the China-New Zealand MOA calls for, among other things, the upgrade of the China-New Zealand FTA and cooperation at the multilateral level (e.g., the AIIB).⁶³ One of its three cooperation principles calls for adherence to “international good practice, market orientation and professional principles” in the promotion of cooperation under the BRI.⁶⁴ This MOA should be read with the China-New Zealand FTA, the AIIB, and the cooperation principles.

Third, soft law instruments rarely bring substantial normative development under the BRI. The normative development of the BRI is at a very embryonic stage. BRI-specific documents often contain statements of expected behavior (particularly common policy priorities), and to a lesser degree, principles. The call for expected behavior is often vague and general, such as “a long-term, stable, sustainable financing system that is well-placed to manage risks”.⁶⁵ Taking Suzhou Consensus of the Conference of Presidents of Supreme Courts of China and Central and Eastern European Countries as an example, it emphasizes, among other aspects, judicial efficiency, the unification of judicial practice, and “clear, precise and predictable jurisprudence”.⁶⁶ Additionally, BRI-specific documents sometimes set out principles. The China-New Zealand MOA indicates principles, including “wide consultation, joint contribution and shared benefits,” the enhancement of existing bilateral and multilateral mechanisms, and the consistency with international good practice, market orientation and professional principles.⁶⁷

These soft law documents make it easier to build consensus through information sharing and persuasion without concerns around treaty ratification or litigation.⁶⁸ For instance, the UNECE-NDRC MOU aims to promote information sharing through the dialogue mechanism under the BRI, including a multilateral dialogue mechanism on

⁶² See e.g. China.org.cn. Jun. 7, 2017.

⁶³ Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative Between the Government of the People’s Republic of China and the Government of New Zealand Paragraphs III.2, III.4. 2017.

⁶⁴ Id. at, Paragraphes II.3.

⁶⁵ Guiding Principles on Financing the Development of the Belt and Road. 2017.

⁶⁶ Suzhou Consensus of the Conference of Presidents of Supreme Courts of China and Central and Eastern European Countries paragraph VII. May 5, 2017.

⁶⁷ Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative Between the Government of the People’s Republic of China and the Government of New Zealand Paragraph II. 2017.

⁶⁸ Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINNESOTA LAW REVIEW 706, 709 (2010).

the public-private partnership (PPP).⁶⁹ However, the effect of soft law is yet to be determined as it consists of hortatory or even promotional language without an enforcement mechanism.

B. The continued relevance of treaties

The BRI involves treaties, but these treaties often existed before or outside the BRI or do not refer to the BRI. A number of reasons for the continued use of treaties exist. For one, soft law is insufficient to protect investors from the grave risks they face: the BRI provides for investment largely in jurisdictions where other states and international financial institutions have been reluctant to invest,⁷⁰ and few of these countries are “noted for the rule of law.”⁷¹ There are obvious downsides to the soft law approach, particularly the difficulties in enforcement of soft law. In addition, the reliance on treaties, particularly PTIAs and WTO norms, may be attributed to difficulties in coordinating among BRI states, transaction costs (in forging a BRI-wide treaty) and a path dependence.

Therefore, treaties could be utilized when applicable in BRI trade and investment. First, PTIAs help China strengthen its economic and political relationships with BRI jurisdictions through, inter alia, important albeit often limited market opening and investment protection.

Second, WTO rules arguably remain the core of international norms applicable to BRI-related trade. There are a number of considerations. The fate of the multilateral system will profoundly affect the BRI, since the BRI will rely on multilateral mechanisms in global governance.⁷² WTO law overall benefits China as a major goods exporting country, although it has limited coverage, sets WTO-plus obligations for China, and largely has not been upgraded. Therefore, China supports the multilateral trading system and endeavors to ensure consistency or alignment with these norms.

Moreover, most of the BRI countries are WTO members, and WTO norms could help promote BRI-related trade in prioritized areas. This explains why the WTO Agreement on Trade Facilitation (TFA) is the only specific trade agreement that is referred to in the BRI Action Plan, and its implementation is highlighted.⁷³ The BRI could build on the TFA to promote trade facilitation. WTO multilateral agreements in other areas are also useful, such as those on technical standards and intellectual property. For WTO plurilateral agreements, the Agreement on Government Procurement (GPA) is particularly relevant,⁷⁴ including its rules on non-

⁶⁹ Memorandum of Understanding between the United Nations Economic Commission for Europe and the National Development and Reform Commission of China Article 1(1)(d) 2017.(the establishment of a BRI PPP multilateral dialogue mechanism)

⁷⁰ Avery Goldstein, *A Rising China's Growing Presence: The Challenges of Global Engagement*, in CHINA'S GLOBAL ENGAGEMENT: COOPERATION, COMPETITION, AND INFLUENCE IN THE 21ST CENTURY 9, (Avery Goldstein & Jacques Delisle eds., 2017).

⁷¹ Peter Ferdinand, *Westward Ho—the China Dream and 'One Belt, One Road': Chinese Foreign Policy Under Xi Jinping*, 92 INTERNATIONAL AFFAIRS 941, 953 (2016).

⁷² Zeng, CHINESE JOURNAL OF INTERNATIONAL LAW, 541 (2016).

⁷³ National Development and Reform Commission, et al., Part IV. 2015.

⁷⁴ Several BRI countries (including Moldova, Montenegro and Ukraine) are party to the GPA, while China and a number of BRI countries (e.g., Albania, Georgia, and Jordan) are

discrimination. On the one hand, Chinese investors will probably bid for government procurement contracts in the BRI states.⁷⁵ On the other hand, accession to the GPA will help assuage possible criticism about non-transparency or discrimination as regards public procurement for BRI projects.

Third, other treaties are relevant. For instance, China acceded to the Customs Convention on the International Transport of Goods under Cover of TIR⁷⁶ Carnets (TIR Convention, 1975) in 2016, which is “the only universal customs transit system for moving goods across international borders.”⁷⁷ The TIR Convention accession is deemed as a possible “real game changer” for trade that will strongly contribute to the BRI, since it helps harmonize standards and boost transport, trade and development across the Eurasian landmass.⁷⁸

However, these treaties are not specific to the BRI. WTO norms and the TIR Convention exist without the BRI, while the legal text of China’s PTIAs with BRI states concluded after the announcement of the initiative rarely refers to the BRI.

C. The possible hardening of soft law?

China does not stop at soft law, and may utilize soft law to affect, cement or develop hard law. Hard law could overall be beneficial to China if the norms are favorable to China, since it would be more effective in helping China to realize the priorities of the BRI (including policy coordination, and financial integration), and its goal of refashioning the world economic order.⁷⁹ Soft law could be a progressive path towards becoming hard law.⁸⁰

In the mid- to long-term, China may want its preferred rules to gradually obtain normative status as hard law. China could leverage its political, economic and technological advantages to promote its national standards in BRI countries, which may even shape global standards and foster a paradigm change in global standard development.⁸¹ Through the BRI, China wants to “assume commensurable

negotiating accession. WTO, *Agreement on Government Procurement: Parties, observers and accessions*(2018), available at https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

⁷⁵ See, e.g. Charlotte Greenfield, *New Zealand's far north paves way for China's 'One Belt, One Road'*(Apr. 14, 2017), available at <https://www.reuters.com/article/us-newzealand-china-infrastructure/new-zealands-far-north-paves-way-for-chinas-one-belt-one-road-idUSKBN17G0GK>.

⁷⁶ TIR represents “Transports Internationaux Routiers.”

⁷⁷ United Nations Economic Commission for Europe, *China's Accession to the United Nations TIR Convention Opens Prospects for New International Trade Routes*(July 26, 2016), available at <https://www.unece.org/info/media/presscurrent-press-h/transport/2016/chinas-accession-to-the-united-nations-tir-convention-opens-prospects-for-new-international-trade-routes/doc.html>.

⁷⁸ *Id.* at.

⁷⁹ Petersmann, 5. 2018.

⁸⁰ H. Wolfgang Reincke & Jan Martin Witte, *Challenges to the International Legal System Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords*, in COMMITMENT AND COMPLIANCE 95, (Dinah Shelton ed. 2003).

⁸¹ Jyh-An Lee, *The New Silk Road to Global IP Landscape*, in LEGAL DIMENSIONS OF CHINA’S BELT AND ROAD INITIATIVE 424-425, (Lutz-Christian Wolff & Xi Chao eds., 2016).

responsibilities and have the corresponding influence and voice in determining international affairs and rules.”⁸² China may develop hard law through the BRI to innovate trade and investment rules,⁸³ and respond to emerging norms elsewhere (e.g., deep FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)). This is echoed by the arguments of a former Vice-President of the Supreme People’s Court of China (SPC) that the BRI requires a system of international treaties that is suitable to the development of the initiative.⁸⁴

It is likely that China will pursue the hardening of soft law under the BRI in selective areas where China has advantages. China will in all likelihood utilize soft law to gradually establish practices which can be elevated to hard law. Technical standards are one potential area. The BRI is likely to promote China’s technical standards, since infrastructure projects provide standard-setting opportunities.⁸⁵ The BRF Joint Communiqué also reveals the aim of “harmonizing rules and technological standards when necessary.”⁸⁶ Another area could be e-commerce. China is reported to be planning to take the lead in shaping rules on cross-border e-commerce regulation, through first shaping the standard and then forming the relevant fundamental principles of the World Customs Organization (WCO).⁸⁷

Notably, China may pursue the hardening of soft law through agreements, particularly PTIAs. China has signed 56 BITs and 11 FTAs with BRI jurisdictions⁸⁸ (e.g., bilateral FTAs with Pakistan, South Korea and Singapore, as well as BRI states under the China-ASEAN FTA), many of them concluded before the BRI was announced. Within China’s proposed global FTA network, China’s strategy of free trade areas envisages the expansion of FTAs alongside the BRI in the medium and long-term,⁸⁹ which is related to the need for China to adapt to economic globalization

⁸² Justin Yifu Lin, *"One Belt and One Road" and Free Trade Zones-China's New Opening-up Initiatives*, 10 FRONTIERS OF ECONOMICS IN CHINA 585, 588 (2015).

⁸³ For instance, there is a paper available at the website of State Council Information Office in 2017 that indicates such possibility. Monan Zhang, *Comprehensively Promote Cooperation on BRI Framework Mechanism*, www.scio.gov.cn(2017), available at <http://www.scio.gov.cn/xwfbh/xwfbh/wqfbh/35861/36637/xgbd36644/Document/1551139/1551139.htm>.(The BRI should envisage major normative and rule innovations in the trade and investment system)

⁸⁴ Rong He, *On China’s Judiciary Participation in the Formation of International Economic Rules*, 1 CHINESE REVIEW OF INTERNATIONAL LAW 3, 15 (2016).

⁸⁵ Jonathan Hillman, *Belt and Road Summit: Beijing’s Push on Trade*(May 2, 2017), available at <https://www.thecipherbrief.com/belt-and-road-summit-beijings-push-on-trade-2>.

⁸⁶ Joint Communiqué of the Leaders Roundtable of the Belt and Road Forum for International Cooperation Paragraph 15(e). 2017.

⁸⁷ Xinhua News Agency, *China to Push Formulation of Cross-Border E-Commerce International Rules for World Customs*(January 11, 2018), available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/43482.htm>.

⁸⁸ Manjiao Chi, *Integrating the Sustainable Development Goals (SDGs) in the Regulation of Public-Private Partnerships (PPPs) in the Belt and Road Countries: A Chinese Perspective*(2018), available at <http://investmentpolicyhub.unctad.org/Blog/Index/64>.

⁸⁹ State Council, *Opinions on Speeding up the Implementation of Free Trade Area Strategy* (2015).

and to possibly deepen domestic reform.⁹⁰ Regarding the recent FTAs with BRI countries, China has signed an FTA with Georgia,⁹¹ concluded FTA negotiations with the Maldives,⁹² and is negotiating new or upgraded FTAs with a limited number of BRI states (e.g., Sri Lanka, Moldova, and Pakistan).⁹³ China has also substantially concluded the negotiation of a trade and economic cooperation agreement with the Eurasian Economic Union (EAEU).⁹⁴ In addition, the BRI Action Plan pushes forward negotiations on investment protection agreements and double taxation avoidance agreements to protect investors.⁹⁵

That said, it is difficult for China to develop hard law in wide-ranging areas (particularly WTO-plus stringent domestic regulatory norms) at this stage due to China's capacity limitations (e.g., local administrative agencies' capacity), its reluctance to accept high-level regulatory disciplines, and the difficulties of coordination among BRI countries. If hard law is to be promoted at the regional level, it also requires compelling normative justification that will be not easy. For instance, developing BRI countries may doubt the necessity of binding obligations on higher levels of intellectual property protection (e.g., patents, trade secrets), since it could increase the costs of accessing knowledge,⁹⁶ and intellectual property has not "catered to agriculture and rural populations."⁹⁷ Therefore, China adopts a soft law approach, but this may change over time.

IV. A proactive approach

A. A shift to a proactive approach

1. An evolution in Chinese practices

China's BRI strategy represents an evolution of its prior practice. The BRI is part of China's long-term approach to trade and investment, including as a continuity of its "go-out" policy in the late 1990s in sectors such as energy.⁹⁸ Dispute settlement is a

⁹⁰ Bath, "One Belt, One Road" and Chinese Investment 6. 2016.

⁹¹ China FTA Network, *China and Georgia formally signed the free trade agreement*(May 15, 2017), available at http://fta.mofcom.gov.cn/article/chinageorgia/chinageorgianews/201705/34958_1.html.

⁹² China FTA Network, *China and Maldives Concludes the Free Trade Agreement Negotiations*(Sept. 20, 2017), available at http://fta.mofcom.gov.cn/enarticle/enrelease/201709/35939_1.html.

⁹³ China FTA Network, <http://fta.mofcom.gov.cn/english/index.shtml> (last visited 9 March 2018).

⁹⁴ China FTA Network, *China and the Eurasian Economic Union Substantially Conclude the Negotiation of Trade and Economic Cooperation Agreement*(Oct. 13, 2017), available at http://fta.mofcom.gov.cn/enarticle/enrelease/201710/35977_1.html.

⁹⁵ National Development and Reform Commission, et al., Part IV. 2015.

⁹⁶ Lee, 425. 2016.

⁹⁷ Thomas Cottier, *Intellectual Property and Mega-Regional Trade Agreements: Progress and Opportunities Missed*, in MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TISA 155, (2017).

⁹⁸ Françoise Nicolas, *The Economics of OBOR: Putting Chinese Interests First*, in THREE YEARS OF CHINA'S NEW SILK ROADS: FROM WORDS TO (RE)ACTION? 17 (BRI could be interpreted as "a new version of the 'going out' strategy launched in the late 1990s with a view to facilitating the internationalization of Chinese firms"), (Alice Ekman, et al. eds., Feb. 2017); Gabrielle Desarnaud & Seaman John, *OBOR and Energy: China's Evolving*

typical area. The increased attention of Chinese courts to the BRI is connected with the previous adjustment of China's judicial policy to protect overseas interests. Alongside its ascendancy, China has started to adjust its judicial policy (e.g., exercising jurisdiction on the basis of international law) to protect its expanding overseas interests and exhibit its growing status as a great power.⁹⁹ Chinese courts have been involved in foreign relations in a deliberate manner, and begun to coordinate with other governmental bodies to expand and protect China's national interests.¹⁰⁰ Crucially, the dynamic of the BRI requires that an expanded range of trade disputes are resolved efficiently. Businesses, which are often large SOEs, investing in BRI projects or conducting BRI-related trade, recognize that their interests are best protected through legal infrastructure and the court has a crucial role here.¹⁰¹ For instance, intellectual property protection demands judicial cooperation and enforcement alongside the BRI.¹⁰² China makes a major movement, including by proposing several international commercial courts, to seek a central position in BRI dispute settlement.

China's approach to the BRI cannot be separated from its practice outside of the BRI. China's BRI approach echoes and builds on its efforts to advance regional economic cooperation in various forums such as the Regional Comprehensive Economic Partnership (RCEP), the APEC (e.g., China's strong support for the development of an Free Trade Area of the Asia-Pacific (FTAAP)), the G20 (e.g., the G20 Guiding Principles for Global Investment Policymaking¹⁰³), and PTIAs prior to the announcement of the BRI (e.g., an incremental PTIA approach reflecting its sensitivity to the specific needs of its neighbors¹⁰⁴). China's movements in respect of the BRI will naturally benefit from China's international practice elsewhere.

2. The upgrade to a proactive approach

China's proactive approach cannot be completely differentiated from reactive considerations. In particular, one may argue that the BRI is a kind of Chinese response to the US' strategy of "containing China". It has been observed that China's motivations for launching the BRI include responding to US discourse of containing China¹⁰⁵ or a "pivot to Asia". The BRI arguably reduces China's reliance on the US in

Internationalization Strategy, see id. at 30 (the BRI is viewed as the continuation of China's 'going abroad' strategy in the energy area), (.

⁹⁹ Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 269, 287 (2016).

¹⁰⁰ Congyan Cai, *Chinese Foreign Relations Law*, 111 AJIL UNBOUND 336, 340 (2017).

¹⁰¹ Supreme People's Court Monitor, Supreme People's Court and "One Belt One Road" (2015).

¹⁰² Karry Lai, *IP Trends to Watch in China's Belt and Road Initiative*(14 November 2017), available at http://www.managingip.com/Article/3766976/IP-trends-to-watch-in-Chinas-Belt-and-Road-Initiative.html?utm_campaign=Email+verification&utm_content=2018-03-30&utm_term=Verification+link&utm_medium=Email+operational&utm_source=Registration+Form&r=verified.

¹⁰³ *G20 Guiding Principles for Global Investment Policymaking*, (2016).

¹⁰⁴ Peter K. Yu, *Sinic Trade Agreements*, UC DAVIS LAW REVIEW, 1009 (2011).

¹⁰⁵ Sonia E. Rolland, *Making International Economic Law Work: Integrating Disciplines and Broadening Policy Choices*, 48 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 371, 375

terms of trade and investment by developing its network in Asia and elsewhere, and contributes to further balancing US hegemony.¹⁰⁶

However, the BRI cannot simply be considered a reaction to US policy. China has moved to a proactive approach under the BRI through systematic and coordinated efforts in designing and implementing the initiative at the internal and external levels. Internally, China has shifted away from reactive measures particularly in the WTO context. Under the WTO, domestic measures are mainly reactive to the needs of complying with WTO commitments. In contrast, the BRI is an endogenously-determined policy. Several aspects are worthy of note. As an illustration, China's courts are more proactive than before in terms of institutional development in international commercial courts (discussed further below).

China has been "experimenting" through pilot programs on BRI-related issues largely to accumulate experience for the BRI. This follows China's usual practice of piloting programs in certain parts of the country before they are expanded nationwide. China actively promotes FTZs that are closely linked to,¹⁰⁷ and arguably part of, the BRI. Both the BRI and FTZs are regarded as "new reform and opening-up strategies proposed in line with the changed domestic and international circumstances".¹⁰⁸ The number of FTZs increased greatly from one to 11 in recent years, including seven new FTZs announced in 2016 that underline China's long-term plans to develop inland China and support the BRI.¹⁰⁹ The FTZs make a number of contributions to the BRI: (i) hosting a large number of businesses which have participated or are to participate in China's overseas investment; (ii) serving as hubs for transit along the BRI and platforms for trade co-operation; (iii) building important links for cultural and people-to-people exchange; (iv) exploring techniques for risk management (e.g., financial risks, legal risks);¹¹⁰ and (v) experimenting in respect of 21st Century issues (e.g., the negative list approach, pre-establishment national treatment, and competitive neutrality) to accumulate experience for China's leading role in international negotiations,¹¹¹ to name a few. However, the developments produced by FTZs are considered mainly procedural (e.g., simplified procedure, reduced processing time), instead of policy-related or systematic.¹¹² Their effect on the BRI remains to be seen.

China has proactively taken measures targeting Chinese stakeholders to promote the BRI and particularly address issues faced by Chinese actors. A large number of

(2017); NADÈGE ROLLAND, CHINA'S EURASIAN CENTURY?: POLITICAL AND STRATEGIC IMPLICATIONS OF THE BELT AND ROAD INITIATIVE 118 (National Bureau of Asian Research, 2017).

¹⁰⁶ Carrai, TRANSNATIONAL DISPUTE MANAGEMENT, 3 (2017).

¹⁰⁷ *One Belt One Road, FTZ Plans Go Hand in Hand* (Feb. 25, 2015), available at <http://www.globaltimes.cn/content/908837.shtml>.

¹⁰⁸ Lin, FRONTIERS OF ECONOMICS IN CHINA, 590 (2015).

¹⁰⁹ Dezan Shira & Associates, *Investing in China's Free Trade Zones* (September 21, 2017), available at <http://www.china-briefing.com/news/2017/09/21/investing-in-chinas-free-trade-zones.html>.

¹¹⁰ Chen Yin, Chinese FTZs and Their Contributions to BRI (2017).

¹¹¹ He, CHINESE REVIEW OF INTERNATIONAL LAW, 13 (2016).

¹¹² Bin Sheng, *How to Develop the Upgraded Free Trade Zones?*, Shanghai Securities News (Mar. 28, 2017), available at <http://news.cnstock.com/paper,2017-03-28,796736.htm>.

measures are adopted by China to promote investment and trade under the BRI,¹¹³ ranging from a binding investment process to non-binding guidelines (like those on insurance to support BRI projects,¹¹⁴ and on the environment to relieve environmental concerns over BRI projects through exhortation¹¹⁵), and other tools (e.g., databases). For instance, the approval process has been changed to record filing¹¹⁶ regarding China's overseas direct investment (ODI),¹¹⁷ and the PPP approval procedures have been streamlined.¹¹⁸ In practice, Chinese businesses are observed to “enjoy a relatively smooth approvals process” for deals connected to the BRI.¹¹⁹ Moreover, infrastructure projects that facilitate adopting BRI policy fall within the encouraged industry category under the Further Guidelines on the Monitoring and Supervision of Outbound Direct Investment issued by the Chinese government in 2017.¹²⁰ In addition, China endeavors to develop a “holistic and effective approach” to address intellectual property risks through, inter alia, a database documenting seven indices of intellectual property challenges in BRI jurisdictions to assist Chinese businesses with better understanding intellectual property risks.¹²¹

Externally, China initiated and leads the BRI (e.g., as the main provider of funding, goods, services and technical resources for BRI projects¹²²) as a China-centric initiative. The BRI reflects China's ambition in respect of global governance, such as the pursuit of “new models of international cooperation and global governance”¹²³ through the BRI.

¹¹³ Lee, 420-421. 2016.

¹¹⁴ Xinhua, *Chinese insurers to serve projects along Belt and Road Initiative*(Apr. 28, 2017), available at http://www.chinadaily.com.cn/business/2017-04/28/content_29123286.htm.

¹¹⁵ Guidance on Promoting Green Belt and Road (2017).

¹¹⁶ Ningning & Terri, 147-152. 2016.

¹¹⁷ It should be noted that investors shall submit the relevant information and materials to regulators before establishing an enterprise outside China, and that recordation or confirmation will be granted only if the statutory requirements are met. This differs from an automatic recordation after overseas investment. Chinese Ministry of Commerce, et al., Interim Measures for the Recordation (or Confirmation) and Reporting of Outbound Investment Article 2.1 (2018).

¹¹⁸ Lan Lan, *PPP List Open to Foreign Bidders with More Than 1,000 Projects on Offer*, China Daily Europe(May 26, 2015), available at http://europe.chinadaily.com.cn/business/2015-05/26/content_20817843.htm.

¹¹⁹ Andrew Lumsden & Lizzie Knight, *Tails Will Wag on the Belt and Road*(2018), available at http://www.corr.com.au/thinking/insights/tails-will-wag-on-the-belt-and-road/?mkt_tok=eyJpIjoiWW1JMU1EQTBPV1JoWIRkailsInQiOiJwdHh1ZkpTZEthcFNUaTRpSGFOd0orRnp5WTVzeGZBTDZpOHc2V0JFVWtwZXVUUNKY0VLd0ZMQlk1Q2VCSXQ5RGdNRVJGSEpYRU1IQjQza013OStCMnFzY1ZJS1FzXC9GdnRMNDI2OFBIQktoRTVPRDRaeIR4ZFpGT3VRUkgwM0sifQ%3D%3D.

¹²⁰ Greg Pilarowski & Lu Yue, *China Further Tightens Control of Outbound Direct Investment*(Aug. 28, 2017), available at <http://www.pillarlegalpc.com/en/news/wp-content/uploads/2017/08/PL-China-Regulation-Watch-ODI-Restriction-2017-08-28.pdf>.

¹²¹ Lee, 420-421. 2016.

¹²² Petersmann, 15. 2018.

¹²³ National Development and Reform Commission, et al., Part I. 2015.

China proactively interacts with other jurisdictions and international organizations. The initiative reflects the underlying profound shift in China's foreign policy from "keeping a low profile" to "striving for achievement".¹²⁴ This contrasts with China's previous approach of "hide brightness and nourish obscurity",¹²⁵ and its role as a participant rather than a leader in multilateral and megaregional negotiations (i.e., the WTO, and the RCEP as the only megaregional that China joins¹²⁶).

China proactively engages with international organizations, particularly the United Nations (UN). The Chinese government has signed BRI documents with at least nine international organizations,¹²⁷ while Chinese government departments have signed at least ten such documents.¹²⁸ As the first ever China-UN MOU,¹²⁹ the UNECE-NDRC MOU arguably marks the beginning of an epoch in China-UN interactions. MOUs and agreements with the UN also include the MOU on a Green BRI with UNEP, and an agreement with the World Intellectual Property Organization (WIPO) on BRI intellectual property cooperation.¹³⁰ In working with the WCO, China endeavors to take the lead in shaping international rules on cross-border e-commerce regulation. In addition, the BRI has been included in a UN Security Council Resolution for the first time, and it is regarded as one of the "regional development initiatives."¹³¹

¹²⁴ Zhou & Esteban, *JOURNAL OF CONTEMPORARY CHINA*, 6 (2018).

¹²⁵ Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 945, 967 (2016).

¹²⁶ Chinese government "firmly supports Asean's core leading role" in the RCEP negotiations. See, *Beijing 'firmly supports' Asean's core role in RCEP negotiations* (Jan 31, 2018), available at <http://www.straitstimes.com/asia/beijing-firmly-supports-aseans-core-role-in-rcep-negotiations>.

¹²⁷ These international organizations include the United Nations Development Programme, the United Nations Industrial Development Organization, the United Nations Human Settlements Programme, the United Nations International Children's Fund, the United Nations Population Fund, the United Nations Conference on Trade and Development, the World Health Organization, the World Intellectual Property Organization and the International Criminal Police Organization. China.org.cn, Part I.2. Jun. 7, 2017.

¹²⁸ These international organizations include the United Nations Economic Commission for Europe, the World Economic Forum, the International Road Transport Union, the International Trade Center, the International Telecommunication Union, the International Civil Aviation Organization, the United Nations Alliance of Civilizations, the International Development Law Organization, the World Meteorological Organization and the International Maritime Organization. Id. at, Part I.4.

¹²⁹ Lewis & Moise, *TRANSNATIONAL DISPUTE MANAGEMENT*, 10-11 (2017).

¹³⁰ Agreement on Enhancing 'Belt and Road' Intellectual Property Cooperation between the Government of the People's Republic of China and the World Intellectual Property Organization (WIPO). World Intellectual Property Organization, *WIPO Director General Visits Belt and Road Forum and China Supreme People's Court* (May 18, 2017), available at http://www.wipo.int/about-wipo/en/offices/china/news/2017/news_0001.html.

¹³¹ *Security Council Authorizes Year-Long Mandate Extension for United Nations Assistance Mission in Afghanistan, Adopting Resolution 2344 (2017)* (2017), available at <https://www.un.org/press/en/2017/sc12756.doc.htm>. (paragraph 34 of Resolution 2344 "Welcomes and urges further efforts to strengthen the process of regional economic cooperation, including measures to facilitate regional connectivity, trade and transit,

Through issuing action plans, the Chinese government intends to define the contours of the BRI and provide soft law guidance. These action plans target all BRI states in prioritized areas, and could gradually have BRI-wide implications if properly managed. Taking standards as an example, official documents aim to accelerate the alignment of standards and formulate international standards or rules of certification and accreditation, including the Action Plan on Connecting the Belt and Road by Standards and the Belt and Road Vision and Actions for Cooperation in Metrology.¹³² For trade facilitation, Guidelines on the Implementation of Promoting International Road Transport Facilitation in the Context of the Belt and Road Initiative aim to align the connectivity-related regulations and systems for better “soft connectivity”.¹³³

More broadly, China proactively engages with BRI states through numerous ways. A key and integral feature of the BRI is the designation of specific countries along BRI routes as “strategic partners”.¹³⁴ As an all-inclusive approach, China has indicated a willingness to work with any government, including jurisdictions with active conflicts (such as Syria and Yemen),¹³⁵ governments at different levels (such as California¹³⁶), and jurisdictions with different political systems, levels of economic development and levels of rule of law.¹³⁷ Specifically, China offers to pursue BRI projects,¹³⁸ and calls for “all forms” of industrial parks in BRI states.¹³⁹ For documents, the Chinese government emphasizes negotiating and signing general cooperation agreements with developing states along the BRI’s trade routes,¹⁴⁰ which usually call for cooperation and announce specific agreed projects. China also pursues other forms of documents (like joint communiqués) and FTAs relating to the BRI.

B. Prioritized and ambitious movements on dispute settlement?

China appears to prioritize dispute settlement in the BRI. Its major movements include envisaged international commercial courts, BRI-related “typical cases”

including through regional development initiatives such as the Silk Road Economic Belt and the 21st-Century Maritime Silk Road (the Belt and Road) Initiative...”)

¹³² OFFICE OF THE LEADING GROUP FOR THE BELT AND ROAD INITIATIVE, 20. 2017.

¹³³ *Id.* at, 21.

¹³⁴ Lewis & Moise, TRANSNATIONAL DISPUTE MANAGEMENT, 15 (2017).

¹³⁵ Hillman, China’s Belt and Road Initiative: Five Years Later 6. 2018.

¹³⁶ *California and China to Work Together on Belt and Road Globalization Project, and Climate Change*(June 8, 2017), available at <https://www.telesurtv.net/english/news/California-to-Work-with-China-on-Belt-and-Road-Initiative-20170608-0005.html>.

¹³⁷ Jonathan Hillman, *Will China's Belt and Road Stretch Further?*(December 26, 2017), available at <https://asia.nikkei.com/Viewpoints/Jonathan-Hillman/Will-China-s-Belt-and-Road-stretch-further>.

¹³⁸ Hillman, China’s Belt and Road Initiative: Five Years Later 5. 2018.

¹³⁹ National Development and Reform Commission, et al., Part IV. 2015.

¹⁴⁰ Bath, The South and Alternative Models of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements 80. 2017.

(guiding cases),¹⁴¹ and a plan on wide-ranging issues to support the BRI.¹⁴² As the special policy document on the BRI, *Several Opinions on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People’s Courts (SPC Opinions)*¹⁴³ is ambitious. It covers measures relating to a wide range of issues, including the exercise of jurisdiction (e.g., respecting the jurisdiction of other countries along the BRI’s trade routes, handling parallel litigation),¹⁴⁴ the efficiency of the courts, the protection of foreign parties, and judicial assistance and cooperation.¹⁴⁵ Generally speaking, China highlights the courts’ role to realize the BRI goal and institutional development to shape international norms.

1. Courts’ efforts to reach the BRI goal

The Chinese government’s goals in respect of the BRI influence judicial thinking. The SPC’s BRI document explicitly emphasizes that it aims to “bring the trial functions and roles of the people’s courts into full play and effectively serve and safeguard the smooth implementation” of the BRI.¹⁴⁶ The Chinese judicial system shares this ambition with the government and works cooperatively to reach that goal. To strengthen its courts’ capacity to serve the BRI, China connects transnational legal issues with its domestic courts more closely than before in at least four ways. First, the courts seek to closely associate international dispute settlement with China’s domestic courts through institutional development, particularly international commercial courts proposed by the SPC.

Second, the judicial system strives to increase international confidence in Chinese court judgments,¹⁴⁷ and move the locus of China-related dispute settlement from Europe or elsewhere to China.¹⁴⁸ For instance, the SPC highlights the application and interpretation of international treaties (like trade, investment, finance, and maritime transport pacts with BRI states) according to the Vienna Convention on the Law of Treaties.¹⁴⁹

¹⁴¹ At the time of writing, there are 18 BRI-related guiding cases and the number is likely to increase. Stanford Law School China Guiding Cases Project, *B&R Cases Archive - China Guiding Cases Project*, available at <https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/?page=1>.

¹⁴² *Several Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People’s Courts* (2015).

¹⁴³ *Id.* at.

¹⁴⁴ *Id.* at, Paragraph 5.

¹⁴⁵ *Id.* at, Paragraphs 4, 5.

¹⁴⁶ *Id.* at.

¹⁴⁷ *Id.* at, Paragraph 7.

¹⁴⁸ Supreme People’s Court Monitor, *Update on China’s International Commercial Court*(March 11, 2018), available at <https://supremepeoplescourtmonitor.com/2018/03/11/update-on-chinas-international-commercial-court/>.

¹⁴⁹ *Several Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People’s Courts* Paragraphs 7, 8. 2015.

Third, the courts aim to improve the application of transnational norms (such as through court capacity-building, and the fulfilment of PTIA obligations¹⁵⁰). Besides the application of international treaties as discussed above, BRI-related guiding cases reflect a greater emphasis on transnational norms by Chinese courts considering legal issues associated with the BRI. These guiding cases are provided by the SPC to address legal risks in BRI projects.¹⁵¹ They help to ensure a consistent approach among different courts, since local courts handling BRI-related cases need guidance from the SPC.¹⁵² These guiding cases involve, amongst other issues, letters of credit, and the recognition of foreign judgments and arbitration awards (including the first-time recognition of a Singaporean commercial judgment).¹⁵³

Last but not least, the courts endeavor to strengthen judicial assistance from other states. Reciprocity in judicial assistance is a prime example. Chinese courts may take the initiative in extending reciprocity to the counterparts of other jurisdictions to promote the formation of reciprocal relationships.¹⁵⁴ In this way, China's courts endeavor to actively engage with the counterparts of other BRI jurisdictions.

2. Institutional development to affect international norms

China prioritizes institutional development concerning BRI-specific dispute settlement. In particular, the SPC will set up three international commercial courts to deal with disputes related to the BRI, since the existing system to solve disputes is “complicated, time-consuming and costly.”¹⁵⁵ This BRI dispute resolution mechanism aims to provide parties from BRI states with one-stop legal services.¹⁵⁶ China's envisaged international commercial courts arguably constitute a landmark in Chinese court development from the perspective of international economic law. However, the proposed international commercial courts face a number of challenges, such as the selection of judges and development of international confidence in the courts.

China, in developing BRI-related dispute settlement institutions, is seeking to shape international norms. The enhancement of China's role in BRI dispute settlement and, more broadly, the international influence of China's judicial system is a major aim behind the SPC's efforts. One of the underlying goals set out in the SPC Opinions is to “improve the international standing and influence of the Chinese courts and other

¹⁵⁰ Id. at, Paragraph 8.

¹⁵¹ Stanford Law School China Guiding Cases Project, *Seminar Summary: China's Guiding Cases and U.S. Precedents*(July 31, 2017), available at <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2017/08/guiding-cases-seminar-20170731-English.pdf>.

¹⁵² Supreme People's Court Monitor. 2015.

¹⁵³ Legal Daily, *China Recognized the Singaporean Commercial Judgement for the First Time*(May 16, 2017), available at <http://legal.people.com.cn/n1/2017/0516/c42510-29277953.html>.

¹⁵⁴ Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People's Courts Paragraph 6. 2015.

¹⁵⁵ *China to establish 3 international courts to deal with BRI disputes*, The Asian Age(2018), available at <http://www.asianage.com/world/asia/270118/china-to-establish-3-international-courts-to-deal-with-bri-disputes.html>.

¹⁵⁶ Supreme People's Court Monitor, SPC Reveals New Belt & Road-Related Initiatives (Oct. 7, 2017).

legal institutions”.¹⁵⁷ Under the BRI, the SPC expects Chinese courts to “actively participate in the formulation of the relevant international rules and constantly improve China’s international discourse power in justice.”¹⁵⁸ In the view of a former Vice-President of the SPC, Chinese courts could play an active role in FTZ-related scenarios regarding heated issues (e.g., intellectual property, labor, and climate change), with the aim of promoting the reform and development of certain “unreasonable” international economic norms.¹⁵⁹ Chinese courts will strive to play an important role in the BRI, including by making decisions in internationally influential cases, and confirming new-type business rules.¹⁶⁰

In this sense, dispute settlement is arguably the most significant aspect of China’s approach to the BRI, from a legal perspective. Other measures either lack substantial normative or institutional development (e.g., the joint initiatives to promote collaboration) or do not only target the BRI (e.g., the AIIB and FTZs). That said, the role of courts in BRI-related legal and economic reform should not be exaggerated. Arbitration bodies within and outside China are likely to play an important role, as many BRI-related disputes will be settled by arbitration. The courts will address some of the issues raised by arbitration, including the recognition and enforcement of arbitration awards.

C. Passiveness in engagement with sensitive or unclear aspects

China’s proactiveness is limited to certain aspects of the BRI. China demonstrates greater passivity in respect of providing clarity on the vague aspects of the BRI (e.g., the lack of legal and policy documents or mechanisms that clarify what is currently unclear). In various facets of the BRI, vagueness is revealed by a lack of clear rules, implementation mechanisms, definitions and explanation of key relationships. Regarding rules, it is not easy to find “formal legal sources, either domestic or international” regarding the BRI.¹⁶¹ It remains to be seen how the BRI will strike a balance between market and social values, and turn this into operational norms. As a result, detailed norms on the design and operation of the BRI can hardly be identified, which makes many aspects of the BRI vague. Policy documents alone can hardly address these issues. In respect of implementation mechanisms, there are few details on these mechanisms provided in the BRI Action Plan.¹⁶² Regarding definitions, the BRI is unclear on the meaning of key terms (e.g., BRI-related disputes,¹⁶³ BRI

¹⁵⁷ Supreme People’s Court Monitor, Supreme People’s Court and “One Belt One Road”. 2015.

¹⁵⁸ Several Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People’s Courts Paragraph 13. 2015.

¹⁵⁹ He, CHINESE REVIEW OF INTERNATIONAL LAW, 14 (2016).

¹⁶⁰ Id. at, 11-13.

¹⁶¹ Zeng, CHINESE JOURNAL OF INTERNATIONAL LAW, 539 (2016).

¹⁶² Greening the belt and road initiative: WWF’s recommendations for the finance sector 8. 2018.

¹⁶³ Supreme People’s Court Monitor. March 11, 2018.

projects,¹⁶⁴ the meaning of “partnering” with BRI programs¹⁶⁵). Finally, concerning relationship, a number of aspects should be clarified, including the interrelation between the BRI and Chinese legal instruments, and the link between BRI projects.

V. The Essence of China’s Approach to the BRI: Flexibility?

In theory, China could have adopted an institutionally-focused, treaty-based and “clearer” approach to the BRI. For example, China could strive to draft a BRI-wide treaty, build a formal institutional arrangement, and provide more clarity on aspects of the BRI. There could be several advantages to such an approach. First, it could help build the legitimacy of and trust in the BRI. An agreement on the BRI could facilitate the implementation of the initiative with “a sustained and solid international legal foundation.”¹⁶⁶ It could thereby, to some extent, address certain concerns of the BRI countries, including as to the transparency of the bidding process, social and environment standards, and national security. Second, such an approach could enhance the enforcement of rules, and the protection of Chinese investors and traders, particularly through adoption of a treaty-based mechanism. Third, a BRI-wide treaty, a strict institutional arrangement and more clarity on the BRI could provide predictability and consistency.

Why, then, did such an approach not emerge? The basis and essence of China’s approach to the BRI is arguably flexibility. Flexibility appears to prevail over other considerations such as predictability, consistency, and rule enforcement. As an illustration, the BRI Action Plan explicitly indicates that the BRI is an open and “highly flexible” process of cooperation that “does not seek conformity.”¹⁶⁷ Flexibility could be affected by the positions of BRI states and China itself. On the one hand, the large number of BRI states vary considerably in respect of each other, and it would be difficult to reach a BRI-wide treaty containing clear rules. Flexibility helps to engage BRI states and promote the initiative. On the other hand, China has diverse interests: the preferencing of dispute settlement and hard law in certain areas in the long term (e.g., trade in goods, investment, and intellectual property) to protect China’s investment and promote trade, alongside hesitation in accepting strict obligations regarding social issues (e.g., labor rights and the environment).

China demonstrates flexibility in its approach to issues – acting proactively in responses to prioritised issues, and not proactively, or passively, in respect of issues it does not prioritise. For external engagement, China pushes forward negotiations on investment protection agreements, double taxation avoidance agreements, and FTAs to protect investors and traders regarding prioritized issues (like technical standards, investment protection, e-commerce, and intellectual property). Intellectual property is

¹⁶⁴ Mikael Weissmann & Elin Rappe, *Sweden’s approach to China’s Belt and Road Initiative: Still a glass half-empty*(2017), available at <https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2017/paper-1-swedens-approach-to-chinas-belt-and-road-initiative.pdf>.(China considered the construction of a Swedish high-speed railway and two private wind power projects as BRI projects "simply because they are about infrastructure").

¹⁶⁵ Astrid H. M. Nordin & Mikael Weissmann, *Will Trump Make China Great Again? The Belt and Road Initiative and International Order*, 94 INTERNATIONAL AFFAIRS 231, 231 (2018).

¹⁶⁶ Zeng, CHINESE JOURNAL OF INTERNATIONAL LAW, 532 (2016).

¹⁶⁷ National Development and Reform Commission, et al., Part VIII. 2015.

a prime example: as the BRI aims to expand China's technology industries and outbound investment, the protection of intellectual property in BRI jurisdictions becomes a major concern of the Chinese government and enterprises since Chinese businesses will probably engage in more cross-border intellectual property-driven M&A transactions under the BRI.¹⁶⁸

Regarding domestic measures, China prioritizes dispute settlement under the BRI, particularly the role of Chinese courts to protect Chinese investors in a number of ways. First, the SPC endeavors to improve its efficiency and attractiveness, suggesting that one option for Chinese investors is to negotiate the choice of Chinese dispute resolution venues – either courts or arbitration centers – in addition to the application of Chinese law, particularly in countries with relatively weak legal systems.¹⁶⁹ Second, China's efforts are intended to avoid recourse to international courts and respond to the often inadequate independence and judicial expertise of local courts in certain African and Asian states.¹⁷⁰ Third, through the proactive engagement with BRI counterparts, Chinese courts strive to address the insufficiency of agreements with BRI countries, since only seven out of 64 BRI countries have concluded bilateral treaties on judicial assistance in civil and commercial matters with China.¹⁷¹ Future judicial assistance agreements would be more useful for breaches of commercial contracts. Therefore, SPC Opinions target, *inter alia*, expanding the scope of international judicial assistance, and focus on delivering judicial documents, obtaining evidence, and recognizing and enforcing foreign court judgments.¹⁷²

China's approach maximizes institutional, temporal, and normative flexibility. In respect of institutional flexibility, the less institutionally-focused approach helps China avoid being checked by a strict external institutional structure. The BRI could utilize different instruments to promote its implementation. For instance, the BRI incorporates certain elements of regional economic integration and of a partnership arrangement between states,¹⁷³ without addressing the thorny institutional legal issues. Regarding China's internal institutions, the development of China's courts and FTZs is a self-driven process without international obligations. Therefore, sensitive systemic issues can be avoided.

As to normative flexibility, China prefers leeway in adapting or innovating international norms. The non-treaty-based approach and vagueness of the BRI mean that there is much room left for China regarding whether and how to apply international norms. Soft law increases the elasticity of China in addressing the difficulty of building BRI projects.¹⁷⁴

¹⁶⁸ Lee, 421. 2016.

¹⁶⁹ Bath, "One Belt, One Road" and Chinese Investment 5. 2016.

¹⁷⁰ Petersmann, 1. 2018.

¹⁷¹ Weidong Zhu, *Some Considerations on the Civil, Commercial and Investment Dispute Settlement Mechanisms Between China and the Other B&R Countries*, 14 *TRANSNATIONAL DISPUTE MANAGEMENT*, 5 (2017).

¹⁷² Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts Paragraph 6. 2015.

¹⁷³ Zeng, *CHINESE JOURNAL OF INTERNATIONAL LAW*, 517 (2016).

¹⁷⁴ Du, *THE CHINESE JOURNAL OF GLOBAL GOVERNANCE*, 40 (2016).

Moreover, the non-treaty-based approach and vagueness enable China to either develop or challenge current rules, particularly through soft law. Soft law has the advantages of flexibility and informality,¹⁷⁵ and arguably brings less contention. On the one hand, soft law can be adopted to develop existing agreements. Soft law helps entrench substantive standards as international obligations. Taking investment pacts as an example, China may largely maintain the status quo with existing pacts operating alongside new, less formal commitments.¹⁷⁶ These less formal commitments probably constitute soft law. On the other hand, soft law can be used to obfuscate existing legal norms.¹⁷⁷ Soft law may soften hard law mechanisms, particularly in the case of distributive conflicts between powerful nations.¹⁷⁸ China can deviate from existing norms through soft law and create new practices.

Regarding temporal flexibility, China engages with partners in a pragmatic way under separate terms and structures, which can be renegotiated when needed. Such flexibility ensures that the BRI can evolve over time, taking into account economic and political factors.¹⁷⁹ China's positions on international norms can be adjusted when needed. China could learn by developing soft law instruments and gradually explore and develop rules related to the BRI. This is partially due to the fact that China lacks experience in engaging in global affairs, and needs to learn in the international arena.¹⁸⁰

China's BRI approach may take flexible shapes for different scenarios. The loose institutional structure, use of soft law and vagueness in various aspects of the BRI (e.g., BRI definitions, rules and relationships) mean that China could easily maintain elasticity in the design and operation of the BRI. Such flexibility enables the BRI to incorporate treaty or soft law arrangements, and go beyond rigid institutions. It thus supports the versatility, evolution and even effectiveness of the BRI.

Moreover, the flexible strategy could have spillover effects. For instance, institutional flexibility could give China the prevailing negotiation position, since negotiations are conducted separately with China.¹⁸¹ Despite existing organizations such as the SCO seeking to promote dialogue, the BRI does not have an explicit coordination mechanism and heavily relies on bilateral coordination.¹⁸² The BRI relies on predominantly bilateral legal structures,¹⁸³ and projects conducted through bilateral

¹⁷⁵ Shaffer & Pollack, *MINNESOTA LAW REVIEW*, 710 (2010).

¹⁷⁶ Bath, "One Belt, One Road" and Chinese Investment 8-9. 2016.

¹⁷⁷ Shaffer & Pollack, *MINNESOTA LAW REVIEW*, 709 (2010).

¹⁷⁸ *Id.* at.

¹⁷⁹ Shepard. October 19, 2017.

¹⁸⁰ Bloomberg News, *China Cites 'The Art of War' as Trump Signals Trade Battle*(Nov. 28, 2016), available at <https://www.bloomberg.com/news/articles/2016-11-28/china-turns-to-the-art-of-war-as-trump-signals-battle-on-trade>.

¹⁸¹ Wade Shepard, *China's Challenges Abroad: Why the Belt & Road Initiative Will Succeed*, *Forbes*(October 17, 2017), available at <https://www.forbes.com/sites/wadeshepard/2017/10/17/chinas-challenges-abroad-5-reasons-why-the-belt-road-will-succeed/#34972eba4a82>.

¹⁸² Yiping Huang, *Understanding China's Belt & Road Initiative: Motivation, framework and assessment*, 40 *CHINA ECONOMIC REVIEW* 314, 320 (2016).

¹⁸³ Petersmann, 15. 2018.

agreements.¹⁸⁴ They are often either one-on-one or group+1, involving states and political blocs across Asia, Europe, and Africa.¹⁸⁵ China is likely to have a good negotiation position in such a context.

VI. Conclusion

China has adopted a less institutionally-focused, non-treaty-based and proactive approach to the BRI. However, the strength of these characteristics should not be exaggerated. Reflecting Chinese culture, China takes a flexible “middle-of-the-road” strategy in respect of the BRI, which avoids extremes and occupies an intermediate position. Despite its less institutionally-focused approach, China also promotes BRI-related institutions (particularly the AIIB), and the development of BRI-specific mechanisms that do not have a strict legal structure (like the BRF). China’s proactive approach is also a limited one, given the vagueness of various aspects of the BRI. China may be less or more proactive, depending on the issues. Further, despite its non-treaty-based approach, China also explores PTIAs with BRI states (albeit slowly and with a limited number of BRI jurisdictions) and utilizes other treaties, particularly WTO norms.

The desire to retain flexibility is arguably the essence of, and a unifying factor in, China’s BRI approach. China’s approach maximizes flexibility, through which the BRI can readily respond to variations in practice. This reflects a largely instrumental approach to law, and adaptive and pragmatic attitude. On a related note, the underlying logic of China’s BRI approach is observed to be “somewhat analogous to the functionalist approach that launched the European Coal and Steel Community after the Second World War”, although substantial differences exist in various areas.¹⁸⁶

The BRI approach diverges from China’s engagement with the WTO and the deep FTA¹⁸⁷ templates advocated by developed nations (particularly the US and EU). The BRI may constitute a kind of Chinese counter-model to deep FTAs. Foremost, both the WTO and deep FTAs are treaty-based and institutionally-focused, and thus differ from the BRI. The WTO system is based on a number of multilateral and plurilateral agreements, and relies on a set of institutions ranging from ministerial conferences to committees. These were “preset” by WTO founding members before China joined the WTO. Meanwhile, a feature of deep FTAs is the increasingly long treaty text. The institutionally-focused approach of deep FTAs can be found in, inter alia, the proposed investment courts under the recent FTAs of the EU (like those with Vietnam and Canada) and institutional arrangements under deep FTAs (e.g., the Trans-Pacific Partnership Commission, working groups and other subsidiary bodies under the

¹⁸⁴ Kaura. 10 June 2017.

¹⁸⁵ Shepard, *China's Challenges Abroad: Why the Belt & Road Initiative Will Succeed*. October 17, 2017.

¹⁸⁶ Ferdinand, *INTERNATIONAL AFFAIRS*, 950 (2016). (the differences include a greater sensitivity to national sovereignty under the BRI).

¹⁸⁷ In this paper, deep FTAs refer to trade pacts that target non-tariff measures and set stringent regulatory disciplines. They focus on WTO-plus and WTO-extra rules that go deeper and broader than the WTO counterparts respectively.

CPTPP¹⁸⁸). Second, China's proactive approach under the BRI is a departure from its predominantly reactive approach to the WTO. China predominantly responded to external demands during the WTO accession, and has taken "a backseat rather than a leadership role" in the Doha Round negotiations,¹⁸⁹ although it is becoming increasingly active in WTO dispute settlement. This contrasts with China's proactive BRI approach. Third, China's BRI approach diverges from deep FTAs that set high-level regulatory disciplines. The thrust of the BRI approach is not to create new norms at this stage, given that trade relations are viewed as a way to expand a country's influence.¹⁹⁰ Presently, China contributes to, rather than leads, the development of norms. This is due internally to China's capacity limitations and unwillingness to adopt regulatory disciplines, and externally to the need to engage various, less developed BRI states given the huge variation among BRI countries.

Looking into the future, the BRI will not only implement but also probably shape China's future trade and investment law and policy. In any case, China's BRI approach is likely to stimulate selective innovation, particularly in relation to dispute settlement and soft law instruments. Regarding dispute settlement, China's courts are likely to explore innovations through the envisaged international commercial courts. For soft law, China's BRI approach seems to be to develop an emerging network of soft law to coordinate policy. Soft law instruments could be hardened in selected areas in the future (e.g., technical standards and e-commerce). More broadly, an amalgamation of trade and investment rules could be possible given their concurrent practice under the initiative. Outside the sphere of law, political clout could play an important role. All the development of China's BRI approach deserves close attention.

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¹⁸⁸ See, e.g., CPTPP Article 27.2.4.

¹⁸⁹ Gisela Grieger, *China's WTO Accession: 15 Years on Taking, Shaking or Shaping WTO Rules?*(Dec., 2016), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593570/EPRS_BRI\(2016\)593570_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593570/EPRS_BRI(2016)593570_EN.pdf).

¹⁹⁰ Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHICAGO JOURNAL OF INTERNATIONAL LAW 1, 14 (2006).

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